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LAY DIVORCE FIRMS AND THE UNAUTHORIZED PRACTICE OF LAW

Effective January 1, 1972, Michigan adopted a no-fault divorce law.¹ Since that time, at least two firms in the Detroit area have gone into the business of providing assistance to people wishing to process their own divorces.² These enterprises, which have been dubbed divorce firms or divorce kit firms,³ have come under heavy attack from the organized bar. The State Bar of Michigan has instituted court proceedings against one firm for the unauthorized practice of law,⁴ and a court on its own initiative has already issued an injunction against the other.⁵

These cases raise two important issues: whether the divorce firms are guilty of the unauthorized practice of law, and if they are and may therefore be enjoined from continuing their operations, whether to do so is in the public interest. As to the first of these issues, it is likely that on the basis of present law these firms may successfully be prosecuted for unauthorized practice.⁶ It is far less clear that this result is a desirable one. Evaluations of this sort should be made by weighing both the costs and the benefits flowing from the operation of lay divorce firms and from the prohibition of such firms.⁷ On the basis of such an analysis this article offers several suggestions for a new approach to divorce firms and the unauthorized practice of law.⁸

¹MICH. COMP. LAWS ANN. § 552.6 (Supp. 1972) (originally enacted as 25 P.A. 1971, No. 75, § 1). The law is quoted in part at note 76 *infra*. The term "no-fault" refers to a divorce law which is based solely on the breakdown of the marital relationship, as opposed to a "fault" law which conditions the granting of a divorce on proof of one spouse's misconduct (e.g., adultery).

²The two firms are Harry Gordon & Associates in Oakland County (suburban Detroit) and Gordon, Graham & Cramer in Detroit. See Detroit Free Press, Oct. 1, 1972, at 3A, col. 5.

³Harry Gordon & Associates actually did have a kit which was sold to couples seeking divorces. The other firm, Gordon, Graham & Cramer, utilizes a series of interviews and has no actual kit. See notes 44 and 45 *infra*.

⁴The State Bar of Michigan v. Harold Graham, No. 72-218571-C2 (Wayne County Cir. Ct., filed Sept. 27, 1972).

⁵Bales v. Bales, No. 72-87626 (Oakland County Cir. Ct., Aug. 23, 1972). This was a divorce case involving clients of Harry Gordon & Associates. Judge William J. Beer, on his own motion, found Harry Gordon in contempt of court for practicing law without a license and issued a permanent restraining order prohibiting him from providing assistance in divorce cases.

⁶See part I B 2 *infra*.

⁷See part II C 3 *infra*.

⁸See part III *infra*.

I. DIVORCE FIRMS AND THE PRACTICE OF LAW: LEGAL ISSUES

A. The Present State of the Law Governing Unauthorized Practice

At common law the determination of who was qualified to practice law was wholly within the power of the courts.⁹ This heritage has been preserved in this country within the constitutional framework of the separation of powers, with the judiciary generally claiming an inherent power to control participants in the legal process.¹⁰ Nevertheless, all states in the exercise of their police powers also regulate the practice of law by statute.¹¹ Although there have been occasional conflicts between these sources of authority,¹² the courts appear for the most part to have gratefully accepted this legislative assistance in regulating the legal profession,¹³ while retaining the right to act apart from statute if necessary.¹⁴ Even the statutes, however, generally give

⁹This judicial authority dates at least to 1292, when a statute of Edward I directed the justices of the Court of Common Pleas to appoint a certain number of "attorneys and lawyers" who might serve in court, and that only they and no others should practice. See Vom Baur, *An Historical Sketch of the Unauthorized Practice of Law*, 24 UNAUTHORIZED PRACTICE NEWS, Fall, 1958, 1, 3; 1 F. POLLOCK & F. MAITLAND, 1 THE HISTORY OF ENGLISH LAW 216 (2d ed. 1968). The statute of 4 Hen. IV, ch. 18 (1402) confirmed that the judiciary was to have total discretion in determining who was qualified to practice in the common law courts, presumably on the grounds that they were officers of the court and of the King.

¹⁰AMERICAN BAR FOUNDATION PROJECT ON THE UNAUTHORIZED PRACTICE OF LAW, UNAUTHORIZED PRACTICE STATUTE BOOK 1-4 (1961) [hereinafter cited as UNAUTHORIZED PRACTICE STATUTE BOOK]. This view has been adopted in Michigan. See, e.g., *Ayres v. Hadaway*, 303 Mich. 589, 596-98, 6 N.W.2d 905, 907-08 (1942).

¹¹UNAUTHORIZED PRACTICE STATUTE BOOK, *supra* note 10, at 5 and *passim* (cataloging statutes).

¹²Legislative attempts at regulating the practice of law have occasionally been held to violate the doctrine of separation of powers under state constitutions. Application of Kaufman, 69 Idaho 297, 206 P.2d 528 (1949); *Meunier v. Bernich*, 170 So. 567 (La. App. 1936); Application of Sedillo, 66 N.M. 267, 347 P.2d 162 (1959); *In re Bledsoe*, 186 Okla. 264, 97 P.2d 556 (1939); *In the Matter of Levy*, 23 Wash. 2d 607, 161 P.2d 651 (1945); *In re Opinion of the Justices to the Senate*, 289 Mass. 607, 194 N.E. 313 (1935). This last case was an advisory opinion by the Massachusetts Supreme Judicial Court holding that parts of a proposed statute which permitted the practice of law by lay organizations or persons in certain limited fields constituted an invalid invasion of the judiciary's right to control legal practice.

¹³See, e.g., 3 MICH. LAW & PRACTICE, *Attorneys & Counselors* § 2, at 225 (1956): "Notwithstanding this inherent power of the Supreme Court, it has been generally conceded that the legislature may prescribe reasonable rules and regulations for the licensing of attorneys which will be followed by the court," *citing In re Bonam*, 255 Mich. 59, 237 N.W. 45 (1931); *In re Alexander*, 167 Mich. 495, 133 N.W. 491 (1911).

¹⁴"Some states have determined that the legislature in the exercise of its police powers may pass statutes setting minimum standards so as to aid the judiciary in regulating the practice of law, although the legislature cannot exclude the judiciary from this power." UNAUTHORIZED PRACTICE STATUTE BOOK, *supra* note 10, at 1 (footnote omitted, emphasis in original).

the courts much discretion in their policing of unauthorized practice,¹⁵ and the area remains very much within the judicial domain.

In a majority of jurisdictions, including Michigan, the statutory scheme for restricting legal practice involves the establishment of an integrated bar.¹⁶ The Michigan statute authorizes the state supreme court to provide for the organization and regulation of the bar¹⁷ and permits legal practice only in accordance with the rules so promulgated.¹⁸ Persons engaging in the unauthorized practice of law are guilty of contempt of court and may be punished accordingly.¹⁹ Although the Michigan statute, unlike many others, does not explicitly authorize any particular form of relief, it appears that, in addition to the more common means for redressing contempt, the courts will grant injunctions against unauthorized practitioners.²⁰

The Michigan statute regulating the unauthorized practice of law does not specify who may seek enforcement of its provisions, although certain limitations on proper parties are suggested by the nature of the available remedies. Most common is a suit by or on behalf of a bar association seeking injunctive relief to prevent the defendant from continuing his activities. The supreme court's Rules Concerning the State Bar of Michigan give the Bar the power "to investigate matters pertaining to the unauthorized practice of law and, with the authority of its board of commissioners,

¹⁵ For example, the Michigan statute provides:

It is unlawful for any person to practice law, or to engage in the law business, or in any manner whatsoever to lead others to believe that he is authorized to practice law or to engage in the law business, or in any manner whatsoever to represent or designate himself as an attorney and counselor, attorney at law, or lawyer, unless the person so doing is regularly licensed and authorized to practice law in this state. . . .

MICH. COMP. LAWS ANN. § 600.916 (1968). The determination of what acts constitute practicing law is apparently left to the courts.

¹⁶ The term "integrated bar" refers to the situation where all persons licensed to practice law are members of the bar association, or alternatively, where only members of the bar may practice law. As of 1961 the American Bar Foundation noted twenty-nine out of fifty-four jurisdictions surveyed have integrated bars. UNAUTHORIZED PRACTICE STATUTE BOOK, *supra* note 10, at 5-16. MICH. COMP. LAWS ANN. § 600.901 (1968) provides:

The state bar of Michigan is a public body corporate, the membership of which consists of all persons who are now and hereafter licensed to practice law in this state. The members of the state bar of Michigan are officers of the courts of this state, and have the exclusive right to designate themselves as "attorneys and counselors," or "attorneys at law," or "lawyers." No person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto.

¹⁷ MICH. COMP. LAWS ANN. § 600.904 (1968).

¹⁸ *Id.* § 600.901.

¹⁹ *Id.* § 600.916.

²⁰ Bay County Bar Ass'n v. Finance System, Inc., 345 Mich. 434, 76 N.W.2d 23 (1956); Grand Rapids Bar Ass'n v. Denkema, 290 Mich. 56, 287 N.W. 377 (1939); Detroit Bar Ass'n v. Union Guardian Trust Co., 282 Mich. 216, 276 N.W. 365 (1937). See also *In re Albert*, 383 Mich. 722, 179 N.W.2d 20 (1970), which held that a court may initiate contempt proceedings on its own motion.

to file and prosecute actions and proceedings with regard to such matters.”²¹ The importance attached by the State Bar to the control of unauthorized practice is indicated by the existence of a standing committee whose sole purpose is to perform this function.²² It is with this committee in particular, and the State Bar in general, that primary responsibility rests for the prosecution of violators.²³

It is conceivable that an unauthorized practice case could also be brought by a party not acting on behalf of a bar association. Such cases are, however, not likely to occur with any frequency because, as a practical matter, the plaintiff would have little or nothing to gain in an ordinary unauthorized practice suit, the available relief being an injunction, a contempt conviction, or both.²⁴ Although unauthorized practice has on occasion been successfully raised as a defense to a suit brought to collect a fee,²⁵ it is probable that most cases will result from the initiative of the organized bar or the courts themselves.

Because the practice of law has been limited to members of the bar, thereby making legitimate practitioners readily identifiable, the primary issue in any unauthorized practice case is whether the accused nonlawyer has engaged in activities properly constituting the practice of law. The formidable task of constructing a definition of the practice of law has largely been left to the judiciary,

²¹ RULE 18, RULES CONCERNING THE STATE BAR OF MICHIGAN, in MICHIGAN COURT RULES (Supp. 1972). These are the rules formulated by the supreme court pursuant to MICH. COMP. LAWS ANN. § 600.904 (1968).

²² *Bylaws of the State Bar of Michigan*, 45 MICH. ST. B.J., June, 1966, at 40. Art. VII, § 2(g) of the bylaws reads:

Unauthorized Practice of Law.

It shall be the duty of this committee to study and report to the State Bar from time to time on unauthorized practice of the law in Michigan, and to investigate into, and to take or cause to be taken, in accordance with Rule 17, all steps necessary or desirable to prevent the unauthorized practice of the law and to punish or discipline those engaged in or contributing to such practice. It shall cooperate with local bar associations engaged in similar activity.

²³ Smith, *Investigation of Unauthorized Practice of Law by Omnibus Proceeding: The Ohio Method*, 30 UNAUTHORIZED PRACTICE NEWS 199 (1964); RULE 18, RULES CONCERNING THE STATE BAR OF MICHIGAN, in MICHIGAN COURT RULES (Supp. 1972); ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 3-5.

²⁴ Injunctions and punishment for contempt are the normal remedies for unauthorized practice. See notes 21-23 and accompanying text *supra*. Unauthorized practice might be raised in a tort suit for damages (e.g., plaintiff relied on defendant's erroneous advice and suffered a loss as a result). Nevertheless, if the suit alleged no personal damages, the plaintiff would merely be suing on behalf of the public and would gain little or nothing from the outcome of his action.

²⁵ *E.g.*, *Hightower v. Detroit Edison Co.*, 262 Mich. 1, 247 N.W. 97 (1933). A nonlawyer solicited a personal injury case and then found a lawyer to handle it. The lawyer was denied recovery of his fee because he was acting in concert with the nonlawyer, who was guilty of unauthorized practice.

which has developed a substantial body of case law on the subject.

When formulating their tests in terms of abstract principles, courts have generally employed operational definitions, considering the practice of law to consist of those tasks traditionally performed by attorneys. For example, judicial opinions have found unauthorized practice of law to include activities such as the "giving of legal advice and the preparation of wills, contracts, and other legal instruments,"²⁶ or "making it a business to practice as an attorney-at-law not being a lawyer."²⁷

Broad definitions such as these obviously leave the concept of unauthorized practice in a rather malleable state. Despite a wealth of cases considering a wide variety of specific activities,²⁸ no more useful standards have emerged. It is universally acknowledged that the practice of law is not limited to that which takes place within the confines of the courtroom.²⁹ Activities such as the drafting of wills, the preparation of pleadings, and even the mere giving of advice in a specific situation have been held to constitute the unauthorized practice of law when performed by nonlawyers.³⁰

While one commentator has concluded, perhaps too harshly, that "[a] literal interpretation of such . . . broad definition[s] would leave virtually no commercial area of human endeavor un-

²⁶ *Merrick v. American Security & Trust Co.*, 107 F.2d 271, 273 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940).

²⁷ *People v. Alfani*, 227 N.Y. 334, 338, 125 N.E. 671, 673 (1919).

²⁸ See generally the cases cited in AMERICAN BAR FOUNDATION PROJECT ON THE UNAUTHORIZED PRACTICE OF LAW, UNAUTHORIZED PRACTICE SOURCE BOOK, 67-86 (S. Bass ed. 1965).

²⁹ It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts, and, in addition, conveyancing, the preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law. An attorney at law is one who engages in any of these branches of the practice of law.

In re Duncan, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909).

³⁰ See, e.g., *Merrick v. American Security & Trust Co.*, 107 F.2d 271 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940) (defendant enjoined from giving information on estates, taxes, and trusts as well as from preparing release of deed of trust forms and tax returns); *Grand Rapids Bar Ass'n v. Denkema*, 290 Mich. 56, 287 N.W. 377 (1939) (defendant's practice of examining title abstracts, drawing up leases, land contracts, deeds, and mortgages, and occasionally drawing up a will held to be the unauthorized practice of law); *People v. Alfani*, 227 N.Y. 334, 125 N.E. 671 (1919) (defendant who made a business of drawing up legal instruments and papers for profit guilty of unauthorized practice); *In re Duncan*, 83 S.C. 186, 65 S.E. 210 (1909) (defendant who had been previously disbarred convicted of unauthorized practice for accepting employment which constituted attempting to secure the release of a man in prison).

touched,"³¹ the scope of such definitions is potentially very wide. In an attempt to rationalize the doctrine's operation, the definition of legal practice has been narrowed by the carving out of exceptions, three of which arguably pertain to divorce firms. The first of these, which represents a balancing of the public's right to protection from incompetent practitioners and the individual's right to freedom of speech,³² exempts from the prohibition of unauthorized practice those cases in which the personal attorney-client relationship is lacking. In *New York County Lawyers' Association v. Dacey*,³³ for example, the Court of Appeals of New York reversed a lower court decision enjoining publication of the book *How to Avoid Probate* and adopted the dissenting opinion of Justice Stevens of the Appellate Division stating that:

Dacey's book is sold to the public at large. There is no personal contact or relationship with a particular individual. Nor does there exist that relationship of confidence and trust so necessary to the status of attorney and client. This is the essential of legal practice—the representation and the advising of a particular person in a particular situation.³⁴

A second exception, taking into account the interests of convenience and business efficiency, allows nonlawyers to perform occasional legal services when such services are only incidental to their main businesses and are not performed for profit. In *State ex rel. Indiana State Bar Association v. Indiana Real Estate Association*,³⁵ the court authorized real estate brokers to fill out prepared legal forms:

It cannot be urged, with reason, that a lawyer must preside over every transaction where written legal forms must be selected and used by an agent acting for one of the parties. Such a restriction would so paralyze business activities that very few transactions could be expeditiously consummated. . . .

³¹ Note, 19 DE PAUL L. REV. 319, 329 (1969).

³² For a consideration of the impact of the first amendment on restrictions against the unauthorized practice of law, see Comment, 2 TEXAS TECH. L. REV. 281, 282 (1971).

³³ 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967). The defendant had previously been enjoined in Connecticut from continuing his practice of distributing a pamphlet advising readers on probate problems and then giving individual advice in personal interviews. He then moved to New York and expanded his pamphlet into a book entitled *How to Avoid Probate*.

³⁴ In the Matter of New York County Lawyers' Ass'n. v. Dacey, 28 App. Div. 161, 174, 283 N.Y.S.2d 984, 998 (1967).

³⁵ 244 Ind. 214, 191 N.E.2d 711 (1963). Suit was brought by the bar association to enjoin the defendant real estate brokers from filling in the blanks in real estate documents which had been prepared by attorneys. The court sanctioned the completion of simple forms where it would be a great inconvenience to require that a lawyer make the entries.

The possibility of an occasional improvident act in the use of such forms may not, with reason, be made the basis for denying the right to perform the same act in a thousand instances where the public convenience and necessity would seem to require it.³⁶

This exception has been narrowly construed by the courts. The legal work must be clearly incidental to one's primary occupation and done only as a matter of convenience.³⁷ Even incidental legal services may be prohibited if the nature of the work is too complex.³⁸

A third exception, again based upon considerations of public convenience, would permit lay persons to render assistance in legal matters where such activity appears to be consistent with a legislative purpose in a specific area. The United States Court of Appeals for the District of Columbia, in *American Automobile Association, Inc. v. Merrick*,³⁹ sanctioned the automobile club's practice of having lay employees assist members in filing claims in small claims court because "[t]o prohibit appellant's lay employees from filling out and filing these papers would be inconsistent with the spirit of the Act."⁴⁰ This exception, however, has not found favor with other courts.⁴¹

The prohibition against the unauthorized practice of law is founded on the premise that the public is entitled to protection from unskilled and unscrupulous practitioners.⁴² The exceptions

³⁶ *Id.* at 221, 191 N.E.2d at 715.

³⁷ *Id.* See also *Ingham County Bar Ass'n v. Walter Neller Co.*, 342 Mich. 214, 217, 69 N.W.2d 713, 715 (1955), where two Michigan corporations were found not guilty of the unauthorized practice of law for filling out "standard printed forms of agreements of purchase and sale, deeds, land contracts, mortgages, assignments of mortgages, notices to quit, et cetera . . ." for which they did not charge any fee additional to their standard fee for handling the transaction; *Merrick v. American Security & Trust Co.*, 107 F.2d 271 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940), where defendant was enjoined from giving information on estates, taxes, and trusts and preparing release of deed of trust forms and tax returns; *Detroit Bar Ass'n v. Union Guardian Trust Co.*, 282 Mich. 216, 230, 276 N.W. 365, 370 (1937), where the circuit court enjoined the defendant from performing any act or drawing any paper (which would otherwise constitute the practice of law) in connection with the administration of any estate in the probate court or any other court except the same be ordinary or incidental services for which no charge is made or fee claimed.

³⁸ *State ex rel. Indiana State Bar Ass'n. v. Indiana Real Estate Ass'n., Inc.*, 244 Ind. 214, 220, 191 N.E.2d 711, 715 (1963).

³⁹ 117 F.2d 23 (D.C. Cir.), *modifying* 31 F. Supp. 876 (D.D.C. 1940).

⁴⁰ 117 F.2d at 25.

⁴¹ No other case has been found where a court permitted a lay person or organization to perform legal services because it was consistent with a legislative purpose at least in the absence of an express provision permitting such activity. Note also that *In re Opinion of the Justices to the Senate*, 289 Mass. 607, 194 N.E. 313 (1935), declared that the legislature was without power to authorize nonlawyers to perform acts where the judiciary declared those acts to be the unauthorized practice of law.

⁴² *People v. Alfani*, 227 N.Y. 334, 339, 125 N.E. 671, 673 (1919); Comment, *The Unauthorized Practice of Law by Laymen and Lay Associations*, 54 CALIF. L. REV. 1331

to unauthorized practice represent situations in which the potential harm to the public from such activities is relatively slight. In considering future cases it will be important to remember that these are only narrow exceptions to the broad general prohibition against the performance of legal services by laymen, and such exceptions will not be recognized by the courts if the potential public harm is too great.

B. The Status of Divorce Kits Under Present Law

*1. Divorce Firms and Their Operation*⁴³—The two Detroit firms represent the two main approaches to lay divorce assistance: one operates strictly through a prepared kit and offers no personalized counseling;⁴⁴ and the other employs a series of personal interviews with the client.⁴⁵ The self-contained kit which includes all necessary forms and accompanying instructions is probably the simplest format for providing divorce advice. Inevitably, however, the difficulties involved in anticipating and providing for a broad range of individual problems restrict the utility of such a kit and create certain dangers for the untrained layman. A kit, no matter how well written, cannot provide for all potential difficulties involved in a divorce proceeding. The detection of problem areas requires interpretation as well as observation of the facts. Thus, while the client may look at the facts objectively, he may still fail to understand their legal implications. There are occasions upon which the presence of an expert is required in order to discern problems which are not readily apparent to a layman. The untrained individual proceeding without personal advice from an experienced counselor could overlook any number of potential problems, some of which could conceivably result in

(1966); Note, *Law Clerks and the Unauthorized Practice of Law*, 46 CHI.-KENT L. REV. 214 (1969); *Report of the Standing Committee on Unauthorized Practice of the Law*, 66 A.B.A. REP. 268 (1941).

⁴³ Much of the data for this section was obtained in an interview with Mr. Harold Graham of Gordon, Graham & Cramer, in Detroit, Mich., Nov. 30, 1972.

⁴⁴ Harry Gordon & Associates sold a kit which contained copies of all the necessary forms and instructions on how to complete and file them. Once the client purchased the kit, there was no further contact with the firm. Another such kit is available through the mails from J. Lawrence Publications of Pompano Beach, Fla.

⁴⁵ Gordon, Graham & Cramer conducts a series of four interviews with the client. The first interview is introductory; at this time the client fills out an application and the counselor explains that he is not an attorney. At the second interview the complaint is drafted, and at the third the motion for default judgment is prepared. The final appointment is immediately prior to trial, and the client is briefed on what to expect and how to conduct himself in court.

the loss of legal rights.⁴⁶ Alternatively, the client may see as a major difficulty something which an advisor would know is minor and easily remediable, such as failure to file proof of service prior to trial.

Finally, one must not underestimate the value of personal advice and emotional support that an impartial advisor can provide in a divorce case. The events leading to divorce are generally traumatic for the parties, and lawyers who handle divorce cases often characterize their role as being more than that of a legal advisor because of the emotional problems involved.⁴⁷ If a person performs his own divorce, he must face a system of courts and procedures which are both alien and probably somewhat forbidding to him. The lack of a knowledgeable and sympathetic advisor who will discuss apprehensions and answer questions can only serve to increase the client's anxiety and uncertainty as well as increase the likelihood of mistakes that a trained counselor, not personally involved in the litigation, would be able to avoid. Of course, such advice must be paid for,⁴⁸ and if a party wishes to forego it, perhaps he should be allowed to do so. Nevertheless, there is a substantial danger that individuals whose cases are too complex to be handled with a kit may attempt to do so anyway, either out of ignorance or out of a simple desire to save money.

The second type of firm attempts to alleviate some of these problems by means of a series of personal interviews. At each interview the client fills out certain forms which are to be filed, and each step of the procedure is explained to him. This is intended to allay his fears and to enable him to do a better job of processing his own divorce. By the time the client's case goes to court, his work has been checked and he understands what is going to take place in the courtroom.⁴⁹ If anything unexpected

⁴⁶ A spouse might give up an extremely important right (e.g., visitation rights) in the mistaken belief that it is not truly essential in settling the matter in court. Even if the client recognizes a problem, it may be one which he is unable to solve on his own. An example of this is a case handled by Gordon, Graham & Cramer. According to Mr. Graham, the judge agreed to grant the divorce if the husband sold his car and shared the proceeds with his wife. However, the husband's remaining payments on the car amounted to more than the fair market value of the car by several hundred dollars. The client, with Mr. Graham's assistance, drafted an agreement stating that he would sell the car if he could get a price which exceeded the total of his remaining payments. The judge accepted this agreement.

⁴⁷ See Usdin, *Marital Problems and the Attorney*, 12 *LOYOLA L. REV.* 9 (1965); Foley, *Lawyer's Role in Domestic Relation Cases*, 36 *OKLA. B.A.J.* 2377 (1965).

⁴⁸ In 1966, the Michigan State Bar Association's recommended minimum fee for handling an uncontested divorce without property settlement and where there were no children involved was \$250. *Suggested Minimum Fee Schedule Revised as of August 1, 1966*, 45 *MICH. ST. B.J.*, Aug., 1966, 37. Lay divorce firms, by contrast, usually charge between fifty and one hundred dollars per divorce.

⁴⁹ At Gordon, Graham & Cramer, the client's last interview is held immediately prior to his court appearance. The client is told what will happen in court, and he is given a form which he will read as his testimony.

happens, the advisor tries to help the client find a solution. If he is unable to do so, the client is referred to an attorney.⁵⁰

Assuming the lay advisor is well trained in divorce law,⁵¹ this type of operation is far superior to that of the kit. Although the advisor is not an attorney, he should be able to discern and dispose of problems with which the client alone is simply not equipped to cope.⁵² He has sufficient background to know whether the case as a whole is of a routine type which can be properly handled by the divorce firm, or whether the complexities of the case make it advisable that the client consult an attorney.⁵³

2. *Divorce Firms and the Unauthorized Practice of Law*—In an unauthorized practice case, the court's first task is to decide whether the activity in question constitutes the practice of law. The basis is whether the activity has traditionally been within the attorney's function.⁵⁴ Divorce, originally within the province of the church, has long been a subject of civil law;⁵⁵ and Michigan courts have recently held nonlawyers who assisted persons in obtaining divorces to be guilty of the unauthorized practice of law,⁵⁶ necessarily implying that the courts consider divorce work to be legal practice. There thus seems no doubt that these lay divorce firms are indeed practicing law.

The judicially created exceptions to the prohibition of unauthorized practice probably do not apply to these divorce firms. The first exception for general advice distributed as printed matter where there is no personal contact with the purchaser,⁵⁷ might possibly cover the firm selling self-contained kits, providing the firm were careful to do nothing more than market the kit and had

⁵⁰ Gordon, Graham & Cramer has had several clients who, for various reasons, have been denied a divorce by the judge. The practice has been to refund the fee and advise the client to consult an attorney. No particular lawyer has ever been recommended, however.

⁵¹ There is at present no reliable method for evaluating the competence of the people employed as advisors. Since the Michigan State Bar Association contends that these firms are illegally practicing law, it will not concern itself with whether the advisors possess enough knowledge to do the job properly. Inasmuch as no other state agency regulates these firms, there is currently no check on the quality of their services.

⁵² A divorce advisor should be as familiar with the law governing divorce as an attorney. The crucial distinction is that the divorce advisor is a specialist in only that one field and cannot deal with any other legal problems. If a divorce involves legal issues outside the area of the advisor's expertise, he must refer it to an attorney.

⁵³ For example, the divorce advisor would probably not be equipped to deal with cases involving complex property issues or involved settlement disputes. He should, however, be able to recognize these problems and refer the client to an attorney for assistance.

⁵⁴ See part IA *supra*.

⁵⁵ Civil law governing divorce in Michigan dates back at least to 1846 (R.S. 1846, ch. 84, § 6). See also Lee, *Divorce Law Reform in Michigan*, 5 U. MICH. J.L. REF. 409 (1972).

⁵⁶ See Recent Developments, 28 UNAUTHORIZED PRACTICE NEWS at 100, 317 (1962).

⁵⁷ See notes 32-34 and accompanying text *supra*.

absolutely no personal contact with its customers.⁵⁸ Even if all personal contact could be avoided, the Michigan courts might well enjoin sales of such kits because the advice contained therein is of a highly technical legal nature.⁵⁹ In any event, this exception would not exempt those firms which conduct personal interviews, probably the more desirable firms from the client's point of view.

The second exception permitting a lay firm to perform legal services which are incidental to its primary business,⁶⁰ clearly does not apply to divorce firms. Divorce assistance, far from being incidental, is the sole business of the firms in question. Another factor operating against the firms is the fact that their services are, of course, fee-generating.⁶¹

It might be argued that lay firms should be permitted to provide assistance in divorce cases on the basis of the third exception to the prohibition of unauthorized practice; allowing nonlawyers to provide legal services where to do so is consistent with a clear legislative intent.⁶² As one commentator has stated, the No-Fault Divorce Law is predicated on the belief that "when the marriage relationship has terminated, granting of the divorce should flow as an inalienable legal right."⁶³ Because there would seem to be little value in instituting major statutory reform to guarantee a right when the exercise of that right is conditioned upon one's ability to retain legal counsel, arguably the activities of lay divorce firms are not only consistent with the legislature's intent in revising the divorce law, but may in fact be indispensable if the goal of more readily available divorce is to be achieved.

This argument is far from conclusive, however. The distinction between ends and means is crucial. One objective of the legislature was to facilitate the obtaining of a divorce; and while lay divorce firms are one means of attaining that goal, the legislature chose a different means, that of simplifying the grounds for divorce. There is no evidence of any intent to permit the activities of lay divorce firms, and such intent should not lightly be inferred.

⁵⁸ Although this is possible, a conscientious divorce kit distributor should try to screen his customers to ensure that the kit is suited to their needs. The resulting contact will, however, negate his exemption from prosecution for unauthorized practice.

⁵⁹ The boundaries of this particular exception to unauthorized practice are not yet firmly established. In formulating more specific guidelines governing its applicability, the complexity of the subject matter will probably become one of the criteria to be considered, just as it has in the exception of incidental legal services. See notes 32-34 and 38 and accompanying text *supra*.

⁶⁰ See notes 35-38 and accompanying text *supra*.

⁶¹ See note 37 *supra*.

⁶² See notes 39-41 and accompanying text *supra*.

⁶³ Honigman, *What "No-Fault" Means to Divorce*, 51 MICH. ST. B.J. 16, 17 (1972).

II. DIVORCE FIRMS AND THE PRACTICE OF LAW: POLICY ISSUES

A. *The Anatomy of Divorce in Michigan*⁶⁴

Lay divorce firms are designed to render assistance only in very simple divorce cases. In a typical case the couple would have no minor children,⁶⁵ a property settlement would already have been agreed upon,⁶⁶ and the divorce itself would not be contested.⁶⁷ This type of case will provide the model for the following discussion. The attorney's tasks in any divorce action, whether or not under a no-fault law, may be divided, as may the work for any law suit, into three categories: (1) investigation of the facts and preparation of legal arguments,⁶⁸ (2) filing of the proper forms and written motions,⁶⁹ and (3) conduct of the trial itself. Under the No-Fault Divorce Law,⁷⁰ the attorney's job should require less effort and less expertise than was previously necessary, especially in uncontested cases.

⁶⁴ Data used in this section were obtained in part by observation of divorce trials in Washtenaw County Circuit Court, Nov. 16, 1972, and in an interview with Peter J. Hoffman, Director, University of Michigan Clinical Law Program, in Ann Arbor, Mich., Jan. 22, 1973.

⁶⁵ Gordon, Graham & Cramer did process divorces involving minor children when it first started doing business but has since stopped doing so under court order. The firm was ordered to take no more cases involving children at the time suit was filed against it for unauthorized practice. *State Bar of Michigan v. Harold Graham*, No. 72-218571-C2 (Wayne County Cir. Ct., filed Sept. 27, 1972). Even if the order is lifted, however, the firm has determined not to accept any more cases involving children.

Where minor children are involved, special procedures must be utilized to insure that their interests are being protected. The Friend of the Court investigates and makes a recommendation concerning custody, visitation privileges, and child support, pursuant to his authority under MICH. COMP. LAWS ANN. §§ 552.251, .252, .252a, .253, and MICH. CT. RULE 727, in 4 J. HONIGMAN & C. HAWKINS, MICH. CT. RULES ANN. (1967), *as amended*, (Supp. 1972). See note 125 *infra*.

⁶⁶ Where there is no real property involved, the parties will often divide up the property before trial and, in the proposed divorce decree, provide that each party shall retain whatever property is in his possession. In many cases where the parties have separated previously, the property is already divided, and the same provision is included in the decree.

⁶⁷ Although the defendant can answer the complaint and appear at trial while not contesting the divorce, more commonly the defendant allows the plaintiff to obtain a default judgment by not responding to the complaint.

⁶⁸ Investigation of the facts is taken to include the process of interviewing the client and any other witnesses, and preparing for the trial. An attorney who is familiar with divorce law should have to do relatively little legal research unless the case involves unusual issues.

⁶⁹ The basic forms which must be filed in an uncontested divorce are a complaint, summons, proof of service, affidavit that the defendant is not in military service, motion for default judgment, default judgment, and proposed divorce decree. If there are minor children involved, the court requires a recommendation from the Friend of the Court and there may be additional paper work involved. MICH. CT. RULE 727, in 4 J. HONIGMAN & C. HAWKINS, MICH. CT. RULES ANN. (1967), *as amended*, (Supp. 1972). See note 125 *infra*.

⁷⁰ MICH. COMP. LAWS ANN. § 552.6 (Supp. 1972).

1. *Investigation and Preparation of the Case*—Prior to filing suit, the lawyer must determine whether there is a basis for maintaining the action. To fulfill the basic requirement of jurisdiction in divorce actions in Michigan, the plaintiff must have been a resident of the State for at least one year⁷¹ and of the county in which the court sits for at least ten days prior to filing suit.⁷² Before the institution of the No-Fault Divorce Law, the plaintiff was required to plead a specific ground for the divorce,⁷³ the most common of which were extreme cruelty, desertion, failure to provide support, adultery, and habitual drunkenness.⁷⁴ It was necessary to discover some improper behavior of the other spouse on which to base the request for divorce.

The plaintiff faced another serious problem prior to the institution of no-fault divorce. A suit for divorce was in equity, and the "clean hands" doctrine posed an obstacle in many cases.⁷⁵ Under this theory, a court of equity would only grant relief to a plaintiff who was himself innocent of any misconduct. In uncontested cases, this problem was often solved by concealing the fact of the plaintiff's wrongdoing from the court. Nevertheless, it was a problem of which attorneys had to be aware.

Under the No-Fault Divorce Law, the sole ground for divorce is a total breakdown of the marriage.⁷⁶ The court must satisfy

⁷¹ *Id.* § 552.9(1). *Id.* § 552.9(2) excuses the one year residency requirement if the parties were married in Michigan within the last twelve months and have continuously resided in Michigan since the date of their marriage.

⁷² *Id.* § 552.9(3).

⁷³ MICH. REV. STAT. OF 1846, ch. 84, § 6, *as amended* MICH. COMP. LAWS ANN. § 552.6 (Supp. 1972), provided:

A divorce from the bonds of matrimony may be decreed by the circuit court of the county where the parties, or 1 of them, reside, or by the court of chancery, on the application by petition, in either of the following cases:

1. Whenever adultery has been committed by any husband or wife;
2. When 1 of the parties was physically incompetent at the time of the marriage;
3. When 1 of the parties has been sentenced to imprisonment in any prison, jail or house of correction for 3 years or more, and no pardon granted to the party so sentenced, after a divorce for that cause, shall restore such party to his or her conjugal rights;
4. When either party shall desert the other for the term of 2 years;
5. When the husband or wife shall have become an habitual drunkard;
6. And the circuit courts may, in their discretion, upon application, as in other cases, divorce from the bonds of matrimony any party who is a resident of this state, and whose husband or wife shall have obtained a divorce in any other state.

⁷⁴ Honigman, *supra* note 63, at 16.

⁷⁵ Under the "clean hands" doctrine, a court will grant a divorce only where the complaining spouse is innocent of any misconduct. For a discussion of this doctrine (also referred to as "recrimination"), see Freed, *Defenses Against Divorce in French and American Law*, 38 TEX. L. REV. 303, 307-311 (1960).

⁷⁶ MICH. COMP. LAWS ANN. § 552.6 (Supp. 1972) provides:

- (1) A complaint for divorce may be filed in the circuit court upon the allegation that there has been a breakdown of the marriage relationship to the

itself that the marital relationship has in fact ceased to exist and should also be convinced that there is no realistic possibility of reconciliation. A temporary breakdown is not sufficient grounds for divorce. The breakdown must be total and permanent. Thus the new law reflects not so much a legalistic approach but rather the approach that a marriage counselor might take, looking not, as previously, for specific misconduct but rather to the state of the marriage as a whole.

2. *Forms and Motions in a Divorce Case*—There has also been some simplification of the forms to be filed with the court. Most forms remain the same as before the No-Fault Divorce Law took effect, but these should present no problem even to a layman.⁷⁷ The only change is in the grounds for divorce which must be alleged in the complaint.⁷⁸ Whereas previously the complaint had to allege the specific grounds for the divorce⁷⁹ and there was a danger of variance between proof and pleading,⁸⁰ under the No-Fault Divorce Law the complaint in a divorce must allege

extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. In the complaint the plaintiff shall make no other explanation of the grounds for divorce than by the use of the statutory language.

(2) The defendant, by answer, may either admit the grounds for divorce alleged or deny them without further explanation. An admission by the defendant of the grounds for divorce is not binding on the court's determination.

(3) The court shall enter a judgment dissolving the bonds of matrimony if evidence is presented in open court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.

For a general discussion and evaluation of Michigan's new divorce law, see Honigman, *supra* note 63; Snyder, *Divorce Michigan Style—1972 and Beyond*, 50 MICH. ST. B.J. 740 (1971). Mr. Honigman is Chairman of the Michigan Law Revision Commission which proposed the new law. Mr. Snyder is Chairman of the Family Law Committee of the State Bar of Michigan which opposed it. See the report of the family law committee at 50 MICH. ST. B.J. 534, 537 (1971). See also Lee, *supra* note 55.

⁷⁷ These forms can and have been standardized (by Gordon, Graham & Cramer and the University of Michigan Clinical Law Program, among others) so that the plaintiff need only fill in a few blanks, sign the forms in the presence of a notary public, and file them with the court clerk. The only possible area of difficulty might be in serving the complaint on the defendant, but if the divorce is desired by both parties the defendant's cooperation eliminates this problem.

⁷⁸ The complaint must also allege the court's jurisdiction (see notes 71 and 72 and accompanying text *supra*), that the parties are legally married, and that the wife is not pregnant. If the wife is pregnant the divorce will not be granted until the child is born. In this manner the court can assure itself that the child's needs are provided for. These allegations, however, are easily provided for in a standardized form.

⁷⁹ See note 73 and accompanying text *supra*.

⁸⁰ For example, if the plaintiff alleged desertion as the grounds for divorce, proof of extreme cruelty would not suffice. Most judges would, however, probably have allowed the plaintiff to amend the complaint to conform to the proof. Allying several grounds initially provided another safeguard against this type of error.

only the total breakdown of the marriage relationship,⁸¹ and any proof the plaintiff presents must tend to prove the breakdown.⁸² Thus, the chance of erring by citing the wrong grounds in a divorce complaint has been substantially reduced, for the plaintiff need only copy the words directly from the statute.⁸³

3. *Trial of a Divorce Case* – The final stage of a divorce suit is the hearing in open court. In an uncontested case, the testimony is brief and very simple, often requiring less than ten minutes.⁸⁴ The plaintiff takes the stand, identifies himself, and establishes the court's jurisdiction.⁸⁵ He then states that the marital relationship has broken down beyond any hope of reconciliation and normally gives a short example to support this statement.⁸⁶ The question of why the marriage has failed is not raised, nor is any attempt made to place the blame on either spouse.⁸⁷ If the plaintiff wishes to testify without having an attorney present, his testimony can be condensed to a single page and read to the court.⁸⁸ At the close of the direct examination, the judge may ask a few questions of the witness before he steps down.⁸⁹ Normally no additional witnesses are called.⁹⁰

B. *The Competence of Paraprofessional Advisors in Divorce Cases*

Interest in the use of lay personnel for doing simple legal work has increased dramatically in recent years.⁹¹ Paraprofessionals

⁸¹ MICH. COMP. LAWS ANN. § 552.6(1) (Supp. 1972). This allegation is both necessary and exclusive. No other grounds may be alleged. See also Honigman, *supra* note 63, at 21.

⁸² See Honigman, *supra* note 63, at 20–21.

⁸³ Of course, if the plaintiff failed to allege the statutory grounds his complaint would be defective. Yet because there is no longer any need to choose between alternative grounds, the chance of error is greatly diminished.

⁸⁴ Honigman, *supra* note 63, at 22, estimates that testimony in uncontested no-fault divorce cases should require no more than the "ten minutes previously prevalent." That duration "will be enough for a spouse to testify in broad terms that he or she has been unhappy in the marriage, that the parties have in fact separated, and at least one of them is unwilling to resume the marital relationship."

⁸⁵ See notes 71 and 72 and accompanying text *supra*.

⁸⁶ Statements to the effect that the couple was separated and did not intend to reconcile or that they were living independent lives and intended to continue doing so were considered sufficient in cases observed by the author.

⁸⁷ See Honigman, *supra* note 63, at 20–22.

⁸⁸ Gordon, Graham & Cramer has a one page form on which the client fills in several blanks. The client then reads this statement as his testimony in court, which appears to be virtually the same as the testimony observed by the author.

⁸⁹ The witness may be asked once again if the marriage has broken down to the point that there is no chance of reconciliation and whether the wife is pregnant. The plaintiff, moreover, may state that all property issues have been settled and that his right to alimony has knowingly been waived.

⁹⁰ See Honigman, *supra* note 63, at 22.

⁹¹ See generally Turner, *Effective Use of Lay Personnel*, 38 J.B.A. KAN. 301 (1969);

have been employed both to ease the workloads of attorneys and to provide efficient legal services at a lower cost.⁹² The ideal area for using lay assistants is one in which the work is processed in quantity and is relatively simple, and where standardized procedures can easily be established.⁹³

Divorce, especially under a no-fault law, is certainly such an area. Many firms which deal with divorces do so in substantial quantity, and legal aid clinics almost invariably process large numbers of divorce cases.⁹⁴ It is also apparent that the legal knowledge necessary to process an uncontested divorce suit under Michigan's No-Fault Divorce Law is relatively simple. The first stage of the case, that of investigating the facts and preparing the legal arguments, is much less complex under the new law than was previously true.⁹⁵ Basically, one need only find evidence that the marriage has permanently broken down.⁹⁶ While the parties' agreement concerning the breakdown may not be conclusive,⁹⁷ it is strong evidence that the marriage has failed. The fact of a long separation also constitutes strong proof. The more technical legal issues of whether the defendant's conduct falls under one or more of the criteria enumerated under the fault-oriented law and whether the plaintiff has also committed such a breach of marital duty have disappeared. Strict guidelines for proof of a marital breakdown do not exist. A layman should be able to determine whether the circumstances indicate a defunct marriage, and a great legal expertise may in fact be of little value today.

Compliance with the technical requirements such as filing the proper forms and serving process also require only slight legal skill.⁹⁸ The procedure is straightforward and the risk of erroneous decisions giving rise to later complications has been minimized. A layman with a small amount of training should be able to perform the task satisfactorily.

The final step in a divorce suit is the trial. The proof, being of a more general nature, under the new law requires less expertise in its presentation. Previously the plaintiff risked the danger that

Holme, *Paralegals and Sublegals: Aides to the Legal Profession*, 46 DENVER L.J. 392 (1969); UNIVERSITY RESEARCH CORP., PARAPROFESSIONALS IN LEGAL SERVICES PROGRAMS: A FEASIBILITY STUDY (1968) [hereinafter cited as PARAPROFESSIONALS].

⁹² See, e.g., Turner, *supra* note 91 (private law office); PARAPROFESSIONALS, *supra* note 91 (legal aid clinics).

⁹³ See Turner, *supra* note 91; Holme, *supra* note 91, at 405-17.

⁹⁴ One study estimates that divorce accounts for approximately 50 percent of the caseloads of legal aid clinics. PARAPROFESSIONALS, *supra* note 91, at 89.

⁹⁵ See part II A 1 *supra*.

⁹⁶ Honigman, *supra* note 63, at 18-22.

⁹⁷ *Id.* at 22; MICH. COMP. LAWS ANN. § 552.6(2) (Supp. 1972).

⁹⁸ See part II A 2 *supra*.

evidence of his own misconduct would be introduced, thus barring relief.⁹⁹ Arguably someone untrained in the law would be unable to render reliable advice as to what activities of the plaintiff would prevent the divorce from being granted should evidence of the activities to introduced at trial. Under the No-Fault Divorce Law, however, the only evidence that might bar the granting of the divorce would be evidence suggesting the possibility of reconciliation between the parties.¹⁰⁰ Presumably, without legal training one should be able to distinguish between facts indicating a total breakdown of the marriage and those indicating possible reconciliation.

The idea of using paraprofessional assistance in divorce work is not new.¹⁰¹ Nonlegal assistants are already employed for this purpose in both private law firms and legal services programs.¹⁰² In California, which also has a no-fault divorce law, a legal aid clinic employing paralegals for divorce work reports that a typical divorce case requires approximately seven minutes of attorney time.¹⁰³ The nonlawyer divorce specialist conducts the interviews and drafts the petitions, subject to a lawyer's supervision.¹⁰⁴ Advocates of the utilization of lay help often assume that such help should be employed only in lawyers' offices. Perhaps this restriction is included in these proposals as a tactical concession to lessen the expected opposition from the organized bar, but there may also be a substantial fear of allowing nonlawyers to process such work without having a trained lawyer present to guide their work and to take charge should complications arise. These dangers, however, seem minimal in the case of uncontested no-fault divorces. The work is sufficiently routine that a lawyer's expertise is unlikely to be needed, and there is no reason to believe that a properly trained layman would become any more lax in his work than would an attorney.¹⁰⁵ Should complications arise, a lawyer could always be brought into the case.¹⁰⁶

⁹⁹ See text accompanying note 75 *supra*. See also Honigman, *supra* note 63, at 16-17.

¹⁰⁰ See note 76 and accompanying text *supra*. Since there is no longer any attempt to place the blame for the failure of the marriage on only one of the parties, the clean hands doctrine should no longer bar consideration of the other facts of the case.

¹⁰¹ See note 91 and accompanying text *supra*.

¹⁰² See note 91 *supra*.

¹⁰³ See PARAPROFESSIONALS, *supra* note 91, at 67.

¹⁰⁴ *Id.* at 89-113.

¹⁰⁵ One argument against allowing unauthorized practice is that attorneys have a greater sense of responsibility. While this may be true in some cases, there is no reason to believe that a properly trained paralegal would not be equally responsible. Comment, *supra* note 42.

¹⁰⁶ Although lawyers may prefer to enter a case at its inception, if proper records are kept this should not prove to be a serious problem in the few cases in which the need for a lawyer develops.

Certainly there is some danger involved in allowing nonlawyers to practice without supervision, and perhaps an attorney should be available even in the simplest of cases.¹⁰⁷ Unfortunately, at this time no lawyer would be willing to work for a lay divorce firm because by doing so he would violate the American Bar Association's Code of Professional Responsibility,¹⁰⁸ thereby risking disbarment.¹⁰⁹ The fact remains, however, that such difficulties are not the product of any inherent inability on the part of the paraprofessional to perform adequately the routine work in simple divorce cases. On the contrary, it appears that the special expertise of the lawyer is simply not essential for such work and that properly trained and supervised nonlawyers could easily handle uncomplicated divorce actions.

This conclusion, of course, does not end the inquiry. Such arrangements, even though feasible, may nevertheless prove undesirable. An intelligent appraisal of current restrictions upon the operations of lay divorce firms requires consideration of their potential costs and benefits to the public, in light of the goals and values served by the laws prohibiting unauthorized practice.

C. Policy Considerations Regarding Paraprofessional Divorce Firm Operations

The arguments for strictly controlling the unauthorized practice of law seem to fall into two categories, emphasizing the potential harm either to the public or to the legal profession. Injury to the profession may be further subdivided either as economic or as directed toward the integrity of the bar.

1. The Economic Threat—Certainly lawyers have a direct financial interest in restricting entry by paraprofessionals into the areas currently designated as constituting the practice of law. The economics of supply and demand in the area of legal services suggest that the less legal assistance available, the higher the price of that legal assistance is likely to be. Thus, by restricting entry into his field, the divorce practitioner may theoretically maintain an artificially high price for his services. Although there is a

¹⁰⁷ This can be accomplished by requiring lay divorce firms to employ a staff attorney. Gordon, Graham & Cramer initially planned to include an attorney on the staff but abandoned the idea when unable to find one who was willing to join.

¹⁰⁸ "A lawyer shall not aid a nonlawyer in the unauthorized practice of law." ABA CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 3-101(A). "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." *Id.*, DISCIPLINARY RULE 3-103(A).

¹⁰⁹ RULE 15, RULES CONCERNING THE STATE BAR OF MICHIGAN, in MICHIGAN COURT RULES (Supp. 1972).

reluctance among lawyers to articulate this as a legitimate policy goal,¹¹⁰ it is a potentially significant factor.¹¹¹

Several arguments can be marshalled against this position. Perhaps the most basic is the general recognition that such protectionism is simply not a legitimate public value sufficient to justify its judicial enforcement. Furthermore, to the extent that other reasons serve in part as rationalizations for the underlying motives of self-protection, it should be noted that lay divorce firms are in any event unlikely to affect significantly the incomes of most lawyers. Many attorneys who do specialize in divorce work are unlikely to be seriously affected by divorce firms because these firms deal with only the simplest cases, in which the parties have already agreed on all the details and are merely seeking to add legal sanction to their own dissolution of the marriage. Where there is considerable property involved, agreement on a settlement is less likely, even in uncontested cases. The divorce firms' clientele should be mainly young and lower income couples without substantial amounts of money or other property.¹¹² Licensed practitioners should continue to attract clients with problems concerning related matters such as property settlements, alimony, and child custody.¹¹³

2. *The Integrity of the Bar*—There is a less obvious but equally basic threat to the legal profession in the unauthorized practice of

¹¹⁰ Professional aggrandizement is often denied by lawyers in favor of a case based upon the public harm of unauthorized practice. See Marden, *The American Bar and Unauthorized Practice*, 33 UNAUTHORIZED PRACTICE NEWS, Spring-Summer, 1967, at 2:

That is why we are here today, to talk about the way the lines are currently being drawn between lawyers and others. Our concern in this matter is governed by broad considerations of social policy and the public interest. It must not be motivated by selfishness, by competition-for-competition's sake, or by avaricious materialism. The lawyer who thinks that unauthorized practice work is simply a means for increasing his own income has no place in this discussion.

We are here to protect the public from the hidden dangers of dealing with the unlicensed and unauthorized practitioner; not to protect the lawyer from competition. We are not a trade union, and we must beware of giving the appearance of acting for our selfish interests when we attack the illegal practitioner.

¹¹¹ An excellent illustration is contained in *Legal Business That Goes Outside the Profession*, 34 UNAUTHORIZED PRACTICE NEWS, Spring, 1968, at 25:

We're talking about the legal business that's being handled every day by non-lawyers who provide legal services as "fringe benefits" as an inducement to clients or customers. The banker, the real estate agent and broker, the insurance man, the accountant, the tax specialist and even the notary public—all get a big chunk of the practice that should be handled by the practicing attorney within the confines of the lawyer's office.

This is a serious economic problem affecting the legal profession as a whole.

¹¹² These groups as a whole tend not to turn to lawyers for assistance. PARAPROFESSIONALS, *supra* note 91, at 7.

¹¹³ Involved property settlements, alimony settlements, and child custody issues are sufficiently complex that lawyers will usually be consulted.

law because it both devalues the intangible attributes of the profession like exclusive claim to specialized knowledge and weakens its institutional framework by operating outside the control of bar associations. Thus, in a very fundamental sense, the prohibition of unauthorized practice is a necessary concomitant of the organized bar.¹¹⁴ Once again, however, it is possible that lay divorce firms represent no real threat to the profession. The integrity of the bar is seriously at issue only in the face of truly substantial encroachments by nonmembers. Purely as a matter of degree, divorce firms would affect only a relatively small portion of what is presently viewed as the practice of law. Yet these firms may be important simply as symbols of lay encroachment, as encouragement for further attacks on the professional citadel. In view of the public interest in a strong and viable bar,¹¹⁵ such factors may weigh somewhat more heavily than the purely economic concerns.

3. *The Public Interest*—The primary rationale for the prohibition of the unauthorized practice of law is to protect the public from the potential harm of incorrect or misleading advice.¹¹⁶ The judiciary and the organized bar are charged with the task of providing this protection.¹¹⁷ There are other values, however, which supplement and compete with this goal and may affect the means for its attainment.

The public interest in the practice of law assumes two conflicting forms. The requirement of protection from unskilled practitioners who may give incorrect or incomplete advice must be balanced against the need for the easy availability of inexpensive legal assistance. The former is achieved primarily through regulations limiting the practice of law to certain qualified persons, but such quality controls necessarily reduce the quantity of available assistance by restricting the number of practitioners. The major cost, or undesirable effect, of permitting lay divorce firms is the danger that erroneous or incomplete advice will be given to clients. In light of the relatively simple nature of divorce under the no-fault law, that risk is small, and a minimum of training should be needed to equip lay personnel not only to deal

¹¹⁴ See, e.g., Onion, *The Unauthorized Practice of Law*, 25 UNAUTHORIZED PRACTICE NEWS 271, at 271 (1959): "[T]he prohibition of the unauthorized practice of law is coextensive with the very existence of the legal profession itself." See also Note, *supra* note 42, at 215; Comment, *supra* note 42.

¹¹⁵ "The practice of law by unqualified persons antedated the organized bar. The bar arose as a result of a public demand for the exclusion of those who assume to practice law without adequate qualification." Note, *supra* note 42 at 215. The bar's primary functions today are still to limit the practice of law to qualified practitioners and to regulate the conduct of those practitioners.

¹¹⁶ See note 42 and accompanying text *supra*.

¹¹⁷ See notes 9-23 and accompanying text *supra*.

with simple divorce cases successfully but also to recognize more complex problems which require a lawyer's attention.¹¹⁸ It is also possible that the existence of lay divorce firms will reduce the organized bar's control over the practice of law not merely in this area but in other areas as well,¹¹⁹ greatly hindering that body's efforts to protect the public from dangers of unauthorized practice. Nevertheless, a carefully planned system for regulation of these lay firms should vest sufficient control in the bar so that its power is not seriously diminished. Furthermore, lay divorce firms potentially offer important benefits to the public. Permitting such firms to operate would certainly increase the availability of divorce assistance. This, combined with the lesser amount of training required for lay divorce advisors as compared with that required for lawyers, should lead to lower costs for divorce assistance. If proper control is exercised to prevent the dissemination of improper advice, the benefits of these firms seem to outweigh their costs, and they should be allowed to provide their services.

III. PROTECTING THE PUBLIC INTEREST

Since it appears that lay divorce firms may be able to function successfully, yielding a net benefit to the public, they should be given the opportunity to prove their value and efficiency. Yet because their operation does entail certain risks, their public benefit is premised upon the maintenance of certain standards of performance. The judiciary and the organized bar have assumed the responsibility for protecting the public from unskilled practitioners, but these bodies should also perform this task in a manner which is most beneficial to the public. Neither total exclusion of divorce firms through prosecution for unauthorized practice nor a policy of complete noninterference is an acceptable solution.

The state and local bar associations in Michigan have demonstrated strong animosity toward the lay divorce firms, and the judiciary has shown a willingness to enjoin the operation of such firms.¹²⁰ It seems, however, that the organized bar should refrain from relying solely on the relatively easy remedy of unauthorized practice prosecutions and instead seek new and innovative remedies to the problem of nonlawyers encroaching on areas traditionally viewed as the exclusive province of lawyers. The State

¹¹⁸ See part II A *supra*.

¹¹⁹ See part II C 2 *supra*.

¹²⁰ See notes 4-5 and accompanying text *supra*.

Bar of Michigan should establish a new committee to regulate lay divorce firms to ensure that the public will be protected. Firms not complying with the regulations promulgated by this committee would then be subject to prosecution for the unauthorized practice of law. The committee's primary task would be to determine the types of cases these firms may process. The simplest cases, in which agreement has been reached on all matters prior to filing suit, are no longer adversary proceedings and clearly can be processed by the lay firms.¹²¹ If the property settlement stipulated by the parties is complex, an attorney should draw up that portion of the agreement. The remainder of the work can be performed by the divorce firm.¹²²

If the divorce itself or the settlement is disputed, the parties should not be allowed to use the services of a lay firm,¹²³ for the divorce suit then becomes an adversary proceeding¹²⁴ and the parties should have skilled legal counsel who will represent their interests and protect their rights. Divorce firms are designed to offer advice on the procedural aspects of a divorce and are not equipped to represent parties in the capacity required in contested cases. A question does arise as to those cases involving minor children, even where custody and visitation rights have been worked out between the spouses. The parties must meet with the Friend of the Court, who then makes a recommendation to the court.¹²⁵ The major factor against allowing lay firms to handle

¹²¹ An English study of divorce law reports:

Under a law based on breakdown, the trial of a divorce case becomes in some respects analogous to a coroner's inquest, in that its object would be judicial inquiry into the alleged fact and causes of the "death" of a marriage relationship.

LONDON S.P.C.K., *PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY* 67 (1966). See also MICH. COMP. LAWS ANN. § 552.6 (Supp. 1972); Recommendations of the Michigan Law Revision Commission Relating to the Revision of the Grounds for Divorce, in Institute of Continuing Legal Education, Michigan's New No-Fault Divorce Law 2, 5 (unpublished course materials, 1971).

¹²² See part II A *supra*.

¹²³ This should apply whenever there is any kind of a dispute, whether over the issue of the divorce or the terms of the property settlement. If denying access to a divorce firm acts as an incentive for parties to settle (thereby avoiding the need to consult an attorney), this would perhaps be a desirable side effect.

¹²⁴ See, e.g., Honigman, *supra* note 63, at 22:

Certainly if the parties are not in dispute as to alimony, custody or property settlement, it would clearly be a *pro confesso* situation. If the grounds for divorce have been admitted but there are nonetheless unresolved disputes as to alimony, property settlement or child custody, it should be deemed a contested action

¹²⁵ The Friend of the Court is an officer of the court and does not represent either party. His job is to seek the best result for the child. Although the parties' decision concerning the child is a major factor, it is not binding on the Friend of the Court, and it is possible that he will reject it. Judges rely quite heavily on his recommendation, and contesting it is a difficult process. MICH. COMP. LAWS ANN. §§ 552.251, .252, .253 (1967), § 552.252a (Supp. 1972); MICH. CT. RULE 727, in 4 J. HONIGMAN & C. HAWKINS, MICH. CT. RULES ANN. (1967), *as amended*, (Supp. 1972).

these cases is the gravity of the decision involved. A decision to give up custody or accept limited visitation privileges can have very serious consequences and should be made only with a full understanding of the rights involved. Should divorce firms prove to be an efficient and capable source of legal advice, they may in the future be permitted to expand the scope of their operations to include such cases.

An additional requirement which might be appropriate would be the retention of a staff attorney. He could oversee the work, advise lay employees when necessary, and take over the case if serious complications arose. Of course, if a dispute arose between the parties, the divorce firm would have to advise them both to consult outside attorneys in order to avoid a conflict of interest problem. The staff lawyer would then be responsible for assembling the data on the case and making it available to the newly retained attorneys.¹²⁶

Divorce firms could offer another advantage by providing some type of counselor to deal with the emotional aspects of a divorce. Prominent divorce lawyers agree that a substantial portion of their work is of a nonlegal nature.¹²⁷ A psychologist or other nonlawyer trained to deal with emotional problems could probably perform better in this area. Perhaps requiring lay divorce firms to employ a trained counselor is overly restrictive, but such a practice should certainly be strongly suggested.¹²⁸

Finally, the bar committee should require divorce advisors to meet certain qualifications. Examinations can be used to test the applicant's knowledge of divorce law, and acceptable candidates could receive certification.¹²⁹ Standardized forms and procedural outlines should be prepared or approved by the committee. These steps should be sufficient to protect the public from the danger of receiving erroneous advice from unskilled practitioners.

The judiciary also has the power to control legal practice, and while it has gratefully acknowledged guidelines established by other bodies,¹³⁰ it has also indicated a clear intent not to relinquish its inherent power in this area.¹³¹ An integral part of

¹²⁶ Although a client's communications to his lay advisor would not fall under the attorney-client privilege, it still might be desirable to screen the information before releasing it.

¹²⁷ See note 47 and accompanying text *supra*.

¹²⁸ It should be noted that requiring a staff attorney and a marriage counselor might produce too heavy a burden for small firms or else necessitate sharply increased fees, thereby eliminating a major advantage of divorce firms. Since lawyers process divorces without employing a special counselor, such a requirement perhaps should be imposed on lay firms only if it proves financially feasible.

¹²⁹ Certification could also require a showing of good moral character and responsibility.

¹³⁰ See note 13 and accompanying text *supra*.

¹³¹ See note 14 and accompanying text *supra*.

any program allowing lay divorce firms to operate would be a revision of the Michigan Supreme Court Rules regarding unauthorized practice.¹³² Although the desired result could be obtained by allowing practice by any person who has received the official approval of the state bar committee, this is probably too broad and perhaps even an invalid delegation of judicial power.¹³³ Alternatively, a provision authorizing qualified lay persons to render advice in simple uncontested divorce cases would accomplish the immediate goal while doing very little to facilitate future changes in the rules which may prove desirable.¹³⁴ In view of the comparatively new and untested nature of the concept of allowing regulated lay firms to render legal advice, the latter approach seems preferable at present.

By adopting a program such as that outlined above, the judiciary and the bar can attain the goal of protecting the public without sacrificing the potential benefit from lay divorce firms. Of course, the suggestions offered here are merely tentative, and considerable effort will be necessary if this plan is to be effective. Yet the apparent need of the public for low-cost legal assistance makes it imperative that the organized bar seek new and innovative remedies to the problem of the unauthorized practice of law by laymen.

—Arthur R. Miller

¹³² See part I *A supra*.

¹³³ If the Supreme Court Rules were to bind lower courts to accept the Bar's decisions on authorized practice, this ruling might amount to a delegation of judicial power to the State Bar.

¹³⁴ The same process of changing the rules would have to occur again to accommodate future policy changes. The recommended revisions, except for possibly having removed a barrier against innovation and established a precedent, would do little to facilitate future revisions of the rules.