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A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach To Defining the Practice of Law

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A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach To Defining the Practice of Law

Soha F. Turfler*

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* Candidate for J.D., Washington and Lee University, May 2005; B.A. University of New Mexico, May 2002. I would like to thank all of my family and friends for their love and support. I would especially like to express my gratitude to my parents, Robert and Behin Turfler. Without their support I would have been unable to write this Note. My thanks also to Professor Bradley Wendel, Virginia Vance, Carter Williams, and the law review editorial staff for their invaluable assistance in completing this Note. This Note is dedicated to the memory of Maryam Venus, my grandmother.

I. Introduction

Access to legal guidance is extremely important in American society. All persons are subject to the law—the law creates individual rights and responsibilities affecting many aspects of social and personal life.¹ The law protects and the law punishes—it is the main avenue through which justice and freedom are secured.² Ignorance of the law is often no excuse—individuals are expected to know the law and to understand their legal rights and obligations.³

Yet the law is also increasingly diverse and complex, and for many individuals it is extremely difficult to navigate through the legal web that surrounds their lives.⁴ The lawyer or attorney traditionally has fulfilled the role of gatekeeper and guide to the web of law.⁵ Yet many low- and middle-income Americans do not have access to an attorney because they lack adequate amounts of disposable income.⁶ Consequently, various reforms have

1. See, e.g., RICHARD SUSSKIND, *THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY* 11 (1996) ("The law is at the heart of our personal and social lives . . .").

2. See, e.g., CHRISTINE PARKER, *JUST LAWYERS: REGULATION AND ACCESS TO JUSTICE* 48 (1999) (describing how access to the law can help secure freedom and ultimately attain justice).

3. See, e.g., SUSSKIND, *supra* note 1, at 17 (discussing how the principle that ignorance of the law is no excuse means that all citizens are presumed to know the law).

4. See *id.* at 13 ("[W]e are all subject in our social and working lives, to a body of legal rules and principles that is so vast, diverse, and complicated that no one can understand their full applicability and impact.").

5. See, e.g., L. RAY PATTERSON & ELLIOT E. CHEATHAM, *THE PROFESSION OF LAW* 63 (1971) ("Law is the principal instrument of power in our society, and, since it is not self-applying, the lawyer is the principal participant in its administration. . . . The lawyer is necessary to interpret law to give it meaning for the individual, to apply law to give the individual its benefits, and . . . [l]aw is thus both a restraining and an enabling instrument of society.").

6. As Justice Douglas eloquently wrote in his dissent in *Hackin v. Arizona*, 389 U.S. 143 (1967):

Rights protected by the First Amendment include advocacy and petition for redress of grievance and the Fourteenth Amendment ensures equal justice for the poor in both criminal and civil actions. But to millions of Americans who are indigent and ignorant—and often members of minority groups—these rights are meaningless. They are helpless to assert their rights under the law without assistance. They suffer discrimination in housing and employment, are victimized by shady consumer sales practices, evicted from their homes at the whim of the landlord, denied welfare payments, and endure domestic strife without hope of the legal remedies of divorce, maintenance, or child custody decrees.

If true equal protection of the laws is to be realized, an indigent must be able to obtain assistance when he suffers a denial of his rights. Today, this goal is only a goal. Outside the area of criminal proceedings covered by our decisions in *Gideon*

sought to provide wider access to legal assistance. For example, legal aid programs hold the potential to address the needs of some lower income individuals, but many other individuals are still denied access to legal guidance.⁷ Therefore, many of these individuals attempt to ignore legal problems when they arise, or they may seek to redress these problems through the use of self-help.⁸ In a society where knowledge and access to the law is so important, the legal needs of many individuals remain unmet.⁹

This problem is serious and requires a solution. Much of the reform debate attempting to address inadequate access to legal guidance in past years has focused primarily on restructuring the delivery of services in the legal services market.¹⁰ For example, the public's legal needs traditionally have been met by locally regulated and operating attorneys practicing alone or in small firms.¹¹ Bans on multidisciplinary practice (MDP),¹² multijurisdictional

v. *Wainwright and Douglas v. California*, counsel is seldom available to the indigent.

Id. at 144–46 (Douglas, J., dissenting) (citations omitted); see also George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm*, 70 *FORDHAM L. REV.* 775, 775 (2001) (discussing how middle-class Americans lack access to legal services because they may be both unable to pay lawyers fees and ineligible for public assistance).

7. See, e.g., PARKER, *supra* note 2, at 31–41 (describing four waves of access to justice reform, including legal aid, which is unfortunately limited by its expense).

8. See, e.g., Christopher Curran, *The American Experience with Self-Regulation in the Medical and Legal Professions*, in *REGULATION OF PROFESSIONS: A LAW AND ECONOMICS APPROACH TO THE REGULATION OF ATTORNEYS AND PHYSICIANS IN THE US, BELGIUM, THE NETHERLANDS, GERMANY AND THE UK* 47, 57 (Michael Faure et al. eds., 1993) ("[I]t is not obvious that higher quality levels of services received from licensed sellers means the overall quality level of consumer consumption will rise. Higher average quality levels will drive output prices up and encourage consumers to substitute into lower cost services, like self-service."); see also Julee C. Fischer, Note, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 *IND. L. REV.* 121, 125 (2000) (discussing how self-help products are an attractive alternative to the high costs of an attorney).

9. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 241–43 (1988) (discussing the lack of access to legal guidance of low-income individuals and stating that "[o]n an extremely conservative estimate, the over-sixteen poor person encounters an average of one legal problem per year . . . poor people are constantly bumping into sharp legal things"). Luban calculates "over twenty million hours of necessary legal services that are by-and-large not provided." *Id.*

10. This Note uses the term "legal services" to refer to any activity or service that primarily or directly relates to and affects legal rights, particularly in the civil context. For examples of the reform debates, see *infra* Part II, which discusses multidisciplinary practice, multijurisdictional practice, and the unauthorized practice of law.

11. State courts have long claimed the inherent authority to regulate the practice of law and lawyers. See, e.g., *In re Attorney Discipline Sys.*, 967 P.2d 49, 54 (Cal. 1998) ("In California, the power to regulate the practice of law . . . has long been recognized to be among

practice (MJP),¹³ and the unauthorized practice of law (UPL) supported this traditional provision of services.¹⁴ However, society and governing law have changed drastically since this tradition emerged. The traditional figure of the locally operating attorney is being replaced by large firms with multistate and multinational branches.¹⁵ Many of the services that lawyers traditionally provided are being encroached upon by nonlawyers and information technology.¹⁶ Traditional notions of MDP, MJP, and UPL likewise demand

the inherent powers of the [courts]. Indeed, every state in the United States recognizes that the power to admit and to discipline attorneys rests in the judiciary."); *In re Day*, 54 N.E. 646, 650–53 (Ill. 1899) (discussing the historical regulation of the bar and confirming the judiciary's power to regulate the practice of law); see also Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 796 (2003) (discussing state courts' power over the unauthorized practice of law); Joseph R. Jolin, *The Legal Profession: Education and Entry*, in REGULATING THE PROFESSIONS 201, 209 (Roger D. Blair & Stephen Rubin eds., 1980) (discussing regulation of the legal profession and stating that "[i]t is elementary that lawyers are officers of the judicial branch of our government. Thus in a large part, regulation is in the hands of the courts and those persons and entities to whom the courts may have granted a role"). Scholars identify four tests that courts developed in order to determine whether an activity constitutes the unauthorized practice of law by a nonlawyer: the traditional practice test, the professional judgment test, the incidental legal services test, and the public harm test or situational approach. See, e.g., Kathleen Eleanor Justice, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179, 187–90 (1991) (discussing the four tests and noting the inconsistency in defining the practice of law).

12. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.4 (2002) (prohibiting a lawyer from forming a partnership with a nonlawyer and from sharing legal fees with a nonlawyer).

13. See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY DR 3-101(B) (1986) ("A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."). But see *Sperry v. Florida*, 373 U.S. 379 (1963) (allowing a lawyer to engage in multijurisdictional practice when such conduct was authorized by preemptive federal legislation).

14. See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY DR 3-101(A) (1986) ("A lawyer shall not aid a non-lawyer in the unauthorized practice of law.").

15. See, e.g., Chet Bridger, *'Blue Blood' Law Firms Dying; the Practice of Law Has Changed Greatly Since the Days When the Good Old Boys Would Hang Around and Meet Clients at the Buffalo Club*, BUFFALO NEWS, Nov. 11, 2001, at B7 (reporting that "[e]conomics 101 has caught up with the law business nationally . . . [increased competition and other] market forces have prompted a number of well-known local firms to disband in recent years").

16. See, e.g., ABA STANDING COMM. ON LAWYERS' RESPONSIBILITY FOR CLIENT PROTECTION, 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE xvi–xvii (1996) (discussing encroachments on the bar's jurisdiction, including efforts of paralegals and computer technology); Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 LAW & SOC'Y REV. 713, 725 (1999) ("Much as craftspeople were displaced by early technological developments and the division of tasks into relatively simple elements, formal professionals are being displaced by service providers organized around highly specialized tasks who may, when needed, draw upon modern technological tools to access information."). See

reassessment, and much scholarly debate has concerned the need to reconceptualize the legal services market.¹⁷ Underlying these debates is the notion that the delivery of legal services necessarily involves the regulation of the practice of law.¹⁸ The notion is that the practice of law—the delivery of certain legal services—requires state regulation to protect the public from incompetent providers. Yet there is no clear consensus on what is meant by the "practice of law."¹⁹ Some reformers recognize the need for a definition of

generally SUSSKIND, *supra* note 1 (discussing the future of law as including effective use of information technology).

17. See, e.g., Robert R. Keatinge, *Multidimensional Practice in a World of Invincible Ignorance: MDP, MJP, and Ancillary Business After Enron*, 44 ARIZ. L. REV. 717, 717 (2002) (discussing changes in the legal services market). Keatinge states that:

As lawyers' services and the manner in which those services are provided expand and change, the rules governing lawyers and legal services must respond. The forces behind the change include clients' increasing disregard for state and national boundaries; the growth in the types of services being provided by lawyers, often to include services that either historically have been provided by others or which are entirely new; and the encroachment on the work of legal professionals by nonlawyers and interactive software.

Id. (footnote omitted); see also ABA STANDING COMM. ON LAWYERS' RESPONSIBILITY FOR CLIENT PROTECTION, *supra* note 16, at xix–xx ("The ebb and flow of UPL regulation by the American bar, therefore, has been affected primarily by external forces. These include court decisions, the cost of litigation, the consumer movement, increased demands to satisfy unmet legal needs, technology, and other factors beyond the bar's control.").

18. See *infra* note 23 (discussing how regulation of the legal services market involves regulation of the legal profession).

19. Definitions of the practice of law vary greatly from state to state, and even scholars lack a consensus on what activities the practice of law encompasses, although many argue that it does not include routine services, as will be discussed in Part II.A.1.c and Part III. See, e.g., ALA. CODE § 34-3-6 (2003) (defining the practice of law as including anyone who appears before court, gives legal advice, or acts in a legal representative capacity for consideration and making exceptions for several nonlawyer providers); KY. REV. STAT. ANN. SCR 3.020 (2003) ("The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services."); MO. ANN. STAT. § 484.010 (West 2004) (defining the practice of law as "the appearance as an advocate in a representative capacity or the drawing of papers . . . or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record . . . or any body . . . constituted by law or having authority to settle controversies"); R.I. GEN. LAWS § 11-27-2 (2003) (defining the practice of law as "the doing of any act for another person usually done by attorneys at law in the course of their profession" and listing several activities included within the definition including representation before a court, giving legal advice, and drafting legal instruments); *Dressel v. Ameribank*, 664 N.W.2d 151, 157 (Mich. 2003) ("[A] person engages in the practice of law when he counsels or assists another in matters that require the use of legal discretion and profound legal knowledge."). For a recent comprehensive list of state definitions, see AMERICAN BAR ASSOCIATION TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT, app. A (2003) [hereinafter TASK FORCE REPORT], available at

the practice of law. Attempts to formulate a definition, however, largely have been met by failure.²⁰ This Note contends that the legal community should formulate a model definition of the practice of law to address the many issues arising from restructuring the legal services market. Ultimately, a model definition is needed to help remedy problems with access to law and justice in modern American society. When the practice of law has been defined adequately, it will be easier to develop and determine better and more efficient ways of providing legal services to the public. Furthermore, lawyers, by taking the initiative and defining the practice of law, can improve the image of the legal profession in the eyes of the public.²¹ This Note posits that the definition of the practice of law, although often shrugged off as unnecessary or unachievable, actually plays a vital role in the legal services market. Furthermore, if the legal profession is unwilling to formulate a definition, the profession may find itself stripped of much of its current authority over the legal services market. This Note also contends that the prior approach taken in defining the practice of law is inefficient and is contributing to the difficulty of formulating a model definition. Therefore, this Note presents an alternative approach for defining what constitutes the practice of law.

Part II of this Note addresses the need for a definition of the practice of law and examines the debate over UPL in order to demonstrate how the definition of the practice of law can affect the legal services market. Part III discusses the need for the legal community to formulate a model definition and examines a recent effort by the American Bar Association towards this end. Part IV discusses a conceptual approach frequently taken in defining the practice of law and instead proposes an alternative method and perspective.

II. The Need for a Definition of the Practice of Law

The practice of law has often been approached through an "I know it when I see it" attitude; courts and critics frequently express the sentiment that the practice of law is impossible to define.²² There is, however, a definite need

http://www.abanet.org/cpr/model-def/model_def_statutes.pdf.

20. See *infra* Part III.A (discussing the appointment, activities, and recommendations of the Task Force on the Model Definition of the Practice of Law).

21. See *infra* Part III.D (discussing how a clear definition of the practice of law can improve the image of the profession in the eyes of the public).

22. See, e.g., *Bd. of Overseers of the Bar v. Mangan*, 763 A.2d 1189, 1193 (Me. 2001) (discussing the difficulty of formulating a definition of the practice of law to fit all situations and stating that "[t]he determination of what constitutes the practice of law is very fact specific"); Keatinge, *supra* note 17, at 762 (discussing a fact-specific alternative for the

for a clear definition of the practice of law. The primary importance of the definition is that it interacts with prohibitions against the unauthorized practice of law to establish what activities or legal services the state will regulate.²³ In other words, the definitions of the practice of law and the unauthorized practice of law determine *who* can provide *what* legal services to the public.²⁴

definition of the practice of law). Keatinge states:

In a world in which professional services are changing, this may be the only truly workable approach. Under this approach, separate rules may apply to such activities as providing representation to the indigent, acting as in-house counsel, practicing as an out-of-state attorney, acting as a third-party neutral, acting pursuant to another professional license, and performing legislative lobbying.

Id. Linda Galler, however, presents a different view:

To date, the practice of law has been defined only in rudimentary fashion by vague statutes and court rules as well as haphazard court decisions. While an "I know it when I see it" approach might have served Justice Stewart's needs in defining pornography, an analogous strategy in defining law practice in the context of MDPs would reduce, or perhaps even negate, the effectiveness or value of any regulatory scheme adopted by the states.

Linda Galler, "Practice of Law" in the *New Millennium: New Roles, New Rules, But No Definitions*, 72 TEMP. L. REV. 1001, 1001-02 (1999) (citations omitted).

23. See Keatinge, *supra* note 17, at 722 (describing the penalties for the unauthorized practice of law). Keatinge states that "[t]he principal application of the definition of the practice of law occurs in the enforcement of rules and statutes proscribing the unauthorized practice of law. In general, most states have statutes or rules that prohibit the 'practice of law' by persons not licensed to practice law." *Id.* at 753. For example, by restricting the practice of law to lawyers, nonlawyers are restricted from performing those activities considered to constitute the practice of law. By regulating lawyers, the state also is regulating "the practice of law" by restricting specified activities to certain service providers and then regulating those providers. This function of the definition is seen in many judicial opinions concerning the unauthorized practice of law. For a sampling of these opinions and further examination of the relationship between "the practice of law" and the "unauthorized practice of law," see *infra* notes 24-26 and accompanying text.

24. The practice of law can determine the *what* in this sentence, whereas the "unauthorized practice of law" determines the *who*. See *infra* note 26 and accompanying text (discussing the interplay between the unauthorized practice of law and the practice of law). Of course, the distinction between the two may not be so clear-cut. A statement in a recent Seventh Circuit opinion illustrates and supports this distinction:

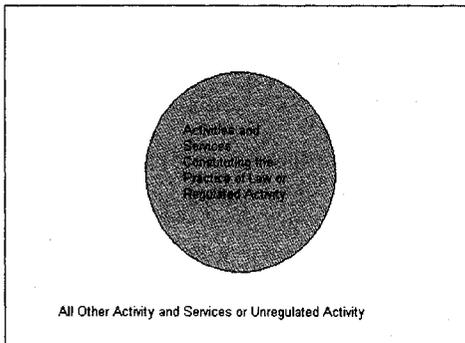
The issue of whether Appellants engaged in the unauthorized practice of law requires us to examine, as a preliminary matter, what constitutes the practice of law. In Illinois, the practice of law includes, at a minimum, representation provided in court proceedings along with any services rendered incident thereto, even if rendered out of court. More generally, providing *any* advice or other service "requiring the use of any legal skill or knowledge, . . . the legal effect of which, under the facts and conditions involved, must be carefully determined," amounts to practicing law. Only under the direct supervision of a licensed attorney may certain of these functions be performed by a paralegal. Absent the imprimatur of meaningful attorney supervision, any legal advice or other legal service provided by a nonlawyer constitutes the unauthorized practice of law.

Thus, the definition of the practice of law has an almost symbiotic relationship with the unauthorized practice of law. In order to understand the relationship between the practice of law and the unauthorized practice of law, it is useful to conceptualize the practice of law as encompassing a particular sphere of legal services or activities. Every service falling inside the sphere is considered the practice of law; any activity falling outside of the sphere is not considered the practice of law.²⁵ When someone not authorized to practice law provides services falling within that sphere, that person is liable for the unauthorized practice of law. Likewise, a person cannot be liable for the unauthorized practice of law when performing a service falling outside of the sphere because he or she has not "practiced" law by performing that activity.

The two concepts of the practice of law and the unauthorized practice of law are so interrelated that the fine distinction between them can be easily misunderstood. However, the two concepts are in fact different. The definition of the practice of law involves what *activities* are considered to be within the sphere, whereas the concept of unauthorized practice has to do with *who* may perform the services falling within that sphere.²⁶ Thus, the practice

United States v. Johnson, 327 F.3d 554, 561 (7th Cir. 2003) (citations omitted); *see also* Johnstone, *supra* note 11, at 806 (discussing the unauthorized practice of law and stating that "[t]he underlying purpose of this field of law is regulating who may provide legal services and under what circumstances"). The relationship between the two concepts will be further explored in this Part of the Note.

25. The following is a useful visual conception of the description of the sphere of regulated activities found in the accompanying text above:



26. This distinction is implicit in many statutes and court opinions, although it is rarely explicitly pointed out. *See, e.g., In re Skobinsky*, 167 B.R. 45, 57 (Bankr. E.D. Pa. 1994) ("An unauthorized practice of law violation occurs whenever a person engages in activity restricted to the purview of a licensed practitioner of law. Therefore, unless appellant is a duly licensed attorney, his experience is irrelevant to this appeal."). Discussing an activity as constituting the unauthorized practice of law blurs this fine distinction. Whether or not an activity will constitute the unauthorized practice of law will always depend upon who is performing that

of law operates to determine which legal services will be regulated by the state, and the prohibition against unauthorized practice of law determines who may perform those regulated services. This sphere may encompass a broad or narrow swath of activities, resulting in either many or few regulated services. If the definition of the practice of law covers a broad amount of activity, then exceptions will probably be carved into the sphere, which will shield particular service providers from liability for providing certain legal services.²⁷

The definitions of the practice of law and the unauthorized practice of law can have a profound effect on how legal services are provided to the public. By working with the ban on unauthorized practice to determine who can provide what services, the definition of the practice of law directly influences competition in the legal services market, which in turn has great influence upon the price of legal services.²⁸ The price of those services then directly affects who is able to afford legal services, and consequently controls access to legal guidance.²⁹

activity—the activity cannot constitute unauthorized practice when an authorized person is performs it. Black's Law Dictionary also demonstrates this distinction by defining the practice of law:

The professional work of a duly licensed lawyer, encompassing a broad range of services such as conducting cases in court, preparing papers necessary to bring about various transactions from conveying land to effecting corporate mergers, preparing legal opinions on various points of law, drafting wills and other estate-planning documents, and advising clients on countless types of legal questions. The term also includes activities that comparatively few lawyers engage in but that require legal expertise, such as drafting legislation and court rules.

BLACK'S LAW DICTIONARY 1191–92 (7th ed. 1999). Black's defines the unauthorized practice of law as "[t]he practice of law by a person, typically a nonlawyer, who has not been licensed or admitted to practice law in a given jurisdiction." *Id.* at 1192.

27. If a broad, largely unqualified definition of the practice of law is controlling in a jurisdiction, then certain service providers, such as title insurers or real estate brokers, may be permitted to perform services that technically fall within the definition. The exemption for that service provider may be found in a variety of places, such as statutes or case law definitions of either the practice of law or the unauthorized practice of law, or may be found in statutes or case law related to that particular service or provider. For example, Louisiana's definition of the practice of law includes certifying or giving opinion to title, but an exception in the statute provides that "[n]othing in this Section prohibits any person from . . . preparing abstracts of title; or from insuring titles to property . . . but every title insurance contract relating to immovable property must be based upon the certification or opinion of a licensed Louisiana attorney authorized to engage in the practice of law." LA. REV. STAT. ANN. § 37: 212(A)(2)(d), (B) (West 2003).

28. See, e.g., John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 93 (2000) (discussing the anticompetitive effect of unauthorized practice of law prohibitions which may result in higher fees).

29. The unauthorized practice of law is part of a licensing regime that shields local

In order to fully understand the relationship between the definition of the practice of law and the legal services market, it is useful to understand some of the reasoning behind recent debates regarding reform of the legal services market. The following sections present a summary of the debates behind MDP, MJP, and UPL in order to illustrate how these reforms can influence access to justice and to demonstrate how the definition of the practice of law relates to those debates. Incidentally, the unauthorized practice of law is often understood to refer to what legal services a nonlawyer may or may not legally offer to the public. Unauthorized practice rules, however, refer not only to what services a nonlawyer may provide, but also to what services a lawyer may provide to the public in any given jurisdiction.³⁰ MJP encompasses the

lawyers from competition with alternative providers, both nonlawyers and nonlocal lawyers. See, e.g., Roger C. Cramton, *The Future of the Legal Profession: Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 544–45 (1994) (discussing the regulatory licensing regime of the legal profession, including bans on the unauthorized practice of law). Part II.A will explore the definition of the practice of law and its relationship with this licensing regime and the legal services market, although this Note presents a simplified version of the effects that the licensing of services has on society. Christopher Curran identifies five general categories of the social costs of occupational licensing. Curran, *supra* note 8, at 73. Two of these categories are price distortions and service availability distortions in the professional services market. *Id.* Curran states:

[S]uccessful occupational licensing alters the range of services available to consumers. The stated objective of all occupational licensing is to remove low quality services from the market. In reality, regulators can only remove some of the low quality services from the market. Higher prices due to occupational licensing will cause consumers to increase the amount of self-provision of services or to delay the purchase of service. Because purchasers of lower quality services have withdrawn from the market, the average level of services received by consumers purchasing services will rise. However, the average quality of services received by all members of society may not rise Since the quality of services is a normal good, it is reasonable to conclude the poor bear a greater proportion of these costs than do the wealthy. Such inequities in developed economies are troublesome.

Curran, *supra* note 8, at 77.

30. See, e.g., AMERICAN BAR ASSOCIATION CTR. FOR PROF'L RESPONSIBILITY, CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 8 (2002) [hereinafter ABA MJP REPORT] (discussing the relationship between unauthorized practice of law rules and multijurisdictional practice), available at http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf. The report states:

States give effect to jurisdictional restrictions through UPL statutes and proscriptions in the rules of professional conduct such as those based on ABA Model Rule 5.5. Although UPL provisions are most often applied to nonlawyers, they have also been applied to lawyers. They subject lawyers to the risk of sanction (in some states, criminal sanction) for practicing law within a state where they are not licensed. Besides being enforced directly, these provisions may be invoked in disciplinary proceedings based on disciplinary rules that prohibit

latter application of unauthorized practice, and this Note will refer to the former application by the designation UPL.

A. The Definition of the Practice of Law and Its Role in the Restructuring of the Legal Services Market

In recent years, the debates over MDP, MJP, and UPL all dealt with the restructuring of the legal services market, and each debate involved a reconceptualization and consideration of what it means to practice law.³¹ For example, MDPs are entities in which lawyers and nonlawyers partner together to provide comprehensive legal and nonlegal services to their clients.³² Client wants and needs often encompass both legal and nonlegal issues, and MDPs have the ability to offer services at lower prices because of lower transactional costs.³³ However, there are serious objections to the use of MDPs, such as the fear of losing lawyers' independent professional judgment.³⁴ The definition of

lawyers from engaging in, or assisting others in, the unauthorized practice of law, in fee forfeiture actions or other civil actions by clients against their lawyers or by opposing parties in the context of disqualification motions.

Id.; see also Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977, 1028 (2003) ("Initially, it is worth noting that statutes and state ethics rules regarding unauthorized practice . . . regulate two different forms of conduct. . . they prohibit non-lawyers from engaging in law practice. . . [and they also] regulate what *lawyers* can do in a particular state when they are not licensed to practice in that jurisdiction . . .").

31. See, e.g., Keatinge, *supra* note 17, at 758 ("The concepts of MDP, MJP, and ancillary business all depend upon the definition of the practice of law and the concept of the unauthorized practice of law.").

32. See, e.g., ABA COMM'N ON MULTIDISCIPLINARY PRACTICE, RECOMMENDATIONS, REPORT, AND REPORTER'S NOTES ON THE ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE, app. A (June 8, 1999) (defining the term MDP as "a partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client"), available at <http://www.abanet.org/cpr/mdpappendixa.html>.

33. See Dzienkowski & Peroni, *supra* note 28, at 118–23 (discussing the benefits achieved through the use of a MDP). Dzienkowski & Peroni describe these benefits:

[A] client with legal and non-legal problems does not need to schedule appointments with several service providers who may or may not have worked together before. Eliminated transaction costs may include duplication of effort, the need for the professionals to consult each other in costly conferences or meetings, and the need for each provider to bill a sufficient dollar amount to ensure that the transaction is viable from a business and liability perspective.

Id. at 118–19.

34. See *id.* at 137 ("The opponents of MDPs argue that lawyers' participation in multidisciplinary practice raises serious concerns about each of the core ethical values of the legal profession."); John D. Messina, *Lawyer + Layman: A Recipe for Disaster! Why the Ban*

the practice of law is related to the MDP debate in many respects. For example, to the extent that nonlawyers may provide legal services in a MDP, they may engage in the unauthorized practice of law.³⁵ The resolution of this issue brings up the question of exactly what activities fall within the definition of the practice of law.³⁶

The definition of the practice of law is also important to the debate behind multijurisdictional practice, or MJP. The individual states have traditionally regulated lawyers, but the importance of state boundaries lessen as the ebb and flow of interstate transactions increases.³⁷ MJP may lower the price of legal services by diminishing the need to retain local counsel when legal issues cross jurisdictional lines.³⁸ On the other hand, the states have an interest in regulating the practice of law in their individual jurisdictions to ensure competence in the legal services market—an outside lawyer may not be familiar enough with local rules and procedures to give competent advice, and incompetent providers could harm unwary clients.³⁹ The debate over MJP ultimately led to the new revision of Model Rule 5.5, which if adopted by the states, allows multijurisdictional practice on a "reasonably related" and "temporary" basis.⁴⁰ Lawyers alternatively have the option of being admitted

on MDP Should Remain, 62 U. PITT. L. REV. 367, 378–82 (2000) (discussing ethical problems presented by MDPs, including the loss of lawyers' professional independence). Perlman, *supra* note 30, at 1038 (discussing views opposing and favoring MDPs and stating that "[o]ne might argue that lawyers would necessarily lose professional independence if they partnered with non-lawyers because non-lawyers would control the legal work that MDP lawyers perform").

35. See, e.g., Dzienkowski & Peroni, *supra* note 28, at 111–12 (discussing the possibility of liability for the unauthorized practice of law for nonlawyers providing legal services in the context of tax practice).

36. See generally Johnstone, *supra* note 11, at 801 (discussing multidisciplinary practice and how it relates to the unauthorized practice of law debate and also noting the current status of the MDP debate). The current status of the debate over MDP is reflected in Model Rule 5.4. See MODEL RULES OF PROF'L CONDUCT R. 5.4 (2002) (prohibiting a lawyer from forming a partnership with a nonlawyer and from sharing legal fees with a nonlawyer). See generally Keatinge, *supra* note 17 (evaluating MDPs in light of the recent Enron scandal).

37. See, e.g., Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 666–69 (1995) (discussing the transformation of the legal profession, especially the increasingly interstate nature of the practice of law).

38. See, e.g., ABA MJP REPORT, *supra* note 30, at 12 (discussing the costs of a regulatory regime that does not accommodate multijurisdictional practice, including creating unnecessary expense by engaging local counsel).

39. See, e.g., Perlman, *supra* note 30, at 1034 (discussing the debate behind multijurisdictional practice, including one view stating that a "Massachusetts lawyer is less likely to be familiar with the relevant law in Rhode Island than a Rhode Island lawyer, so strict MJP provisions are necessary as a matter of consumer protection").

40. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2002); see also Perlman, *supra* note 30, at

pro hac vice,⁴¹ but this procedure does not cover transactional practice.⁴² Many of the transactions that lawyers provide in other jurisdictions may fall within the sphere of the practice of law, and to the extent that those services fall outside of the Model Rule or *pro hac vice* exceptions, that lawyer engages in the unauthorized practice of law.⁴³ A definition of the practice of law could clarify what services a nonlocal attorney could provide in a jurisdiction without liability for unauthorized practice.⁴⁴

1033 (stating that the recently approved revision would make it easier for lawyers to practice multijurisdictionally if the rule is adopted by the states); David W. Raack, *The Ethics 2000 Commission's Proposed Revision of the Model Rules: Substantive Change or Just a Makeover?*, 27 OHIO N.U. L. REV. 233, 258–60 (2001) (discussing the Ethics 2000 revision of Model Rule 5.5).

41. Black's Law Dictionary defines *pro hac vice* as "[f]or this occasion or particular purpose. The phrase usu[ally] refers to a lawyer who has not been admitted to practice in a particular jurisdiction but who is admitted there temporarily for the purpose of conducting a particular case." BLACK'S LAW DICTIONARY 1227 (7th ed. 1999).

42. See, e.g., ABA MJP REPORT, *supra* note 30, at 8 ("For example, every jurisdiction permits *pro hac vice* admission of out-of-state lawyers appearing before a tribunal, although the processes and standards for *pro hac vice* admission differ. For transactional and counseling practices, and other work outside court or agency proceedings, there is no counterpart to *pro hac vice* admission."); see also La Tanya James & Siyeon Lee, Article, *Adapting the Unauthorized Practice of Law Provisions to Modern Legal Practice*, 14 GEO. J. LEGAL ETHICS 1135, 1137–39 (2001) (discussing the potential for unauthorized practice of law liability for MJP, which arises primarily in transactional practice "because lawyers who litigate may be able to be admitted in that state without examination through *pro hac vice* admission. However, states have no procedure for admitting an out-of-state lawyer when the legal services being provided do not involve a courtroom appearance.").

43. As the ABA Committee on Multijurisdictional Practice notes in its report and recommendations:

The explosion of technology and the increasing complexity of legal practice have resulted in the need for lawyers to cross state borders to afford clients competent representation.

In connection with litigation, it is not uncommon for parties to retain lawyers in whom they have particular confidence, or with whom they have a prior relationship, to represent them in lawsuits in jurisdictions in which the lawyers are not licensed, and for these lawyers to be admitted *pro hac vice* to appear on behalf of the client. However, lawyers also perform work outside their home states for which they cannot obtain *pro hac vice* admission, which is not available prior to the filing of a lawsuit or to authorize work that is not related to a judicial proceeding in the particular state. For example, litigators commonly go to states other than those in which they are authorized to practice law in order to review documents, interview witnesses, enter into negotiations, and conduct other activities that are either ancillary to a lawsuit pending in a state in which they are authorized to practice or that are performed before a lawsuit is filed.

ABA MJP REPORT, *supra* note 30, at 10.

44. See, e.g., Diane Leigh Babb, *Take Caution When Representing Clients Across State Lines: The Services Provided May Constitute the Unauthorized Practice of Law*, 50 ALA. L.

1. *The Debate Behind UPL*

The debate behind UPL provides the most conceptually direct application of the definition of the practice of law: The definition of the practice of law directly affects what services nonlawyers may offer to the public. Therefore, the definition has a direct effect on access to legal services. Rules banning the unauthorized practice of law shield lawyers from competition with nonlawyers in the delivery of all legal services considered to constitute the practice of law.⁴⁵ The resulting "legal monopoly" allows for uncompetitive prices, and as the costs of legal services rise, less affluent individuals are pushed out of the market.⁴⁶ Practitioners justify this legal monopoly by arguing that it protects

REV. 535, 537 (1999) (examining varying definitions of the practice of law and stating that "[t]hese broad definitions of the practice of law make it nearly impossible for an out-of-state attorney to represent his or her client without the threat of sanctions"). Babb contends, "[t]he application of these definitions in determining whether an attorney has engaged in the unauthorized practice of law should be modified in order to conform with the role of interstate transactions in modern society." *Id.*

45. See LUBAN, *supra* note 9, at 246–47 ("By restricting the practice of law to members of the bar, of course, a professional monopoly is guaranteed and a higher-than-otherwise level of lawyers' fees is maintained."); Justice, *supra* note 11, at 180 ("The legal profession consistently has fought outside competition and successfully has controlled competition to ensure professional survival. . . . state statutes and bar association regulations forbid the practice of law by nonlawyers. . . . These limitations, however, may be resulting in denial of access to the legal system to the indigent public.").

46. See, e.g., Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2581 (1999) (discussing the legal monopoly). Denckla states:

The nexus between required bar admission and the states' proscription of UPL has created a "lawyer monopoly" over a great deal of activity outside of the courts, which are the traditional domain of lawyering.

As a result, UPL restrictions often prohibit nonlawyers from either giving out-of-court legal advice or helping prepare legal documents, except where no accompanying advice is given. This type of prohibition overwhelmingly affects people of limited means, who are unable to retain a lawyer based on an inability to pay fees or, in the case of a pro bono lawyer, based on limited availability of free legal help.

Id. Professor Rhode points out that the legal monopoly is somewhat of a misnomer: "In technical terms, the profession does not enjoy a monopoly in providing legal services; its conduct in restricting entry and negotiating agreements with competing groups is that of a trade association or cartel, rather than that of a monopolist." Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 4 n.7 (1981). Sherman Act challenges to the legal monopoly usually have been rejected under either the state action doctrine or the Noerr-Pennington doctrine. See, e.g., *Lender's Serv., Inc. v. Dayton Bar Ass'n*, 758 F. Supp 429, 445–65 (S.D. Ohio 1991) (discussing state action and Noerr-Pennington antitrust immunity and rejecting an antitrust challenge to an unauthorized practice of law action by finding that the bar association

the public from incompetent providers.⁴⁷ Critics attack the legal monopoly as protecting lawyers' self-interest and maintaining lawyers' incomes.⁴⁸

The following three sections present a brief discussion of three differing views on the possible scope of the definition of the practice of law. A broad definition enlarges the sphere of regulated activities to encompass most, if not all, of the legal services market.⁴⁹ A narrow definition narrows the sphere so that the practice of law is restricted and encompasses only some legal services.⁵⁰ The case for the repeal of UPL presents a situation where the definition of the practice of law is no longer of any special relevance—there is no difference between services found within the sphere and those found outside it because any willing provider can provide legal services.⁵¹ Although this Note ultimately determines that a narrow definition would best serve the public's interest, the other two views also have merit and raise some issues that should be considered when formulating a definition. The following sections attempt to present the merits of each competing view.

a. The Argument for a Broad Definition

The argument that rules defining the practice of law should be broad in scope has its basis in the need to protect the public.⁵² This need to regulate

is entitled to immunity). *See generally* Stephen Rubin, *The Legal Web of Professional Regulation*, in *REGULATING THE PROFESSIONS* 29, 33–43 (Roger D. Blair & Stephen Rubin eds., 1980) (discussing the history of the "public calling" and how it relates to regulation of the professions and discussing the Parker state action doctrine).

47. *See infra* Part II.A.1.a (discussing the arguments underlying a broad definition of the practice of law, one that upholds much of the legal monopoly); *see also infra* note 52 and accompanying text (discussing how a broad definition of the practice of law is based upon the need to protect the public).

48. *See infra* Part II.A.1.b (discussing the arguments for the repeal of unauthorized practice of law statutes, which some believe uphold the legal monopoly and are not ultimately in the public interest).

49. *See infra* Part II.A.1.a (discussing the argument for a broad definition of the practice of law).

50. *See infra* Part II.A.1.c (discussing the argument for a narrow definition of the practice of law).

51. *See infra* Part II.A.1.b (discussing the argument for the repeal of UPL).

52. *See, e.g.,* Denckla, *supra* note 46, at 2593–94 (discussing how the Model Code's Ethical Considerations reflected the justification for prohibiting UPL). Denckla believes the Model Code reflects four justifying reasons for prohibiting UPL:

[T]hese ECs reflect the dominant justifications for prohibiting UPL and restricting the practice of law to members of the bar: (1) protecting the public against harmful incompetence and unscrupulous conduct; (2) protecting the administration of

and restrict much of the legal services market is caused by imperfections found in that market.⁵³ Two imperfections in particular characterize the rationale for the restriction of the legal services market.

The first imperfection is found in the heterogeneity of service providers.⁵⁴ The arguments to ban nonlawyer providers from the marketplace are based on the belief that nonlawyers provide legal services of inferior quality and thus entail a greater risk of harm to consumers. Nonlawyers, lacking formal training in the law, will be unable to deal with or to recognize legal complexities when they arise, and clients' legal interests will be harmed by their incompetence.⁵⁵ The resulting harm from incompetent services is so severe that it should be avoided.⁵⁶ Essentially, because nonlawyers are

justice from incompetent or unscrupulous nonlawyers; (3) supplying a system of discipline to regulate lawyers; and (4) rewarding lawyers with an economic advantage over their potential and actual competitors in exchange for their submitting to regulation.

Id. at 2594.

53. See, e.g., Cramton, *supra* note 29, at 544–46 (discussing how the licensing of legal service providers has been justified through economic arguments based on imperfections in the market for legal services, including information asymmetry). This Note does not attempt a full economic analysis of the legal services market, but only seeks to present the essence of the varying arguments for regulation or deregulation. For further examination of the market for legal services, see generally *REGULATING THE PROFESSIONS* (Roger D. Blair & Stephen Rubin eds., 1980) and *REGULATION OF PROFESSIONS: A LAW AND ECONOMICS APPROACH TO THE REGULATION OF ATTORNEYS AND PHYSICIANS IN THE US, BELGIUM, THE NETHERLANDS, GERMANY AND THE UK* (Michael Faure et al., eds., 1993).

54. Ira Horowitz points out several imperfections found in the market for professional services, including the heterogeneity of professional skills. He notes:

Professionals offer skills that require specialized knowledge and considerable formal training and that, especially in the perceptions of the persons hiring the skills, generally benefit from experience. A professional's talents are not directly transferable to other professions, nor do practicing professionals comprise a homogeneous group. Thus, prospective purchasers are confronted by differentiated professional services. This differentiation, whether real or imagined, may be the intended result of the individual professional's specific acts or may stem from inherent quality differences affected by the nonhomogeneity of the professionals' skills, training, and experience.

Ira Horowitz, *The Economic Foundations of Self-Regulation in the Professions*, in *REGULATING THE PROFESSIONS* 3, 5–6 (Roger D. Blair & Stephen Rubin eds., 1980). Because of the nature of professional services, nonlawyers, who lack the training and experience in the law that lawyers possess, are thought to offer inferior quality services.

55. See, e.g., Dzienkowski & Peroni, *supra* note 28, at 92 ("The stated purpose of the unauthorized-practice-of-law rules is to protect the public. The theory is that a non-lawyer delivering legal services will make errors in legal work that a lawyer would not make, and will thereby harm the consumer of the legal services.").

56. See, e.g., J. Howard Beales, III, *The Economics of Regulating the Professions*, in *REGULATING THE PROFESSIONS* 125, 127 (Roger D. Blair & Stephen Rubin eds., 1980)

assumed to offer inferior services, a client will be more likely to be harmed when he or she receives legal services from a nonlawyer. This potential for harm should be avoided through regulation.

On the other hand, the inferior quality of nonlawyer services alone would not justify a complete ban on nonlawyer practice. If nonlawyers consistently gave inferior services, and clients were consistently harmed, then market forces would weed nonlawyer providers out of the market. Clients would not seek out inferior and damaging services for their legal needs, and nonlawyers would be unable to survive in the marketplace.⁵⁷ However, another imperfection in the market for legal services prevents consumers from avoiding these risks and thus strengthens the argument for regulation.

A second imperfection found in the legal services market is one of information asymmetry—legal services consumers are unable to evaluate the quality of the services that they are seeking or that they have received.⁵⁸ In any market there may be a difference between the amount of information that either the seller or the buyer possesses.⁵⁹ For example, when a potential orange buyer enters the market for fruit, he or she will usually know less about the quality of the oranges than the purveyor of the fruit knows, such as the conditions under which the fruit was grown or the best types of growth conditions. In the legal services market, however, the assumption is that the asymmetry of information between a competent provider (a lawyer) and a

(discussing market imperfections and stating that because the harm from low quality services can be quite high, there may need to be regulatory protection from low quality services).

57. See, e.g., Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 436 (2001) ("[A] free-market system relies upon a combination of consumer expertise to choose the best and safest products, and *ex post* damages actions to control for substandard or dangerous products. When these options fail, *ex ante* regulation may be justified."). Barton is discussing justifications for barring substandard lawyers from the marketplace, but his analysis can easily be transferred to the justification of barring nonlawyers, viewed as inferior to lawyers, from the marketplace.

58. See *id.* at 437–38 (discussing how regulation is necessary to protect the public from inferior service when consumers lack adequate information to evaluate the quality of the service). Barton states that "the most common defense of lawyer regulation—protection of the public from incompetents—depends upon two separate claims: information asymmetry . . . and [that] incompetent lawyers could cause substantial harm." *Id.*

59. See generally George A. Akerlof, *The Market for "Lemons": Quality Uncertainty in the Market Mechanism*, 84 Q. J. ECON. 488 (1970) (discussing information asymmetry and contending that a market for lemons results from uncertainty of quality); Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328 (1979) (discussing information asymmetry market imperfections).

potential consumer (a client) is so great that many consumers will be unable to evaluate the quality of services that they are seeking or even receive.⁶⁰

The provision of legal services usually involves the application of specialized knowledge to a particular set of facts,⁶¹ and the legal services consumer is seeking services precisely because he or she lacks the required information to make a decision about his or her legal rights.⁶² This unsophisticated potential legal services consumer may be unable to evaluate his or her legal needs and to assess when he or she requires the assistance of an attorney.⁶³ The asymmetry of information may be so great, in fact, that in some cases a client will be unable to evaluate the quality of the service that he or she receives. For example, the quality of legal service may not bear a strong relationship to the ultimate result—even the highest quality legal defense may still result in a loss.⁶⁴ Because legal services are believed to be particularly sophisticated and complex, many clients will not be able to evaluate the quality of the services they need or receive and therefore will be unable to avoid harmful providers.⁶⁵

60. See, e.g., Roger D. Blair & David L. Kaserman, *Preservation of Quality Sanctions Within the Professions*, in REGULATING THE PROFESSIONS 185, 186 (Roger D. Blair & Stephen Rubin eds., 1980) ("The quality of professional services is generally difficult to evaluate on an ex ante basis and is often hard to gauge ex post."); Horowitz, *supra* note 54, at 7 ("Imperfect information is inherent in professional services which, by nature of being highly specialized and requiring considerable training, cannot be appropriately evaluated by most purchasers.").

61. See *infra* note 154 (discussing the practice of law as a professional service, including the application of specialized knowledge to particularized facts).

62. See Beales, *supra* note 56, at 125 ("A consumer consults an agent precisely because he does not have sufficient information to make a decision on his own.").

63. See *id.* (discussing information asymmetry in the professional service market). Beales states:

It is therefore difficult for the consumer to evaluate fully the professional's advice—if he knows enough for competent evaluation, he is likely to find the advice unnecessary. The consumer can check the advice for consistency with other information in his possession, but it is the essence of the transaction that the consumer cannot fully evaluate the information.

Id. at 125–26.

64. See, e.g., Horowitz, *supra* note 54, at 8 ("The best legal defense can result in the conviction of an innocent person, and the worst legal defense can result in the release of one who is guilty.").

65. See, e.g., Julin, *supra* note 11, at 204 (discussing information asymmetry in the legal services market). Julin states:

The consumer has little, if any, way of measuring the quality of his or her attorney. Indeed, I suggest that this evaluation process may be even more difficult than in the field of medicine . . . [as] something tends to happen which the patient is able not only to observe but also to feel. [In the legal services context] the client commonly is in no position to render a considered judgment as to what has taken place in

These two imperfections underlie the justification for regulating and licensing many markets, including the market for legal services.⁶⁶ If these imperfections are found in the market for any good or service, then it might be in the public interest to assure a minimum level of quality through regulation in order to prevent consumer harm.⁶⁷ Regulation must do for the consumer what the consumer is unable to do for himself—evaluate quality and avoid harm.

Regulation of the legal services market may take many forms, but two forms in particular are certification and licensing.⁶⁸ Certification seeks to designate providers who possess certain qualifications. Under a certification regime qualified practitioners are "flagged" so that consumers may recognize that the practitioner can provide at least a minimum quality of service, but noncertified providers are not barred from offering their services in the marketplace.⁶⁹ Therefore, certification gives consumers the choice between paying for certified or noncertified services. Consumers are also given some guidance in the assessment of quality. Under a licensing regime, only licensed providers are permitted to offer services in the marketplace.⁷⁰ Bars against

qualitative terms.

Id.; see also Stephen Rubin, *The Legal Web of Professional Regulation*, in REGULATING THE PROFESSIONS 29, 38 (Roger D. Blair & Stephen Rubin eds., 1980) ("Consumer inability to evaluate the quality of professional services and the hazard to both consumers and the public generally of an erroneous selection are reasons given to justify the prohibition of practice by anyone who has not undergone the scrutiny and approval of licensure.").

66. See, e.g., Barton, *supra* note 57, at 437–48 ("[E]x ante regulation is necessary to protect the public from a substandard product or service . . . when consumers lack sufficient information to gauge the quality of a product, and when the product or service presents a substantial danger to the health or safety of consumers.").

67. Cf. Horowitz, *supra* note 54, at 12 (discussing how professional self-regulation seeks to control the imperfection of heterogeneity of providers by assuring a minimum level of competence). Horowitz states: "[P]rofessional licensing requirements are designed to ensure not that all practitioners are equally able, only that all possess at least some minimal level of competence." *Id.*

68. See, e.g., Kenneth G. Elzinga, *The Compass of Competition for Professional Services*, in REGULATING THE PROFESSIONS 107, 112–13 (Roger D. Blair & Stephen Rubin eds., 1980) (discussing a spectrum of regulation including certification and licensing).

69. See Curran, *supra* note 8, at 54 (discussing certification and stating that "[u]nder such a program the state allows the member of an occupation to use a title if he meet[s] certain standards. . . . Anyone can work in the occupation without the certification; however, only those meeting the state standards can use the official title."); Elzinga, *supra* note 68, at 113 ("A feature of certification, but not licensing, is that it can be consistent with free competition and carry the potential for remedying market failure resulting from consumer ignorance.").

70. See Curran, *supra* note 8, at 53–54 (discussing licensing). Curran states that "[u]nder licensing, admittance to a profession is a right granted by the state. No one may enter the occupation without meeting minimum admittance standards or continue in the occupation

unauthorized practice forbid an unlicensed person from offering his or her services in the marketplace. By forbidding any unlicensed individual from providing services, licensing restricts competition in favor of licensed individuals.⁷¹

There is a correlation between the severity of market imperfections and the extent of regulation required: The more extreme the potential for consumer harm and the more extreme the gap between buyer and seller information, the stronger the case for a stringent regulatory scheme.⁷² The argument for a broad definition of the practice of law contends that the imperfections in the legal services market are so extreme that it would be in the best interests of legal services consumers and the public that all practitioners be licensed.⁷³ Under a broad definition of the practice of law, only lawyers will be able to provide most, if not all, legal services.

The use of an attorney assures a minimum level of competence. An attorney almost always has three years of legal education and training at an accredited law school, has passed a bar examination, and often has met continuing legal education requirements.⁷⁴ The training and testing of attorneys assure consumers of intellectually competent services.⁷⁵ Consumers also are assured ethically competent services. Bar applicants are often subject to character and fitness requirements, and attorneys are bound by rules of professional conduct providing for various duties of loyalty to the client.⁷⁶

With a nonlawyer provider there are no such competency assurances, and because legal service consumers will often be unable to evaluate quality, nonlawyer providers will have the opportunity to cut corners or perpetrate fraud.⁷⁷ Even if a nonlawyer attempts to provide high quality services,

without remaining in good standing with the regulatory board." *Id.* at 53.

71. See, e.g., Elzinga, *supra* note 68, at 114 ("[T]he licensing of professionals, by its nature, is inconsistent with a free-market allocative system.").

72. See, e.g., Barton, *supra* note 57, at 441 (discussing the need for regulation of lawyers as conceived of on a sliding scale).

73. See *id.* at 437–38 (discussing how the claim to regulation depends upon both of the market imperfections being high).

74. See *id.* at 449 ("More than two-thirds of the state bar associations have turned to mandatory continuing legal education . . . in an effort to guarantee ongoing competence."); Cramton, *supra* note 29, at 547 (discussing measures designed to ensure that clients receive competent legal services as including bar admission and continuing legal education).

75. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

76. See generally MODEL RULES OF PROF'L CONDUCT (2002) (providing for duties of diligence, confidentiality, and avoiding of conflicts of interest).

77. See, e.g., *In re Mid-America Living Trust Assocs.*, 927 S.W.2d 855, 860 (Mo. 1996)

nonlawyers often will be unable to deal effectively with the intricacies of the law. For example, nonlawyers do not have the extensive legal background that lawyers have, and they often offer a very specialized, narrow service to the market.⁷⁸ Therefore, nonlawyers may not be able to recognize potential legal issues and will not have enough legal savvy to refer the consumer to a competent provider in order to deal with those issues.

In essence, this theory argues that the cost society pays by restricting competition through licensing is worth the assurance of quality that licensing brings.⁷⁹ Rules of unauthorized practice of law are part of the bargain that society struck by providing lawyers a monopoly in return for the assurance of high quality services.⁸⁰ These rules "help to protect the public from charlatans, incompetents, and over-eager, first-year law students."⁸¹

Beyond the public protection basis for restricting the delivery of legal services to licensed attorneys, there is also a public perception argument that may justify a broad definition. This argument is based on the paradigm of professionalism—the belief that the practice of law is a profession and not a

(pointing to three types of consumer harm stemming from nonlawyer legal service providers); Hon. A. Jay Cristol, *The Nonlawyer Provider of Bankruptcy Legal Services: Angel or Vulture?*, 2 AM. BANKR. INST. L. REV. 353, 357 (1994) (describing nonlawyer "vulture" service providers who "sell their services to the financially distressed, and often cause harm to the debtor").

78. See, e.g., Johnstone, *supra* note 11, at 799 (stating that although lawyers have some competition from nonlawyers, "[o]ne difference between lawyers and nonlawyers as legal services providers is that, collectively, lawyers as a profession provide all kinds of legal services and in all fields of law, whereas each of the nonlawyer professions and occupations, except paralegals, most always operate in more limited legal service spheres").

79. See, e.g., Horowitz, *supra* note 54, at 14–15 (discussing market imperfections and how regulation seeks to assure qualified services at the cost of denying service to the poor). Horowitz contends, "[t]he value judgment issue is whether this supposed misallocation [of resources] is worth suffering in order to prevent the low-priced, presumably least qualified persons from practicing the profession. In the main, our society has judged it to be so, and the policies of self-regulation must be evaluated in this light." *Id.* at 15.

80. See, e.g., Julin, *supra* note 11, at 201 (discussing restrictions on competition through licensing). Julin argues that licensing "is the societal cost worth paying to make certain competency of counsel is a reality capable of being achieved and not simply an illusory objective." *Id.*; cf. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1, 6–7 (1988) (discussing lawyer's freedom from outside regulation). Gordon states:

These freedoms are usually analyzed as part of a social bargain: they are public privileges awarded in exchange for public benefits. Lawyers are given a monopoly over certain kinds of work. . . . They enjoy the social prestige of professional status. In return, supposedly, the bar regulates its members to ensure that lawyers will not only represent clients competently and faithfully but also uphold the law.

Id.

81. Susan Poser, *Multijurisdictional Practice for a Multijurisdictional Profession*, 81 NEB. L. REV. 1379, 1385 (2003).

mere business.⁸² Viewing the provision of legal services as a profession, a public calling of which the primary purpose is to benefit and protect society, rather than as a mere business that places personal gain at the forefront, makes law practice seem like an honorable undertaking. Subjecting the legal services market to capitalist forces breeds mistrust in the law and in lawyers.⁸³ When the public views the provision of legal services as honorable, this in turn breeds respect for the law, which then promotes social order.⁸⁴ Requiring a minimum level of competence in the legal services market promotes respect for the law, as "incompetent legal aids tends to reduce public confidence in the political system and might increase political unrest."⁸⁵ In order to promote respect for the law and general societal good, the definition of the practice of law should be broad enough in scope to restrict most of the legal services market to lawyers.

b. The Argument for a Free Market

Although promoting public safety and protecting social order are noble undertakings, these arguments are not seen as very realistic. The argument for the repeal of unauthorized practice of law rules undercuts the assumptions supporting the argument for a broad definition and instead places all its reliance on the operation of the free market. One does not have to look very hard to see that many Americans dislike and distrust lawyers.⁸⁶ Lawyers are

82. See Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and the Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1231 (1995) (describing the "Professionalism Paradigm" in the beliefs and perceptions of the bar that is characterized by an altruistic higher commitment to social good and rejection of selfish business practices). Pearce describes the professional paradigm as entailing a bargain with society for a monopoly in return for the profession using its skills for the good of the public. *Id.* at 1239. Pearce states, "[w]hile esoteric knowledge made the bargain necessary, lawyers' altruism made the bargain acceptable. In contrast to businesspersons, who maximized financial self-interest, altruistic lawyers placed the interests of the common good and their clients above their own financial and other self-interests." *Id.*

83. See *id.* at 1243-44 (discussing professional paradigm taboos against business-like conduct, including maximizing "profits by serving clients to the detriment of the profession's public trust").

84. Cf. PARKER, *supra* note 2, at 20 (discussing how consumers' satisfaction with the legal services they receive from lawyers affects how those consumers view the law). Parker states, "[b]ad service from lawyers is not just another consumer issue, it makes people feel they have been denied justice." *Id.*

85. Curran, *supra* note 8, at 50-51.

86. See, e.g., Mike France, *Close the Lawyer Loophole; Their Ability to Reduce Legal Liability for Executives is Fueling White-Collar Crime*, BUS. WK., Feb. 2, 2004, at 70

viewed as playing an unnecessary role in many routine legal matters.⁸⁷ Clearly the attempts to restrict the legal services market and the insistence that the law is a profession have failed to promote respect for lawyers or the legal system.⁸⁸ Lawyers are instead seen as manipulating unauthorized practice of law rules to ensure their own economic gain under the guise of public protection.⁸⁹

There may be many factors contributing to the decline of lawyers in public perception. However, this decline is connected with the failure of the professional paradigm itself. The professional paradigm envisions the lawyer as protector of society, as champion of the poor.⁹⁰ By allowing lawyers to dominate the legal services market, society entered into a bargain with the legal profession—in exchange for its monopoly, the profession should provide the public with high quality service that is both intellectually and ethically competent.⁹¹

Many critics argue that lawyers have not been holding up their side of the bargain. Consumers are no longer ensured intellectually competent services through the use of an attorney. Numerous problems with American legal education cast doubt on the ability of law schools to adequately train law

(expressing skepticism about the ethics of business lawyers). France observes "[m]any of the most highly paid corporate attorneys in America all but ignore the spirit of tax, corporate, and securities laws. Instead, they are often linguistic Houdinis who specialize in hypertechnical arguments as to why their client's rat poison meets the five-part test for being apple pie." *Id.*

87. See, e.g., DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 3–4 (2000) ("About three-fifths of Americans describe attorneys as greedy, and between half and three-quarters believe that they charge excessive fees. There is even broader agreement that lawyers handle many matters that could be resolved as well and with less expense by nonlawyers.").

88. See, e.g., Barton, *supra* note 57, at 453–54 (discussing how the elevated social status created by unauthorized practice rules has not ensured professionalism in lawyers). Barton states, "[t]he wave of dissatisfaction over lawyers' lack of professionalism, in fact, suggests that current lawyers are not serving these purposes, regardless of any regulation." *Id.* at 453.

89. See, e.g., Dzienkowski & Peroni, *supra* note 28, at 92–93 ("[T]he unauthorized-practice-of-law rules give lawyers a monopoly over the way in which the need for legal services is satisfied in this country. It is a profession's attempt to limit competition and preserve the power of lawyers over the delivery of legal services."); Marie Haug, *The Sociological Approach to Self-Regulation*, in REGULATING THE PROFESSIONS 61, 67 (Roger D. Blair & Stephen Rubin eds., 1980) ("Licensing arrangements, in short, can be characterized less as methods for protecting the public and for providing external social control in the interest of the consumer than as a means of protecting the occupation's market dominance.").

90. See *supra* note 82 and accompanying text (discussing the "Professional Paradigm" as set out by Russell Pearce).

91. See *supra* notes 79–81 and accompanying text (discussing the social bargain that secures lawyers a monopoly in return for the assurance of intellectually and ethically competent services).

students for day-to-day practice.⁹² Bar examinations often serve merely as a screening device, as "[i]n most states, passage requires only minimal writing capacity, knowledge of basic legal principles, and an ability to function under extreme time pressure."⁹³ Some scholars suggest that continuing legal education does not and cannot assure competence.⁹⁴ Regulatory requirements for legal education are out of tune with the legal environment and can no longer ensure intellectual competence.

Critics also suggest that consumers are no longer ensured ethically competent services by an attorney. For example, professional irresponsibility is often seen as going unpunished, as regulatory bodies lack either the resources or the incentive to punish violations.⁹⁵ Advocacy and justice are skewed because only well-financed interests are well represented.⁹⁶ More lawyers are treating their profession as a business, seeking to maximize profits, and catering their services only to those who can afford it.⁹⁷ The legal monopoly allows lawyers to set uncompetitive prices, and as a result, consumers are forced to seek assistance from an attorney or, more frequently, receive no legal assistance at all.⁹⁸ In short, the Professional Paradigm has

92. See RHODE, *supra* note 87, at 185–92 (discussing many problems with legal education and the need for reform).

93. *Id.* at 150; see also Barton, *supra* note 57, at 445 (discussing problems with the bar examination as not assuring competency and stating that "[a]side from the costs associated with the bar's lofty barriers to entry, their efficacy is open to doubt").

94. See, e.g., RHODE, *supra* note 87, at 156 (discussing various ways that lawyers can fulfill their continuing legal education requirements and suggesting that there is no assurance that educational goals can be met with the use of continuing legal education requirements); Barton, *supra* note 57, at 449–50 (stating that continuing legal education "hardly guarantee[s] any level of competence" and discussing several problems with continuing legal education including that it is "not designed to identify or correct incompetence, instead it is meant to reinforce the skills and knowledge of competent attorneys").

95. See, e.g., France, *supra* note 86, at 79 ("Self-regulation is weak, with state bar associations more interested in preventing non-lawyers from selling cheap wills in strip malls than in disciplining blue-chip law firms that participate in multibillion-dollar frauds.").

96. See, e.g., PARKER, *supra* note 2, at 20–22 (discussing public views that the legal profession only gives good quality representation to the rich and discussing trends in the United States that show lawyers for the rich increasingly are being controlled by their clients).

97. See, e.g., Pearce, *supra* note 82, at 1265 ("Defenders and opponents of the Professionalism Paradigm agree that lawyers are behaving like businesspersons. They structure their practices and sell their services using the same techniques as other businesspersons. Many, if not most, commentators recognize that financial self-interest plays an important role in lawyers' conduct.").

98. See, e.g., Barton, *supra* note 57, at 441–42 (discussing the societal costs of minimum standard requirements). Barton states:

Barriers to entry and minimum standards impose substantial costs on society at large. First, the cost of legal services to consumers is inflated. Barriers to entry,

failed.⁹⁹ The general public is no longer receiving quality legal services and access to justice. The law has become a business, and as such it should be regulated like a business and subject to free market forces.

Many scholars believe that the two concerns underlying the argument for a broad definition could be adequately addressed under a free market. In response to quality concerns, critics point out that attempts to mandate a minimum level of service ignore those consumers who would be willing to face higher risks in return for lower costs.¹⁰⁰ Furthermore, by driving up prices and forcing many consumers to seek self-help, licensing may actually reduce the overall quality of service received by the public.¹⁰¹

Many critics also believe that a general background in law achieved through bar admittance is not necessarily an assurance of high quality service. Studies and experience strongly suggest that consumers are not at a significantly greater risk of harm when they receive their legal services from a lay provider rather than an attorney.¹⁰² Subjecting all legal service providers to minimum intellectual and ethical competence requirements, such as malpractice liability, may minimize any risk posed by nonlawyer services.¹⁰³

As to information asymmetry problems, the quality of legal services should be no more difficult to evaluate than any other market evaluation, and

such as the bar requirements, naturally result in fewer practitioners. Fewer practitioners means a reduced supply of legal services, which increases the cost of hiring a lawyer. The amount of extra expense is determined by the availability of substitute goods; if a consumer can substitute another, non-regulated product for legal services, regardless of barriers to entry, price inflation will be dampened. Prohibitions on the unauthorized practice of law, however, explicitly ban any substitute goods.

Id.

99. See generally Pearce, *supra* note 82 (discussing the failure of the professional paradigm and arguing for a new business paradigm based more on market forces).

100. See Beales, *supra* note 56, at 133 (discussing the hidden costs of excluding lower quality services from the market place such as eliminating the market for low-quality services).

101. See Curran, *supra* note 8, at 57 ("[I]t is not obvious that higher quality levels of services received from licensed sellers means the overall quality level of consumer consumption will rise. Higher average quality levels will drive output prices up and encourage consumers to substitute into lower cost services, like self-service.").

102. See generally Joyce Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says "Cease Fire!"*, 31 CONN. L. REV. 423 (1999) (analyzing the average incidence of harm between attorney and lay provision of legal services in real estate closings and finding that the risk of harm posed by lay provision of legal services was not significant enough to justify its exclusion from the marketplace).

103. See, e.g., Rhode, *supra* note 46, at 94 ("[L]aymen providing legal assistance could be held to the same standards of competence and ethical conduct as attorneys for purposes of civil liability.").

gaps in information are steadily decreasing.¹⁰⁴ The argument for a free market proposes that any information asymmetry concerns could instead be addressed through certification.¹⁰⁵ Consumers would be able to recognize a superior service provider through a regime of certification, and providers would have an incentive to comply with certification requirements in order to gain a competitive advantage in the marketplace.¹⁰⁶ At the same time, uncertified providers also would be able to participate in the marketplace, and consumers who are willing to chance the risks of low quality service would have an avenue for legal assistance.¹⁰⁷ The free market model thus presents an attractive alternative to the expansive and expensive broad definition.

104. See, e.g., Beales, *supra* note 56, at 126 (comparing consumer evaluation of professional services to evaluation of an automobile). Beales notes that in both cases the costs of inaccurate assessment can be high. In particular, he finds that in the professional services market "the consumer can observe whether the treatment solved the problem which provoked his initial visit to a professional. Indeed, the ability to recognize that a problem exists presupposes a considerable amount of consumer knowledge." *Id.* at 128; see also Elzinga, *supra* note 68, at 109 ("Consumers may have little savvy, and the stakes may be high, in selecting a lawyer. But this may also be true in selecting a furnace. In addition, the market mechanism itself may generate information to assist otherwise unwary buyers in the consumption of complex professional services."); Haug, *supra* note 89, at 75 (discussing the demystification of professional knowledge). Haug states, "[t]he knowledge gap between professional and client is being narrowed as more and more consumers are equipped to absorb the information on health and legal matters which is disseminated by the media. Do-it-yourself books . . . are popular examples." *Id.*; see Pearce, *supra* note 82, at 1267 (comparing legal services to other goods in terms of consumers' ability to evaluate their quality).

105. See, e.g., George C. Leef, *Lawyer Fees Too High? The Case for Repealing Unauthorized Practice of Law Statutes*, in REGULATION, at <http://www.cato.org/pubs/regulation/reg20n1c.html> (1997) (arguing for the repeal of unauthorized practice of law statutes and the imposition a regulatory regime of certification) (on file with the Washington and Lee Law Review).

106. See, e.g., Barton, *supra* note 57, at 447 ("[U]nder certification the availability of a substitute, that is, uncertified practitioners, acts as a natural drag on any over-pricing by the certified. There would also be free entry into the market for the uncertified, providing a further downward pressure on prices.").

107. See, e.g., Elzinga, *supra* note 68, at 117 (discussing the benefits of certification). Elzinga states:

There is nothing immutable about a world in which, say, those who practice law must be graduates of an approved law school and successful takers of a bar examination. If these standards were in fact efficient . . . professionals with these credentials could, individually or collectively, apprise clients of these advantages through certification. But clients would still be free to hire other individuals (presumably at lower prices if the credentials were in fact quality-related) to meet some of their needs for legal counsel. The entrance of previously unqualified professionals would lower the overall price of the service, but it is not intuitively clear that quality would suffer in all cases.

Id.

c. The Argument for a Narrow Definition

The argument for a narrow definition of the practice of law recognizes and addresses some of the weaknesses and strengths of both the argument for a broad definition and the argument for the repeal of the unauthorized practice of law. Under a narrow definition of the practice of law, service providers would only be deemed to be practicing law when providing select legal services. The definition would be narrowed substantially to allow for nonlawyer provision in many services traditionally considered to be the exclusive province of licensed attorneys, but certain services would still be regulated and restrained.

A narrow definition recognizes that the underlying premises of the argument for a broad definition have some merit and are generally true in the provision of some, but not all, legal services. A narrow definition also recognizes that, although the free market model can address some of these public protection concerns, the market may not always provide the best framework for regulating the practice of law. For example, the potential risk of harm created by incompetent service in some legal services, such as criminal defense, is so severe that it becomes necessary to provide an assurance of competence.¹⁰⁸ Furthermore, although the increasing complexity of law calls for increased specialization, a general background is often essential to competent service because many legal problems do not fit easily into discrete categories—a legal provider needs to be able to recognize extrinsic issues when they arise.¹⁰⁹ Although the benefits of increased competition in the marketplace are certainly worthwhile, some sort of limiting device is needed to address these potential consumer harms.

The free market model suggests that an alternative regulatory regime is certification, in which competence is used primarily as a marketing device.¹¹⁰ Certified providers would have to comply with minimum quality requirements in order to retain their certification, but all other providers would not have to comply. Minimum levels of competence in noncertified providers would have to be assured through other types of regulation. Therefore, the free market

108. See, e.g., Barton, *supra* note 57, at 440 (noting that, although the harm from many legal transactions is remediable, "some potential harms, notably those involved in criminal defense work, are potentially irremediable and may justify regulation").

109. See SUSSKIND, *supra* note 1, at 17 ("However, no area of the law—no matter how specialized, obscure or arcane—is completely self-contained and there are dangers in this compartmentalization, especially those of disregarding potentially applicable, neighboring areas of law.").

110. See *supra* note 106 and accompanying text (discussing several arguments for imposing a regime of certification on the legal services market instead of licensing).

model also suggests that subjecting all legal providers to intellectual and ethical competence qualifications, and providing a consumer remedy for violation of those qualifications, might curtail potential harmful behavior.¹¹¹ However, the process of subjecting all providers to minimum entry requirements does not significantly differ from the licensing regime already in place, and the costs of compliance with these requirements would be reflected in the price of services.¹¹² Malpractice liability, if taken seriously, also drives up prices and, at the very least, lowers the minimum quality assured in the marketplace.¹¹³ It appears that the only way the free market model truly will reflect market prices is if minimum competence requirements and potential liability for noncertified providers are largely discarded.¹¹⁴ In other words, the only way the free market model will work is if society stops trying to minimize risk.

One problem with leaving the market unregulated and allowing consumers to evaluate quality levels on their own is that information asymmetry does exist in some situations. Legal services are information and

111. See *supra* note 103 and accompanying text (articulating a suggestion that all legal service providers should be held to minimum standards of competence).

112. Cf. Cramton, *supra* note 29, at 550 (discussing the rising costs of entry into the legal profession and the effect of entry costs upon ultimate prices).

113. For example, a malpractice remedy for incompetently rendered services may not adequately assure competence standards in the market for legal services as well as licensing. This, again, is due in part to information asymmetry:

[B]ecause many individuals are "one-shot" participants in the legal market, they are much more likely to suffer from the three major information asymmetries that foster agency problems Not only do many individual clients lack the sophistication, knowledge or means to monitor or prevent agency problems, they also have less power when such problems are identified, in part because they *are* often one-shot participants who cannot necessarily promise future business. Individual clients, of course, can seek to use other controls—principally liability controls—that address lawyer misconduct. . . . Although certainly a potential remedy for the type of agency problems from which individuals commonly suffer, malpractice actions are subject to limitations as a control device. Some individual clients do not realize when they are the victims of malpractice. Most important, malpractice suits are not effective where the misconduct at issue does not result in provable damages that outweigh the transaction costs involved in the malpractice litigation. Professional discipline, then, would seem to be better than liability controls as a means of addressing individuals' "low-level agency problems."

Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 49–50 (2002).

114. Cf. Jeffery W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25, 59 (1999) (noting that free market advocates rarely argue for pure market approach and stating that "there is an inherent inconsistency in advocating a business/market solution to the problems of legal services and then refusing to embrace a pure market approach").

advocacy services—consumers would not seek legal assistance if they could adequately navigate through the law by themselves.¹¹⁵ The asymmetry of information between consumer and provider in the legal services market sometimes can be quite high. For example, many legal services consumers do not use legal services frequently—they are one-time consumers, and therefore, might not have prior experience with which to compare the present service.¹¹⁶ The free market model suggests that the use of market information devices might address information asymmetry problems.¹¹⁷ But even if educational efforts are successful at increasing understanding of the legal services market, these efforts cannot solve all information asymmetry problems because no marketing device can change the unpredictable nature of legal services.¹¹⁸ Many consumers may not have the savvy to avoid an incompetent provider and may be unwittingly exposed to high risks.

Allowing legal services consumers to be exposed to high risks does not fit well within a society that idealizes equal justice for all.¹¹⁹ In the end, neither

115. See *supra* notes 58–65 and accompanying text (discussing information asymmetry and how it is exacerbated by the nature of legal services).

116. See RHODE, *supra* note 87, at 144 (discussing the rationale for the regulation of legal services). Rhode states that "[m]ost individual . . . clients are one-shot purchasers. They seldom consult an attorney, and their lack of experience, coupled with the difficulties and expense of comparative shopping, makes it hard to assess the quality of assistance." *Id.*

117. See *supra* note 105 and accompanying text (discussing certification as a possible way to remedy information asymmetry problems in the legal services market).

118. See *supra* Part II.A.1.a (discussing how the quality of legal services infrequently bears a relationship to the eventual result, making it difficult for consumers to evaluate quality); Horowitz, *supra* note 54, at 12 ("The professionals' clients, too, are not homogeneous and have differing abilities to evaluate and process information about professional services. . . . Under uncertainty, perfect information is not necessarily worth its cost, nor will additional information necessarily improve decisions if one is incapable of appropriately evaluating and processing the information."). But see Barton, *supra* note 57, at 485–86 (discussing how information asymmetry in the legal market could be addressed by providing more information).

119. See, e.g., LUBAN, *supra* note 9, at 240 (contending that equal access to the law must be understood as equal access to equal legal services, not as access to minimally competent legal help). Luban states, "[l]aw, unlike many other professions, is adversarial in character, so in practice, minimal access may turn out to be no better than no access." *Id.* But see Barton, *supra* note 57, at 480 (criticizing Luban's argument as not necessarily requiring regulation of the legal market).

The free market model argument—that legal services are no different than complex durable goods—often seems to forget the importance of access to justice in the first place—namely, the importance of law in individual and social life. See *supra* Part I (discussing the importance of law in American society). The free market model's response is typically to point to the harm caused by a wrong choice in the automobile market (such as, an accident resulting in serious physical injury or death) to demonstrate the similar importance of that market. See, e.g., Elzinga, *supra* note 68, at 128 (comparing the market for professional services to the market for complex durable goods and stating that "both incompetent physicians and low

the broad definition model nor the free market model appears to be in tune with the concept of equal justice. Under a broad definition, prices are driven up so high that many consumers can no longer afford access to justice. Under a free market model, there is no assurance of quality, and legal interests may be harmed. A narrow definition of the practice of law seeks to walk a middle path between these two models and the problems they present.¹²⁰

Under a narrow definition, many of the benefits of a free market model would be realized. Competition for many legal services would be increased, leading to lower prices and increased access for the public.¹²¹ For example, many critics suggest that the definition of the practice of law could encompass complex or novel issues and leave routine services outside the definition of the practice of law.¹²² Nonlawyers would be allowed to provide so-called routine legal services, whereas licensing still would be required for complex

quality automobiles can kill"). Of course, the government tries to avoid such harm by regulating automobiles, such as setting standards for child restraints. 49 C.F.R. § 571.225 (2004); *see also* Stempel, *supra* note 114, at 48–49 (1999) (arguing that harms from incompetent legal services are unique). Stempel states:

[T]here are several unique hazards and difficulties posed by poor lawyering. First, consumers of legal services are particularly vulnerable to harm if services provided are incompetent or self-serving, since representation frequently deals with matters extremely important to the client. Second, improper or incompetent lawyering is difficult to detect in a timely fashion. Third, legal activity has potentially long-lasting and wide-ranging effects on society, requiring that its regulatory paradigm curb self-dealing by lawyers as much as possible.

Id. The harm from incompetently rendered legal services should likewise be avoided through regulation, such as requiring minimum qualifications for activities entailing risk of severe harm. A major problem with defining the practice of law is determining which harms should be avoided.

120. *Cf.* Julin, *supra* note 11, at 205 (discussing the need for access to the legal system and the need for maintenance of quality). Julin finds that "[t]he objective of the reform sought is at least two fold. First, it is to make legal services available at a lower cost to a greater numbers of persons in a form which will expedite the result sought, whether it be counsel or litigation. Second, the objective is to improve the overall *quality* of legal services available." *Id.*

121. *See, e.g.,* Kritzer, *supra* note 16, at 743–45 (discussing different ways that opening up the legal services market to nonlawyers will promote access to justice). Kritzer notes:

In those areas of legal services where lawyers have obtained control, access to services depends on a combination of fee structures, client resources, and availability of legal aid. Opening previously controlled legal services for delivery by those who do not possess the full credentials of a legal professional has the potential of greatly widening access to legal services.

Id. at 743.

122. *See* Julin, *supra* note 11, at 204–05 (discussing the possibility that quality control could be divided between routine and unique services). Julin states, "Could it be that the whole quality control process need not be brought to bear on what is simple and routine as opposed to that which is complex and unique?" *Id.* at 205.

services.¹²³ By allowing nonlawyers to provide some legal services to the public, greater access to legal guidance could be achieved.

A narrow definition of the practice of law, opening up competition in much of the legal market while leaving a role for the traditional attorney, also could improve the public perception of lawyers and increase respect for the law.¹²⁴ For instance, the increased access to legal services and increased knowledge of the law that will result as the services become more affordable to a larger segment of the public could promote a feeling of participation in the legal process.¹²⁵ The legal monopoly would be confined to a smaller portion of the legal services market. However, lawyers still would have exclusive power over a portion of the legal services market and therefore still would enjoy status as a profession. The conception of lawyers as a profession also encourages lawyers to act in a professional, public-minding way.¹²⁶ Furthermore, incompetently rendered legal services have a wider detrimental effect on society in general. Therefore, it might not always be wise to allow consumers to choose incompetent services.¹²⁷

Many benefits could be achieved by defining the practice of law to include only a limited amount of legal services. As will be discussed, the services that eventually fall within the definition ideally would be those that entail a greater risk of harm.¹²⁸ Thus the regulatory regime would still involve

123. Consider, however, that this Note does not necessarily endorse a routine/complex distinction of the practice of law. See Part IV (suggesting an alternative perspective for formulating the definition of the practice of law).

124. Cf. John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL. U. L. REV. 563, 573 (1994) (discussing the connection between image of the legal profession and legitimacy of government). Buchanan notes:

As the symptoms of the legal profession's failures continue to appear, the public becomes less and less confident in its ability to carry out its governmental role. This loss of confidence in a vital branch of government—one third of the cherished American tripartite—erodes the very foundation upon which our government depends.

Id.

125. LUBAN, *supra* note 9, at 248–66 (discussing the right of the poor to have legal services and describing how cutting people out of the legal system undercuts its legitimacy).

126. See, e.g., Stempel, *supra* note 114, at 46–47 ("Lawyers should continue to be regulated as professionals . . . not because of the traditional bases for professional self-regulation such as the complexity rationale, but because the professionalism paradigm does a better job of fostering judgment with regard for public as well as private interests among lawyers than does the business paradigm.").

127. See *id.* at 49 (arguing that there are long-lasting and far-reaching societal implications from incompetently rendered legal services).

128. See, e.g., Barton, *supra* note 57, at 439–41 (suggesting that not all legal services

licensing, but the scope of restricted activities would be substantially narrowed to subject the legal services market to increased competition.¹²⁹ The difficulty in formulating a narrow definition, however, is distinguishing those activities that should be restricted from those that should not. Producing the ideal definition of the practice of law therefore entails a fine balancing between affordability and assurance of quality.

B. The Practice of Law Is Worth Defining

The reasoning underlying the MDP, MJP, and the UPL debates illustrates the importance of the definition of the practice of law.¹³⁰ The definition can alter how legal services are offered in the market, which in turn profoundly affects who can afford access to the legal services market. In other words, the definition of the practice of law affects the price of the legal services and access to justice.

For example, imagine that Wanda and William Woodhouse, a young middle-class couple living in Forest State, have a disabled child, Timothy, who attends Forest State Elementary.¹³¹ Forest Educational Services Corporation (FESC) is a nonprofit organization that provides advice, counseling, and advocacy services to families of children with disabilities. Martin Mahogany is a nonlawyer employee of FESC who possesses specialized knowledge and training in the field of special education. The Woodhouses utilize FESC's counseling services frequently.

present a risk of severe, irreversible harm and that regulation of the legal profession should be confined to services presenting that risk); *infra* Part IV (arguing that the activities falling within the practice of law should be "high-risk" services).

129. A system of certification also may be useful in the unlicensed portion of the legal services market, as a scheme of certification does provide a device for many consumers to evaluate quality. *See* Beales, *supra* note 56, at 133 (discussing the two approaches to professional regulation as task-specific licensing or certification and the benefits of certification as a remedy to information asymmetry problems).

130. *See, e.g.*, Keatinge, *supra* note 17, at 758 (discussing the role of the definition of the practice of law in legal service reform debates).

131. The facts of this hypothetical are drawn to a large extent from *In re Arons*, 756 A.2d 867 (Del. 2000). In that case, the Parent Information Center of New Jersey represented families with disabled children in due process hearings. *Id.* at 868–69. The Delaware Supreme Court determined that the representation constituted the practice of law and that the Individuals with Disabilities Act did not provide an exception for their activities under the Delaware prohibition against the unauthorized practice of law. *Id.* at 872–73. The Center violated the prohibition against the unauthorized practice of law. *Id.* at 874. *See generally* Debra Baker, *Is This Woman a Threat to Lawyers?*, A.B.A. J., June 1999, at 54.

The Forest State Educational Board decided to make some changes to Timothy's placement at Forest State Elementary, and the Woodhouses are unhappy with those changes. They are entitled to challenge the placement under the Forest State Children with Disabilities Education Act, which provides for several procedural safeguards, including the opportunity for an impartial due process hearing in front of the Forest Department of Education. The Woodhouses, suffering great financial burdens and seeking affordable representation, approach Mahogany and ask him to represent them during the hearing. Would Mahogany and FESC be liable for UPL if he represents the Woodhouses? What are the Woodhouses' legal service alternatives if Mahogany is unable to represent them because of prohibitions against UPL? The answers to these questions largely depend upon Forest State's definition of the practice of law.

For instance, assume Forest State determines that it is in the public interest to have a broad definition of the practice of law. Prior case law includes representation before an administrative tribunal within that definition. Mahogany will be subject to liability under Forest State's unauthorized practice of law statute unless there is an explicit exemption for nonlawyer representation at a due process hearing before the Forest Department of Education generally, or for FESC-like providers particularly. Because Forest State's practice of law definition and the Act as interpreted provide for no exception, Mahogany is unable to represent the Woodhouses. The Woodhouses, unable to afford the high cost of an attorney and ineligible for public legal assistance, will most likely be forced to proceed without legal guidance.

If, on the other hand, Forest State decides to repeal its unauthorized practice of law statute, then Mahogany will be able to represent the Woodhouses without fear of liability. Assume the worst-case scenario occurs, however, and the due process hearing results in an adverse decision. When the Woodhouses decide to appeal that decision to Forest State Court, Mahogany, unfamiliar with court procedure and unwilling to disclose his incompetence, neglects to file a necessary pleading. The Woodhouses' claims are denied. If Forest State decides to impose intellectual and ethical competency requirements on all legal service providers, FESC's prices will have to reflect the costs of its compliance with those minimum standards. As a result the Woodhouses may not be able to afford Mahogany's services in the first place, even though the services are set at competitive prices.

Assume now that Forest State, wanting to introduce more competition into the legal services market, decides that the risks associated with a free market are not in the best interests of the public. Instead, Forest State adopts a

narrow approach to its definition of the practice of law. Forest State determines that representation before an administrative tribunal does not fall within the definition of the practice of law but has determined that representation before the Forest State court falls within the definition. Thus, Mahogany can undertake the representation of the Woodhouses without fear of UPL liability. However, when it becomes apparent that the Woodhouses want to appeal their adverse decision to Forest State court, Mahogany has a strong incentive to refer the matter—Mahogany may be liable if he persists in representing the Woodhouses in state court. Increased competition in the legal services marketplace may lower the prices that many Forest State attorneys charge, and so the Woodhouses may be able to afford an attorney's assistance. Even if the Woodhouses are not able to retain competent counsel, they will, at the very least, have whatever little guidance Mahogany is able to give them.

In reviewing these scenarios, it is apparent that the operation of the definition of the practice of law is very important in terms of access to legal guidance. Defining the practice of law may be a very difficult task, but the difficulty of the task in no way detracts from the need for it to be done.¹³² The task is not impossible, and as discussed below, a comprehensive definition of the practice of law is possible if approached from a perspective that avoids thinking about the issue in the abstract.¹³³ Of course, there may be a question as to whether defining the practice of law is important enough to justify the effort in formulating a definition. This Note, however, argues that the definition of the practice of law is of sufficient value because of the profound effect it can have on the delivery of legal services. Access to legal guidance and, ultimately, access to justice are worthwhile endeavors.¹³⁴ The practice of law, therefore, should be defined.

132. John Gibeaut, *Another Try: ABA Task Force Takes a Shot at Defining the Practice of Law*, A.B.A. J., Dec. 2002, at 18. ("Like the Quest for the Holy Grail, the pursuit of an ideal definition of the practice of law has been a largely futile endeavor."). The article continues:

The MDP Commission's Experience with the Model definition doesn't faze [ABA President Alfred P.] Carlton. "Just because it's a tough question doesn't mean we shouldn't try to answer it," he says.

[Task Force member Lynda C.] Shely insists that it's worth taking a stab at marking some basic boundaries for lawyers as well as laypeople who venture into the legal services field.

"As we've seen in MJP, we need some uniformity," she says. "If you have one state that says taking a deposition is the practice of law and another that says it isn't, what's a lawyer supposed to do?"

Id. at 19.

133. See *infra* Part IV (suggesting a new perspective for evaluating the practice of law).

134. See *supra* Part I (discussing how the law affects individuals' social and personal lives); *supra* Part II (discussing how the definition of the practice of law functions in the legal

The importance of the definition of the practice of law, however, does not necessarily lead to the importance of a *model* definition of the practice of law. Lawyers, after all, are regulated by the states, and so it would seem to make sense to leave formulation of the definition to the individual states.¹³⁵ There are other issues, however, that need to be addressed before lawyers shrug off this burden entirely to the states.

III. The Need for the Legal Community To Formulate a Model Definition

A. The Task Force's Attempts To Formulate a Definition

The American Bar Association (ABA) recently appointed a Task Force to analyze the need for a model definition of the practice of law.¹³⁶ The Task Force was challenged:

To determine the best approach for the Association to address whether to create a model definition of the practice of law that would support the goal of providing the public with better access to legal services, be in concert with governmental concerns about anticompetitive restraints, and provide a basis for effective enforcement of unauthorized practice of law statutes.¹³⁷

Alfred P. Carlton, former president of the ABA, in testimony before the Federal Trade Commission, stated that:

[A] threshold problem with the delivery of legal services [is]: What constitutes legal information as opposed to legal advice? Is the distinction that legal *information* can be provided by someone who is not a lawyer whereas legal *advice* requires the skill and judgment of someone who is admitted to practice law? I have appointed an ABA Presidential Task Force on the Model Definition of the Practice of Law to provide direction on this issue. I did so because of the fourway intersection. Where there is a collision of four issues: MDP, MJP, Access to Legal Services, and the Unauthorized Practice of Law. When we have properly defined the practice of law, we will be far better able to determine the unauthorized practice of law. This is particularly important with the delivery of legal

services market by affecting competition).

135. See, e.g., Julin, *supra* note 11, at 209 ("Admission to practice and regulation thereafter are basically a state matter.").

136. See ABA BOARD OF GOVERNORS RESOLUTION, at http://www.abanet.org/cpr/model_def_home.html (last visited Sept. 10, 2004) (appointing the Task Force on the Model Definition of the Practice of Law) (on file with the Washington and Lee Law Review).

137. AMERICAN BAR ASSOCIATION, ABA CHALLENGE STATEMENT: MODEL DEFINITION OF THE PRACTICE OF LAW, at http://www.abanet.org/cpr/model_def_challenge.html (last visited Sept. 10, 2004) (on file with the Washington and Lee Law Review).

services via the Internet because of the proliferation of entities that provide people with legal assistance online.¹³⁸

The Task Force circulated a draft definition "with the goal of stimulating discussion" on September 18, 2002.¹³⁹ The draft definition stated that the practice of law "is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law."¹⁴⁰ Several activities presumptively fell within the practice of law:

- (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;
- (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;
- (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or
- (4) Negotiating legal rights or responsibilities on behalf of a person.¹⁴¹

The definition excluded several service providers from the overall definition of the practice of law.¹⁴² The definition also subjected any person practicing law to duties of care and loyalty, required disclosure for any nonlawyer providing services, and provided liability for the unauthorized practice of law.¹⁴³

The Task Force received several comments on the definition from trade associations, scholars, lawyers, and the federal government.¹⁴⁴ Many of these comments criticized the definition as overly broad and as creating strong anticompetitive effects.¹⁴⁵ A public hearing on the definition was held on

138. *Possible Anticompetitive Effects to Restrict Competition on the Internet: Federal Trade Commission Public Workshop*, Testimony Before the Federal Trade Commission, Alfred P. Carlton, Jr., President, American Bar Association, at 12 (Oct. 9, 2002), available at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/carlton.pdf>.

139. TASK FORCE REPORT, *supra* note 19, at 2.

140. AMERICAN BAR ASSOCIATION, TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, DRAFT (9/18/02), DEFINITION OF THE PRACTICE OF LAW, at http://www.abanet.org/cpr/model_def_definition.html (last visited Sept. 10, 2004) (on file with the Washington and Lee Law Review).

141. *Id.*

142. *See id.* (providing exceptions for those with a limited license, pro se litigants, mediators, and supervised paraprofessionals).

143. *See id.* ("Any person engaged in the practice of law shall be held to the same standard of care and duty of loyalty to the client independent of whether the person is authorized to practice law in this jurisdiction. . . . [I]f the person providing the services is a nonlawyer, the person shall disclose that fact in writing.")

144. *See* AMERICAN BAR ASSOCIATION, TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, at http://www.abanet.org/cpr/model-def/draft_def_comment.html (last visited Sept. 10, 2004) (on file with the Washington and Lee Law Review).

145. *See, e.g.,* Candace Heckman, *Who Can Give Advice on Law? Critics Say ABA Limit*

February 7, 2003, at which the Task Force heard statements from nineteen individuals both applauding and admonishing its efforts.¹⁴⁶ Several speakers expressed the view that a definition of the practice of law was either impossible or not worth the effort.¹⁴⁷

Could Hurt the Poor and Victims of Abuse, SEATTLE POST-INTELLIGENCER, Feb. 8, 2003, at B1 (discussing the reaction to the ABA's draft definition). Heckman reports:

While there is clear evidence that consumers have been hurt by lay people dispensing legal services, the ABA proposal, which would be referred to individual states to adopt, is "overbroad," said Charles Harwood, Northwest Director of the Federal Trade Commission. . . .

Maryland lawyer Richard Granat, who heads the ABA's electronic-lawyering task force, warned that the new definition might be opposed on constitutional grounds. "Lawyers don't own the law," Granat said, "Everybody owns the law."

And creating less competition for lawyers may further sully the profession's public image, he added.

Id.; see also Tamara Loomis, *Defining Law Practice: ABA's Proposal Has Many Critics, Including the Justice Department*, N.Y. L.J., Jan. 9, 2003, at 5 (discussing the draft definition). Loomis writes:

Undeterred by the failed attempts of the past, American Bar Association President Alfred P. Carlton Jr. last summer appointed a task force to draft a model definition of the practice of law.

Now, the ABA may be wishing it had left well enough alone. The proposed definition, which came out in September, has generated a storm of criticism from the operators of online legal services, real estate agents, paralegals and even local bars such as the New York County Lawyers' Association, who contend the definition is unduly broad and unworkable.

Id.; see Maureen Sirhal, *Legal Group's Work Could Hurt E-Commerce*, NAT'L J. TECH. DAILY, Jan. 24, 2003 (discussing the Federal Trade Commission's comment on the draft definition, which warned that the draft language was too broad and could hinder online commerce). In response to the comments made by the FTC, Sirhal reports:

The task force's work stems from the ABA's desire to address concerns about consumers' ability to obtain legal services, according to ABA President Alfred Carlton. By clearly defining services, he said consumers would have better access to lawyers and providers of "allied" legal services for transactions like real-estate closings.

"It is rather ironic, I should think, that the FTC and Department of Justice see some conspiracy to restrict access to lawyers," Carlton said.

Id.

146. TASK FORCE REPORT, *supra* note 19, at 2.

147. See Hearing Before the Task Force on the Model Definition of the Practice of Law (Feb. 7, 2003) (commenting on the draft definition), available at http://www.abanet.org/cpr/model-def/task_force_transcript.pdf. Such comments include:

Mr. Davis: . . . you all have my condolences and commiserations because . . . you have a completely impossible task. You've been sent a conundrum that is insoluble (sic). If you were going to try to solve it, you cannot do it in the way that you're trying to do it. . . .

If you feel you must persist in a definition, the only way to define it is subjectively.

The ultimate recommendation of the Task Force, adopted by the ABA House of Delegates on August 11, 2003, abandoned the proposed draft definition and instead recommended that each state adopt a definition of the practice of law.¹⁴⁸ The recommendation includes a "basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity," which excludes any mention of the provider's skills.¹⁴⁹ The background report to the recommendation expressly states that "[t]his basic premise is not a model for a definition, but rather a part of a framework."¹⁵⁰ The report then provides a procedural framework for the individual states to consider while creating their own *unauthorized* practice statutes—the framework deals with determining who should be authorized to practice law, not with determining what constitutes the practice of law.¹⁵¹ The report suggests that the individual states should consider the minimum qualifications, competence, and accountability of those who would be authorized to practice law.¹⁵² States should undertake studies of potential harm and should continually review the definition in order to "take into account changing market factors . . . with an eye to the future."¹⁵³

If the client reasonably believes they have engaged a lawyer, they're getting legal services. If the person providing the service is not holding themselves out as a lawyer, they should be permitted to do it.

Id. at 73–74.

I commend and commiserate with this Task Force and its fundamental task. It is truly daunting to come up with a uniform and all-encompassing definition of the practice of law. And courts, including the Arizona Supreme Court, and commentators like Professor Rhodes, and others who are far more experienced and wise than I, have concluded that it's just impossible to do. And I think the draft that the Task Force has put before us, based largely on the definition here in Washington, really reflects that reality

The practice of law, which only trained and licensed lawyers can engage in, is the provision of those legal services which, "require the knowledge and skill of one trained in the law." It's really pretty circular.

Id. at 140–41.

148. See TASK FORCE REPORT, *supra* note 19, at 3 ("Upon further deliberation, the Task Force became convinced that the considerations in defining the practice of law in each jurisdiction required that a procedural framework for jurisdictions to follow be recommended instead.").

149. *Id.* at 13.

150. *Id.*

151. *Id.* at 5–8.

152. *Id.*

153. *Id.* at 12.

B. The Task Force's Efforts in Perspective

The substance of the Task Force's recommendation and background report is somewhat helpful. The broad premise that the practice of law is the application of judgment to the circumstances of another basically asserts that the practice of law is the giving of legal advice. This is tantamount to saying that the practice of law is a professional service.¹⁵⁴ Of course, understanding that legal professionals practice law is a useful, if somewhat obvious, starting point.¹⁵⁵ The factors provided for determining the unauthorized practice of law are also useful as a basis for determining the proper scope of the definition.¹⁵⁶ However, the actual procedure the Task Force followed—a procedure consisting primarily of reflection and consultation—provides a more helpful framework for developing a model definition. As will be discussed below, the procedure also demonstrates one of the reasons why the legal professional community needs to formulate a definition of the practice of law.¹⁵⁷

154. Cf. Kritzer, *supra* note 16, at 717 (discussing the sociological approach to defining a profession and stating that "[p]rofessions are specific occupational groups that are at a minimum defined as 'exclusive occupational groups applying somewhat abstract knowledge to particular cases'").

155. Cf. Daniel B. Evans, *Unauthorized Practice of Law (ABA Style)*, DEATH, TAXES, AND LAW: COMMENTARIES, at <http://evans-legal.com/dan/blawg.html#UPL-ABA> (last visited Oct. 10, 2004) (criticizing the Task Force's ultimate Report) (on file with the Washington & Lee Law Review). Evans writes:

So the Task Force is NOT recommending a definition of the practice of law, but only a "basic premise" that should be included in whatever definition "every jurisdiction" adopts. Does this "basic premise" have enough substance to debate? Is there any there there? . . . [T]he second draft is more vulnerable to criticism because it makes no attempt to propose any exceptions or limitations whatsoever. Even the accompanying report does little to dispel the presumption that the "practice of law" is what lawyers do and that the definition should be as broad as possible to "protect the public" against those who are not lawyers. . . . If there really are public interests to be protected, and if a definition of the practice of law is necessary to protect those public interests, why can't the ABA produce a REAL definition? Is there some kind of deadline that must be met? Why not spend the effort to do the job right and develop a definition that can withstand close scrutiny and serve as a model or framework for the protection of the public?

Id.

156. See *infra* Part IV (articulating suggestions for a model definition of the practice of law, including a suggestion that the definition should focus on whether the activity should be regulated in the public's interest).

157. See *infra* Part III.E (discussing the legal community's need to formulate a definition in order to ensure its voice in the reform debate and suggesting that the procedural framework undertaken by the Task Force is a good example of how that definition should come about).

Although the Task Force was criticized as trying to promote the legal monopoly and to protect lawyers' self-interest, the Task Force should be commended for its efforts and for its decision not to attempt to promulgate an overly broad rule. The legal profession, however, is still left with the task of formulating an ultimate model definition. Some of the more important reasons for formulating a model definition will be briefly discussed below. These reasons include the diminishing role of jurisdictional boundaries,¹⁵⁸ the legal profession's need to justify its position in the eyes of the public,¹⁵⁹ and the legal profession's need to ensure its voice in the reform of the legal services market.¹⁶⁰

C. *The Diminishing Role of Jurisdictional Boundaries*

As mentioned previously, the nature of traditional law practice has changed.¹⁶¹ The increasing complexity of law calls for increased specialization.¹⁶² Traditional ways of delivering legal services have also changed: Law practice is becoming more national in scope.¹⁶³ Legal transactions and issues frequently cross state boundaries as commercial and personal mobility increases, and the regulation of law practice must begin to reflect these modern changes.¹⁶⁴

158. See *infra* Part III.C (arguing that a model definition could bring uniformity to inconsistencies caused, in part, by the diminishing role of jurisdictional boundaries).

159. See *infra* Part III.D (discussing the need for lawyers to ensure their claims to exclusive power are seen as legitimate).

160. See *infra* Part III.E (discussing the need for lawyers to formulate a model definition because of its importance in the reform of the legal services market).

161. See *supra* notes 15–18 and accompanying text (discussing traditional law practice and how the nature of law practice has changed in modern society).

162. See generally SUSSKIND, *supra* note 1 (discussing the increasing need for specialization in the law because of the added complexity of law).

163. See *supra* notes 37–44 and accompanying text (discussing the benefits and need for multijurisdictional practice).

164. See, e.g., Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 344 (1994) (arguing that changes in law practice call for uniform professional regulation of the legal profession). Zacharias states:

The bar's expansion has been accompanied by changes in the provision of legal services. To service increasingly mobile individual clients and national commercial clients, lawyers and firms have broadened their practices. Most major firms maintain branch offices in several states. Virtually all lawyers have become accustomed to representing clients in multistate transactions and litigation. Lawyers no longer can afford to confine their activities to local courts . . . servicing clients in more routine matters requires local lawyers to offer advice and

Increasing use of the Internet and information technology provides an avenue for offering affordable and widespread legal services to the public.¹⁶⁵ Internet services are not constrained by state lines and can potentially be accessed from any jurisdiction, making regulation of the practice of law over the Internet difficult.¹⁶⁶ Lawyers and nonlawyers are potentially subject to inconsistent obligations based on inconsistent definitions of the practice of law, determining what legal services they may perform without fear of unauthorized practice liability.¹⁶⁷ A unified vision of the definition of the practice of law would certainly assist in the development of nationalized services and would bring clarity to the growing "gray area" created by inconsistent rights and obligations.¹⁶⁸

D. Legitimizing the Profession's Claims to Exclusive Knowledge and Power

The discussion of the debate underlying UPL mentioned how the public has lost faith in lawyers.¹⁶⁹ The controversy surrounding *State Bar v. Arizona*

representation that cross state lines. The practices of both multistate law firms and less ambitious practitioners thus have become national in nature.

Id. at 342–43.

165. See generally SUSSKIND, *supra* note 1 (advocating a large role for information technology in the future of legal services delivery); Cynthia L. Fountaine, *When Is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment*, 71 U. CIN. L. REV. 147 (2002) (discussing whether legal software constitutes the unauthorized practice of law and arguing for a place for legal software in the future regulation of the practice of law); Richard S. Zembek, Note, *Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace*, 6 ALB. L.J. SCI. & TECH. 339 (1996) (discussing the vast use of cyberspace and describing the assertion of personal jurisdiction over legal disputes arising in cyberspace).

166. See generally Joel Michael Schwarz, *Practicing Law over the Internet: Sometimes Practice Doesn't Make Perfect*, 14 HARV. J. L. & TECH. 657, 658 (2001) (providing "a road map through the jurisdictional quagmire associated with determining whether a particular lawyer's activities on the Internet constitute the unauthorized practice of law, and, if so, where that attorney may be prosecuted").

167. See *supra* note 19 (surveying various state definitions of the practice of law). See generally *Unauthorized Practice of Law Comm. v. Parsons Technology, Inc.*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated and remanded* by 179 F.3d 956 (5th Cir. 1999) (enjoining a computer program, *Quicken Family Lawyer*, from distribution in Texas).

168. See Loomis, *supra* note 145, at 5 (stating that New York County Lawyers' Association President Michael Miller said that "he thought a uniform definition would be a useful concept, 'particularly in the movement in the profession toward multi-jurisdictional practice'").

169. See *supra* Part II.A.1.c (discussing the negative image of the legal profession in the

*Land Title and Trust Co.*¹⁷⁰ is illustrative of this public sentiment. In *Arizona Land Title*, the Arizona Supreme Court held that the practice of law was "those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day," including legal document preparation, legal advice, and adjudicative representation.¹⁷¹ Real estate agents were barred from practicing law, and in the ensuing backlash, Arizona citizens amended their state constitution to include the right of real estate agents to draft and complete contracts and other documents in real estate transactions.¹⁷²

Although the public generally has a negative view of lawyers as a group, members of the public do trust individual lawyers to a large extent and will frequently seek a lawyer's assistance.¹⁷³ At the same time, the public believes that lawyers play an unnecessary role in many routine legal transactions.¹⁷⁴ This contradiction might be explained by understanding that the public will

eyes of the public); see also Buchanan, *supra* note 124, at 564–66 (discussing the negative image of the profession and the public's mistrust of lawyers).

170. *State Bar v. Arizona Land Title & Trust Co.*, 366 P.2d 1 (Ariz. 1961). In *Arizona Land Title*, the Arizona Supreme Court considered whether several realty and title companies engaged in the practice of law by preparing legal documents and giving legal advice. *Id.* at 4. The court also considered whether the companies' activity, by being incidental to the long established customs of the industry, did not constitute the unauthorized practice of law. *Id.* at 5. The court examined the historical role of the attorney as a profession to discuss the importance of ensuring ethical and intellectual competence in the legal services market. *Id.* at 6–9. Although the court stated that "it is impossible to lay down an exhaustive definition of 'the practice of law' by attempting to enumerate every conceivable act performed by lawyers in the normal course of their work," it proceeded to define the practice of law. *Id.* at 8–9. The court determined that the practice of law is "those acts, whether performed in court or in the law office, which lawyers customarily carried on from day to day." *Id.* at 10. The court rejected the contention that the preparation of legal documents was incidental to title insurance activity and so was not the unauthorized practice of law, and also rejected the notion that an activity could not be the practice of law because the bar had long acquiesced in nonlawyers performing that activity. *Id.* at 12–13. The court went on to enjoin the companies from performing a large amount of activities held to be the practice of law. *Id.* at 14–15.

171. *Id.* at 9–10.

172. See ARIZ. CONST. art. XXVI (granting licensed real estate brokers the right to perform certain legal tasks). For an in-depth examination and continuation of this ongoing saga, see generally Jonathan Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem That Won't Go Away*, 34 ARIZ. ST. L.J. 585 (2002).

173. See, e.g., RHODE, *supra* note 87, at 6–7 (discussing how the public, although dissatisfied with lawyers in general, are often very satisfied with their own lawyers and stating that "[p]eople hate a hired gun until they need one of their own").

174. See *id.* at 3–4 ("About three-fifths of Americans describe attorneys as greedy, and between half and three-quarters believe that they charge excessive fees. There is even broader agreement that lawyers handle many matters that could be resolved as well and with less expense by nonlawyers.").

accept lawyers' claims to superior knowledge and skill, and therefore the exclusive authority or power to act, in many situations. The Arizona experience shows, however, that the public does not see lawyers' claims to exclusive authority as legitimate in all situations.¹⁷⁵ Thus, lawyers' claims to exclusive authority will be accepted by the public as legitimate in certain situations and in a certain realm of activities, such as complex transactions or representation before a court, but not in all situations, such as routine transactions or representation before an administrative agency.¹⁷⁶ Lawyers' claims to legitimate, exclusive authority will grow weaker as those claims encompass more activities over which the public believes lawyers lack superior knowledge and skill.

The activities in which lawyers claim to have exclusive authority are those activities that fall within the sphere of the practice of law. When a certain activity is considered to be the practice of law, unauthorized practice of law rules create a legal monopoly over that activity.¹⁷⁷ Lawyers therefore claim exclusive authority over that activity.¹⁷⁸ If the definition of the practice

175. Perlman, *supra* note 30, at 1017–18 (noting that although the legal profession should not be overly concerned with public image when crafting regulation, there are many circumstances where it is appropriate for the legal profession to pay attention to public opinion, such as opinion over scandals). Perlman states that "if the profession ignores these types of criticism, it risks losing control over some of its rulemaking authority." *Id.* at 1017 n.239.

176. See *infra* note 178 (discussing how the success of a profession's claims to authority is contingent on its ability to gain legitimacy in that demand by establishing its expertise over a given area of work).

177. See *supra* Part II (discussing the relationship between the practice of law and the unauthorized practice of law and illustrating how that relationship creates a legal monopoly over the legal services market).

178. Terence Halliday explains how professional claims to authority are justified:

It is clear that the extent of influence that a profession may wield is not fixed and immutable. A profession is not simply endowed with control over a given area of work. A domain of influence must be created by the profession itself. . . . [P]rofessional influence can expand and contract depending on the success of the profession in asserting its "rights" over various kinds of work and in insinuating its counsel into the policy-making of various social institutions, a process that inevitably engages it in conflict with other groups pressing contrary claims. Like other professions, therefore, the legal profession in the last century has been committed to a policy of professional expansionism, both in the areas of work over which it claims a monopoly, and, more important, in the affairs of its institutions, including, but not limited to, the judiciary.

The extent and success of a profession's expansionism is contingent, therefore, in the first instance, on the ability of the profession to establish its expert credentials—to gain legitimacy for its demand that the profession confronts esoteric and complex problems and that the resolution of those problems must be limited to those persons with requisite education, training, and certification. The complexity of professional skills has been reinforced by professions that have

of law encompasses virtually any type of legal service, then the definition will include many services to which lawyers have weak claims of legitimate authority. The public is encouraged to distrust lawyers when lawyers are seen as overreaching, and it begins to question the legal monopoly, especially when the needs for legal services of many are unmet.¹⁷⁹ Nonlawyers successfully providing many of the services falling within the definition makes that overreaching even clearer in the eyes of the public, and this further weakens the legal profession's claims to exclusive authority to act.

For example, suppose that it is determined to be in the public's interest to limit all title searches to lawyers. Once title searching falls within the definition of the practice of law, lawyers have exclusive power in all title searches, and nonlawyers are forbidden from performing title searches. Most of the general public, however, does not believe that only lawyers are qualified to perform title searches. Nonlawyers are believed to be equally able to perform title searches. The public therefore distrusts lawyers' claims to exclusive authority in the area of title searches; the claim is not seen as legitimate. The public is further encouraged to distrust lawyers in general, especially when many individuals cannot afford title searches because of uncompetitive prices.

Clearly and narrowly defining the practice of law clarifies claims to legitimate authority, and a clear and narrow definition may, therefore improve the image of the profession in the eyes of the public. The public may be tempted to strip away some of lawyers' claims if it feels the claims have gone too far, as demonstrated in Arizona.¹⁸⁰ Much of the legal monopoly may be stripped away if lawyers continue to insist on exclusive authority in many activities to which they have weak, illegitimate claims. If the public is encouraged to distrust lawyers enough, then it may even strip lawyers of exclusive authority over those services which should be restricted and

gained statutory mandates to exclude unauthorized practitioners.

TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* 44-45 (1987).

179. See, e.g., Baker, *supra* note 131, at 55 (discussing recent unauthorized practice of law enforcement activity). Baker quotes Phil Shuey, co-chair of the ABA Law Practice Management Section's Futurist Committee, who states: "If we overuse unauthorized practice, the appearance is that all we're trying to do is protect our monopoly. There is a real danger there. It fosters distrust. . . . [T]he bar should choose challenges carefully and focus on whether the public is being misled." *Id.*

180. See *infra* note 184 (discussing Joseph Julin's warning to the legal profession that if the profession does not increase access then nonlawyers will be authorized by the public to practice law); see also *supra* notes 170-72 and accompanying text (discussing the Arizona experience with the unauthorized practice of law).

regulated in the public's interest.¹⁸¹ By narrowing the definition and clarifying what activities are encompassed within lawyers' exclusive authority, the legal profession's image could be improved in the eyes of the public. The profession could be seen as relinquishing some of its overbroad claims to exclusive authority. Lawyers should re-evaluate what services the profession will claim as its exclusive province in light of public perception as well as public interest because:

[T]he public will permit the cartel to exist, or go unregulated by itself, only if the public and its representatives, the government, perceive that "adequate" service is being provided at a "fair" price. Thus, one of the cartel's problems is to convince the public and the government that the profession is indeed so providing and, moreover, that the self-regulatory organization, the cartel, is necessary and beneficial to the public.¹⁸²

The public will only accept lawyers' monopoly over the legal services market if it believes the monopoly is necessary and beneficial to the public. Legitimizing the legal profession's claims to exclusive power in certain activities is therefore one very important reason for the legal profession to draft a model definition of the practice of law.

E. A Strong Voice: Lawyers' Participation in the Formulation of a Definition

The legal profession may have to relinquish much of its legal monopoly in defining the practice of law. The need to restructure the delivery of legal services to increase access and the need to legitimize the claims of the profession in the eyes of the public will probably warrant a narrow definition of the practice of law.¹⁸³ Of course, this is a decision that should be made after

181. Cf. Peter Megargee Brown, *The Decline of Lawyers' Professional Independence*, in ROBERT S. ALEXANDER ET AL., *THE LAWYER'S PROFESSIONAL INDEPENDENCE: PRESENT THREATS/FUTURE CHALLENGES* 23, 25-30 (1984) (discussing threats to the legal profession's self-regulation). As Brown argues:

[P]rofessionalism and independence are synonymous. If the American bar does not do its duty to the public good, the administration of justice, and the aspirations of the profession, then its trust will be taken away and public regulation will soon be making decisions for the profession which the profession should be making for itself. The choice is ours. The time is now.

Id. at 31.

182. Horowitz, *supra* note 54, at 10-11.

183. See *supra* Part II.A.1.c (discussing the argument for a narrow definition of the practice of law); *supra* Part III.D (discussing the need to legitimize lawyers' claims to exclusive power); see also Johnstone, *supra* note 11, at 818-19 (discussing that, although the

considerable study and deliberation. This is another reason why the legal profession needs to articulate a model definition. Lawyers need to provide a model definition of the practice of law in order to ensure the legal profession's voice in the discussion.¹⁸⁴

Lawyers enjoy a large amount of autonomy in the regulation of their profession, and independence of professional judgment is highly valued in the professional community.¹⁸⁵ The definition of the practice of law might profoundly affect the regulation of legal services.¹⁸⁶ MDP, MJP, and UPL reforms all have potentially drastic effects on the amount and type of competition in the market, which in turn affects lawyers' incomes.¹⁸⁷ Lawyers

unauthorized practice of law debate has been rather quiet, "the prolonged and relatively quiescent period in reforming and enforcing unauthorized practice of law may be coming to an end"). Johnstone continues: "The market for legal services is too important for so much of the law as to who may participate in that market to remain indefinitely so ambiguous, uncertain and unenforced." *Id.* at 818.

184. Joseph R. Julin presented an argument, warning, and premonition to the legal profession, similar to the one presented here, over twenty-four years ago:

Unless the costs of practicing law and rendering legal services are dramatically curtailed, the practice of law will decrease in scope. Access to the legal system, as we have known it in the last decades, has become prohibitive for ever-increasing numbers of people not commonly defined as indigent. For many in need of more than "simple" or even "routine" legal counsel, there is a growing reluctance to become involved with a lawyer unless real trouble is afoot. If the legal profession does not do more than in the past to increase productivity while maintaining reasonable standards of practice, I believe the void will be filled by persons not fully trained in the practice of law being authorized to perform so-called routine, perhaps more than routine, lawyerlike tasks.

I do not mean to argue that we, as members of the legal profession, should cling to some notion of territorial integrity in areas now known as the practice of law which might well be handled by others in an effective and less costly way. I believe, however, that lawyers should continue to be in the forefront of this reform. Lawyers must be neither bystanders nor obstacles. In short, the profession must use its collective imagination to provide cost-effective vehicles for the delivery of adequate "legal services" at a price the individual can afford to pay. If the profession does not, others in the name of and at the demand of the consumer will be authorized to do so.

Julin, *supra* note 11, at 208.

185. See generally Gordon, *supra* note 80 (discussing what is meant by lawyers' professional independence, evaluating claims that independence has declined, and determining the conditions under which independence will flourish).

186. See *supra* Part II.A (discussing the relationship between the definition of the practice of law and the market for legal services).

187. Lawyers may have a strong incentive to oppose the opening of much of the legal services market because of the potential loss of income:

Any lowering of entry barriers would be disastrous to existing lawyers who will have relied upon the current rate of pay for legal services to repay these sunk costs.

should have a sincere interest in how the services they provide are delivered. If any reforms are to be made, then the legal community should want to have a voice in their making.¹⁸⁸

Christine Parker, in her study on access to justice and the legal profession, conducted a survey that evaluated lawyers' responses to structural

If entry barriers shrank, and the price of legal services dropped, these lawyers would experience a devastating loss on their investment to become a lawyer. As such, arguments considering the "quality" of the bar aside, lawyers will fight tooth and nail before a flood of lower-priced competitors enters every area of the legal market.

Barton, *supra* note 57, at 489. Statements like these, however, ignore that not all lawyers are profit-oriented and that many genuinely care about the best interests of the public:

I know that to many it will seem incredible that lawyers in a position to make a lot of money would sacrifice it to other goods. "If that's what it takes," they will say, "forget it." All I can do is point out that historically lawyers have sacrificed income repeatedly. I will give only a few examples among many. In the midst of his extremely lucrative practice, Hamilton took time off to hold public office, even though he had no other source of income and died without enough to pay his debts. Brandeis articulated an explicit theory that the purpose of private practice income was to permit the independent lawyers to engage in public causes; he followed his own preaching, living ascetically and taking on his major public causes without fee. . . . Today, lawyers still trade law-firm partnerships for judgeships or administrative posts paying a quarter to a tenth as much.

Gordon, *supra* note 80, at 40.

188. For example, Quintin Johnstone foresees continued activity in the unauthorized practice of law debate. He presents possible future situations that might change the legal services market:

The market for legal services is so big, so profitable, and legal restrictions on unauthorized law practice so seldom enforced that participation in that market is attractive to many legal service providers despite the apparent illegality of their legal services work. . . . The continued violations of laws as important as those regulating who may provide legal services, and the ambiguity in important aspects of those laws, cannot continue indefinitely without far more extensive law enforcement or law reform efforts. . . . If the bar does not initiate a major move against its competitors, one or more of the big nonlawyer occupations active in providing legal services may attempt to change the basic legal underpinnings of unauthorized practice law. They may believe this is necessary if they are to expand their legal service activities even more extensively. Additionally, they may conclude that the time has arrived for them to seek legal validation of their established position in the legal services market; that they are so entrenched in that market that government law-making bodies are now certain to support changes in the law that will fully and clearly approve their current legal services activities. What precise event or events will trigger these major efforts to attain comprehensive change in the enforcement or reform of unauthorized practice laws are not predictable this far in advance but sooner or later will occur.

Johnstone, *supra* note 11, at 841-42.

reforms of the legal profession.¹⁸⁹ The study demonstrated that lawyers are much more willing to cooperate with structural reforms of the legal profession when they feel they have a voice in the reform discussion, and Parker points out:

In the Australian case study, engaging the legal profession in dialogue proved effective in converting lawyers through debates where their view was heard, but where it was not necessarily the predominant one. Some lawyers were responsive to such dialogue simply to maintain legitimacy in the eyes of the community. Others opened their minds to the ideas of reformers and were persuaded by their merits. Yet voluntary change was most common where persuasive dialogue was accompanied by a perception of the inexorability of the reform process. For some, inexorability was about the power of commercial consumers to force competition. For others it was about the determination of reformers who had power in a climate of micro-economic reform to introduce change. Conversely, attempts to force change without dialogue produced unnecessary resistance to reform and entrenched conservatism among lawyers. When reformers seemed to assume that the profession had not and would not reform itself, or where reformers seemed to refuse to listen to lawyers' perspectives on their own profession, lawyers experienced reform proposals as illegitimate insult. The apparent inexorability of reform became a goad to defiance and reactance.¹⁹⁰

Lawyers are also in a unique position to assess the characteristics of various legal services and have experience in dealing with the intricacies of the law. Any reform that the definition of the practice of law may bring to the legal services market will benefit from professional views.¹⁹¹

Procedural strategies for formulating a definition of the practice of law similar to the Task Force's deliberation and consultation provide an excellent forum for articulating lawyers' concerns.¹⁹² The process of formulating a model definition would provide an excellent opportunity for consultation within the legal community as to what constitutes the practice of law, and a model definition would provide an example that could spark and guide debate in the individual states.¹⁹³ Organizations such as the ABA have the potential

189. See PARKER, *supra* note 2, at 124–39 (discussing the survey).

190. *Id.* at 137.

191. See, e.g., Gordon, *supra* note 80, at 75 (discussing lawyers' competence to participate in political reform). See *contra* Rhode, *supra* note 46, at 61 (arguing that lawyers are not in any special position to determine the level of risk consumers are willing to assume in legal services).

192. See *supra* Part III.A–B (discussing the Task Force's efforts and stating that the procedure the Task Force followed was a helpful example for the process of formulating a model definition of the practice of law).

193. Terence Halliday points out that the legal profession's technical authority over the

of providing a strong voice in reform debates.¹⁹⁴ Although any model definition would have to be adopted by the individual states to have any enforceability, a model definition—drafted by the legal profession to reflect the profession's concerns—would at the very least promote a feeling of professional participation in the reform process. Ensuring lawyer participation in the reform debate is another reason why it would be in the best interest of the legal profession to formulate a model definition.

IV. Suggestions for a Model Definition

Defining the practice of law is admittedly a difficult task. The difficulty of producing a definition is increased, however, because attempts to define the practice of law often approached the task from the wrong perspective. Many definitions attempted to siphon off individual practice of law activities from the myriad stew of activities lawyers perform in their professional lives. This approach seeks to determine what exactly is the "essence" of being a lawyer.¹⁹⁵ These definitions ask: What is it that a lawyer does that is the practice of law? How is the practice of law distinguished from all the many legal services

law creates a unique opportunity for the profession to exert moral authority over the law:

The uniqueness of the legal profession largely inheres in the fact that it has technical authority in a normative system, namely, the law. Because the distinction between what is technical and what is normative in the law becomes very opaque, the legal profession has an unusual opportunity to exercise moral authority in the name of technical advice. It can move with such an easy facility between one form of authority and another that even bar leaders become uncertain as to the bounds of their expert role.

HALLIDAY, *supra* note 178, at 41. In other words, because of the both moral and technical nature of law, the technical mastery of lawyers over the law makes it easier for lawyers to exert their authority over the moral nature of law, that is, public policy. *Id.* at 39–41. Halliday continues by pointing out that "effective professional influence requires collective professional action Bar associations . . . become intervening links in a logic of action extending from epistemology to power." *Id.* at 47.

194. See, e.g., Keatinge, *supra* note 17, at 771 (discussing changes in the legal services market, including nonlawyer intrusion into the heretofore-exclusive province of attorneys). As Keatinge states: "It seems unlikely that the ABA will provide the last word on these issues. Nonetheless, to the extent the ABA is willing to approach the questions that need to be addressed thoughtfully, it may be able to provide insight that should be considered by the states and the lawyers" *Id.*

195. See, e.g., Rhode, *supra* note 46, at 82 (discussing the traditional standard of defining the practice of law, which seeks to determine what activities have customarily been practiced by attorneys); see also *supra* note 170 (discussing the approach taken by the Arizona Supreme Court in defining the practice of law by looking at the acts lawyers customarily perform in the profession).

lawyers provide? Once an activity falls within the definition of the practice of law, the approach seeks to determine whether a particular nonlawyer can competently perform the service. The Task Force's report and recommendations reflect this approach—it seeks to determine the common theme underlying lawyers' services.¹⁹⁶ The report then provides a framework for evaluating who can provide legal advice and under what circumstances.¹⁹⁷ This approach to defining the practice of law, which this Note will call the "lawyer-centered" perspective, is inefficient and produces arbitrary and vague results.

The lawyer-centered perspective assumes that a lawyer is needed to provide all legal services, except when the service is sufficiently innocuous that a nonlawyer could practice without posing an undue risk of harm.¹⁹⁸ This perspective leads to an extremely inefficient conception of the practice of law. Each potential provider has to be judged and weighed in order to determine whether she is deemed competent to provide each legal service. This deliberate weighing of the costs and benefits of each service in relation to each provider is extremely inefficient. The varied and rapidly changing nature of legal services makes wholesale evaluation of the potential harm to the entire legal services market almost impossible.¹⁹⁹ Alternative forms of delivery and alternative providers would each have to be evaluated whenever they arise, and innovation would be severely inhibited because these providers would each require authorization before they could legally enter the market. Under a lawyer-centered perspective, the best approach to defining the practice of law would probably be on a case-by-case basis, evaluating the risk of harm whenever that harm rears its ugly head.²⁰⁰ Under these circumstances, the definition of the practice of law is almost impossible to define.

196. See Part III.A–B (discussing and critiquing the Task Force's efforts).

197. See TASK FORCE REPORT, *supra* note 19, at 4 ("Inherent in the drafting and selection of legal documents is the provision of legal advice. Inherent in the representation of another before a court is the provision of legal advice.").

198. See, e.g., *State Bar v. Guardian Abstract & Title Co.*, 575 P.2d 943, 949 (N.M. 1978) (holding that, although nonlawyers may fill in the blanks of legal forms, preparing documents affecting substantial rights requires "the legal skill and knowledge greater than that possessed by the average citizen" and so constitutes the practice of law and is restricted to lawyers).

199. *Cf. State Bar v. Butterfield*, 111 N.W.2d 543, 546 (Neb. 1961) ("While an all-embracing definition of the term 'practicing law' would involve great difficulty, it is generally defined as the giving of advice In an ever-changing economic and social order, the 'practice of law' must necessarily change, making it practically impossible to formulate an enduring definition.").

200. *Cf. supra* note 22 and accompanying text (discussing a common case-by-case approach to defining the practice of law frequently utilized by courts who express the sentiment that formulating a definition to fit all situations is impossible).

A lawyer-centered approach also has the potential of creating extremely vague definitions. The lawyer-centered perspective attempts to abstractly determine what the essence of lawyering is. The perspective often admits that the practice of law does not encompass everything a lawyer does, but it is difficult to draw an abstract distinction.²⁰¹ The result is a muddy "I do not know how to define it, but I know it when I see it" approach to the definition of the practice of law. There are many reasons that make a clear definition desirable. For example, a definition of the practice of law may possibly be struck down as unconstitutionally vague.²⁰² The definition also needs to be clear enough to allow legal service providers to act without significant hesitation. If nonlawyers are allowed to provide legal services, then nonlawyers must know what services they can perform without fear of liability.²⁰³ A vague definition will make nonlawyers hesitant to participate in the legal marketplace, and any efficiency that comes from nonlawyer participation will be stymied.

Finally, any definition formulated from a lawyer-centered perspective has the potential of being extremely arbitrary. Consider, for example, the Task Force's distinction that the essence of practicing law is legal advice.²⁰⁴ Almost any activity related in any small way to legal rights could fit within a legal advice definition. As long as a service is tailored to fit a particular situation, it involves legal advice and will constitute the practice of law.²⁰⁵ The provision of so-called legal information, as opposed to legal advice, is not the practice of

201. See, e.g., *Cardinal v. Merrill Lynch Realty/Burnet, Inc.*, 433 N.W.2d 864, 867 (Minn. 1988) (stating that although the practice of law cannot be defined precisely, "lawyers should be the first to recognize that between the two there is a region wherein much of what lawyers do every day in their practice may also be done by others without wrongful invasion of the lawyers' field").

202. See, e.g., *Iowa Supreme Ct. Comm'n on Unauthorized Practice of Law v. Sturgeon*, 635 N.W.2d 679, 681–82 (Iowa 2001) (rejecting a challenge to the definition of the practice of law based on EC 3-5 as unconstitutionally vague and defining the practice of law as "relat[ing] to the rendition of services for others that call for the professional judgment of a lawyer"). Professor Rhode also contends that the unauthorized practice of law, as infringement on nonlawyer First Amendment rights, must be the least restrictive alternative for accomplishing the state's interest in safeguarding the public. Rhode, *supra* note 46, at 62–71, 94.

203. Cf. *Sturgeon*, 635 N.W.2d at 685 (stating that "to pass a vagueness test a statute must be 'set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest'" (quoting *Arnett v. Kennedy*, 416 U.S. 134 (1974))).

204. See *TASK FORCE REPORT*, *supra* note 19, at 4 (discussing how the broad basic premise for defining the practice of law is providing legal advice).

205. See *id.* (defining the practice of law as the giving of legal advice which is the application of legal principles and judgment to the circumstances or objectives of another person).

law. After all, lawyers do not get paid by their clients for reciting the Uniform Commercial Code.

The distinction between legal advice and legal information is almost meaningless when discussing nonlawyer participation in the marketplace. To recall the example in Part II.B, the Woodhouses would not seek out Mahogany if all he could do is hand them a copy of Forest State Statutes at Large.²⁰⁶ At the very least Mahogany should hand the Woodhouses a copy of the Children with Disabilities Education Act. But by pointing the Woodhouses to a particular advantageous law, Mahogany just tailored his services to fit the Woodhouses' situation and gave them legal advice.

Even if the lawyer-centered perspective takes a more realistic view of the legal services market, the legal advice distinction is still arbitrary. Court clerks, for example, are often accosted by the public with questions about their legal situation.²⁰⁷ Clerks, who are allowed to give out legal information but not legal advice, are cautioned against using the word "should" in their answer and instead provide information about what the litigant "can" do.²⁰⁸ Although the linguistic variation between what a person "can" do and what a person "should" do may mean a lot in legal terms, this fine distinction may be lost on unsophisticated litigants.²⁰⁹

The legal monopoly is unjustified in much of the legal services market. Requiring the use of a lawyer for many legal services is inefficient, expensive,

206. See *supra* Part II.B (using the Woodhouse hypothetical situation to demonstrate the effect of the definition of the practice of law on the legal services market).

207. Cf. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 1992 (1999) ("Unrepresented litigants typically will encounter a variety of court personnel during the course of their cases, beginning with clerks in the clerk's office.")

208. See *id.* at 1994 (discussing how clerks are forbidden from giving legal advice). Engler continues:

The ease with which courts announce the rule prohibiting advice-giving belies the difficulties in understanding and applying the rule. Some courts have sought to distinguish between the giving of legal advice, which is prohibited, and the giving of legal information, which is not. Another opinion indicates that clerks may identify options, but may not assist the litigant in choosing among the options. . . . Notwithstanding the various efforts to help clerks draw the line, one clerk's candid assessment resonates from jurisdiction to jurisdiction: "We have been told here . . . not to give 'legal advice' but I have never heard this term defined so I do struggle with what to tell [pro se litigants] . . . because sometimes this can be a fine line."

Id. (quoting Pro Se Issues & Answers: An On-line Forum, FJC Directions, June 1996, at 33–34).

209. Cf. *id.* (discussing how one scholar suggests that clerks are unable to identify what constitutes legal advice and arguing that the phrase "legal advice" has no inherent meaning).

and detrimental to access to justice.²¹⁰ Subjecting the legal services market to free market forces, however, is also detrimental to access to justice.²¹¹ For reasons explored above, the assurance of competency in some legal services is important to safeguard the interests of the consumer and of society at large.²¹² There may also be important reasons for forbidding court clerks to dispense legal advice on important legal matters.²¹³ However, the approach that has previously determined whether or not a clerk can provide legal advice, the lawyer-centered perspective, is not the best way to articulate or determine those reasons.

An alternative approach to defining the practice of law is an "activity-centered" perspective. Instead of focusing on whether licensed providers usually performed that activity, that is, whether that activity is inherent in what they do, the definition of the practice of law should focus on the activity itself. The activity-centered approach seeks to determine whether any particular activity should be licensed without regard to the performer's ability.

The definition of the practice of law seeks to protect the public from incompetently rendered services by restricting the performance of that activity to licensed providers.²¹⁴ By regulating licensed providers and restricting the activity to those providers, the state is indirectly regulating the activity itself.²¹⁵ As such, when determining whether an activity should fit within the definition of the practice of law, the state should seek to determine whether that activity should be regulated; whether that activity should be licensed. The activity-centered approach asks a fundamental question—is the risk of harm of this activity severe enough to demand licensure? If the answer is yes, then the

210. See *supra* Part II.A.1.b (discussing how rules barring nonlawyer involvement increase the price for legal services, thereby making access to legal guidance unaffordable).

211. See *supra* note 119 and accompanying text (arguing that leaving consumers exposed to high risks does not fit well with a society that idealizes equal justice for all).

212. See *supra* Part II.A.1.c (discussing the need for a narrow definition of the practice of law, where many activities are open to competition, but some are relegated to licensed providers).

213. Cf. Margaret F. Brown, Note, *Domestic Violence Advocates' Exposure to Liability for Engaging in the Unauthorized Practice of Law*, 34 COLUM. J.L. & SOC. PROBS. 279, 286 (2001) ("A number of studies have revealed that 'court clerks offer victims very limited assistance, and that a substantial number actually discourage petitioners from filing for protective orders, much less inform them of additional remedies to pursue.'") (quoting Deborah Epstein, *Effective Intervention in Domestic Violence Court: Rethinking the Roles of Prosecutor, Judges and the Court System*, 11 YALE J.L. & FEMINISM 3, 26 (1998)).

214. See *supra* Part II.A.1.a (discussing the reasons for restricting the practice of law to licensed providers).

215. See *supra* note 23 and accompanying text (discussing the function of the practice of law as regulating legal services).

activity will fall within the definition of the practice of law. Unlike the lawyer-centered approach, however, the activity-centered approach does not assume that a lawyer will be needed to provide most, if not all, services related to legal rights. Instead, the activity-centered approach assumes that a nonlawyer can provide all legal services, except when the service poses a severe risk of harm such that the activity should be restricted to licensed lawyers to minimize that harm.

Ideally, the activity-centered perspective should be empirically based. The approach considers a certain service, such as title searches. The activity-centered approach then takes into account the severity of the imperfections in the market for that particular service. First, the activity-centered approach asks: Is the risk of harm from incompetently rendered title searches such that it ought to be licensed? The risk of harm consists of both the potential harm to the consumer and the potential harm to society at large. For example, many risks are not without remedy, so it would be wise to open competition in these low-risk activities, while licensing high-risk or irremediable activities.²¹⁶ Second, the activity-centered approach asks: Is the asymmetry of information and understanding between the client and the provider severe enough that a potential client could not appreciate the risk of harm? Some risks are comprehensible by clients, and many clients may wish to waive the assurance of competency in exchange for more affordable service. At the same time, however, a client may not always be able to appreciate the severity of the risk of harm,²¹⁷ and so these nonwaivable, "high-risk" services should be licensed in order to ensure competent service.

When evaluating court representation through an activity-centered approach, the risk of harm to the consumer and the risk of harm to society at large from incompetent service should be weighed. For example, the potential risk of harm to the consumer from incompetent court representation might be

216. Cf. Barton, *supra* note 57, at 440 (discussing how many harms stemming from incompetent legal practice are not irremediable and stating that "[n]evertheless, some potential harms, notably those involved in criminal defense work, are potentially irremediable and may justify regulation"); Rhode, *supra* note 46, at 137 (arguing for the elimination of unauthorized practice of law prohibitions). However, Rhode also states that "[w]here the risk of injury is substantial, in contexts such as immigration, consumers may benefit from licensing systems that impose minimum qualifications and offer proactive enforcement. In other fields it could be sufficient to register practitioners and permit voluntary certification . . ." *Id.* In evaluating the risk of harm, it is also useful to remember the relative merits of other regulatory devices, such as certification, *supra* notes 68–69 and accompanying text, or malpractice liability, *supra* note 113 and accompanying text.

217. See *supra* notes 58–65 and accompanying text (discussing the information asymmetry inherent in many legal services which makes it difficult for consumers to evaluate the quality of the service they have received).

serious, resulting in a large judgment against a blameless client, and "[t]he intricacies of court procedure and trial tactics, essential to protect clients from serious harm, suggest the desirability of confining representation to skilled advocates."²¹⁸ Incompetent representation before a court also has larger implications for society, such as detrimental effects on efficient court operation.²¹⁹ Furthermore, the information asymmetry found in the court context may be quite high. It is difficult to evaluate quality when the effects of incompetent representation are not necessarily apparent.²²⁰ Of course, these harms are largely assumed. The fact that the state does not provide civil lawyers and allows unsophisticated litigants to appear *pro se* cuts strongly against these assumed harms.²²¹ An activity-centered approach should understand these assumed harms but should base its decision to license an activity on studies of the *actual* risk of harm to the consumer and to society at large. The Task Force's identified factors for determining who should be able to provide services may also be useful as guideposts in structuring the evaluation of harm under an activity-centered approach.²²²

Many efficiencies flow from an activity-centered perspective. A definition formulated from this perspective has the potential of being drawn very narrowly and encompassing all the high-risk services, while opening up competition in the rest of the legal services market.²²³ An activity-centered definition also fosters innovation in creating alternative forms of legal service delivery and providers because the market would be open for many low-risk services. The process of formulating the definition of the practice of law is also more efficient under an activity-centered approach. Instead of forcing regulators to determine abstractly the essence of what a lawyer does and making regulators weigh the consequences of both activities and individual providers, an activity-centered approach only requires an evaluation of various

218. Cramton, *supra* note 29, at 569.

219. *See id.* at 569–70 (arguing that efficient operation of the court system requires restricting representation to licensed attorneys who will understand court procedure).

220. *See supra* notes 50–65 and accompanying text (discussing information asymmetry in legal services and stating that even the highest quality defense may result in a loss).

221. *Cf.* Barton, *supra* note 57, at 447–48 (discussing how the argument based on serious harm to the consumer is undermined by the fact that unauthorized practice of law bans do not stop a person from proceeding *pro se*).

222. TASK FORCE REPORT, *supra* note 19, at 5 ("Each jurisdiction should weigh concerns for public protection and consumer safety, access to justice, preservation of individual choice, judicial economy, maintenance of professional standards, efficient operation of the marketplace, costs of regulation and implementation of public policy.").

223. *See supra* Part II.A.1.c (discussing the benefits of a narrow definition of the practice of law).

legal activities. The definition of the practice of law will encompass those "high-risk" services—those services with sufficiently severe consequences or those services where the market could not trust clients to adequately waive potential risks.²²⁴

Any definition formulated through an activity-centered perspective also has the potential to avoid vagueness or arbitrariness concerns. By articulating exactly what activities nonlawyers cannot perform, the distinction between the practice of law and all other legal services is drawn clearly. Nonlawyers will clearly understand what services they can and cannot provide. An activity-centered definition could take on a laundry list form, listing activities considered to be the practice of law.²²⁵ Unlike a laundry list definition formulated through a lawyer-centered perspective, however, an activity-centered definition only lists "high-risk" activities, rather than activities considered to be what lawyers normally do when they are practicing law.

The activity-centered approach also provides the opportunity for the formulation of a definition with meaningful distinctions for lawyer and nonlawyer practice. By evaluating a legal service's actual risk of harm, the activities that fall within the definition of the practice of law will be those activities in which it is truly in the public's interest to restrict. The definition will also avoid arbitrary, primarily linguistic distinctions because the definition must focus on the underlying transaction of the service rather than on its

224. Note, however, that this perspective does not necessarily advocate a routine or complex conception of the practice of law. There may be many technically routine legal services posing a high risk of harm or technically complex legal services posing risk of harm. The focus is not on the complexity of the service, but on the actual potential for harm—stemming either from severe damages or a high level of information asymmetry—created by incompetent service. Under an activity-centered perspective, the practice of law will only encompass those activities which it truly would be in the public's interest to regulate: Where regulation must do for the consumer what the consumer cannot do for herself—evaluate quality and avoid harm. See Rhode, *supra* note 46, at 83 (discussing the complexity approach taken by many definitions, criticizing it as often broadly assuming that many activities require the exclusive use of an attorney, and stating that the approach is both under- and over-inclusive).

225. Several state definitions of the practice of law reflect this laundry list approach, setting out in detail the types of activities lawyers engage in that are considered to be the practice of law. For example, the Georgia Code defines the practice of law as:

The practice of law in this state is defined as: (1) Representing litigants in court and preparing pleadings and other papers incident to any action or special proceedings in any court or other judicial body; (2) Conveyancing; (3) The preparation of legal instruments of all kinds whereby a legal right is secured; (4) The rendering of opinions as to the validity or invalidity of titles to real or personal property; (5) The giving of any legal advice; and (6) Any action taken for others in any matter connected with the law.

GA. CODE ANN. § 15-19-50 (2004).

appearance by evaluating the actual risk posed. The line will be clearly drawn and ideally will not reflect a fuzzy legal information or legal advice distinction. Furthermore, an activity-centered approach provides for meaningful nonlawyer participation in the marketplace. By allowing nonlawyers to perform "low-risk" services, services not restricted as the practice of law, nonlawyers will be able to offer many services to the public. Legal services consumers will utilize these services if they decide that any risk posed by a nonlawyer provider is personally acceptable. The activity-centered approach therefore can create a clear, meaningful, and efficient definition of the practice of law and provide a useful approach to the formulation of a model definition.

V. Conclusion

Access to legal guidance is a serious problem with which society must deal, and alternative forms of legal services delivery and providers present a solution to that problem. The process of restructuring the legal services market will most likely continue irrespective of whether a model definition of the practice of law is ever formed. Lawyers, however, should not sit by idly. Rather, they should ensure that a professional voice is heard in the debate over the restructuring of the market. The legal community should also consider an activity-centered perspective in its debate over the definition of the practice of law, as current forms of evaluating the practice of law are extremely inefficient.

The model definition should understand the benefits and the consequences that the alternative forms of legal service delivery entail and should truly protect the public. All lawyers should reassess their notions of the practice of law and of protection of the public. Whatever the ultimate consensus on the definition of the practice of law is, the correct balance between the public's need for access to legal services and its need for protection must be struck. Access to justice is a problem that should not be ignored. The time has come to formulate a model definition of the practice of law: If the time is not now, then when?

