

Nonlawyer Activity in Law-Related Situations A Report with Recommendations

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Contents

- [MEMBERS OF THE COMMISSION ON NONLAWYER PRACTICE](#)
- [DEDICATION -- THE HONORABLE WILLIAM R. ROBIE](#)
- [PREFACE](#)
- [TERMINOLOGY](#)
- [EXECUTIVE SUMMARY](#)
- [PART ONE: FINDINGS](#)
 - The History of Nonlawyer Delivery of Legal and Law-Related Services to the Public
 - Nonlawyer Activities in Specific Legal and Law-Related Matters
 - The Growth of the Paralegal Profession
 - Nonlawyer Accountability to Consumers
 - Recent Efforts by States to Examine and Regulate Nonlawyer Activities and to Fashion Appropriate Regulatory Approaches
- [PART TWO: ANALYSIS, CONCLUSIONS AND RECOMMENDATIONS](#)
 - Increasing the Public's Access to the Justice System and to Affordable Assistance with its Legal and Law-Related Needs is an Urgent Goal of the Legal Profession and the States
 - The Practicing Bar, Bar Associations, Courts, Law Schools and Governments Should Continue to Improve Access to Justice
 - The Protection of the Public from Harms Arising From Incompetent and Unethical Conduct by Persons Providing Legal or Law-Related Services is an Urgent Goal of Both the Legal Profession and the States. When Adequate Public Protections for the Public Are in Place, Nonlawyers Have Important Roles to Perform in Providing the Public with Access to Justice
 - Both To Protect the Public and Promote Access to Justice, States Should Assess Whether and How to Regulate the Varied Forms of Nonlawyer Activity in Law-Related Matters That Exist or Are Emerging in Their Respective Jurisdictions
- [CLOSING STATEMENT](#)
- [SUMMARY OF RECOMMENDATIONS](#)
- [MINORITY REPORTS](#)
- [APPENDICES](#)
 - Biographies of Commissioners
 - Summary of the Commission's 1993 Survey of Judges
 - State Legislation Considered From 1992 to 1994
 - National Paralegal Organizations' Position Statements on Regulation, Certification and Education
 - Legal Needs Studies from 1985 to 1995

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DEDICATION

THE HONORABLE WILLIAM R. ROBIE

William R. Robie, Chief Immigration Judge of the United States, was the driving force behind the creation of the ABA Commission on Nonlawyer Practice.

Judge Robie exemplified the selflessness found in our profession. A member of the ABA since his graduation from Northwestern University School of Law in 1969, he spent his entire professional life advocating access to justice, programs for client protection, and the promotion of pro bono publico services. In twenty-three years of outstanding service to the Association, Judge Robie

chaired the Standing Committee on Legal Assistance for Military Personnel, the Special Committee on Delivery of Legal Services, the Standing Committee on Legal Assistants and the Standing Committee on Lawyers' Responsibility for Client Protection. He also served as a member of the Consortium on Legal Services and the Public and participated in its National Conference on Access to Justice in the 1990s.

Before retiring as Chair of the ABA Standing Committee on Lawyers' Responsibility for Client Protection, Judge Robie advanced the concept of creating an entity to explore the extent of the delivery of legal and law-related services by nonlawyers and to formulate a response to that phenomenon. A working group resulted, which was jointly sponsored by the Committee on Lawyers' Responsibility for Client Protection and the Consortium on Legal Services and the Public. In a real sense, it was primarily his initiative that ultimately led to the appointment of the Commission on Nonlawyer Practice.

Judge Robie also worked extensively with paralegals and paralegal organizations, and was himself a paralegal instructor. He was a member of the National Advisory Board of the National Federation of Paralegal Associations, Inc., the USDA Graduate School Advisory Committee on Law and Paralegal Studies, and the National Association of Legal Assistants, Inc. He was instrumental in establishing the paralegal training program at the University of Maryland.

Bill Robie died on October 18, 1992, and we will miss him as a friend and a visionary who long ago recognized the importance of promoting access to justice and the securing of all options for delivery of quality legal services. It is in the spirit of that commitment and in acknowledgment of his intelligence, humor and humility that the Commission dedicates this Report to him.

PREFACE

In 1992 the American Bar Association established the Commission on Nonlawyer Practice consisting of 16 lawyers and nonlawyers having diverse geographical and professional backgrounds. The Association's Board of Governors directed the Commission to "conduct research, hearings and deliberations to determine the implications of nonlawyer practice for society, the client and the legal profession." From this directive, the Commission embarked upon a course of nationwide hearings, fact gathering, analysis and formulation of conclusions and recommendations.

Origins of the Commission

The Commission traces its origins to the 1986 report of the ABA Commission on Professionalism which recommended that lawyers "encourage innovative methods that simplify and make less expensive the rendering of legal services" for middle class persons, including consideration of "the limited licensing of paralegals." That report also stated that "care must be exercised in having paraprofessionals enter these arenas and in making sure that the training, supervision, and testing required is comprehensive."¹

For at least a decade, the ABA Standing Committee on Lawyers' Responsibility for Client Protection ("LRCP")² and the ABA Consortium on Legal Services and the Public ("Consortium")³ have examined issues surrounding the delivery of law-related services to the public by persons other than licensed lawyers. LRCP is primarily concerned with client protection and the Consortium with access to affordable services. Both have emphasized the importance of high quality services, regardless of who renders those services.

In addressing the complex problem of combining access to justice with the competent provision of legal services, LRCP has emphasized the need to be responsive to the concerns and best interests of the client population through programs that serve to prevent or redress harm done in the rendering of legal services.

In 1989 the Consortium and Tulane Law School sponsored the Conference on Access to Justice in the 1990's, issuing its report titled *Civil Justice: An Agenda for the 1990s*.⁴ The Conference found that access to legal services by low- and moderate-income persons had not been significantly enhanced despite recent technological advances and the previous decade's experimentation with legal advertising, alternative dispute resolution mechanisms, national and local legal clinics, lawyer referral and information services, and a variety of prepaid legal plans. The Conference "strongly supported the relaxation of current barriers to the involvement of non- attorneys in the provision of legal assistance and called for careful experimentation with lay advocacy programs to determine whether and how much such representation will increase access to the legal system."⁵

In 1992 an informal working group, cosponsored by LRCP and the Consortium, explored the implications of expanded nonlawyer practice.⁶ After a year of intensive investigation, the working group concluded that:

[T]here is a greater incidence of nonlawyer practice at all levels of client service than at first suspected and that formal efforts to . . . regulate nonlawyer practice, particularly by state legislatures are increasing. The rendering of what are traditionally considered to be legal services by persons not licensed as lawyers in any jurisdiction is a concern with implications that go to the very essence of a client's interaction with the system of justice, defined here to include the full range of legal and law-related client needs, particularly for the delivery of legal services to those not now having access to them, the quality of those services and the recourse available if those services are not competently provided.

The report of the working group supported its request that the ABA Board of Governors create a Commission to conduct an in-depth analysis of the delivery of legal and law-related services by nonlawyers. This Commission was appointed in September 1992. The ABA Justice Systems Initiative, the Association's multi-year national agenda to improve the administration of justice, identified this Commission as one of the ABA entities charged with the duty to address access issues related to improving the justice system and to identify problems and develop solutions.

Commission Hearings and Deliberations

The Commission launched a nationwide series of public hearings beginning in December of 1992 and continuing until August 1994. The Commission heard testimony in ten cities (Orlando, San Antonio, Boston, Sacramento, Chicago, Washington, D.C., New York, Phoenix, Minneapolis and New Orleans) and amassed an extensive record, comprised of the testimony of witnesses,⁸ written submissions and independent documents, as the principal basis for its findings and recommendations. During the hearings, nearly 400 persons presented their views, now preserved in thousands of pages of transcripts in the Commission's archives. Many of these persons supplemented their statements with additional written comments. More than 100 others who were unable to attend the public hearings also submitted written comments.

The Commission sought out the views of every identifiable group and sector having an interest in the provision of legal services in the United States. These groups included judges, ABA members, representatives of ABA entities, state and local bar associations, specialty bar associations, legal services programs, legal education institutions, legislators and representatives of federal and state government agencies, arbitrators, mediators and representatives of their associations, paralegals, paralegal educators and representatives of paralegal organizations, self- represented persons and document preparers, legal technicians and others in law-related businesses, representatives of consumer organizations, nonprofit entities, self-help mutual support groups, Native American Tribal Court advocates and others.

Information received at the Commission's hearings was supplemented with extensive research into the provision of legal and law-related services in America and Canada today. The Commission's archives now contain more than 2,000 documents including case law, statutes and court rules,

reports of legislative bodies, administrative agency reports and rules, law review articles, treatises, books, reports, studies and surveys by state and local bar associations, state legal needs studies, and commentary from the general news media and other national organizations. The Commission closely examined all reports on nonlawyer activity and the responses to those reports by state legislative, judicial and bar authorities. In addition, statutes, rules and case law on unauthorized practice of law ("UPL") and related nonlawyer activity for every state and the District of Columbia were collected to aid in understanding the pattern of UPL enforcement in the United States. The Commission also reviewed the comprehensive materials on law-related delivery systems maintained by the Association's Legal Services Division.

The Commission's public hearing transcripts, coupled with its extensive library of commentary and documents relating to the provision of law-related services by nonlawyers, has thus become what is probably the nation's broadest, most comprehensive database available on the subject.

Based on the record developed at the time, the Commission issued its first report in April 1994, titled *Nonlawyer Practice in the United States: Summary of the Factual Record Before the American Bar Association Commission on Nonlawyer Practice*. This initial report on the Commission's factual record was presented to elicit comment and supplemental information. At its final hearing in New Orleans in August of 1994, the Commission received comment from many persons who were active members of ABA sections and committees, and from representatives of other bar associations and legal organizations.

Two prominent national organizations of paralegals, the National Association of Legal Assistants, Inc. (NALA) and the National Federation of Paralegal Associations, Inc. (NFPA), submitted extensive information on their policies and on the history and activities of paralegals. Both organizations urged an expanded role for traditional paralegals and some form of code of ethics, entry requirements, continuing paralegal education and periodic recertification.

Representatives of HALT, a citizen's legal reform advocacy group, spoke at several of the Commission's hearings and provided extensive written analysis and recommendations concerning the full spectrum of issues related to permitting nonlawyer delivery of legal services directly to clients without the required participation of a lawyer.

Several other sources provided useful information for the Commission. The American Bar Association Standing Committee on Delivery of Legal Services has examined the problem of assuring greater access to the legal system for moderate-income individuals. Several of its studies have provided valuable information. Two recent studies on the future of the courts, in California (1994) and Massachusetts (1992), also offered valuable guidance.⁹

Special Acknowledgements

The Commission was extremely fortunate to receive gratis transcription services of court reporters from the national reporting firm of INTERIM Court Reporting, formerly Noon & Pratt, obtained with the generous assistance of the National Federation of Paralegal Associations, Inc. These reporters transcribed the statements of several hundred persons who spoke to the Commission and the Commission gratefully acknowledges their substantial contribution to its work.

Finally, while the Commission could not have succeeded without the information and perspectives of the hundreds of persons who addressed it and the thousands of documents it amassed, its most essential support came from the many individuals on the staff of the American Bar Association who labored to support the Commission's work. The Commission wants to thank the Center for Professional Responsibility, the Division for Legal Services and the Office of Planning for their valuable assistance.

The Report was written by the Commission, with primary roles assumed by a drafting committee co-chaired by Zona F. Hostetler and Gerry Singen and including Commissioners Merle L. Isgett,

C. Terrence Kapp, Herbert M. Rosenthal, John E. Sandbower III, and L. David Shear.

TERMINOLOGY

The lexicon of nonlawyer activity in legal and law-related matters may be confusing because many of the terms are used with significant variation from jurisdiction to jurisdiction and from one organization to another. It is important to note the Commission's definitions of the four terms that follow. The Commission has attempted to define these four key terms and to use them consistently and narrowly. The Commission's definitions may differ from those used by other organizations, those used by other Association entities, or from the definitions adopted in various state laws.

The four key terms used in this Report are: Self-Represented Person, Document Preparer, Paralegal, and Legal Technician.

- **SELF-REPRESENTED PERSON** -- a person who represents himself or herself for the purpose of resolving or completing a process in which the law is involved. Such a person may seek assistance with preparing for or completing some tasks within the overall process, but ultimately brings the process to completion without representation by another person. A pro se litigant (sometimes described as a person proceeding "in propria persona" or "pro per") is a Self-Represented Person in an adjudicative proceeding. Self-Represented Persons sometimes choose to utilize the services of a Document Preparer, a Legal Technician or a lawyer to assist in all or part of a legal process.

- **DOCUMENT PREPARER** -- a person who assists in the preparation of forms and documents using information provided by a Self-Represented Person. A Document Preparer is a copyist, who usually types but may also use word processing computers to produce computer-generated forms. Document Preparer is synonymous with scrivener. It is important to note that the Document Preparer provides no advice or substantive information to persons using his or her services. All substantive information is provided by the Self-Represented Person. A Document Preparer functions much like a court reporter or a transcriber, recording as exactly as possible only the information provided by the Self-Represented Person without addition, deletion or editorial comment. A Document Preparer may use commercially produced and court-approved forms, if available, or prepare a document drafted or dictated by the Self-Represented Person. If language translation services are provided by the Document Preparer, the translation is as literal as possible and devoid of substantive advice, implied or expressed. A Document Preparer does not give advice, for example, on the selection of forms for a particular purpose, on the appropriateness of answers to questions on forms, or on the choice of administrative agency, court or forum. A Document Preparer sometimes provides incidental assistance, such as advice on court decorum, directions to or within a building, proper dress for an appearance in court, or other similar nonsubstantive matters. A Document Preparer who gives advice on the selection of a form or an answer to a question is in this Report a Legal Technician.

- **PARALEGAL** -- a person who performs substantive legal work or provides advice to a client with the supervision of a lawyer or for which a lawyer is accountable. Paralegals are employed or retained by lawyers, law firms, governmental agencies, corporate law departments, and other entities. Synonymous with the term Paralegal in this Report, and used interchangeably, are the terms Traditional Paralegal and Legal Assistant. Although these terms may be used interchangeably in this Report, it is understood that the work performed by any of these persons is supervised by a lawyer or is work for which a lawyer is accountable. The term Paralegal has been found during the Commission's deliberations to avoid some of the ambiguities included in other terms and to most clearly distinguish itself from the term Legal Technician. The term Paralegal includes the concepts of freelance and contract paralegal; such persons work with the supervision of a lawyer or produce work for which a lawyer is accountable.

In this Report, the Paralegal who provides legal services without either the supervision of a lawyer or lawyer accountability for the work product will be considered a Document Preparer or a Legal Technician, depending upon whether substantive advice is given.

- **LEGAL TECHNICIAN** -- a person who provides advice or other substantive legal work to the public with regard to a process in which the law is involved, without the supervision of a lawyer and for which no lawyer is accountable. The fact that a Legal Technician may seek guidance from a lawyer (without being either supervised by or accountable to the lawyer) does not give the Legal Technician the status of a Paralegal. A number of terms for specific types of nonlawyer providers of legal and law related services may be familiar to the reader, for example, special advocate, agency representative, accredited representative, enrolled agent and others. Except where specially noted, these providers will also be considered either Paralegals or Legal Technicians depending upon the presence or absence of lawyer supervision or accountability in the delivery of their services.

EXECUTIVE SUMMARY

The Commission's report, *Nonlawyer Activity in Law-Related Situations*, is based on the statements of nearly 400 witnesses and the information contained in more than 2,000 documents gathered during the course of the Commission's deliberations and ten hearings held in 1992, 1993 and 1994. Part One of the Report details the findings of the Commission. Part Two sets forth the Commission's analysis, conclusions and recommendations.

PART ONE: FINDINGS

- **The History of Nonlawyer Delivery of Legal and Law-Related Services**

From the founding of the colonies until today, nonlawyers have participated with lawyers in the giving of advice and assistance to others on matters involving the law. The role of nonlawyers in the process waxed and waned until the eve of the 20th century. Then, in a span of about 70 years, requirements for admission to practice law became more rigorous and laws prohibiting the unauthorized practice of law (UPL) were enacted. The 1930s began several decades of aggressive enforcement of UPL laws. The last 20 years have seen a gradual decline of enforcement, although increased activity by prosecutors or state bar UPL committees has occurred in several jurisdictions in the last few years.

- **Nonlawyer Activities in Specific Legal and Law-Related Matters**

Today, individuals often choose to act on their own behalf without the assistance of a lawyer in situations that involve the law, even when those situations involve appearances before courts or administrative tribunals. Self-representation is particularly common in day-to-day business and personal interactions, in family courts, in tribunals hearing traffic, housing, estate and small claims matters, and in many state and federal administrative proceedings. Among reasons for self-representation given by those appearing before the Commission were the expected cost of hiring a lawyer, the perceived simplicity of a matter, the desire to act independently, and frequently, problems of communication with lawyers. People who choose to represent themselves obtain needed information from many sources other than lawyers, ranging from neighbors, friends and the media, to religious advisors, teachers, co-workers, counsellors and computer networks. A significant development is the proliferation of self-help books and computer software programs related to a vast range of law-related situations, many of which provide ready-to-use legal forms accompanied by instructions on their preparation and use. This new frontier of self-help materials draws on increasingly available and accepted technology: software programs guide individuals in the preparation of legal forms; e-mail networks make quick exchanges of information easier; and a few courts even make computer-generated forms available within the courthouse. Some self-representing individuals are not skilled in the use of computers, or even typewriters; others do not speak or read English. For such persons, document preparers

copy handwritten documents, type dictated information into forms, or translate responses from a person's native language into English. As long as document preparers give no legal advice (even advice as to which form to use) their services are almost always held not to violate statutes prohibiting the unauthorized practice of law.

The Commission found that an extensive array of federal and state administrative agencies allow nonlawyers to provide advice to self-representing persons and even to represent parties in agency proceedings. Examples of federal agencies that allow nonlawyer practice include the Internal Revenue Service, the Immigration and Naturalization Service, the Social Security Administration and the Patent Office. In those agencies, nonlawyers not only assist with agency paperwork and applications for agency action, but also may handle full evidentiary hearings as well. The Supreme Court of the United States has held that a federal agency's decision to allow nonlawyer practice preempts application of state UPL provisions. Myriad instances of legal advice and representation by owners and employees of well-established businesses, as well as by employees of unions and government, are often overlooked in a review of nonlawyer activity in law-related situations. Among the businesses are title companies, real estate brokerages, accounting firms, bank trust departments, debt collection agencies and architects. Union representatives represent workers in the automobile industry, teaching profession and a host of other labor settings in grievance hearings, arbitrations and negotiations. Government employees provide advice about the law to members of the public.

Members of community-based organizations and nonprofit charitable groups also provide advice and, sometimes, representation to group members and to low- and moderate-income individuals concerning their law-related problems. In certain instances, such as asylum assistance or advocacy on behalf of children with special educational needs, these nonlawyer advocates undertake lengthy training, use sophisticated materials and offer extremely specialized services.

Finally, the Commission found that an increasing number of other nonlawyers are offering advice and assistance to self-representing individuals or are actually representing consumers in law-related situations. The Report categorizes these nonlawyers as "legal technicians." The number of legal technicians is not known. One relatively well known example is the storefront tax preparer. Other examples include persons offering services to individuals seeking divorces, facing evictions, applying for visas, claiming bankruptcy, and desiring wills and trusts, and persons calling themselves document preparers but offering advice about legal forms. The Commission's record contains reports of both high and low quality work by legal technicians (including some work by people described as document preparers but who were also providing advice) and some reports of actual harm to consumers.

- **The Growth of the Paralegal Profession**

Paralegals, as defined in the Report, are different from legal technicians by virtue of their working with the supervision of lawyers, or at least with lawyers who are accountable for their work. The paralegal profession has grown greatly since it came into existence during the 1960s. Paralegals work in law firms, government agencies, corporate law departments, nonprofit organizations and, increasingly, on their own as freelance or contract paralegals. They often perform complex substantive tasks which would otherwise be done by lawyers. Although a lawyer is always accountable to a client for a paralegal's work, witnesses reported that many paralegals operate without meaningful supervision. An increasing number of paralegals have higher educations, and two national paralegal organizations are urging broad adoption of voluntary certification systems for paralegals. The details of their recommendations, and those of other paralegal organizations, can be found in an Appendix to the Report.

- **Nonlawyer Accountability to Consumers**

Authority on the specific liability to consumers of different types of nonlawyer providers of law-related services varies. For example, union representatives are not held to a lawyer's

standard of care when representing union members at hearings while some legal technicians have been held to lawyers' standards. Paralegals sometimes have been held directly liable to consumers but more commonly only the lawyers with whom they work are held liable. The one area in which there is some degree of uniformity involves self-help materials. Authors and publishers of self-help materials are generally not subject to challenge under either product liability or unauthorized practice statutes.

- **Recent Efforts to Examine and Regulate Nonlawyer Activities**

Several states have recently examined nonlawyer activity. State legislatures have considered a wide variety of measures to regulate legal technicians.¹⁰ Reports from court and bar task forces in California, Arizona, Minnesota and Florida, among others, proposed more explicit or expanded roles for nonlawyers. Bar inquiries in other states, including Nevada and Nebraska, led to reports which did not recommend more explicit or expanded nonlawyer roles.¹¹ The thoughtfulness of the varied state task force reports bolsters the Commission's general belief that most of the issues discussed in those reports can best be addressed at the state level.

PART TWO: ANALYSIS, CONCLUSIONS, AND RECOMMENDATIONS

The Commission reached three major conclusions when it analyzed the record:

- Increasing access to affordable assistance in law-related situations is an urgent goal;
- Protecting the public from harm from persons providing assistance in law-related situations is also an urgent goal; and
- When adequate protections for the public are in place, nonlawyers have important roles to perform in providing affordable access to justice.

The most fundamental conclusion of the Commission, however, was that each state has a unique culture, a specific legal history, a distinct record of experience with nonlawyer activity and a current economic, political and social environment which will affect its approach to varied forms of nonlawyer activity. As a result, the most important conclusion of the Commission is that each state should conduct its own careful analytical examination, under the leadership of its supreme court, to determine whether and how to regulate the varied forms of nonlawyer activity that exist or are emerging in its jurisdiction.

The information that led the Commission to these conclusions also led it to formulate six major recommendations and to identify a wide variety of actions that practicing lawyers, bar associations, courts, law schools and the federal and state governments might take. Part Two of the Commission's Report sets forth the bases for these conclusions, the recommendations they led to, and the actions that are needed to implement the recommendations.

- *Increasing the Public's Access to the Justice System and to Affordable Assistance With Its Legal and Law-Related Needs is an Urgent Goal of the Legal Profession and the States.* Lawyers have a long tradition of aspiring to assure that justice is available for everyone. Standards of conduct have consistently encouraged pro bono and public service activities. Despite this tradition, much remains to be done before all moderate- and low-income persons will have effective access to affordable assistance with their legal and law-related needs. Many studies identify a massive volume of unmet legal needs among low-income persons. Similar studies focusing on moderate-and middle-income individuals establish that more than sixty percent of the legal and law-related problems of that group are not brought to lawyers or courts. This widespread refusal to use the justice system can be attributed to numerous factors, not the least of which is a matter of individuals' perceptions about their problems: either they view their problems as not serious enough to justify obtaining legal assistance; they believe that their situation does not warrant paying what they expect to be charged; or they suspect that their problem will cost more to resolve than they can afford. The Commission heard many reasons for consumers not utilizing the services of lawyers to serve law-related needs: that lawyers are not always available at affordable rates; that for

some kinds of specialized issues (for example, special education cases) few lawyers have the knowledge and experience needed; that for damage claims involving relatively low potential recoveries, the available fees may be too low for a lawyer to be able to undertake the work; that there are too few lawyers fluent in languages other than English who can handle the cases of non-English speaking clients; and that lawyers' significant debt burdens and rising operating costs put lawyers under economic pressure to charge higher fees. On the other hand, many initiatives to improve access to justice have originated within the legal profession, and the Commission believes that continued innovation is essential and will benefit both the public and the profession. In other words, making the justice system more accessible can be a "win-win" situation.

- Steps to Continue Improving Access to Justice

There are many opportunities for lawyers in private practice and for the other institutions of the justice system to improve access to justice. The first recommendation of the Commission's Report calls on everyone involved to do what they can: The American Bar Association, state, local and specialty bar associations, the practicing bar, courts, law schools and the federal and state governments should develop and finance new and improved ways to help the public meet its legal and law-related needs.

1. The Practicing Bar

The practicing bar can do many things that will both enhance their practices and increase the public's access to justice through affordable legal services. The profession has developed many innovations that make services more affordable and available, and therefore more attractive to consumers. The Commission recommends that the profession continue and intensify this work. Examples of innovations that lawyers can use to improve their economic well-being while reducing unmet legal needs include: making their law offices more "consumer-friendly" and their hours more convenient; offering fixed fees for routine services rather than hourly rates; improving communication with clients; participating in or even forming prepaid and other group legal service plans; employing new technology to reduce costs and increase productivity; and, in appropriate circumstances, considering new techniques for giving advice over the telephone and through other means of electronic transmissions and providing limited assistance rather than full representation to self-representing persons.

A major opportunity for enhancing law practice and improving access to legal services involves more extensive utilization of paralegals. The Commission recommends that the range of activities of traditional paralegals be expanded, with lawyers remaining accountable for their activities.

There are many ways that paralegals can enhance productivity, efficiency and quality in all law practice settings. Among the possibilities are their undertaking an increased number of appropriate tasks, including such work as preparation of paperwork in administrative claims, working as freelance paralegals when services of full time paralegals are not needed, and possibly assuming expanded substantive responsibilities. The Association's Section of Law Practice Management has recently published materials describing many of these opportunities.

Tasks currently performed by paralegals cover a wide range of activities that include interviewing clients, drafting simple wills, conducting title searches, handling residential real estate closings, probating estates and preparing bankruptcy petitions and tax forms. Paralegals also render litigation support services such as drafting pleadings, preparing summaries of depositions, collating documentary evidence and preparing responses to discovery requests.

The Commission found that lawyers use the services of paralegals in innovative ways to save time and reduce costs to clients. Several lawyers recommended to the Commission, for example, that court rules be changed to permit paralegals to appear in court for their law firm employers on routine matters such as calendar calls or

previously agreed-to matters such as child support calculations and small estate probate hearings.

2. Bar Associations

Bar associations can also play a role in increasing affordable assistance to the public. For example, associations can: (1) support the expanded activities recommended for members of the practicing bar; (2) publish materials that assist self-representers to understand the law and obtain justice; (3) join with nonprofit programs to bring legal information to the programs' members and constituents; (4) enhance regular and reduced fee lawyer referral and information services; (5) create legal information telephone lines; and (6) sponsor legal assistance clinics and community law programs. The Commission specifically notes in this context the special responsibility of the American Bar Association to encourage the work of its own entities in these areas. Association entities already having key roles in this process include the Division for Legal Services, the Sections on General Practice and on Law Practice Management, the Standing Committee on Legal Assistants and the Judicial Administration Division.

3. Courts, Law Schools, Federal and State Governments

The Commission also encourages courts, law schools, and the federal and state governments to undertake wider efforts to increase accessible and affordable law-related services for the public. As the site of the most visible and important interactions between the public and the justice system, the courts of our nation have central opportunities to help with improvements in access to justice. The Commission suggests that courts examine and consider such judicial innovations as the use of pamphlets, slide shows and video presentations for self-representers, telephone information services, employment of courthouse facilitators and use of interactive computer systems.

Law schools have profound influences on people who become lawyers and are a major resource for change in the justice system. Among suggestions for law schools are special curricula that train students to provide legal services to under-represented segments of the population on a fee generating basis, encouragement of more extensive pro bono service to those who cannot afford to pay any fees, and making space available in appropriate law school courses and facilities for nonlawyers seeking substantive and skills training.

The federal and state governments make the laws, establish and fund the courts and administrative agencies and, through their employees, interpret and enforce the rules that govern many economic, social, political and personal dimensions of our lives. Among suggestions for implementation by governments are a proposal by the Attorney General of the United States that states encourage or fund four-year college programs in community advocacy, proposals for simplification of laws, regulations and procedures to make self-representation more effective and efficient, and suggestions for government sponsored community advice and referral systems.

Individuals often attempt to resolve legal and law-related matters through federal, state and local administrative agencies. In federal agencies there is broad acceptance that nonlawyers, working under rules established by the particular forum involved, can provide assistance and representation to clients dealing with or appearing before the agencies. The Administrative Conference of the United States urged the Commission to encourage more nonlawyer representation in these agencies under the same rules of conduct that apply to lawyers. The ABA Coordinating Committee on Immigration Law urged the Commission to recommend, among other things, that the Immigration and Naturalization Service amend its rules regarding representation by accredited nonlawyers to allow the sponsoring organizations to charge reasonable fees and to allow paralegals in law firms to be accredited.

State administrative agencies have a less uniform practice regarding nonlawyer

assistance to, or representation of, individuals having administrative agency claims or problems, even though the federal experience, as well as that of many states, suggest that nonlawyers can be an important source of help in the agency arena. Consequently, the Commission recommends that states should consider allowing nonlawyer representation of individuals in state administrative agency proceedings and that nonlawyer representatives be subject to the agencies' standards of practice and discipline.

All of the individuals and institutions that are involved in the justice system have a role in making and modifying the laws, rules and policies that affect access to justice. The Commission urges that consideration be given, as part of the overall effort to consider ways to improve access consistent with public protection, to possible modifications in statutes, standards and policies. Within the ABA itself, this encouragement extends to many of its Sections, Committees, Commissions and Divisions, each of which is involved in developing and implementing Association policy.

A prominent example of what might be examined is the ABA's own set of ethical rules governing lawyer practice in conjunction with nonlawyers, rules and policies relating to limited forms of assistance by lawyers to clients, rules regarding fees and partnerships, rules related to rendering of law-related services through lawyer owned or controlled businesses, and rules addressing unauthorized practice and supervision of the work of legal assistants. The Commission, therefore, recommends that the American Bar Association should examine its ethical rules, policies and standards to ensure that they promote the delivery of affordable competent services and access to justice.

- The Protection of the Public From Harm Arising From Incompetent and Unethical Conduct by Persons Providing Legal or Law-Related Services is an Urgent Goal of Both the Legal Profession and the States. When Adequate Protections for the Public Are in Place, Nonlawyers Have Important Roles to Perform in Providing the Public with Access to Justice. These two conclusions establish the basis for the final two recommendations of the Commission. Public protection is an essential component of any examination of increasing access to justice and to affordable assistance in legal and law-related situations. It has long been a major concern of the legal profession, as evidenced in the report's discussion of the history of enforcement of UPL, the recent efforts by some states to establish limited licensing of legal technicians, and the range of laws and ethical rules for public protection. It is a central element the analytical framework which is at the core of the Commission's recommendation for state-by- state assessment of the possible future roles for, and increasing regulation of, nonlawyer activity.

The record before the Commission makes it clear that expanding access to justice through the services of document preparers, legal technicians, or other nonlawyer service providers carries with it both the risk of incompetent or even fraudulent services and the promise of excellent and high quality services. The states will have to take both risk and promise into account in their assessments.

Some states have already found the promise of sufficient value to permit an extensive range of legally protected nonlawyer activity that includes assisting self-representing individuals and representing other individuals pursuant to specific statutes, court rules or agency regulations. As to nonlawyers whose work is already authorized as a matter of current law under specific statutes or within the federal legal system, the Commission recommends that their work should be continued subject to review by the entity under whose authority their services are provided.

Representation by a lawyer is essential before tribunals that use formal evidentiary rules to determine complex matters. For simpler matters, many persons choose not to retain a lawyer's help. There is no bright line along which to determine when a lawyer's skills are needed. The record does reveal, however, that where lawyers may not be essential, nonlawyers may provide a variety of important law-related services. For example, the U.S. Supreme Court has determined that the complex task of preparing a patent application can be performed by nonlawyers admitted to practice by the United States Patent Office despite

a history that includes unscrupulous nonlawyer patent agents.

Similarly, in the area of tax preparation and related advice, even though significant economic interests are at stake, the consumer is allowed to represent himself, use self-help books or software, obtain tax advice from nonlawyers who work for the IRS, hire a nonlawyer tax preparer, employ a highly trained and regulated Certified Public Accountant, obtain the services of an IRS-approved "Enrolled Agent," or retain a lawyer.

As to Nonlawyers Whose Services Are Not Already Authorized Under Current Statutes or Other Law, the Commission Recommends That States Should Assess Whether and How To Regulate Their Activities.

Even with all the efforts of lawyers, bar associations, courts, and others, a significant gap in access to justice and to affordable services will probably remain. Nonlawyers might help to fill the gap. However, much of the unmet need involves legal issues that seem simple but turn out to have complex and far-reaching ramifications. In these situations, consumers can be seriously hurt by misinformation and bad advice. Any attempt to determine an appropriate level of protection or regulation will require a careful balancing of interests. Among these interests will be public safety, consumer protection, access to equal justice, affordability, individual choice, judicial economy, efficient operation of the marketplace, implementation of public policy and respect for state sovereignty.

Consequently, beyond the expansion of traditional paralegal roles, more widespread approval for nonlawyer roles in state administrative agencies, and continuation of nonlawyer activity which is already lawful, the Commission recommends that the states adopt an analytical approach in assessing whether and how to regulate other varied forms of nonlawyer activity that exist or are emerging in their respective jurisdictions. The Commission further recommends that the criteria for this analysis include the risk of harm the nonlawyer activities present, whether consumers can evaluate providers' qualifications, and whether the net effect of regulating the activities will be a benefit to the public. Finally, the Commission recommends that the highest courts take the lead in examining specific activities within their jurisdictions, with the active support and participation of the bar and the public.

The Commission recommends a specific analytical approach for use by the states in determining what level of regulation, if any, is appropriate. The approach will help in assessing whether a particular activity should be unregulated, regulated or prohibited. Three broad criteria are suggested:

1. Does the nonlawyer activity pose a serious risk to the consumer's life, health, safety or economic well-being?
2. Do potential consumers of law-related nonlawyer services have the knowledge needed to properly evaluate the qualifications of nonlawyers offering the services?
3. Do the actual benefits of regulation likely to accrue to the public outweigh any likely negative consequences of regulation?

Regulation of a nonlawyer activity may be needed if the activity presents a serious risk, if consumers cannot protect themselves against that risk because they will find it difficult or impossible to evaluate the nonlawyer service provider's qualifications, or if the likely benefits of regulation outweigh the likely negative consequences of regulation. The type of regulation chosen will depend upon the predicted costs and effectiveness of different options for reducing the predicted harm while avoiding counterbalancing negative consequences. The activity should be prohibited if no regulatory approach will effectively and economically achieve acceptably low levels of harm to consumers.

The first criterion involves judgments about degrees of injury. Of course there is some risk of harm in every activity. A state will need to consider how frequently a nonlawyer might make mistakes, whether those mistakes will actually cause injury, how substantial the injury will be, whether there is an effective remedy if injury occurs, and if there is any experience in other states on which to make such judgments. If there is relatively little serious risk to life, health, safety or economic well-being, regulation may not be needed.

The second criterion asks whether consumers can protect themselves by assessing provider qualifications, and will turn on whether the consumers will know what qualifications may be relevant and will be able to evaluate them. This criterion does not rely on the consumer's

ability to directly assess the quality of services provided because this is very difficult to do when professional services are involved. If consumers can protect themselves, then regulation may not be needed.

The third criterion involves balancing the actual benefits likely to arise from regulation against any negative consequences of that regulation. Although regulation or prohibition of an activity can reduce the risk of harm to consumers who cannot protect themselves adequately, some levels or forms of regulation may reduce access to justice. For example, will the regulatory system cause nonlawyers to raise their prices so much that increases in access will be lost? Moreover, certain forms of regulation may not provide adequate protection. In that regard, it will be essential to identify whether the regulatory system under consideration can and will actually be enforced.

At the root of this balancing lies a difficult question which each state will have to assess. How much does the consumer's interest in having at least some assistance from a nonlawyer justify the increased risk of harm to that consumer from possibly lower quality assistance?

As states conduct their assessments, they should consider a wide range of regulatory possibilities, depending upon the activity to be regulated. Among the simplest are consumer protection laws, unfair and deceptive trade practice statutes, criminal laws against fraud and the traditional remedies of actions sounding in negligence. A second group of regulatory possibilities includes design of affirmative consumer remedies, such as insurance, bonding, arbitration and mediation, or client protection fund requirements. A third approach is regulation through control of the forum, such as that found in administrative agencies, and might include prescribing forms, limiting access to the tribunal and requiring disclosure of the provider's nonlawyer status.

Finally, for certain types of activities, states will want to explore regulation by registration, certification or licensure. In this exploration, regulatory systems might include requirements related to disclosure, education, age, work experience, specialized training, recordkeeping, continuing education, compliance with ethical standards, disciplinary procedures and admission examinations.

The report concludes by giving examples of how these criteria might be employed by a state in its assessment of several common situations in which nonlawyer activity has been considered. The situations vary in complexity, potential for harm and in other ways, permitting the reader to see sample application of the Commission's proposed analytical framework. These examples include the document preparer who types or otherwise completes court-approved forms or other forms, the legal technician who assists a self-representer by providing both typing services and limited advice about a "simple" divorce, a legal technician who assists in a residential real estate sale, and a battered women's shelter advocate who, functioning as a legal technician, advises and assists a client in filing a complaint, seeking police action and preparing papers for a protective order.

CONCLUSION

The Commission's Report amply demonstrates that nonlawyers provide services which in many instances relate to the practice of law. We believe that this report fulfills the mandate of the Commission to investigate the extent of, and the areas in which, such practice takes place. The factual findings of the Commission demonstrate that nonlawyers, both as paralegals accountable to lawyers and in other roles permitted by law, have become an important part of the delivery of legal services, and that their expertise and dedication to the system have led to improvements in public access to affordable legal services. The work of the Commission has also uncovered many inadequacies among lawyers in providing professional services which have given rise to increasing dissatisfaction with our profession by the public. The debate over delivery of law-related services and their cost is a public concern that will be debated by the public, not just by the legal profession. This Report should be viewed by the bar as an opportunity to take those steps which will protect the public and at the same time provide increased access. If this Report is to have any value, it will be in the thoughtful consideration of it by the bar, the judiciary and the public. In the first instance, the bar must take the lead to assure that legal services are rendered in a manner

which will enhance public respect for the institutions of justice.

SUMMARY OF RECOMMENDATIONS

Whereas, Increasing the Public's Access to the Justice System and to Affordable Assistance With Its Legal and Law-Related Needs Is an Urgent Goal of the Legal Profession and the States; and

Whereas, The Protection of the Public from Harm Arising From Incompetent and Unethical Conduct By Persons Providing Legal or Law-Related Services Is an Urgent Goal of Both the Legal Profession and the States; and

Whereas, When Adequate Protections for the Public Are in Place, Nonlawyers Have Important Roles to Perform in Providing the Public With Access to Justice;

THEREFORE, The American Bar Association Commission on Nonlawyer Practice Recommends:

1. The American Bar Association, State, Local and Specialty Bar Associations, the Practicing Bar, Courts, Law Schools, and the Federal and State Governments Should Continue to Develop and Finance New and Improved Ways to Provide Access to Justice to Help the Public Meet Its Legal and Law-Related Needs.
2. The Range of Activities of Traditional Paralegals Should Be Expanded, With Lawyers Remaining Accountable for their Activities.
3. States Should Consider Allowing Nonlawyer Representation of Individuals In State Administrative Agency Proceedings. Nonlawyer Representers Should Be Subject To the Agencies' Standards of Practice and Discipline.
4. The American Bar Association Should Examine Its Ethical Rules, Policies and Standards to Ensure that they Promote the Delivery of Affordable Competent Services and Access to Justice.
5. The Activities of Nonlawyers Who Provide Assistance, Advice and Representation Authorized by Statute, Court Rule or Agency Regulation Should Be Continued, Subject to Review By the Entity Under Whose Authority the Services Are Performed.
6. With Regard to the Activities of All Other Nonlawyers, States Should Adopt an Analytical Approach in Assessing Whether and How To Regulate Varied Forms of Nonlawyer Activity that Exist or Are Emerging in Their Respective Jurisdictions. Criteria for this Analysis Should Include the Risk of Harm These Activities Present, Whether Consumers Can Evaluate Providers' Qualifications, and Whether the Net Effect of Regulating the Activities Will Be a Benefit to the Public. State Supreme Courts Should Take the Lead in Examining Specific Nonlawyer Activities Within Their Jurisdictions With the Active Support and Participation of the Bar and Public.

MINORITY REPORTS

We have served with dedicated colleagues on the Commission on Nonlawyer Practice, which conducted a comprehensive examination of the impact of nonlawyer practice and formulated policy recommendations for the American Bar Association. Our decision to offer this Minority Report reflects our belief that protection of the public is a paramount goal of the legal profession and of the justice system it serves. For attorneys, a license to practice law is more than a mere authorization to do lawyering, it is an assurance to the public that a lawyer places the interests of the client above all else and is qualified to competently serve those interests. Client protection should be no less when the providers of services are nonlawyers. This Minority Report does not concern itself with protection of lawyers and their economic interests, but rather is a reaffirmation of the obligation of public protection at all levels of the legal service system and by all service providers. One of the subscribers to this Report was appointed to the Commission in his role as Chair of the ABA Standing Committee on Lawyers' Responsibility for Client Protection and as a representative of the Center for

Professional Responsibility. Others of us also bring to our roles as commissioners deep concern over the protection of the public. Our commitment to client protection is an abiding one.

While we agree with most of the recommendations of this Report and with the thrust of the Report to increase access to justice, we believe that the Report does not sufficiently emphasize that the protection of the public should be an essential factor in any proposal to increase access. We disavow any inference that may be taken to the effect that access to justice is the paramount goal to be served, or that in doubtful cases, the access goal should be given greater weight than the goal of the protection of the public from the harm that may befall them at the hands of unskilled or unethical providers. In our judgment, the prospect of incompetent representation casts a long shadow over the doorway of access.

The failings of this Report to provide procedures to assure client protection are in stark contrast to the prominence given within the legal profession to self-regulation and public protection. This system did not emerge overnight, but is the product of years of experience and refinement. Public protection has become a goal essential to the integrity of the American legal system. This was reflected most recently by the ABA adoption of The Report of the Commission on Evaluation of Disciplinary Enforcement (known as the McKay Commission) which proposed numerous measures to strengthen disciplinary enforcement and expand public protection. It, therefore, seems incongruous that while efforts are made to further expand already stringent elements of lawyer accountability to clients, the Commission's Report makes no truly parallel effort to ensure protections when nonlawyers provide services directly to the public.

The disparity in public protection between lawyer and, as envisioned by this Report, nonlawyer providers, is evident. Those who retain a lawyer will be represented by a person who has met fitness standards and satisfied educational standards that include testing and licensure, and is also accountable for monetary damages for legal malpractice, insured to cover malpractice losses, and is subject to disciplinary sanction for misconduct. In addition, client protection funds exist today in all but one state to compensate clients for the defalcation of their lawyers.

Consumers who rely on a nonlawyer functioning outside the scope of lawyer accountability and forum regulation are assisted by a person who is not licensed or regulated, has not met any mandated educational or competency standards, and has not been subject to fitness review. The law surrounding these independent nonlawyers' activities to date reveals few meaningful remedies for client redress. Malpractice