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A DIALOGUE ON THE UNAUTHORIZED PRACTICE OF LAW

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FEW PRINCIPLES HAVE RECEIVED AS LITTLE ANALYSIS by courts¹ and commentators² as the principle that nonlawyers may not practice law. Each state has a comprehensive statutory scheme restricting the practice of law to lawyers and providing penalties to deter unauthorized practice.³ Moreover, in every state, court decisions have made clear that statutory provisions governing unauthorized law practice are not merely idle phrases.⁴ The purposes behind these statutes and court decisions appear, at first glance, to be unassailable:

The public, far more than the lawyers, suffers injury from unauthorized practice of law. The fight to stop it is the public's fight. No man is required to employ a lawyer if he does not wish to. But every man is entitled to receive legal advice from men skilled in law, qualified by character, sworn to main-

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1. See Q. JOHNSTONE & D. HOPSON, *LAWYERS AND THEIR WORK* 173 (1967). The authors indicate that the courts "have failed to sufficiently explore and articulate the goals they are working towards in allocating functions to the bar and its competitors. Nor have they fully considered the implications of the goals that they apparently do articulate." *Id.* For some representative decisions, see *State ex rel. Indiana State Bar Ass'n v. Osborne*, 241 Ind. 375, 172 N.E.2d 434 (1961); *Gardner v. Conway*, 234 Minn. 468, 48 N.W.2d 788 (1951).

2. For examples of the willingness of commentators to accept without critical analysis the rationale underlying the prohibition against law practice by laymen, see Davis, *Unauthorized Practice of Law and the Public Interest in the Qualified Lawyer*, *UNAUTH. PRAC. NEWS*, December, 1955, at 4; Kephart, *Unauthorized Practice of Law*, 40 *DICK. L. REV.* 225 (1936). But see Johnstone, *The Unauthorized Practice Controversy: A Struggle Among Power Groups*, 4 *U. KAN. L. REV.* 1 (1955) (critically assessing purposes behind unauthorized practice statutes); Llewellyn, *The Bar's Troubles, and Poulitices—and Cures?*, 5 *LAW AND CONTEMP. PROB.* 104 (1938) (critical examination of traditional premises supporting prohibition of the unauthorized practice of law).

3. See, e.g., *MICH. COMP. LAWS ANN.* §§ 600.901, .904 (1968); *N.M. STAT. ANN.* § 18-1-26 (1970). See generally *UNAUTHORIZED PRACTICE HANDBOOK* 6-110 (J. Fisher & D. Lachmann eds. 1972).

4. A representative sample of cases from all fifty states can be found in Resh, *Unfounded Attacks on Unauthorized Practice*, 40 *UNAUTH. PRAC. NEWS* 272, 275-76 (1977).

tain a high standard of professional ethics, and subject to the control and discipline of the court. Not only this, he must be served disinterestedly by a lawyer who is *his* lawyer, not motivated or controlled by a divided or outside allegiance.⁵

*It is perhaps in recognition of the foregoing considerations that few constitutional barriers have been imposed on the ability of states to limit the practice of law.*⁶

This article is intended to demonstrate that the interests underlying the unauthorized practice of law provisions have not been analyzed thoroughly. To dramatize some of the issues that have received insufficient examination in the past, this discussion is presented in the form of a dialogue⁷ in which three individuals participate.

First is Mr. Layman, who has just been involved in an automobile accident. Mr. Layman's automobile collided with another vehicle, causing extensive damage to that vehicle and seriously injuring a passenger. The driver, who escaped injury, is suing to recover for the damage done to his car. The State of Dicta has informed Mr. Layman that it will indict him for involuntary manslaughter if the passenger fails to survive; relatives of the passenger have indicated that he intends to sue for personal injuries. Mr. Layman wishes to hire a lay adjuster to handle the civil claims and to use his son, an English professor, to defend any possible criminal charges. Second is Mr. Legislator, a member of the Judiciary Committee of the General Assembly of the State of Dicta and co-author of that state's unauthorized practice of law statute. Third is Mr. Lawyer, chairman of the State Bar Association's Committee on Ethics. Mr. Lawyer strongly believes in the soundness of Canon 3 of the American Bar Association's Code of Professional Responsibility,⁸ which provides: "A

5. Standing Committee on Unauthorized Practice of the Law, *Report*, 66 A.B.A. REP. 268 (1941), quoted in *Bump v. District Court*, 232 Iowa 623, 639, 5 N.W.2d 914, 922 (1942) (emphasis added).

6. *But see Faretta v. California*, 422 U.S. 806 (1974) (establishing a constitutional right of self-representation in criminal cases and condemning the state court for forcing petitioner to accept a state-appointed public defender); *Johnson v. Avery*, 393 U.S. 483 (1969) (the state may not validly enforce a regulation which absolutely bars prison inmates from furnishing other prisoners with assistance in preparing writs of habeas corpus).

7. The primary purpose of this article and the dialogue format is to stimulate critical analysis and discussion of the various issues discussed herein. For an excellent example of the use of the dialogue approach, see generally Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

8. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1978) [hereinafter referred to as ABA CODE]

lawyer should assist in preventing the unauthorized practice of law.”⁹ Mr. Layman has asked Mr. Lawyer and Mr. Legislator to meet with him so he can discuss with them his plans for tackling his legal problems.¹⁰

MR. LAYMAN: I’ll give it to both of you straight. I’m in a bind; I’ve just been involved in a car accident. The driver is suing me for damage to his car, an injured passenger is suing me for personal injuries, and the State of Dicta has threatened to bring criminal charges if the passenger dies. I can’t afford a lawyer but I’m not eligible for legal aid. I want to hire Mr. Augustus F. Mazzacaro,¹¹ a licensed casualty adjuster, to handle my civil matter. He believes he can reach a settlement with the victims and intends to charge me only \$15 an hour for his time. My son, an articulate professor of English, plans to represent me free of charge in my criminal case, if there is one. He’s not a lawyer either. I trust these men. Indeed, I think they would serve me better than any lawyer could.

MR. LEGISLATOR: Your intention to use nonlawyers is simply out of the question. This state prohibits nonlawyers from practicing law.¹² Quite clearly, both gentlemen would be engaging in the practice of law,¹³ and unauthorized practice is not excused merely because a fee is not being charged for the service.¹⁴

MR. LAYMAN: But why can’t these men assist me? It seems absurd that I can’t be helped by men of my choice.

MR. LEGISLATOR: Mr. Lawyer, perhaps you can explain it better than I. The American Bar Association strongly believes that the practice of law should be limited to lawyers, does it not?

MR. LAWYER: It does. Indeed, a lawyer can be disciplined or disbarred for encouraging the unauthorized practice of law in any

9. ABA CODE, *supra* note 8, Canon 3.

10. Footnotes are intended to provide background material. They are not necessarily meant to be attributed to the character who is speaking when the reference appears.

11. *See* Dauphin County Bar Ass’n v. Mazzacaro, 465 Pa. 545, 351 A.2d 229 (1976). In the actual case, Mazzacaro worked for plaintiffs, not defendants, and operated on a contingent fee basis. *Id.* at 547, 351 A.2d at 230.

12. *See* note 3 and accompanying text *supra*.

13. *See* Dauphin County Bar Ass’n v. Mazzacaro, 465 Pa. 545, 555, 351 A.2d 229, 234 (1976) (settling of tort claims involves practice of law even though the nonlawyer always settled cases out of court or else turned matters over to an attorney); *Lake Shore Management Co. v. Blum*, 92 Ill. App. 2d 47, 235 N.E.2d 366 (1968) (appearing in a court of law clearly constitutes practice of law; only lawyers can represent others in court).

14. *See* Grievance Comm. of State Bar v. Dean, 190 S.W.2d 126 (Tex. Civ. App. 1945). *But see* *Darby v. Mississippi Bd. of Admissions*, 185 So. 2d 684 (Miss. 1966) (although one need not charge a fee to be engaged in the practice of law, absence of a fee may be considered in analyzing whether particular activity is in fact practice of law).

way.¹⁵ I should make clear that the rule limiting law practice is *not* designed to aid lawyers; the self-interest of the legal profession plays no role whatsoever here.¹⁶ The sole interest at stake is the public interest.¹⁷ Don't you see, Mr. Layman, the rule is meant to help you. It's for your own good!

MR. LAYMAN: Can you explain how the rule protects the public?

MR. LAWYER: Certainly. The rule is the best assurance that the legal problems of the public will be handled by those with adequate legal training. A legal education provides one with an understanding of legal principles, the ability to spot legal problems, and the skill necessary to research difficult and complex legal questions.¹⁸ Bar examinations and licensing make sure that everyone authorized to practice law has these basic skills. In addition, when the public uses licensed attorneys it uses men and women who are subject to strict rules of ethical conduct and to the supervision of the courts.¹⁹ Finally, when a person takes a problem to a lawyer, he or she gets the protection of the attorney-client privilege so that all disclosures to the attorney will be held in secret.²⁰

15. See ABA CODE, *supra* note 8, DR.3-101. Disciplinary Rule 3-101(A) provides that "[a] lawyer shall not aid a nonlawyer in the unauthorized practice of law." *Id.* The Code contains both disciplinary rules, which "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action," and ethical considerations, which are "aspirational in character and represent the objectives toward which every member of the profession should strive." *Id.*, Preamble and Preliminary Statement.

16. The case law is virtually unanimous in asserting that the prohibition against unauthorized practice is not based upon the self-interest of the legal profession. See, e.g., *Darby v. Mississippi Bd. of Educ.*, 185 So. 2d 684 (Miss. 1966); *In re Community Action for Legal Servs., Inc.*, 26 A.D.2d 354, 274 N.Y.S.2d 779 (1968). *But cf.* *Littleton v. Langlois*, 37 Wis. 2d 360, 155 N.W.2d 150 (1967) (preventing competition with legal profession "proper factor" to consider).

17. Nearly every case considering unauthorized practice of law prohibitions clearly states that the interests of the public are being promoted by such a rule. See, e.g., *Dacey v. New York County Lawyers' Ass'n*, 290 F. Supp. 835 (S.D.N.Y. 1968), *aff'd*, 423 F.2d 188 (2d Cir.), *cert. denied*, 398 U.S. 929 (1970); *Kentucky State Bar Ass'n v. Holland*, 411 S.W.2d 674 (1967); *Dauphin County Bar Ass'n v. Mazzacaro*, 465 Pa. 545, 351 A.2d 229 (1976). See also ABA CODE, *supra* note 8, EC 3-1. Ethical Consideration 3-1 provides:

The 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. Because 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 regulations imposed upon members of the legal profession.

Id. *But see* *Johnstone*, *supra* note 2, at 5 (maintaining that lawyers support unauthorized practice rules at least in part to restrict "the number of lawyers so as to provide higher incomes for those who are authorized to practice").

18. See generally *Davis*, *supra* note 2, at 6 (discussing purposes for prohibiting law practice by nonlawyers).

19. See ABA CODE, *supra* note 8, EC 3-3.

20. *Id.*

MR. LAYMAN: In other words, what the two of you are telling me is that I have to hire a lawyer for my own good?

MR. LAWYER: No, not at all. I've not yet informed you of an important exception to the prohibition of law practice by nonlawyers. You can handle these cases yourself.

MR. LEGISLATOR: Is that a correct statement of the law?

MR. LAWYER: It is. Courts have always recognized that one can represent himself.²¹ In fact, the Code of Professional Responsibility itself acknowledges this principle.²² Indeed, at least with respect to criminal matters, a defendant has a *constitutional* right to represent himself. The leading case on this point is *Faretta v. California*.²³ Let me read to you what the United States Supreme Court stated in that decision: "We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."²⁴

MR. LAYMAN: Wait a minute, I'm confused. First you tell me that the rule prohibiting law practice by nonlawyers is meant to protect the public. Now you tell me that I can represent myself. Yet Mr. Mazzacaro knows a good deal more about tort claims than I do. And my son is much more articulate than I am and could make a better case for me than I could make for myself. Indeed, I'd probably make a fool of myself if I tried to handle these cases alone.²⁵ This whole thing makes no sense.²⁶ Certainly you can't claim that I have the legal expertise necessary to handle my cases.

MR. LAWYER: That's not the issue. I think the United States Supreme Court made sense out of things in the *Faretta* case. Let me continue [*he reads*]:

21. See, e.g., *Roddis v. All-Coverage Ins. Exch.*, 250 Cal. App. 2d 304, 58 Cal. Rptr. 530 (1967); *Lake Shore Management Co. v. Blum*, 92 Ill. App. 2d 47, 235 N.E.2d 366 (1968); cf. *Mazique v. Mazique*, 356 F.2d 801 (D.C. Cir.), cert. denied, 384 U.S. 981 (1966) (when one appears *pro se*, he is held to the rules of court conduct and procedure applicable to lawyers).

22. ABA CODE, *supra* note 8, EC 3-7. Ethical Consideration 3-7 states, in pertinent part, that "[t]he prohibition against a nonlawyer practicing law does not prevent a layman from representing himself." *Id.*

23. 422 U.S. 806 (1974).

24. *Id.* at 817.

25. See *id.* at 852 (Blackmun, J., dissenting). In rejecting the majority's recognition of a constitutional right to self-representation in criminal cases, Justice Blackmun asserted that "[i]f there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a *constitutional* right on one to make a fool of himself." *Id.* (emphasis supplied by Justice Blackmun).

26. See Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 708 (1977) ("Once one agrees that a layman can choose self-representation, it becomes difficult to argue that he should be unable to seek counsel on legal issues from a nonlawyer").

[W]here the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. . . . [H]is choice must be honored out of ". . . respect for the individual" ²⁷

MR. LAYMAN: You've cleared up nothing. I am no less convinced that the law is "contriving against me" when I'm told that I either have to represent myself or hire a lawyer but that I may not obtain assistance from a nonlawyer. Moreover, to the extent that a defendant may occasionally perform better than a lawyer, is it not equally likely that a nonlawyer selected by a defendant may perform better than a lawyer? Indeed, Mr. Mazzacaro and my son clearly would perform better than I could. Finally, how is "respect for the individual" fostered when I am prohibited from choosing whomever I want to represent me? I've expressed my desire to have nonlawyers represent me. I'm the only person who could possibly be harmed by my choice.²⁸ Why won't the law respect my right to make such a choice?

MR. LEGISLATOR: As I recall from my political science days, that great spokesman for individual liberties, John Stuart Mill, believed that when only the individual is affected by his conduct, then the government may not prohibit or restrain that conduct.²⁹ He recognized that "[a]ll errors which he [the individual] is likely to commit against advice and warning, are far outweighed by the evil of allowing others to constrain him to what they deem his good."³⁰ I guess that to the extent we follow Mill's thinking, Mr. Layman's argument for individual choice has merit.

27. 422 U.S. at 834, quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring).

28. Cf. ABA CODE, *supra* note 8, EC 3-7 ("The prohibition against a nonlawyer practicing law does not prevent a layman from representing himself, for then he is ordinarily exposing only himself to possible injury").

29. J.S. MILL, *ON LIBERTY* 75-76 (A. Castell ed. 1947).

30. *Id.* at 77.

- MR. LAWYER: I have two responses. First, as a practical matter, we don't follow the teachings of Mill. Second, even within Mill's framework, the state would be able to prohibit law practice by nonlawyers, since the conduct of the nonlawyer does affect other individuals. Turning to the first point, if our society took Mill's analysis seriously, then any rules regulating conduct which affects only the individual would be untenable: all narcotics laws would go up in smoke; social security programs would retire from the scene; compulsory medical treatment requirements would die out; governments could no longer buckle down on seat belt requirements; the . . .
- MR. LAYMAN: Okay! Okay! But all you're saying is that a line must be drawn somewhere between individual choice and governmental restrictions of choice.³¹ For example, the government in effect forces consumers to pay extra for new cars because the cars must be equipped with seat belts. However, there is no law forcing people to wear them.³² And how important are seat belts anyway? Couldn't more lives be saved by further restricting consumer choice and requiring crash-proof steel cars rather than by simply requiring that all new cars have seat belts? So, even in a life and death situation, the government does not absolutely limit an individual's choice.³³ In the provision of legal services, however, we're not even talking about a life and death matter, except when one is on trial for a capital crime. And in a capital case, as in other criminal cases, the government is *constitutionally* prohibited from forcing a lawyer on a defendant who does not want one.³⁴ So once again, I ask: why won't the law respect my right to individual choice when I wish to be represented by a non-lawyer?
- MR. LAWYER: If you accept the fact that we draw lines, then I submit we should leave the line where it is. Turning to my second point, having answered you on the first, I recall from *my* political

31. See Comment, *Limiting the State's Police Power: Judicial Reaction to John Stuart Mill*, 37 U. CHI. L. REV. 605, 621 (1970) (noting that line-drawing problems arise in applying Mill to concrete situations).

32. *Id.* at 609 n.24.

33. See Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 716 (1965). The author maintains that "[o]ur society is not committed to preserving life at any cost. . . . [L]ives are used up when the *quid pro quo* is not some great moral principle but 'convenience.' Ventures are undertaken that, statistically at least, are certain to cost lives." *Id.*

34. 422 U.S. at 836. Although *Faretta* did not involve capital punishment, nothing in that decision indicates that the result would have been different had the death penalty been involved.

science days that Mill also stated that “[a]s soon as any part of a person’s conduct affects prejudicially the interests of others, society has jurisdiction over it.”³⁵ The issue is not the consequence of an isolated exercise of individual choice; rather, the issue is the impact upon the public of a rule granting the freedom to choose nonlawyer representation. Nonlawyers clearly will harm a large number of people because of their lack of training and freedom from any ethical restraints. Therefore, it is permissible for society to interfere with an individual’s right to choose a non-lawyer to represent him.

MR. LEGISLATOR: You’re misreading Mill. The focus must be on the actor and his conduct rather than upon the rule which makes his conduct possible.³⁶

MR. LAWYER: Even assuming that the focus is on the actor and his conduct, I’m still correct. Let’s focus on conduct, the conduct of the nonlawyer advisor. The advisor’s conduct harms others, namely the clients, by depriving them of the skilled, ethical, and professional representation which they would otherwise receive.³⁷ So Mill *would* support the distinction currently made in the law: one can represent himself because he harms only himself,³⁸ but a nonlawyer can be forbidden from representing—and hence, harming—others. So let’s pack it up and call it a day.

MR. LEGISLATOR: Not so fast! You’re confusing the idea of acting with that of advising another to act. As I understand it, a lawyer advises a client how to act, but ultimately, the decision rests with the client.³⁹ And Mill makes clear that “[w]hatever it is permitted to do, it must be permitted to advise to do.”⁴⁰

35. See J.S. MILL, *supra* note 29, at 75.

36. *Id.*

37. See text accompanying note 5 *supra*.

38. See also ABA CODE, *supra* note 8, EC 3-7, *quoted in* note 28 *supra*.

39. See ABA CODE, *supra* note 8, EC 7-8. Ethical Consideration 7-8 reveals that the lawyer is not the one engaging in actions, but is merely the advisor who must ensure that the client knows “the possible effect of each legal alternative” and the “factors which may lead to a decision that is morally just as well as legally permissible.” *Id.* In essence, the ultimate decision rests with the client. See *id.*

40. J.S. MILL, *supra* note 29, at 100. Arguably, the statement quoted by Mr. Legislator in the text is an over-generalization since the next sentence in Mill’s text states: “The question is doubtful only when the instigator derives a personal benefit from his advice; when he makes it his occupation, for subsistence or pecuniary gain, to promote what society and the State consider to be an evil.” *Id.* It is the authors’ belief that Mill, in this passage, did not intend generally to prohibit the act of advising for pay, but merely intends to prohibit such action when it encourages the individual to engage in conduct which is evil according to the societal view. Thus, Mill would allow a lawyer or nonlawyer to advise a client to enter into a contract, but would not allow the nonlawyer or lawyer to tell the client to take illegal narcotics or to murder.

- MR. LAWYER: Come on; you're really groping now. You know as well as I do that lawyers make all the decisions. Why else would individuals come to lawyers in the first place?
- MR. LEGISLATOR: Well, if clients *don't* make the decisions, I think they should. Lawyers should simply advise them of the alternatives available.⁴¹
- MR. LAYMAN: From what you two have said, I'm not sure how Mill would come out on the matter. But what does his philosophy have to do with this issue anyway?
- MR. LEGISLATOR: Studying the ideas of past philosophers is sometimes helpful, but I agree that these ideas cannot be the last word in examining the wisdom of the current law.
- MR. LAYMAN: Okay, but if we're looking at the wisdom of the current law prohibiting unauthorized law practice, then I have some pressing questions.
- MR. LAWYER: Proceed.
- MR. LAYMAN: Suppose the choice is between employing the assistance of a layman or self-representation. That is, suppose an individual cannot afford a lawyer and a court won't appoint one for him. Is he then forced to handle his own case?
- MR. LAWYER: That seems to be the situation in the few instances I know of.⁴² The only exception to this rule is that prisoners can receive help from their fellow inmates in filing habeas corpus petitions when the state refuses to provide a lawyer for such inmates.⁴³ Don't ask me why the Supreme Court has made an exception here and nowhere else.⁴⁴

41. See generally D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974) (concluding, based on comprehensive empirical studies, that a client should have a much more active role in the attorney-client relationship than he has had traditionally). Cf. J. KATZ & M. CAPRON, *CATASTROPHIC DISEASES: WHO DECIDES WHAT?* 91-115 (1975) (advocating greater role for patient in making decisions concerning treatment of catastrophic diseases). See also note 39 *supra*.

42. See *Hackin v. Arizona*, 102 Ariz. 218, 220, 427 P.2d 910, 912 *appeal dismissed per curiam*, 389 U.S. 143 (1967) (even though the court did not appoint a lawyer, Hackin was found guilty of unauthorized practice of law for helping another in drafting a habeas corpus petition). *Accord*, *Turner v. American Bar Ass'n*, 407 F. Supp. 451 (N.D. Tex. 1975), *aff'd sub nom. Pilla v. American Bar Ass'n*, 542 F.2d 56 (8th Cir. 1976). The *Turner* court held that there is no constitutional right to lay assistance in legal matters under either the first or sixth amendments. 407 F. Supp. at 476-80. The court found that § 1654 of the Judiciary and Judicial Procedure Code, enacted to enforce the sixth amendment's guarantee of a right to counsel, only allows for two types of representation: that by an attorney and that by a person representing himself. *Id.* See 28 U.S.C. § 1654 (1976). Although the Supreme Court has ruled that fellow prisoners may aid each other in filing habeas corpus petitions, the principles stated in *Hackin* are still valid in all cases apart from those in which habeas corpus petitions are involved. See *Johnson v. Avery*, 393 U.S. 483, 490 (1969); note 43 and accompanying text *infra*.

43. *Johnson v. Avery*, 393 U.S. 483, 490 (1969).

44. See *id.* at 485. In *Avery*, the Court emphasized that "[s]ince the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that

MR. LAYMAN: What if I could demonstrate that a nonlawyer in a particular situation is actually more qualified—or at least *as qualified*—as a lawyer?⁴⁵

MR. LAWYER: It would be too burdensome on the courts to make a case-by-case determination of qualifications. Besides, I suspect that nonlawyers are almost never as qualified as lawyers. Moreover, even if a particular individual is qualified, what happens if this nonlawyer walks off with a client's money or discloses a client's secrets? You must remember that the Code of Professional Responsibility applies only to lawyers.⁴⁶

MR. LEGISLATOR: Mr. Lawyer, even though I helped draft the statute prohibiting law practice by nonlawyers, I must point out that you're overstating your case in at least two ways. First, in noting that the Code of Professional Responsibility applies only to lawyers, you fail to point out that *enforcement* of the Code through disciplinary action is rare indeed.⁴⁷ Back-scratching and a reluctance on the part of lawyers to "offend" fellow lawyers have led to inadequate enforcement of the Code, as the American Bar Association itself has recognized.⁴⁸ Second, I think you underestimate the capabilities of individuals who are not members of your beloved profession.⁴⁹ Take patent cases, for exam-

access of prisoners to the courts for the purposes of presenting their complaints may not be denied or obstructed." *Id.* The majority further maintained that "[i]n the case of all except those who are able to help themselves—usually a few old hands or exceptionally gifted prisoners—the prisoner is, in effect, denied access to the courts unless such help [within the prison walls] is available." *Id.* at 488.

45. In many of the cases in which the issue of unauthorized practice is raised, there is no question concerning the quality of the nonlawyer's work. For example, in one case, an accountant was found to have engaged in the unauthorized practice of law. *Agran v. Shapiro*, 127 Cal. App. 2d 807, 820, 273 P.2d 619, 631 (1954). In fact, it appears that the accountant did a commendable job of handling the client's tax matter; he succeeded in obtaining an enormous tax savings for the client, and successfully defended the tax calculations before the tax authorities. *Id.* at 810-11, 273 P.2d at 621-22.

46. See ABA CODE *supra* note 8, EC 3-3. Ethical consideration 3-3 provides:

A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated professional committed to such standards

Id.

47. See ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970) [hereinafter cited as ABA SPECIAL COMM.]. The committee reported the "existence of a scandalous situation" in which "[d]isciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; and many disciplinary agencies have little power to take effective steps against malefactors." *Id.* at 1.

48. See *id.* See generally J. LIEBERMAN, *CRISES AT THE BAR: LAWYERS' UNETHICAL ETHICS AND WHAT TO DO ABOUT IT* 197-211 (1978).

49. See, e.g., *Madera v. Board of Educ.*, 386 F.2d 778, 788 (2d Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968) (the court upheld school policy of not allowing attorneys to represent junior

ple.⁵⁰ I'd hire an engineer over a lawyer any day. And I'd certainly rather have an accountant than a lawyer do my income taxes.

MR. LAWYER: It's not so much a narrow area of expertise that matters; what matters is that a lawyer has a legal education. Let me read to you what the Minnesota Supreme Court has said about this:

The interest of the public is not protected by the narrow specialization of an individual who lacks the perspective and orientation which comes only from a thorough knowledge and understanding of basic legal concepts, of legal processes, and of the interrelation of the law in all its branches.⁵¹

In essence, law school teaches one to "think like a lawyer," and thinking like a lawyer is essential to high quality law practice.

MR. LAYMAN: Accepting for the moment the idea that nonlawyers cannot practice law, I'm confused about what actually constitutes the practice of law. I'm willing to assume that a nonlawyer trying a criminal case or negotiating a settlement in a tort claim constitutes unauthorized law practice, but what about the employment of nonlawyers in other areas?

MR. LAWYER: Such as?

MR. LAYMAN: Such as the preparation of income tax forms.

MR. LAWYER: That probably doesn't constitute unauthorized practice—at least if only simple matters are involved.⁵²

MR. LAYMAN: What about the research necessary to obtain tax savings, when such research is performed in the course of filling out tax returns? You know, like those services that advertise on television.

MR. LAWYER: You mean the person is hired to prepare tax forms but sees a need to research a legal question in relation to such preparation?

MR. LAYMAN: Yes.

high school students in suspension conferences, maintaining that a social worker would be more qualified than a lawyer for such a task).

50. See *Sperry v. Florida Bar*, 373 U.S. 379, 403 (1963) (recognizing the high quality of nonlawyer patent agents and upholding power of Congress to allow nonlawyers to practice before the U.S. Patent Office). For other examples of nonlawyers with strong qualifications and expertise, see *State ex rel. Johnson v. Childe*, 139 Neb. 91, 95, 295 N.W. 361, 383-84 (1941) (court recognized nonlawyer's strong qualifications in transportation rate area, but nonetheless found unauthorized practice of law); *In re New York County Lawyers Ass'n*, 4 Misc. 2d 728, 729, 156 N.Y.S.2d 651, 653 (Sup. Ct. 1956) (nonlawyer with vast knowledge of Mexican law not allowed to advise American citizens on matters relating to Mexican law).

51. *Gardner v. Conway*, 234 Minn. 468, 480-81, 48 N.W.2d 788, 796 (1951).

52. See, e.g., *Lowell Bar Ass'n v. Loeb*, 315 Mass 176, 52 N.E.2d 27 (1943).

MR. LAWYER: It depends on the jurisdiction. In some jurisdictions, mere "incidental" legal work related to nonlegal work does not constitute the practice of law.⁵³ Other jurisdictions reject this idea, focusing instead on the nature of the legal work performed, not on whether or not it is incidental to nonlegal work.⁵⁴

MR. LAYMAN: What about those "do-it-yourself" divorce kits I've been reading about lately? You know, the kits which provide the necessary legal forms along with instructions for filling them out.⁵⁵

MR. LAWYER: This too depends on the jurisdiction. Some states consider the sale of such kits to constitute unauthorized law practice;⁵⁶ other states do not.⁵⁷

MR. LAYMAN: What about the preparation of contracts by real estate brokers?

MR. LAWYER: Again, jurisdictions differ.⁵⁸

MR. LAYMAN: I guess what you're telling me is that there is no wide consensus as to what constitutes the practice of law.

MR. LAWYER: That's right. I don't think it's possible to define the practice of law in such a way as to fit all situations and activities.⁵⁹ As a practical matter, courts must examine the facts of each case to determine whether the particular conduct constitutes law practice. Since the facts of each case are unique, it is not surprising that jurisdictions appear somewhat divided.⁶⁰

MR. LAYMAN: You've pretty much undercut your argument that a case-by-case determination of qualifications of nonlawyers would be too burdensome, haven't you? You certainly can't say that the courts have avoided a case-by-case approach.

MR. LAWYER: Well, perhaps to a certain extent . . .

53. See, e.g., *In re New York County Lawyers Ass'n*, 273 A.D. 524, 537, 78 N.Y.S.2d 209, 220 (1948), *aff'd mem.*, 299 N.Y. 728, 87 N.E.2d 451 (1949) (court found unauthorized practice of law by accountant doing legal research but indicated result would be different if research was incidental to auditing books or filling out tax forms). For a discussion of the "incidental test" in a variety of settings, see Johnstone, *supra* note 2, at 15.

54. See, e.g., *Agran v. Shapiro*, 127 Cal. App. 2d 807, 816, 273 P.2d 619, 625 (1954) (rejecting the "incidental" test).

55. See generally Note, *The Unauthorized Practice of Law and Pro Se Divorce: an Empirical Analysis*, 86 YALE L.J. 104 (1977).

56. See, e.g., *Florida Bar v. Stupica*, 300 So. 2d 683 (Fla. 1974).

57. See, e.g., *Oregon State Bar v. Gilchrist*, 272 Or. 552, 538 P.2d 913 (1975).

58. Compare *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 34 Ill. 2d 116, 120, 214 N.E.2d 771, 774 (1966) (allowing real estate broker to complete form contract of sale) with *Florida Bar v. Columbia Title*, 197 So. 2d 3, 5 (Fla. 1967) (drafting sales contracts constitutes unauthorized practice of law).

59. See *Sparkman v. State Bd. of Bar Examiners*, 77 N.M. 551, 554, 425 P.2d 313, 315 (1967).

60. See notes 53-59 and accompanying text *supra*.

MR. LAYMAN: It seems to me that no matter how law practice is defined, a heck of a lot of law is practiced by nonlawyers.

MR. LAWYER: What on earth do you mean?

MR. LAYMAN: Well, take Mr. Legislator, for example, who's sitting there so quietly. He's not a lawyer; yet he practices law every day.

MR. LEGISLATOR: What may I ask are you talking about?

MR. LAYMAN: I just happen to have here a newsletter you sent me recently in which you describe what you've done for your constituents. According to the letter, you obtained a tax revenue ruling for a sole shareholder of a small corporation; in one phone call you averted the need for a constituent to file a discrimination suit against the school board by convincing the board to renew that person's contract; you saved someone the trouble of appealing an adverse ruling by the Social Security Administration relating to medical disability by writing a letter; you . . .⁶¹

MR. LEGISLATOR: Okay, I get the point. But going to bat for constituents is an essential function of a legislator.

MR. LAYMAN: But aren't all the alleged dangers Mr. Lawyer referred to earlier present here?

MR. LEGISLATOR: Legislators will do a good job. Good work on constituents' problems translates into votes.

MR. LAYMAN: And what about all of the ombudsmen who have been appearing recently? Certainly these nonlawyers are practicing law. Why there are ombudsmen to handle problems of prisoners,⁶² ombudsmen to handle problems of nursing home residents,⁶³ ombudsmen to handle grievances against state and local agencies,⁶⁴ ombudsmen to handle problems of school students,⁶⁵ ombudsmen to handle problems of juvenile delinquents,⁶⁶ ombudsmen everywhere.

61. For a discussion of the "casework" role of United States Congressmen and Senators, see Klonoff, *The Congressman as Mediator Between Citizens and Government Agencies: Problems and Prospects*, 16 HARV. J. LEGIS. — (1979) (forthcoming). See also Jenrette, *The Care and Feeding of a U.S. Congressman*, TRIAL, April, 1977, at 27, 28 ("The people who come to [members of Congress] for help have no lawyer of their own. . . . After exhausting their own resources they come to their congressman as their concerned representative with federal government").

62. See 16 MINN. STAT. ANN. § 241.41 (West 1974) (creating the office of ombudsman for the Minnesota State Department of Corrections).

63. See Klonoff, *The Problems of Nursing Homes: Connecticut's Non-Response*, 31 AD. L. REV. 1 (1979).

64. See Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845, 849 (1975).

65. *Id.* at 850-51.

66. See Silbert & Sussman, *The Rights of Juveniles Confined in Training Schools and the Experience of a Training School Ombudsman*, 40 BROOKLYN L. REV. 605 (1974).

- MR. LEGISLATOR: I'm sure you're aware that ombudsmen do not go into court. They serve as negotiators to avert litigation. I'd say to that extent they're not practicing law.
- MR. LAYMAN: But Mr. Lawyer seemed to indicate that, whatever it means, the concept of law practice is not limited to going into court. For example, the publishing of divorce kits may constitute practicing law.⁶⁷
- MR. LAWYER: Mr. Layman has a point. In one leading case, a licensed casualty adjuster who was not a lawyer was deemed to be engaged in the practice of law simply because he settled tort claims on behalf of injured persons for a fee.⁶⁸ This was so even though the adjuster claimed that he acted only when liability clearly existed and when the tortfeasor was willing to settle; if the tortfeasor was unwilling to settle, the adjuster always advised that a lawyer be hired.⁶⁹ The court noted "the vital role that legal assessments play in the negotiation process."⁷⁰
- MR. LEGISLATOR: Again, ombudsmen are different. They are public officials; they'll do a good job. We have nothing to worry about. However, I can think of a host of nonlawyers who are, in effect, allowed to practice law unabated. I'm referring to those countless individuals who are permitted to appear before administrative agencies on someone else's behalf. It seems clear that one practicing before an agency is no less engaged in law practice than one appearing before a court.⁷¹ And, believe it or not, laymen are permitted to represent clients before such agencies and commissions as the Interstate Commerce Commission,⁷² the Department of the Treasury,⁷³ the United States Patent Office,⁷⁴ and the National Labor Relations Board,⁷⁵ just to name a few.

67. See notes 55-57 and accompanying text *supra*.

68. *Dauphin County Bar Ass'n v. Mazzacaro*, 465 Pa. 545, 555, 351 A.2d 229, 234 (1976).

69. *Id.* at 548, 351 A.2d at 233.

70. *Id.*

71. See, e.g., Kephart, *supra* note 2, at 229. Chief Justice Kephart, formerly of the Supreme Court of Pennsylvania, stated:

While the judicial field is being narrowed and curtailed by the activities of arbitrators, commissions and administrative bodies that are constantly increasing in number and before whom laymen are at times permitted to practice this is a positive infringement of the lawyer's right. *There is no distinction between the practice before such boards, and the duties of a lawyer; all ultimately find their way into the courts, and their preparation and trial should be guarded by the same safeguards as in a court.*

Id. (emphasis added).

72. See *State ex rel. State Bar v. Keller*, 21 Wis. 2d 100, 123 N.W.2d 905 (1963), cert. denied, 377 U.S. 964 (1964).

73. See *Agran v. Shapiro*, 127 Cal. App. 2d 807, 273 P.2d 619 (1954).

74. *Sperry v. Florida Bar*, 373 U.S. 379 (1963).

75. *Auerbacher v. Wood*, 139 N.J. Eq. 599, 53 A.2d 800 (Ch. 1947), *aff'd*, 142 N.J. Eq. 484, 59 A.2d 863 (Ct. Err. & App. 1948).

MR. LAWYER: In most of the instances you cite, the states would love to crack down, but the federal government can authorize non-lawyers to practice law before federal agencies and the states cannot declare such practice illegal because of the supremacy clause.

MR. LAYMAN: The what?

MR. LAWYER: The supremacy clause.⁷⁶ This part of the Constitution requires states to carry out federal law, even when such law is inconsistent with state law.⁷⁷ I should point out that with respect to state agencies, most cases consider lay representation to constitute the unauthorized practice of law.⁷⁸

MR. LEGISLATOR: I can think of many other areas in which—whether legally or illegally—much law practice is engaged in by nonlawyers. First, real estate sales transactions often take place with no participation by lawyers.⁷⁹ Second, much consumer protection work once handled by lawyers is now engaged in by non-legal organizations.⁸⁰ Third, in the area of mutual funds and life insurance, much work, seemingly legal in nature, is carried out by nonlawyers.⁸¹

MR. LAWYER: Perhaps enforcement of the unauthorized practice statute has been inadequate.⁸²

76. See U.S. CONST. art. VI, cl. 2. The supremacy clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

77. See, e.g., *Sperry v. Florida Bar*, 373 U.S. 379, 384 (1963) (since a federal statute expressly permitted the Commission of Patents to authorize nonlawyers to practice before the Patent Office, by virtue of the supremacy clause, Florida could not deny nonlawyers the right to perform functions within the scope of federal authority); *State ex rel. State Bar v. Keller*, 21 Wis. 2d 100, 102-03, 123 N.W.2d 905, 907 (1963) (layman's appearance as representative of others at hearings before Interstate Commerce Commission was authorized by his federal license and could not be enjoined).

78. See, e.g., *State ex rel. Johnson v. Childe*, 139 Neb. 91, 94-95, 295 N.W. 381, 383 (1941) (nonlawyers not allowed to practice law before state railroad agency); *People ex rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 357, 8 N.E.2d 941, 946-47 (1937) (nonlawyers not allowed to practice before workmen's compensation board); cf. *Worker's Compensation Law, ARK. STAT. ANN. § 81-1323(c)* (1976) (nonlawyers may appear before workmen's compensation board). See also *Morgan, supra* note 26, at 708 n.21 ("State courts have been more restrictive as regards practice before state agencies").

79. *Miller, Where Has the Practice of Law Gone?*, 39 UNAUTH. PRAC. NEWS 40, 41 (1974).

80. *Id.* at 42.

81. *Id.* at 41.

82. This is not to say that numerous instances of enforcement cannot be found. See, e.g., *Grievance Comm. of Bar v. Dacey*, 154 Conn. 129, 142, 222 A.2d 339, 346 (1966) (estate planner and

MR. LAYMAN: Or perhaps complaints are not made in most situations because the nonlawyers are doing an adequate job.⁸³

MR. LAWYER: I highly doubt it.

MR. LAYMAN: In light of the discussion we've just had, I'm even more convinced than before that the lay adjuster and my son should be allowed to handle my legal problems. To begin with, I still believe that it makes absolutely no sense to allow me to handle these problems myself yet to deny me the opportunity of retaining a nonlawyer to protect me. The case you spoke of in which the Supreme Court allowed inmates to get assistance from other inmates in habeas corpus proceedings when no lawyer was available seems to recognize that the assistance of a nonlawyer may be more effective than self-representation. Second, the fact that only attorneys are subject to discipline hardly seems to be a powerful argument in light of Mr. Legislator's comments about the inadequacy of disciplinary enforcement. Third, the whole notion of what constitutes the practice of law is entirely uncertain, since it is seemingly dependent upon which court hears a particular case at a particular time. If the public interest is such an important consideration, you'd think that the concept of law practice would be worked out with more consistency. How is the public interest served, for example, by prohibiting divorce kits in some states, but allowing them in others?⁸⁴ Either some states are harming the

salesman of shares in mutual funds who prepared wills and trusts for his clients found to have engaged in illegal practice of law); Florida Bar v. Irizarry, 268 So. 2d 377, 379 (Fla. 1972) (real estate broker who drafted a contract for purchase and sale, and completed a warranty deed and closing statement in a real estate transaction, permanently enjoined from such unauthorized practice of law). See generally UNAUTHORIZED PRACTICE HANDBOOK, *supra* note 3.

83. See K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962). Professor Llewellyn explains:

As one looks through the list of "encroachments" [by lay groups upon areas formerly the exclusive province of lawyers], certain conclusions become hard to escape. . . . Old lines of business are certainly drifting or being sucked into non-Bar hands, but with real probability that this is because they are being done more adequately or more cheaply or both by outside agencies. . . . Abuses there are, on the side of lay "practitioners". But *the steady drift of business is too steady, it recurs in too many fields, to permit the conclusion that the lay agencies, over the long haul are not giving satisfaction.*

Id. at 254 (emphasis added). See also Morgan, *supra* note 26, at 709. Professor Morgan stated: In the specific fields of controversy about unauthorized practice [e.g., collection of debts, executing real estate sales contracts, sale of divorce kits, probate work, tax advising, appearing before administrative agencies], . . . there are problems of correspondence, document management and psychological judgment as to which lay experience may be as important as intellectual training. In such situations, it seems entirely reasonable to expect that many lay persons would perform "legal services" at a level of quality equal to or exceeding that of many lawyers.

Id. But see, e.g., Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (nonlawyer made serious mistakes attempting to handle legal problem); Lowe v. Presley, 86 Ga. App. 328, 71 S.E.2d 730 (1952) (same).

84. See notes 56-57 and accompanying text *supra*.

public or the others are unnecessarily hassling it. Fourth, it seems that a *vast* amount of law practice by nonlawyers already exists, no matter how narrowly law practice is defined. Why grant this privilege to legislators, ombudsmen, practitioners before certain agencies, and others, yet demonstrate your concern about the public interest by not allowing me to do what I think is best? Finally, all this nonsense about the public interest fails to recognize that, in many areas, nonlawyers would probably be more helpful to the client than lawyers. I just can't see why nonlawyers should be barred from law practice, let alone why they should be guilty of a crime for such conduct. I think you two should do something to change things.

MR. LEGISLATOR: What would you suggest?

MR. LAYMAN: Obviously, I'd let people hire nonlawyers if they wanted to.

MR. LAWYER: What about the attorney-client privilege,⁸⁵ the prohibition against conflicts of interest,⁸⁶ and other protections afforded by the American Bar Association's Code of Professional Responsibility?⁸⁷

MR. LAYMAN: Fair enough; I'll assume these protections are not meaningless as a practical matter. I'd simply recommend that the provisions of the Code of Professional Responsibility be extended to apply to all nonlawyers doing legal work.⁸⁸

85. See ABA CODE, *supra* note 8, Canon 4, EC 4-1, 4-5 & 4-6, and DR 4-101(b). Canon 4 provides that "A Lawyer Should Preserve the Confidences and Secrets of a Client." *Id.*, Canon 4. Disciplinary Rule 4-101(b) requires that a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use a confidence or secret of his client for the advantage of himself or of a third person unless the client consents after full disclosure.

Id., DR 4-101(b) (footnotes omitted).

86. See ABA CODE, *supra* note 8, Canon 5, EC 5-1 to 5-24, and DR 5-101 to 5-105. Canon 5 provides that "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." *Id.*, Canon 5. Ethical Consideration 5-1 suggests in part that "[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties." *Id.*, EC 5-1. These disciplinary rules prohibit an attorney from accepting or continuing employment when other interests impair his "independent professional judgment." *Id.*, DR 5-101 to 5-105.

87. ABA CODE, *supra* note 8.

88. There are, of course, possible problems with applying the Code to nonlawyers. For instance, should the attorney-client privilege apply? To the extent that nonlawyers are handling legal problems, it becomes necessary that clients discuss matters with them freely, so the rationale for the privilege would seem equally applicable in this situation. See ABA CODE, *supra* note 8, EC 4-1. Similarly, the public harm from improper solicitation is no less grave when engaged in by nonlawyers. *Cf. In re Primus*, 436 U.S. 412, 434 (1978) (state may forbid in-person solicitation by lawyer for pecuniary gain under circumstances likely to result in deception or improper influence upon clients).

MR. LAWYER: How would the bar do that? It can't simply extend the Code to apply to nonlawyers.

MR. LEGISLATOR: Since the unauthorized law prohibition is statutory,⁸⁹ any relaxation of the prohibition could easily be handled by statutory reform. That same reform could extend the attorneys' code of ethics to nonlawyers who do legal work.

MR. LAYMAN: That seems to take care of your objection, Mr. Lawyer.

MR. LEGISLATOR: Don't congratulate yourself yet. It seems to me that lawyers have enough trouble enforcing their standards among themselves.⁹⁰ How would we ever police the same standards as applied to nonlawyers?

MR. LAYMAN: Why not just create an agency to receive public complaints and investigate possible violations of ethical rules? If a nonlawyer demonstrates that he can't do legal work, he could be fined;⁹¹ perhaps the agency could even prohibit him from further engaging in such activity.

MR. LAWYER: I can't take this any more. This conversation is getting out of hand. What started out as an intelligent discussion among mature individuals has deteriorated into an exercise in futility. In the first place, this idea would never pass. It's not in the public interest and lawyers will see that it dies a quick death. Second, I think people are sick of proposals that add more layers to the constantly growing bureaucracy.⁹² Indeed, your proposal would be counterproductive; like most other agencies, yours would wind up being captured by the very industry it is supposed to regulate.

MR. LEGISLATOR: You mean like the Bar Association?

MR. LAWYER: I'll have you know that the lawyers have done a far better job of policing themselves than have other professions.⁹³ But to continue with my objections, the scheme would expose the public to abuse; it wouldn't do anything to prevent incompe-

89. See note 3 and accompanying text *supra*.

90. See notes 47-48 and accompanying text *supra*.

91. Cf. *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958) (nonlawyers found liable for malpractice and required to pay compensatory damages to plaintiff); *Latson v. Eaton*, 341 P.2d 247 (Okla. 1959) (same).

92. Cf. J. LIEBERMAN, *supra* note 48, at 218 (suggesting that bar enforcement of ethical standards be replaced by public agency regulation and recognizing that such a proposal will be attacked by lawyers as simply adding "another bureaucracy").

93. See *id.* at 220 (other professions have encountered ethical problems of an equal or more serious nature; for example, it is said that medical discipline has deteriorated more than that of the bar). See also Q. JOHNSTONE & D. HOPSON, *supra* note 1, at 72.

tent service by nonlawyers⁹⁴ the way licensing of attorneys ensures the provision of high quality legal service.⁹⁵ Moreover, there would be nothing to make whole the victims of nonlawyer incompetence.⁹⁶ And people would have no way to inform themselves intelligently about which nonlawyers are competent, assuming that some are.⁹⁷ In contrast, people presently can retain a lawyer and know, without any research, that they are getting someone competent to handle their legal matters.⁹⁸ Finally, the idea would lead to even greater inefficiency in the courts.⁹⁹ Attorneys promote courtroom efficiency by sorting out important facts, presenting them in a coherent manner, and focusing on the critical legal issues.¹⁰⁰ Laymen, on the other hand, would be unable to separate the important legal and factual issues from the unimportant. The enormous backlog of our courts¹⁰¹ would only grow worse. The whole idea seems utterly ridiculous and I . . .

MR. LAYMAN: Excuse me. I can think of ways to respond to each of your criticisms.

MR. LEGISLATOR: This seems like a complicated issue, but the idea is intriguing and worth pursuing. Let's take this thing one step at a time. And I would begin by taking issue with Mr. Lawyer's first objection, namely, that the proposal couldn't pass. Mr. Layman's idea, or something like it, would be very attractive to other professionals, such as accountants and real estate brokers, many of whom sit on legislative bodies, or at least, exert a good deal of lobbying influence.¹⁰²

94. *But see* note 91 and accompanying text *supra*.

95. *But see* the scores of cases concerning legal incompetence and neglect cited in Gaudineer, *Ethics and Malpractice*, 26 *DRAKE L. REV.* 88 (1976).

96. *But see* notes 118-19 and accompanying text *infra*.

97. *But see* notes 123-27 and accompanying text *infra*.

98. *But see* note 95 *supra*.

99. *But see* notes 130-32 and accompanying text *infra*.

100. *See* R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 25 (1953). Pound noted that

proper presentation of a case by a skilled advocate saves the time of courts and so public time and expense. It helps the court by sifting out the relevant facts in advance, putting them in logical order, working out their possible legal consequences, and narrowing the questions which the court must decide to the really crucial points.

Id.

101. *See generally* Burger, *The State of the Judiciary—1975*, 61 *A.B.A. J.* 439 (1975).

102. *See* Q. JOHNSTONE & D. HOPSON, *supra* note 1, at 170, 187 (noting ways in which lay competitors have already used their influence to undercut unauthorized practice regulation). A particularly interesting instance of lay groups' overcoming unauthorized practice rules through the political process took place in Arizona in the early 1960's. *Id.* at 169-70. In 1961, the Arizona Supreme Court ruled that title insurance companies and real estate brokers could not

MR. LAWYER: I think you underestimate the lobbying influence of the Bar Association. We're not a helpless and insular minority, you know.

MR. LEGISLATOR: Perhaps other members of *your* profession do not share *your* views.¹⁰³

MR. LAWYER: Even assuming for the moment that the proposal *could* pass, I submit that it shouldn't. Let's focus on each of my earlier points in detail. First, it seems wasteful to create another layer of bureaucracy, particularly when the agency would most likely be co-opted by the intended targets of the regulation.¹⁰⁴

MR. LAYMAN: I don't think the idea is wasteful at all. As I see it, the proposal provides numerous important benefits.

MR. LEGISLATOR: Before you get to the benefits, let me focus on the captured agency problem for a moment. It is likely that this agency, unlike many others, would not be co-opted. It would regulate many groups and individuals other than lawyers. Lawyers will be anxious to find ethical violations or instances of incompetence by nonlawyers; similarly, nonlawyers will seek to show that lawyers are no better than they are. Natural rivalry means that no one interest group is likely to capture the agency.¹⁰⁵ As an additional safeguard, the agency could be staffed

prepare legal documents or give legal advice. *State Bar v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 97, 366 P.2d 1, 15 (1961). Following this decision, Arizona real estate brokers were able to put a constitutional amendment on the ballot giving brokers broad rights to draft legal instruments in the course of their work. Q. JOHNSTONE & D. HOPSON, *supra* note 1, at 170. The proposed amendment was passed by a *four to one* margin in a popular election. *Id.* See Marks, *The Lawyers and the Realtors: Arizona's Experience*, 49 A.B.A. J. 139 (1963); Riggs, *Unauthorized Practice and the Public Interest: Arizona's Recent Constitutional Amendment*, 37 S. CAL. L. REV. 1 (1964).

103. See Q. JOHNSTONE & D. HOPSON, *supra* note 1, at 188. The authors maintain that [t]hose lawyers whose clients include businesses that compete with the bar are likely to oppose aggressive action [to enforce unauthorized practice prohibitions]. These are the house counsel, trade association counsel, and lawyers who regularly do legal work for the banks, real estate brokers, and others who compete with the bar. . . .

But differences over bar association unauthorized practice policy exist even among those lawyers who are not tied in with the bar's competitors.

Id.

104. For a sampling of numerous works on the "captured agency" problem, see, e.g., M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* (1955); G. KOLKO, *RAILROADS AND REGULATION, 1877-1916* (1965); T. LOWI, *THE END OF LIBERALISM* (1969); Huntington, *The ICC Re-examined: A Colloquy*, 63 YALE L.J. 44 (1953); Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952); Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974).

105. The "natural rivalry" argument is analogous to the proposal that bureaucracies or bureaucratic officials be given overlapping jurisdiction, forcing them to compete and thus to become more efficient and less susceptible to "capture." See W. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971). Hence, according to Mr. Legislator's view, there will be competition among the proposed agency and the preexisting "regulatory" agencies, such as

by individuals representing a wide variety of groups likely to compete with lawyers, such as accountants, real estate brokers, bankers, adjusters, engineers, insurance salesmen, and so forth. Indeed, I think this agency would eliminate many of the impediments to effective disciplinary enforcement by the Bar Association. As to your comment that the legal profession already polices itself better than other professions, certainly you're not saying that the legal profession is doing a good job; in fact, it's doing a lousy job, as the American Bar Association itself recognizes.¹⁰⁶

MR. LAYMAN: The suggestion to give representation in the agency to numerous diverse interests pretty much destroys any argument that the agency would be captured by any particular group.

MR. LAWYER: I know of no agency that has succeeded in remaining independent, and your simplistic reasoning doesn't persuade me that this one would be any different. In any event, your proposal places the public at a great risk of abuse. Let me posit three ways in which this is true. First, your scheme does nothing to prevent incompetence among the nonlawyers who will be unleashed on the public. Certainly an occasional fine will not serve as an effective deterrent. Second, how will victims be compensated for those egregious instances of incompetence or fraud that are sure to arise? Third, the public will have no way of learning which, *if any*, nonlawyers are in fact competent.

MR. LEGISLATOR: I know! We can require that nonlawyers be licensed, the way nonlawyers are licensed to practice before the United States Patent Office.

MR. LAYMAN: I'm not familiar with this.

MR. LEGISLATOR: In a nutshell, the Patent Office permits nonlawyers to practice before it, but requires that lawyers and nonlawyers alike pass certain qualifying examinations and demonstrate good moral character.¹⁰⁷ These licensing procedures of the Patent Office have worked incredibly well. Fears among lawyers that nonlawyers would harm the public have simply not been realized. Indeed, the Patent Office itself has indicated that nonlawyers have performed every bit as well as lawyers.¹⁰⁸ I suppose we would

the Bar Association (which will continue to exist and advocate organization interests). Moreover, professional groups, such as accountants, bankers, and real estate brokers, will compete with one another, thus making "capture" even less likely to occur.

106. See notes 47-48 and accompanying text *supra*.

107. See *Sperry v. Florida Bar*, 373 U.S. 379, 384, 402 (1963).

108. See *id.* at 402, quoting COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT OF THE TASK FORCE ON LEGAL SERVICES AND PROCEDURE, Part VI, Appendices and Charts, 158 (1955).

simply leave the details of licensing to the individual states to work out.

MR. LAWYER: Not so fast! Don't pull that debater's trick on me! How would this licensing thing work?

MR. LEGISLATOR: I'm glad you asked that question. The regulatory agency in each state would devise qualifications for and award licenses to nonlawyers on a field-by-field basis. That is, a special test would be set up for those wishing to practice tax law, another test for those wishing to do trusts and estates work, and so forth. Of course, the specialized categories would not arise overnight. Initially, only those areas in which nonlawyers have already expressed a desire to participate would be opened up to them.¹⁰⁹ Other areas of practice would develop over time as nonlawyers indicate an interest in them. The license would be a privilege to practice only the type of law for which qualifications have been met. In contrast, lawyers would still be required to pass a comprehensive bar examination, but would continue to be free to engage in all areas of law practice. In addition, just as lawyers must presently meet high moral standards, laymen would similarly be required to demonstrate high moral character in order to obtain and keep a license. To provide additional protection for the public, licensed nonlawyers would be required to disclose that they are not lawyers. Such disclosure would enable clients to make a more informed selection of whom to hire as their legal advisor. Any nonlawyer attempting to engage in law practice should be required to inform each client: first, that the nonlawyer's license is not the same as a lawyer's license; second, that the nonlawyer does not have a legal education and is not a member of any bar; third, that legal training and testing provides a special ability to spot legal problems and handle legal issues; and fourth, that the client is taking some risk.

MR. LAWYER: Come on. Even assuming this senseless proposal were to be given any consideration, some informed person would immediately point out that disclosure laws are pretty much a joke because the people who need such disclosure are typically un-

109. The American Bar Association has entered into statements of principles with some competing professional groups. See Q. JOHNSTONE & D. HOPSON, *supra* note 1, at 184-87. These lay groups include: the American Bankers Association (Trust Division), certified public accountants, collection agencies, insurance companies and adjustors, life underwriters, life insurance companies, liability insurers, realtors, and social workers. *Id.* at 185 n.71. These agreements suggest only some of the many fields in which licensing could be established.

sophisticated and uneducated and cannot or do not take advantage of detailed disclosure provisions.¹¹⁰

MR. LEGISLATOR: Before you get to the problems of disclosure, Mr. Lawyer, I want to explain to Mr. Layman why licensing of non-lawyers is critical. Licensing ensures that one meets minimal qualifications for performing a particular service.

MR. LAYMAN: Then give the nonlawyer one chance. If he messes things up, bar him from practicing law.

MR. LAWYER: You mean like the "one bite" rule?

MR. LAYMAN: The what?

MR. LAWYER: The "one bite" rule. That's the rule that shields the owner of a dog from liability until after the dog has demonstrated its viciousness by attacking someone.¹¹¹

MR. LEGISLATOR: But there's nothing to take away from one who messes up a case, since he doesn't have a license to begin with. So how do we bar him from practicing? Moreover, there are other reasons for requiring licensing. As I've already noted, licensing ensures that one holding himself out as capable of handling legal problems has at least minimal qualifications. Second, and related to the first, we avoid imposing on the public the costs of learning which nonlawyers have at least a reasonable level of competence. Third, we make sure that individuals holding themselves out as capable of practicing law are of sound moral character. For example, we would not want someone who has been convicted three times for securities fraud to practice securities law.

MR. LAYMAN: You may have a point with that licensing thing. I'm just not sure. It seems to me that if we truly adhere to individual choice, we should allow people to choose *any* nonlawyer to represent them, not just licensed nonlawyers.

MR. LAWYER: Mr. Legislator, do you really think that loss of a license by a nonlawyer will serve as any sort of deterrent? Big deal! Someone loses a license to practice one narrow area of law. On the other hand, lawyers have a lot more to lose if they lose their licenses. That's just one more reason why we should keep things the way they are.

MR. LEGISLATOR: Have you ever stopped to think that it may be precisely because lawyers have so much to lose that disciplinary

110. See Jordan & Warren, *Disclosure of Finance Charges: A Rationale*, 64 MICH. L. REV. 1285, 1320-22 (1966). But see notes 113-15 and accompanying text *infra*.

111. See W. PROSSER, LAW OF TORTS § 76, at 501-02 (4th ed. 1971).

proceedings are rarely filed and, hence, enforcement has become such a farce?¹¹²

MR. LAWYER: I doubt it. But moving on, why doesn't one of you discuss my objection to the disclosure requirement, namely, that disclosure laws don't work?

MR. LEGISLATOR: I think you underestimate the value of disclosure. First, disclosure serves to inform a potential client that he may not get the same level of service from a nonlawyer as from a lawyer.¹¹³ Second, and related to the first, disclosure has had at least some impact on consumer choices.¹¹⁴ Third, evidence demonstrates that one reason why disclosure has not been more successful is that much of what has been disclosed has been either irrelevant or else written in technical jargon comprehensible to almost no one, including many lawyers.¹¹⁵

MR. LAWYER: How do you know so much about disclosure?

MR. LEGISLATOR: In my role as a member of the judiciary committee of this state's legislature, I've heard more than my fair share of hearings about disclosure.

MR. LAWYER: Disclosure aside, what do we do about victims of incompetent performance by nonlawyers? Are these people to be left remediless? I've asked this question already but both of you have ignored it.

MR. LAYMAN: Why not allow malpractice suits?

MR. LAWYER: That wouldn't do much good, particularly in the case of one who in good faith acts as best as he knows how, but who just happens to make a mistake. A nonlawyer would not be held

112. See ABA SPECIAL COMM., *supra* note 47, at 7 (suggesting that mere institution of disciplinary proceeding is so harsh in terms of damage to an attorney's investment in his education and practice that such proceedings are rarely filed).

113. Cf. NATIONAL COMM. ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 176 (1972) (discussing Federal Reserve Board study showing that consumer awareness of interest rates increased in 15 months after enactment of Truth-In-Lending Act, 15 U.S.C. §§ 1601-1605 (1976), thus indicating that disclosure requirements play a significant role in informing the public). See also Brandt & Day, *Information Disclosure and Consumer Behavior: An Empirical Evaluation of Truth-In-Lending*, 7 MICH. J.L. REF. 297, 300-03, 306 (1974).

114. See Brandt & Day, *supra* note 113, at 313 (admitting that disclosure has had "a modest influence on shopping behavior"). But see Jordan & Warren, *supra* note 110, at 1302-03, 1309-10, 1315 (expressing doubts that there is much credit-shopping, and arguing that, in small deals, shopping for best credit terms is seldom as worthwhile as shopping for the desired goods).

115. See David, *Protecting Consumers From Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 VA. L. REV. 841, 843-44, 847-53, 855-56, 897-98 (1977) (empirical analysis indicating that disclosures are often too lengthy and complex to be understood, and concluding that disclosures should be limited to material and simple facts or ideas).

to the standard of a reasonable lawyer under the circumstances; he would be held to the standard of a reasonable nonlawyer.¹¹⁶

MR. LAYMAN: Then why not simply hold nonlawyers to the same standards as lawyers?¹¹⁷

MR. LEGISLATOR: That's a great idea. Holding nonlawyers to the same malpractice standards as lawyers would not only serve to compensate victims, but it would also supplement license revocation as a deterrent against incompetent performance by nonlawyers.¹¹⁸

MR. LAWYER: But even that proposal would not help victims in many cases.

MR. LAYMAN: Such as?

MR. LAWYER: What if the harm is too small to make it worth undergoing litigation costs? What if the client does not *know* he received poor service, for example, when the damages recovered by a nonlawyer are much less than those which an attorney could have obtained? What if the nonlawyer, having already been sued many times, is judgment proof?

MR. LAYMAN: But don't all of these problems exist under the current system with respect to incompetent attorneys?

MR. LEGISLATOR: Maybe my licensing idea would improve things over the current system by dealing with the problems just mentioned.

MR. LAWYER: How?

MR. LAYMAN: How?

MR. LEGISLATOR: We could charge those who obtain licenses an annual fee and use the money to compensate victims of minor instances of incompetence.¹¹⁹ The licensing agency would be responsible for determining when and how much compensation is justified. This is just one more reason why licensing is a good idea. Licensing would add to the benefits of Mr. Layman's idea.

MR. LAYMAN: Speaking of benefits, let's look at the benefits of my proposal. I suppose I've been too dogmatic in not appreciating

116. Cf. W. PROSSER, *supra* note 111, § 32, at 161 (indicating that professionals are held to higher standard than laymen, but implying that the result would be different if a layman misrepresents himself as having all the skills of a professional).

117. See Morgan, *supra* note 26, at 709 n.26 (citing cases in which nonlawyers have already been held to the standard of a reasonable lawyer).

118. See notes 111-12 and accompanying text *supra*.

119. See Comment, *Pennsylvania Clients' Security Fund—How Secure is the Public?*, 22 VILL. L. REV. 452 (1977) (discussing an analogous "client security fund" system in Pennsylvania). See generally Bryan, *Clients' Security Fund Ten Years Later*, 55 A.B.A. J. 757 (1969); Steele & Nimmer, *Lawyers, Clients and Professional Regulation*, 3 AM. BAR FOUNDATION RESEARCH J. 917, 1009-11 (1976).

the benefits of the licensing idea. Individual choice is only one aspect, albeit an extremely important one, of the "public interest." It seems to me that the public interest is promoted to a much greater extent under my system, combined with the licensing scheme, than under the current system. This is not to denigrate the role of individual choice; even under the licensing scheme an individual would have much greater choice than he does presently. That is, under the scheme, an individual can choose: a) to represent himself; b) to hire a lawyer; or c) to hire any nonlawyer meeting minimal qualifications. In addition to the significant increase in individual choice, another clear benefit is the overall cost savings for legal services that would accrue. Two separate factors would lead to such a savings. First, nonlawyers would frequently charge less than lawyers for performing the same service.¹²⁰ Second, increased competition in the performance of legal services, resulting from the entry of nonlawyers into the market, would lead to a reduction in the cost of legal services by lawyers and, ultimately, in the overall cost of resolving legal problems.¹²¹ Still another benefit from the proposed scheme is the improved discipline likely to result from competition between lawyers and other individuals performing legal services. That is, lawyers, eager to maintain their position of being

120. See Q. JOHNSTONE & D. HOPSON, *supra* note 1, at 194 ("Lay legal services often are performed at lower cost than if the work were done by lawyers"); cf. Leff, *Medical Devices and Paramedical Personnel: A Preliminary Context for Emerging Problems*, 1967 WASH. U.L.Q. 332, 336 (1967) (recognizing that increased efficiency would result in the medical field by allowing less difficult tasks to be performed by nonphysicians); Comment, *Legal Paraprofessionals and Unauthorized Practice*, 8 HARV. C.R. & C.L. L. REV. 104, 105 (1973) ("Paraprofessionals may be used to increase efficiency in performing legal functions, to reduce the cost of providing legal services, and to make the delivery mechanism more accessible to low and moderate income communities").

121. See *Surety Title Ins. Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298 (E.D. Va. 1977), *vacated and remanded on procedural ground*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978). In *Surety Title*, the plaintiff title company proposed "to lower the cost of title insurance by eliminating the services of an attorney" and using "trained lay personnel" in connection with insuring titles in land transactions. 431 F. Supp. at 302-03. It was "uncontroverted that [this] . . . approach would result in the consumer receiving *greater services* than presently offered at a *substantially lower cost*." *Id.* at 303 (emphasis added). The Virginia State Bar issued an advisory opinion stating that the title company would be engaging in the unauthorized practice of law if it carried out this proposal. *Id.* at 302. Plaintiff then sued alleging that the issuing of advisory opinions relating to the unauthorized practice of law, coupled with the threat of disciplinary proceedings against attorneys who aided nonlawyers in unauthorized practice, constituted an illegal restraint of commerce in the area of title insurance. *Id.* at 299-300 & n.1. The district court concluded that the bar association's conduct did "not act to advance the consumer interest, but merely that of the attorney. It is neither necessary to, nor are its anticompetitive effects reasonable in light of, the justifying state interest." *Id.* at 308-09. See also Reeves, *UPL: The Lawyers' Monopoly Under Attack*, 51 FLA. BAR J. 600, 607-09 (1977).

singularly competent to handle legal problems, will police with zeal the actions of nonlawyers. Similarly, nonlawyers, eager to establish that lawyers are not singularly competent—or that nonlawyers are not singularly incompetent—will watch carefully for instances of lawyer incompetence or unethical conduct.¹²²

MR. LAWYER: Sorry to interrupt; I know you haven't had a chance to list all of your alleged benefits yet, but I have to ask once again: how will the public know which nonlawyers are incompetent? And don't throw the licensing scheme at me; you know as well as I that just because someone can pass some mickey mouse test doesn't mean he can handle difficult legal problems created in a society dedicated to the rule of law.

MR. LAYMAN: Your touching rhetoric does not mask the stupidity of your argument.

MR. LEGISLATOR: Now gentlemen . . .

MR. LAYMAN: How does the current system reveal to the public which *lawyers* are skilled merely in test taking? Don't throw the legal profession's mickey mouse disciplinary enforcement at me; you know as well as I that enforcement has been pretty much a joke.¹²³

MR. LAWYER: Word of mouth has adequately sufficed to reveal which lawyers are competent and which are incompetent.¹²⁴

MR. LAYMAN: Maybe in a town with a population of two hundred.¹²⁵ At any rate, I have several responses. First, to play your game, news of nonlawyer incompetence will travel by word of mouth. Second, competition will force the louses out of business.¹²⁶ Third, incompetent nonlawyers will have their licenses taken away. And to supplement these safeguards, I have still another idea: the regulatory agency should keep data concerning both lawyers and licensed nonlawyers. Specifically, the agency would encourage feedback from the public relating to the quality

122. See note 105 and accompanying text *supra*.

123. See notes 47-48, 106 & 112 and accompanying text *supra*.

124. *But see* C. WEHRINGER, WHEN AND HOW TO CHOOSE AN ATTORNEY 71-82 (2d ed. 1979) (listing available methods of locating an attorney, *e.g.*, using yellow pages, questioning friends, searching in the Martindale-Hubbell Law Directory, and consulting bar referral services); *cf.* Q. JOHNSTONE & D. HOPSON, *supra* note 1, at 117-18 (attacking inadequacies of bar referral services because they do not indicate which attorneys are competent or better than others, and because attorneys using the service to get business are often inexperienced).

125. *Cf.* J. CARLIN, LAWYERS ON THEIR OWN 155-61 (1962) (discussing fact that Code of Professional Responsibility is geared to small towns).

126. See A. LEFF, SWINDLING AND SELLING 118-26 (1976); P. SAMUELSON, ECONOMICS 357-78, 428-512 (8th ed. 1970).

of legal services they've received. This would lead to the establishment of a collection of consumer complaints to which every citizen would have access. A file would be kept on each lawyer and each licensed nonlawyer. Through media advertising, the agency would appeal to citizens to report their complaints. A "Better Business Bureau for Legal Services" would thus be created.

MR. LAWYER: But citizens wouldn't bother to report minor mishaps, would they? Files would show only the egregious cases; day-to-day incompetence would continue unabated.

MR. LEGISLATOR: Quite the contrary; you're forgetting about my agency compensation fund idea for victims of minor instances of incompetence. The likelihood of compensation makes it reasonable to believe that such minor mishaps will be reported. As to large mishaps, citizens would be motivated to report their complaints to the agency out of sheer revenge. But just to make sure that the most serious errors are not ignored, the agency would keep records of all court cases in which lawyers or licensed non-lawyers have been sued for malpractice.

MR. LAYMAN: That's exactly right. Indeed, now that you mention the compensation point, I think it should be reiterated that this feature would assist those who presently lose out because the cost of litigation exceeds the extent of harm suffered from inadequate legal representation.¹²⁷

MR. LAWYER: Have you finished listing the benefits of your scheme?

MR. LAYMAN: Why, do you have anything to add?

MR. LAWYER: Certainly not in the way of benefits. I do have some criticisms I want to emphasize, however. First, you still haven't told me what your proposal does to protect against the fact that nonlawyers are unable to spot general legal problems. I raised this question before, but you didn't really respond to it.

MR. LAYMAN: Okay, let me answer this criticism. If the risk is real, then nonlawyers will have an incentive to refer cases to lawyers for the purpose of reviewing the case for buried legal problems. Similarly, if the risk is substantial, it is likely that a market in "general issue review" by lawyers will develop. Lawyers would, for a fee, proof the work of nonlawyers to ensure that no buried

127. Although a number of states have client security funds, *see* authorities cited in note 119 *supra*, these schemes have been largely a failure, in part because of insufficient funding. *See, e.g.*, Comment, *supra* note 119, at 459 (during years 1969-74 claims of \$249,065 were approved, but only \$63,676 was actually paid out to claimants).

legal problems were overlooked. Such a service would be useful to clients not wishing to pay the high hourly rates charged by lawyers¹²⁸ but nonetheless desiring assurance that problems of a general legal nature are not overlooked. In short, if lawyers truly have this valuable service to offer, one can rest assured that a market for such services will arise. On the other hand, I'm not at all certain that the problems you raise are even that significant to begin with.

MR. LAWYER: You're wrong; the problems are *very* significant. And your response is unrealistic; it assumes that lawyers will put their necks on the line by giving nonlawyers opinion letters as to the existence or nonexistence of these general legal issues to which we've been referring.

MR. LAYMAN: Oh that's beautiful! I wish I had that one on tape! Do you realize what you've said? First you make the bold assertion that lawyers have this vitally important and unique skill. Then you claim that lawyers are not comfortable enough with that skill to market it. Once again, if the skill is a valuable one, a market for it will develop.

MR. LAWYER: I'm still not persuaded by your arguments.

MR. LAYMAN: I didn't expect that you would be. Being a lawyer, you can't exactly approach these matters with an open mind. You have an economic interest in preserving the status quo.¹²⁹

MR. LEGISLATOR: Gentlemen, gentlemen. Let's keep this thing orderly. And let's try to wind things up. Mr. Lawyer, do you have any other objections you wish to raise?

MR. LAWYER: I would like to make one final point before we drop this dramatic yet dangerous debate. Much earlier, I made the point that your proposal would lead to increased inefficiency in the trial of cases.¹³⁰ Thus, far, you've failed to meet this criticism head on.

MR. LAYMAN: Are you suggesting that nonlawyers, like my son the English professor, cannot do a good job in the courtroom?

MR. LAWYER: Well, with all due respect to your son, who, by the way, I cannot believe is more articulate than you, I *am* saying that nonlawyers generally cannot do an adequate job of trying a case.

128. For other examples of how the cost of professional services can be reduced by the use of paraprofessionals, see sources cited note 120 *supra*.

129. See Johnstone, *supra* note 2, at 5; K. LLEWELLYN, *supra* note 83, at 255-56.

130. See note 99-101 and accompanying text *supra*.

MR. LEGISLATOR: Even if a litigation license were required as a prerequisite to trying cases?

MR. LAWYER: I doubt that an adequate test could be devised for this purpose. Anyway, I suspect that *some* incompetents can slip past any test you might propose.

MR. LEGISLATOR: I'd agree. That's precisely the point Mr. Chief Justice Burger has been making in recent years: law school training and bar examinations do not ensure that lawyers will be able to try cases competently.¹³¹

MR. LAYMAN: Mr. Legislator, does that mean that you do not think that a litigation licensing procedure would be sufficient to meet the objection?

MR. LEGISLATOR: It would, with these qualifications. I would give each trial judge power: a) to recommend that a nonlawyer's license to try cases be revoked; or b) to actually forbid the nonlawyer to try a particular case before him. On the other hand, if a judge dismisses a nonlawyer from a case and the client cannot afford a lawyer, then the court must appoint one for him. I was quite disturbed to learn that a nonlawyer can be punished for assisting someone when the court refuses to appoint a lawyer.¹³² Provided these qualifications are incorporated into the scheme, I think that licensed trial nonlawyers could indeed serve the public interest.

MR. LAWYER: We've reached a deadlock.

MR. LAYMAN: Before we depart, I'd like to spell out the proposal in its entirety. Up until now, we've simply looked at it piece by piece as it evolved. What we've come up with is something like this:

1) Nonlawyers would be permitted to practice in particular fields of law of obtaining a special license for each field;¹³³

131. See Burger, *supra* note 101, at 440 (discussing the numerous lawyers with "little experience in litigation and a minimum of training for the difficult and exacting task of prosecuting or defending a criminal case"). But see Carrigan, *Independent [sic] Trial Lawyers: Freedom's Trustees*, TRIAL, July, 1978, at 53, 55 (questioning the soundness of Burger's claims).

132. See *Hackin v. Arizona*, 102 Ariz. 218, 427 P.2d 910, *appeal dismissed*, 389 U.S. 143 (1967). The establishment of legal aid programs for the poor has not rendered this issue moot. In spite of the Legal Services Corporation Act, 42 U.S.C. §§ 2996-2996l (1976), the fact remains that millions of poor people do not have access to *any* free legal services. See Cramton, *Promise and Reality in Legal Services*, 61 CORNELL L. REV. 670, 674 (1976) ("an estimated twelve million (40.5%) of the nation's twenty-nine million poor live in areas where there are no legal services at all. Inflation and unemployment increase that number even more"). The proposal made in the text accompanying this footnote would resolve the *Hackin* problem noted above, wherein a nonlawyer was punished for helping someone when the court did not appoint an attorney. See note 42 *supra*.

133. See notes 107-12 and accompanying text *supra*.

- 2) The Code of Professional Responsibility would be legislatively extended to apply to licensed nonlawyers doing legal work;¹³⁴
 - 3) Licensed nonlawyers could have their licenses revoked for incompetence or ethical violations;¹³⁵
 - 4) Nonlawyers would be subject to the same high standards as lawyers in malpractice actions;¹³⁶
 - 5) Annual licensing fees would provide funds for compensating victims of inadequate services where the loss involved is not large enough to justify pursuit of malpractice remedies;¹³⁷
 - 6) A governmental agency composed of both lawyers and non-lawyers would be set up to perform the foregoing functions;¹³⁸
 - 7) This agency would also maintain comprehensive data relating to the quality of service by lawyers and licensed nonlawyers.¹³⁹
- I have already demonstrated the benefits of each element of the proposal.

MR. LAWYER: And I've demonstrated the pitfalls of each element.

MR. LEGISLATOR: At a minimum, the discussion has revealed the need to consider with an open mind the possibility and desirability of opening up the practice of law to nonlawyers on a field-by-field basis. For example, we could consider allowing accountants to handle certain tax matters, bank trust officers to do estate planning, and so forth.

MR. LAWYER: The only thing this discussion has revealed to me is the need to get rid of the privilege one has to represent himself, at least in those areas in which such a privilege is not constitutionally protected.¹⁴⁰ Perhaps there may also be a need for increased specialization in the legal profession, particularly in the trial area.¹⁴¹

MR. LAYMAN: The only thing this discussion has *not* revealed to me is how any of this helps me with my pending legal battles. Isn't there anything that can be done?

MR. LAWYER: The fact is, you're out of luck. The law is the law. And in a society dedicated to the rule of law, there is nothing that can

134. See notes 88-91 and accompanying text *supra*.

135. See notes 109-12 and accompanying text *supra*.

136. See notes 116-18 and accompanying text *supra*.

137. See note 119 and accompanying text *supra*.

138. See notes 91, 104-09 & 127 and accompanying text *supra*.

139. See note 127 and accompanying text *supra*.

140. See notes 21-27 and accompanying text *supra*.

141. See generally Burger, *supra* note 101; note 131 and accompanying text *supra*. See also Q. JOHNSTONE & D. HOPSON, *supra* note 1, at 131-59.

be done but abide by the unauthorized practice of law statute.¹⁴² Speaking of this statute, I'm puzzled, Mr. Legislator, as to how *you*, as a draftsman, could attack the rationale of *your* law.

MR. LEGISLATOR: I'm elected to represent the interests of the people of this great state. I consider this my duty. When carrying out this duty requires me to reconsider the soundness of a seemingly valid law, I'm not afraid to admit that I may have been wrong. I no longer see how the public interest is served by our current rigid statute prohibiting the practice of law by nonlawyers. Service to the public frequently requires that one admit he's made a mistake. Can you do likewise, Mr. Lawyer?

142. See notes 3-4 and accompanying text *supra*.