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Articles

AN OVERVIEW OF THE LEGAL PROFESSION IN THE UNITED STATES, HOW THAT PROFESSION RECENTLY HAS BEEN CHANGING, AND ITS FUTURE PROSPECTS

*Quintin Johnstone**

This Article is a follow-up to a recent symposium on the future of law practice, the proceedings of which were published in the *Quinnipiac Law Review*.¹ The symposium was sponsored by the Fellows of the Connecticut Bar Foundation in cooperation with the Connecticut Bar Association. The principal focus of the symposium was the future of the legal profession in Connecticut. This Article focuses on the future of the legal profession nationwide and on recent significant changes that have occurred in the legal profession in some or all states. Many of the recent changes are indicative of trends likely to continue and to result in further important changes in the U.S. legal profession. This Article also considers potential changes lying ahead in the near-term future, and then speculates on some of the possible changes that may occur in the legal profession in the long-term future. In its coverage of recent and prospective changes in the legal profession, the Article also provides a general overview of the current U.S. legal profession.

The term “legal profession” as used in this Article includes not only those individuals licensed to practice law, and their occupational activities, but also the law firms and other organizations of lawyers that provide legal services to clients, the judiciary and other adjudicators, bar associations, and law schools. There are three principal parts in the Article: Part I, Underlying Causes of Recent Changes in the Legal Profession; Part II, Major Sectors of the Legal Profession and Recent

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Changes in each Sector; and Part III, Possible Future Changes in the U.S. Legal Profession. These parts are followed by a brief conclusion.

Throughout this Article, reference frequently is made to “recent” changes in the legal profession. What is meant by “recent” changes? What period of time is intended by the term “recent”? Recent changes, here, means those changes that have occurred during the past quarter-century or so. Similarly, the reference to near-term change possibilities discussed in Part III means those changes that seem likely to occur in the next quarter-century, and long-term possibilities are those changes that conceivably may occur more than a quarter-century from now.

I. UNDERLYING CAUSES OF RECENT CHANGES IN THE U.S. LEGAL PROFESSION

A. *Recent Changes in Consumer Demand for Legal Services*

Demand for most kinds of legal services has been increasing, and there are many reasons for this.² One reason is the increase in the size of the U.S. population.³ Because there is demand for legal services from all segments of the population, population increases result in increased legal services demand.

Another reason for the increase in demand is that the law keeps changing in every significant legal field and in all jurisdictions. Adapting to new laws often requires legal advice and assistance, and new laws also can result in violations and additional litigation. Even laws that remain the same can result in increased legal services demand if enforcement of these laws increases.

Another reason for the increased demand for legal services is that economic and social relations of individuals and organizations recently have become increasingly interstate, transnational, or both. This trend has increased the need for individuals, and particularly business

2. On recent growth in the demand for legal services and reasons for this growth, see JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 282-87 (2005); Marc Galanter, “*Old and in the Way*”: *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081, 1087-89 (1999); James W. Jones, *The Challenge of Change: The Practice of Law in the Year 2000*, 41 VAND. L. REV. 683, 684-92 (1988); Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 347-54 (1994).

3. The current population of the United States is about 300 million, up from about 240 million in 1985 and about 205 million in 1970. U.S. CENSUS BUREAU, *THE 2008 STATISTICAL ABSTRACT* 7, 8 (2006), available at <http://www.census.gov/compendia/statab/>.

organizations, to seek legal assistance. For example, a business that expands its operations from New York to California likely will need legal advice and assistance in adapting to the laws of California. The need for legal advice and assistance can be even greater if the company expands its legal operations to foreign countries.

Individuals, too, have become more geographically mobile, and this has further enhanced legal services demand. They may need legal advice and assistance, for instance, in purchasing and moving to a new home, preparing state income tax returns after moving to a different state, or meeting immigration requirements after moving to a different country.

In addition to increased mobility, other social and behavioral patterns of individuals have increased legal service demand. Examples include increases in incidents of marital discord, resulting in divorce proceedings; increases in the number of automobile accidents, leading to more damage actions and insurance claims; increases in the number of debt defaults, with resulting collection efforts; and increases in illegal drug use, with resulting criminal prosecutions of users and sellers.

B. Increase in Number of Legal Service Providers in the United States Offering Services to Others

There has been a vast increase in the number of legal service providers available to meet the increased demand for legal services. The available supply of these service providers has been even greater than that needed to fill the demand. One important and troublesome exception to this is that the demand from poor persons unable to pay for needed legal services exceeds the supply. There continues to be a serious shortage in the number of legal service providers available to serve the poor.

The supply of lawyers in the United States, the principal providers of legal services in this country, has been increasing very substantially in recent years.⁴ This increase has been proportionately greater than the

4. As of December 31, 2006, the total number of lawyers in the United States actively engaged as lawyers was 1,143,358. Amer. Bar Assoc., 2007 National Lawyer Population by State 3 (2007) (including only lawyers active and resident in the state). In 2003, the number of such lawyers was 1,058,662. Amer. Bar. Assoc., 2004 National Lawyer Population by State (2004), available at http://www.abanet.org/marketresearch/2008_NATL_LAWYER_by_State.pdf. In 1951, the number of licensed lawyers was 221,605; in 1985, it was 655,191; in 2000, it was 1,066,328. AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN

total population increase.⁵ Aiding the U.S. lawyer population increase has been the increase in law school enrollments and the establishment of new law schools.⁶ The appeal of a legal career to undergraduate college students keeps the law schools fully enrolled, despite the increasingly high cost of a law school education, and the number and quality of those recently entering law school has also considerably increased due to the great increase in the number of women and minority law students.⁷ In addition, the percentage of law school entrants who graduate, and the percentage of those taking state bar examinations who ultimately pass and are admitted to practice, has not changed sufficiently to have had any appreciable offsetting effect on the rate at which the supply of new lawyers has increased. A high percentage of law students who enroll in law school eventually graduate and pass the bar.⁸

Consistently in recent years, approximately two-thirds of all those who take a state bar examination in any one year successfully pass the examination.⁹ In recent years, the pass rate for those who took a bar examination for the first time was about 10% higher than for all those who took bar examinations.¹⁰ Pass rates vary among the states. In 2006, California had the lowest pass rate, 47%; Montana had the highest, 91%.¹¹ Overall, bar examination pass rates in some states have declined

2000, at 1 (2004) [hereinafter LAW. STAT. RPT. 2000]. A similar report for recent years has not yet been published. The author's estimate of the number of licensed U.S. lawyers in 2008, active and inactive, is 1,300,000.

5. For example, the population-to-lawyer ratio in 1951 was 695 to 1; in 1980, it was 418 to 1; and, in 2000, it was 264 to 1. LAW. STAT. RPT. 2000, *supra* note 4, at 1.

6. For further consideration of these increases and their implications, see *infra* Part II.G.

7. Once admitted to practice, many women and minority lawyers have long encountered discrimination in employment and promotion. The frequency and extent of this discrimination has been declining, but obviously has not been totally eliminated. On the increasing acceptance and progress of women lawyers, see Ruth Bader Ginsburg, *Women's Progress at the Bar and on the Bench*, 54 FED. LAW. 50 (2007).

8. An indication of this is that 31% of students enrolled in J.D. programs at ABA approved law schools during the academic year 2006-2007 graduated in 2007. LAW SCHOOL ADMISSION COUNCIL ET AL., ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 856 (2008) [hereinafter ABA-LSAC OFFICIAL GUIDE]. The comparable percentage in the academic year 1995-1996 was 30%. *Id.*

9. In the decade from 1997 to 2006, the highest percentage pass rate for all persons who took a state bar examination was 70% in 1997, the lowest was 63% in 2002. 2006 *Statistics*, BAR EXAMINER, May 2007, at 6, 17.

10. *Id.*

11. *Id.* at 15-16. The high failure rate in California presumably is due largely to the number of lower-standard law schools in that state not approved by the ABA. But some graduates of elite law schools who are first-time takers of a state bar examination fail. In the summer 2005 and winter 2006 bar examinations combined, the failure percentage of graduates

considerably in recent years, despite little apparent evidence of candidate qualifications having substantially changed.¹² One quite possible reason for these declines is to reduce competition among lawyers in the state by limiting the number of lawyers licensed to practice in the state. All states except Maryland, Washington, and Wisconsin also impose multistate professional responsibility examination (MPRE) requirements, and in 2006, the pass rate for this type of examination varied from a high of 86% in Utah to a low of 75% in a number of other states.¹³

The rate of lawyer dropout from the profession appears to have increased considerably.¹⁴ These dropouts often are due largely to dissatisfaction with the tension and long hours required in most lawyer jobs, but some dropouts are due to the availability of other higher paying jobs, jobs for which lawyers often are well-qualified. Job dissatisfaction appears to be an increasing problem in most kinds of lawyer jobs.¹⁵ An appreciable number of women lawyers have recently dropped out of active legal profession work to devote more time to their children and other family duties.

Not only has there been a great increase in the number of lawyers as legal service providers, but there also has been a great increase in the number of non-lawyers who provide legal services and are paid for these

of some of these schools was as follows: California-Berkeley, 13%; University of Chicago, 4%; Columbia, 9%; Harvard, 5%; Yale, 6%. ABA-LSAC OFFICIAL GUIDE, *supra* note 8, at 40-45.

12. The pass rate in 1997 compared to 2006 for these states was as follows: Florida, 79% in 1997, 64% in 2006; Indiana, 90% in 1997, 76% in 2006; South Carolina, 84% in 1997, 77% in 2006; West Virginia, 78% in 1997, 60% in 2006. 2006 Statistics, BAR EXAMINER, May 2007, at 6, 15-17. The decline in Connecticut was more moderate, 81% in 1997, 75% in 2006. *Id.* at 15.

13. *Id.* at 25.

14. On lawyer dropouts, see DEBORAH ARRON, *RUNNING FROM THE LAW* (3d ed. 2004); Joe G. Baker & Brian K. Jorgensen, *Leaving the Law: Occupational and Career Mobility of Law School Graduates*, 50 J. LEGAL EDUC. 16 (2000).

The principal reasons for lawyer dropouts, other than taking higher paying non-lawyer jobs, apparently are work hours and pressure, changes in career or professional interests, and family-related matters. Baker & Jorgensen, *supra*, at 33.

15. On job dissatisfaction of lawyers, see DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 24-28 (2000); Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 656-63 (1994) (proposals for improving quality of life for those in the legal profession); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999); Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33 (2001).

services by those receiving them.¹⁶ Most of these non-lawyers are in firms or organizations whose principal business is providing some other kind of service.

More than a dozen different kinds of non-lawyer firms or organizations regularly provide legal services to some of their clients in addition to the firms' or organizations' traditional services, a practice often referred to as multidisciplinary practice (MDP). Among such legal service providers are accounting firms; real estate brokerage firms; title insurance companies; tax return preparation and tax advisory firms, such as H&R Block; commercial banks; savings banks; savings and loans; investment banks; collection agencies; architectural firms; trade unions; non-accountant business consulting firms; and legal document preparation firms. In addition, non-lawyers that frequently provide legal services to others include non-lawyer advocates and adjudicators in alternative dispute resolution proceedings, non-lawyers authorized to represent parties before federal and state administrative agencies, city planners, and social workers.

Paralegals, too, are a very numerous and important category of non-lawyer legal service providers, but unlike most non-lawyers that provide legal services to others, paralegals work under the supervision of lawyers, and lawyers are responsible for their work. Lawyers increasingly rely on paralegals for supplemental legal service help, not only in many law firms but in many corporate law departments and government law offices as well.¹⁷ As of 2004, there were 224,000 paralegals and legal assistants working in this country, and the number is expected to increase.¹⁸ Paralegals perform a wide range of legal services work, including research on legal authorities, initial drafting of some

16. In some instances, a separate charge is not made for providing the legal services, but legal services are included in the price for principally non-legal services. An example of this is real estate brokerage. Usually, if real estate brokers prepare legal instruments or perform transaction closing duties, charges for such services are included in the brokers' sale commissions.

17. The ABA Standing Committee on Legal Assistants has defined paralegals (legal assistants) as follows: "A legal assistant or paralegal is a person, qualified by education, training, or work experience, who is employed or retained by a lawyer, law office, corporation, governmental agency, or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible." ABA CENTER FOR PROF'L RESPONSIBILITY, *THE LEGAL ASSISTANT'S PRACTICAL GUIDE TO PROFESSIONAL RESPONSIBILITY* 12 (2d ed. 2004). The ABA definition has been adopted by the law of some states. See Patrick Vuong, *Regulation Roll Call*, 23 LEG. ASST. TODAY, Mar.-Apr. 2006, at 66 (providing a state-by-state summary of statutes and court rules regulating paralegals).

18. U.S. DEP'T OF LABOR, *OCCUPATIONAL OUTLOOK HANDBOOK* 209 (2006-2007).

legal instruments, factual investigation, and even consultations with clients.¹⁹

Foreign legal consultants are another type of legal service provider whose use recently has increased by lawyers in this country, especially in some of the big cities. Foreign legal consultants are foreign lawyers that, with special authorization by a U.S. state, are permitted to provide advice in the state on the law of the country where they are qualified as lawyers.²⁰

The expanded MDP operations of non-law firms, particularly the big accounting firms, recently caused considerable concern and controversy for many in the legal profession.²¹ The big accounting firms

19. On services provided by paralegals, see ABA STANDING COMM. ON LEGAL ASSISTANTS, UTILIZATION OF LEGAL ASSISTANTS AMONG PRIVATE PRACTITIONERS 9-42 (1998). For a discussion on work performed by paralegals some years ago, see QUINTIN JOHNSTONE & MARTIN WENGLINSKY, *PARALEGALS: PROGRESS AND PROSPECTS OF A SATELLITE OCCUPATION*, ch. 1 (1985). On recommendations of how law firms can best use paralegals, see ARTHUR G. GREENE & THERESA A. CANNON, *PARALEGALS, PROFITABILITY AND THE FUTURE OF YOUR LAW PRACTICE* (2003); Arthur G. Greene, *Expanding the Role of Paralegals, The Profitable Paralegal*, LAW PRAC., June, 2005, at 39. On paralegals, see also U.S. DEP'T OF LABOR, *supra* note 18, at 207-10.

20. For court rules licensing foreign legal consultants, see, for example, STATE BAR OF CAL., REGISTERED FOREIGN LEGAL CONSULTANTS RULES AND REGULATIONS (2006), available at http://calbar.ca.gov/calbar/pdfs/rules/Rules_Title3_Div3-Ch4-FLC.pdf. See also Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 FORDHAM INT'L L.J. 1126 (1998).

The General Agreement on Trade in Services (GATS), an international agreement to which the United States is a signatory, has the potential of eventually regulating foreign lawyers' provision of legal services in the United States. See Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001). On the application of GATS to legal services, see also SYDNEY M. CONE, *INTERNATIONAL TRADE IN LEGAL SERVICES* ch. 2 (1996).

21. Much of this controversy over MDP was sparked by reports of the ABA Commission on Multidisciplinary Practice recommending expanded legalization of MDP by non-law firms. On the MDP controversy and diverse views on expanding legalization of legal services by non-law firms engaged in MDP, see, for example, ABA Comm'n on Multidisciplinary Practice, Background Paper on Multidisciplinary Practice (1999), available at <http://www.abanet.org/cpr/mdp/multicomreport0199.html>; ABA Comm'n on Multidisciplinary Practice, Updated Background and Informational Report and Request For Comments (1999), available at <http://www.abanet.org/cpr/mdp/febmdp.htm>; ABA Comm'n on Multidisciplinary Practice, Report to the House of Delegates (May 2000); ABA Law Prac. and Mgmt. Sec., Symposium, *Multidisciplinary Practice, Staying Competitive and Adapting to Change* (2001); Symposium, *The Future of the Profession: A Symposium on Multidisciplinary Practice*, 84 MINN. L. REV. 1083 (2002); 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 (2000); Lawrence J. Fox, *MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud*, 44 ARIZ. L. REV. 547 (2002); Robert R. Keatinge, *Multidimensional Practice in a*

not only expanded the volume of their tax work but moved into other legal service fields, such as estate planning, litigation support, business planning, and financial planning, with full-time firm lawyer employees providing much, but certainly not all, of the firms' legal services work for clients. Although lawyer employees of the firm are doing much of this work, the provider is an accounting firm, not a law firm.

In addition to some accounting firms, other types of firms use lawyer employees in their MDP operations to provide legal services to their clients. Examples of such firms include some lobbying firms, management consulting firms, and investment banks.²² The increasing expansion of MDP in this country by accounting firms appears to have stalled as a result of the corporate scandals a few years ago, scandals exemplified by the Enron collapse, the resulting elimination of Arthur Andersen as a major accounting firm, and some added legal restrictions imposed on accountants by the 2002 Sarbanes-Oxley Act.²³ The legal services expansion by accounting firms, however, may revive in the near future as concern over the recent scandals subsides, and the accounting firms renew their expansion in providing legal services to clients.

A unique type of legal "service provider" is the individual person who acts pro se, providing his or her own legal services. Pro se legal services recently have become far more frequent in some important fields of law, particularly in cases before the courts.²⁴ Some individuals act pro se because they are unable to pay for needed legal services and

World of Invincible Ignorance: MDP, MJP, and Ancillary Business After Enron, 44 ARIZ. L. REV. 717 (2002).

In Australia, Canada, and some European countries, major accounting firms have expanded their legal services operations by acquiring ownership of some law firms. Gary A. Munneke, *A Nightmare on Main Street (Part MXL): Freddie Joins an Accounting Firm*, 20 PACE L. REV. 1, 6 (1999).

22. On these firms' utilization of lawyer employees in providing legal services to clients, see Dzienkowski & Peroni, *supra* note 21, at 104-06.

23. On the Enron scandals and the subsequent passage of the Sarbanes-Oxley Act, see *infra* note 54.

24. On pro se representation, see JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGES OF PRO SE LITIGANTS: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS (1998); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 803-06 (1986); Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 FORDHAM L. REV. 1573 (2002); William Hornsby, *Defining the Role of Lawyers in Pro Se Litigation*, JUDGES' J., Fall 2002, at 5; Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 399-405 (2004) (noting that pro se filings constitute about a quarter of all civil cases and a majority of uncontested divorce cases); Ronald W. Staudt & Paula A. Hannaford, *Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers*, 52 SYRACUSE L. REV. 1017 (2002); Margaret G. Tebo, *Self-Serve Legal Aid*, A.B.A. J., Aug. 2002, at 38.

are unaware of legal aid or pro bono help, or such help is not available to them. Many other individuals acting pro se can afford to pay legal service providers, but represent themselves to save money or, occasionally, because they believe they can do a better job than the legal service providers they would hire.²⁵

Contributing to the growing volume of pro se representation by individuals able to pay is the increasing resort by many of them to non-lawyer firms that provide legal form preparation assistance.²⁶ The availability of legal forms, legal form preparation assistance, and court personnel advice that many courts will provide at no charge to a pro se litigant with a matter before the court all are aiding pro se representation.²⁷ Although pro se representation may save money for those resorting to it, this form of representation often has undesirable consequences. The adequacy and competence of the representation frequently is deficient. Also, when resorted to in litigated matters, it can create problems for judges and the courts.²⁸ Many judges tend to unduly favor pro se litigants when one of the parties is appearing pro se. An increasingly prevalent response of lawyers to client pro se representation is unbundled legal services. Under this form of representation, the lawyer provides only some of the needed legal services to a client, such as drafting the complaint in a litigated matter, while the client provides the remaining services pro se, such as self-representation before the court in the trial proceedings. Unbundling can provide some fees to

25. On reasons for litigants deciding to appear pro se, see Hornsby, *supra* note 24, at 7-8.

26. On form selection, completion, and sale by these firms, see ABA COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS 41 (1995); Lincoln Brunner, *Nonlawyer Legal Service Industry Mushrooms*, 20 LEGAL ASST. TODAY, Nov.-Dec. 2002, at 16. One of the largest of these organizations, We The People Forms and Service Centers USA, Inc., has franchise outlets in many states. Anyone can purchase printed legal forms on a wide array of legal proceedings and transactions not specifically tailored to any particular clients' legal needs at many stationery stores and other retail outlets.

27. On court personnel assistance to pro se litigants, see GOLDSCHMIDT ET AL., *supra* note 24, at 25-45; John M. Greacen, *Self-Represented Litigants, Learning from Ten Years of Experience in Family Courts*, JUDGES' J., Winter 2005, at 24. On the many different programs provided by courts in California to assist self-represented litigants, see Bonnie R. Hough, *Description of California Courts Programs for Self-Represented Litigants*, 11 INT'L. J. LEGAL. PROF., Nov. 2004, at 305.

28. GOLDSCHMIDT ET AL., *supra* note 24, at 49-61 (considering the problems incurred by courts when parties appear pro se, and some of the possible solutions to those problems). See also Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, JUDGES' J., Winter 2003, at 16; Carolyn D. Schwartz, *Pro Se Divorce Litigants: Frustrating the Traditional Role of the Trial Judge and Court Personnel*, 42 FAM. CT. REV. 655 (2004).

lawyers but reduces the amount the client pays for needed legal services.²⁹

C. Increased Competition Among Legal Service Providers

The market for legal services in this country has always been competitive, but in recent years it has become much more so,³⁰ as have most service markets.³¹ Not only have lawyers and their firms recently become much more competitive with one another, but non-lawyers recently have become more competitive with lawyers, as more non-lawyer firms have entered the legal services market and the volume of non-lawyer legal services has increased tremendously.³² In some fields

29. On unbundling, see Tebo, *supra* note 24, at 43; Norman K. Janes, *You Want to Unbundle What?*, CONN. LAWYER, May 2004, at 38. Some legal aid agencies are also resorting to unbundling as a means of expanding the number of clients they can serve.

However, in unbundled litigated matters, a lawyer in some jurisdictions can risk contempt or other sanction if the lawyer only drafts the complaint or other court filed documents but does not file an appearance. See, e.g., *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997).

30. On competition for legal services and increasing scope and intensity of that competition, see ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS* 247-80 (1988); Milton C. Regan, Jr., *Law School Competition Penalties and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1 (1999). On strategies for business companies (and presumably many law firms) to become more competitive, see GARY HAMEL & C.K. PRAHALAD, *COMPETING FOR THE FUTURE* (1994). Competition also influences regulation. See Symposium, *Business Law: The Impact of Competition and Regulation*, 52 EMORY L.J. 1285 (2003).

31. A services market in which providers are not significant providers of legal services, but which is of comparable and arguably greater importance than the legal services market, is the market for medical services. Increasing competition has also been occurring in the medical services market. Contributing to this increase has been the emergence and expansion of health maintenance organizations. Also, the expanded importance of hospitals as providers of medical services that commonly compete with one another and with patient office care by physicians has also contributed to the increase. Even physicians, probably the most respected of professionals, have been encountering increasing competition, not only from one another, but from other occupations, including nurse practitioners, physician assistants, chiropractors, optometrists, pharmacists, naturopaths, and acupuncturists. There is very extensive literature on the changing medical profession. See, e.g., PAUL A. LONDON, *COMPETITION SOLUTION* 187-95 (2005) (recommending even more competition in the health care industry); ALICE G. GOSFIELD, *HEALTH LAW HANDBOOK* 89 (1999); Special Issue, *Transforming American Medicine: A Twenty-Year Retrospective on the Social Transformation of American Medicine*, 29 J. HEALTH POL., POL'Y & L. 557 (2004); Symposium, *Is the Health Care Revolution Finished?*, L. & CONTEMP. PROB., Autumn 2002, at 1; Edward P. Richards & Thomas R. McLean, *Physicians in Managed Care, A Multidimensional Analysis of New Trends in Liability and Business Risks*, 18 J. LEG. MED. 443 (1997).

32. Due to fundamental noncompetitive influences, the market for legal services is not, however, a perfect market in economic terms. These influences include the complexity of legal reasoning and process, the state's monopoly over the democratically legitimate exercise of force, and the relatively unified nature of the legal profession. For a discussion of these

of law, lawyers and their firms have also encountered enhanced competition from potential clients, as more such potential clients able to pay for legal services and who have legal problems are providing the services pro se.³³

Why this increased competition for legal services—why has it occurred?³⁴ There are a number of reasons. One reason is that intense and pervasive competition for most kinds of products, services included, increasingly has been perceived in this country as a social goal offering benefits to consumers, including lower cost and often higher quality and more rapid product delivery. This growing favorable recognition of competition as a valued social norm has been applicable to the legal services market as well as most other markets.

Another explanation for recent increased competition for legal services is that some non-lawyer firms have been encountering increased competition for their principal service, and have moved into the legal services market to help sustain and even enhance their profitability. Accounting and real estate brokerage are examples of occupations where this expansion has occurred.³⁵ Competition for legal services also has recently increased due to enhanced standardization and simplification of many legal service products that have enabled these products to be properly prepared and delivered by persons with less legal expertise than that of lawyers. An example of this is the legal advice and document preparation needed to successfully negotiate, finance, and close most single family residential conveyances.

Another reason for enhanced competition for legal services work is the recent modification of laws to permit some non-lawyers to provide

influences and their implications for the justice system, see Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 964-83 (2000).

33. On pro se representation and its recent increase, see *supra* notes 27, 28, and accompanying text.

34. On competition for legal services and the increasing scope and intensity of that competition, see ABBOTT, *supra* note 30, at 247-80; Regan, *supra* note 30, at 1. On strategies for business companies (and presumably many law firms) to become more competitive, see HAMEL & PRAHALAD, *supra* note 30. Competition also influences regulation. See Symposium, *Business Law: The Impact of Competition and Regulation*, 52 EMORY L.J. 1285 (2003).

35. For accountants, see Michael J. Powell et al., *The Changing Professional Organization*, in RESTRUCTURING THE PROFESSIONAL ORGANIZATION 15 (David M. Brock et al. eds., 1999). For real estate brokers, see PATRICK J. ROHAN ET AL., REAL ESTATE LAW AND PRACTICE §10.01 (2005) (discussing that among recent increasing forms of competition for real estate brokers is the use of internet listings by sellers that eliminates the use of brokers in many sales transactions).

legal services to their clients, and to permit more multijurisdictional practice by lawyers in jurisdictions in which the lawyers are not licensed to practice. Recent modifications of unauthorized-practice laws are more fully discussed in the next section.

A still further reason for enhanced competition is that many non-law firm legal service providers recently have been extensively utilizing the greater legal service cross-selling opportunities they have compared to those available to law firms.³⁶ Many non-law firms provide legal services predominantly to clients with whom they have established relationships in providing non-legal services. Often the existence of client legal service needs becomes apparent in the process of providing clients with a non-legal service, and the service providers frequently obtain the legal service work by alerting the client to the service needed and offering to provide that needed legal service. For example, accounting firms' opportunities to cross-sell legal services are enhanced by the range of non-legal services that many of them provide to their clients, including, in addition to auditing tax return preparation, financial planning, sale of investment products, and sale of insurance.³⁷ The big accounting firms, as multidisciplinary practice operations, have been particularly successful in cross-selling legal services because of the variety of legal services they offer, the geographic scope of their operations, and their capacity to provide many of the kinds of legal services that become apparent in providing their clients with non-legal services.

D. Recent Changes in Regulation of Legal Service Providers

Legal service providers and their organizations in this country are subject to a vast body of regulatory laws. These laws, with frequent variation among U.S. jurisdictions, and often with considerable ambiguity, universally regulate who may provide legal services, and to whom; how legal services may be provided; who may impose and enforce regulations on legal service providers; and what sanctions may be imposed on legal service providers for violating the regulations.

36. For suggestions by a practicing lawyer on how law firms can increase their cross-selling of legal services, see George B. Harris, *Effective Cross-Selling Begins With an Introduction*, in HOLLIS H. WEISHAR & JOYCE K. SMILEY, *MARKETING SUCCESS STORIES* 157-58 (2d ed. 2004).

37. See Barry C. Melancon, *In Support of CBA Financial Planners*, J. ACCT., Feb. 1, 2005, at 30. See also C.R. Hinings et al., *The Dynamics of Change in Large Accounting Firms*, in *RESTRUCTURING THE PROFESSIONAL ORGANIZATION*, *supra* note 35, at 136.

Governmental regulation of legal service providers primarily has come from the states, but there is some significant regulation of these providers by the federal government. Congress and some federal administrative agencies have shown an increased likelihood of intervening by enacting their own laws if serious problems of national significance arise in delivery of legal services that the states appear unwilling or unable to deal with adequately.³⁸ The Sarbanes-Oxley Act and subsequent SEC regulations are an illustration of this point.³⁹

At the state level, state courts have been particularly active in adopting laws regulating legal service providers. This involvement of state courts has resulted partly from case law decisions on particular issues of law concerning legal service operations of particular legal service providers, and from court rules issued separately from the courts' opinions in litigated cases and generally more comprehensive in coverage than typical case law decisions. In asserting their regulatory authority over legal service providers, an authority that the courts in many states have claimed is superior to that of the other two governmental branches, the courts' justification has been their express power granted by the state's constitution or their inherent power as courts.⁴⁰

Government administrative agencies also impose some regulatory control over legal service providers. Important controls of this sort include government administrative agency rules or decisions as to who may represent parties in hearings before the agency.⁴¹ Administrative

38. On the recent increasing federal government regulation of lawyers, see Ted Schneyer, *An Interpretation of the Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 566-84 (2005).

39. On the Sarbanes-Oxley Act, see *infra* note 54.

40. On state courts' reliance on express constitutional or inherent powers in regulating legal service providers, see Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation - The Role of the Inherent Power Doctrine*, 12 U. ARK. LITTLE ROCK L. J. 1 (1989-90); Quintin Johnstone, *Unauthorized Practice Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 823-30 (2003); G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 JUDICATURE 12 (2004).

41. See, e.g., 31 C.F.R. § 10.3 (2007) (attorneys, certified public accountants, and enrolled agents are among those expressly authorized to practice before the U.S. Internal Revenue Service); 37 C.F.R. § 10.14 (2007) (attorneys may represent parties before the U.S. Patent and Trademark Office in trademark and other nonpatent cases); N.Y. COMP. CODES R. & REGS. tit. 12, § 701.9(d) (2001) (attorneys may represent parties in adjudicatory proceedings of the N.Y. Department of Labor); N.Y. COMP. CODES R. & REGS. tit. 20, § 3000.2(a)(2) (2005) (attorneys, certified public accountants, enrolled agents, and public accountants enrolled with the N.Y. Education Department may represent others before the N.Y. Tax Appeals Tribunal).

agencies in many states also administer licensing or certification examinations for certain legal service occupations.⁴²

Lawyers and their firms, the major providers of legal services in the United States, have long been subject to extensive legal regulation.⁴³ But the scope and explicitness of that regulation have changed considerably in the recent past. These recent changes have reduced the ambiguity in many of the laws regulating lawyers by making them more detailed. Among recent regulatory changes are increases in the legally permissible marketing efforts by lawyers and their firms;⁴⁴ expansion in the legally permissible multijurisdictional practice of law by lawyers in jurisdictions in which the lawyers are not licensed to practice;⁴⁵ added legal restrictions that modify or clarify what are perceived as the legal profession's core values;⁴⁶ and revisions in the lawyer regulatory

42. See, e.g., CAL. BUS. & PROF. CODE § 5023 (2003) (state committee shall conduct licensing examinations for certified public accountants); CONN. SUPER. CT. RULES §§ 2-3, 2-5 (2007) (examining committee appointed by the judges of the superior court shall examine candidates for admission to the bar); 225 ILL. COMP. STAT. ANN. 454/25-5 (2007) (state agency to conduct examinations for real estate brokers and sales persons); WASH. CT. RULES, APR. R. 12 (2007) (state agency established to conduct certification examinations for closing officers authorized to prepare and complete real estate transactions and personal property transactions).

43. For treatises and commentaries that provide extensive and detailed coverage of legal regulation of lawyers, see GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* (3d ed. 2000); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* (1986); *RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS* (2000) (with updated supplements) [hereinafter, *RESTATEMENT*].

There are also, of course, additional civil law obligations applicable to all legal service providers, as well as most everyone else. Agency, tort, and contract laws are examples of civil laws creating such obligations. Malpractice, generally a form of tort, is a risk incurred by all legal service providers, and many lawyers and some other legal service providers obtain malpractice insurance as protection against this risk. But one state, Oregon, requires all practicing lawyers to purchase malpractice insurance. OR. REV. STAT. § 9.080(2)(a) (2005).

44. See *infra* note 71 and accompanying text.

45. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.5 (2002). This rule, as revised by the ABA in 2002 and widely adopted by U.S. states, extensively broadened the right of a U.S. lawyer to provide legal services in states where the lawyer is not licensed to practice. On multijurisdictional practice by U.S. lawyers, see AMER. BAR ASSOC., *REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE* (2002); Carol A. Needham, *Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 2003 U. ILL. L. REV. 1331 (2003).

46. The core values are "independence of professional judgment, the protection of confidential client information, and loyalty to the client through the avoidance of conflict of interests." ABA COMM'N ON MULTIDISCIPLINARY PRACTICE, *REPORT TO THE HOUSE OF DELEGATES* app. at C10 (1999), available at <http://www.abanet.org/cpr/mdp/mdpreport.html>. For some recent changes concerning certain core values, compare MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.7, 1.8, and 5.4 (before and after the 2004 Model Rule modifications). The

enforcement structure by some shift in regulatory responsibility in many states from the organized bar to state government officials and agencies, particularly to legislatures.⁴⁷

The most important recent source of change in the regulation of lawyers has been the proposed rules of professional responsibility adopted by the American Bar Association (ABA).⁴⁸ These proposed rules were greatly modified and expanded by the ABA in 1983, extensively revised in 1997, and lesser but often appreciable changes were made in other years.⁴⁹ The official title of the current ABA rules is the ABA Model Rules of Professional Conduct. The published version of the ABA Model Rules also includes a set of comments following each rule; the comments are legally nonbinding but are influential interpretations that further clarify the meaning and applicability of each rule.

ABA House of Delegates, however, never adopted the principal changes recommended in the above cited ABA Commission Report.

47. James M. Fischer, *External Control Over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 95-109 (2006) (discussing the increased legal regulation of lawyers by legislatures).

48. Professional and trade associations of some other legal service occupations also have adopted rules of conduct for those in their occupation, but these rules have not been adopted as binding law by the courts or other governmental bodies. Examples of such rules of conduct include AMER. INST. CERTIFIED PUB. ACCOUNTANTS, CODE OF PROFESSIONAL CONDUCT (2006) (a long and detailed set of principles and rules covering many of the same aspects of professional conduct as do the ABA Model Rules of Professional Conduct, such as conflict of interest, maintaining client confidences, fees, and advertising, with occasional written interpretation issued by the Executive Committee of the Institute's Professional Ethics Division, interpretations published in the *Journal of Accounting*), and NAT'L ASSOC. OF REALTORS, CODE OF ETHICS AND STANDARDS OF PRACTICE (2008) (containing seventeen brief articles (rules), plus brief standards of practice (comments) following each article). Engineers also have a code of ethics. For a discussion and copy of the engineers' code, see F.A. Kulacki, *The Future of Callings -- An Interdisciplinary Summit on the Public Obligations of Professionals Into the Next Millennium: Engineering, Engineers and the Public Good*, 25 WM. MITCHELL L. REV. 157 (1999). Two of the national paralegal professional associations have codes of professional conduct. For copies of these codes, see ARTHUR GARWIN, ABA CENTER FOR PROF'L RESPONSIBILITY, THE LEGAL ASSISTANT'S PRACTICAL GUIDE TO PROFESSIONAL RESPONSIBILITY (2d ed. 2004); Nat'l Ass'n of Legal Assistants, NALA Code of Ethics and Professional Responsibility (2007), <http://www.nala.org/code.htm> (last visited May 25, 2008); Nat'l Fed'n of Paralegal Ass'ns, Model Disciplinary Rules and Ethical Considerations, <http://www.paralegals.org/displaycommon.cfm?an=1&subarticlenbr=133> (last visited May 25, 2008).

49. On the history of ABA drafting and approval of rules of professional conduct for lawyers, see HAZARD, JR. & HODES, *supra* note 43, §§ 1.10-1.19; Elizabeth Chambliss, *Professional Responsibility: Lawyers, A Case Study*, 69 FORDHAM L. REV. 817, 828-43 (2000).

The ABA Model Rules of Professional Conduct, as their current official model rule title implies, are not per se legally binding requirements. They are proposals to the courts of each state and the federal government as to what rules of professional responsibility the courts should adopt as law. The great significance of the ABA Model Rules is that the courts of all states, except California and New York, have adopted the ABA Model Rules.⁵⁰ In most all states that have adopted the ABA Model Rules, the adoptions have been with some modifications, the modifications varying considerably from state to state.

The federal courts in lawyer disciplinary cases before them usually apply the professional conduct rules of the state where the court sits or the professional conduct rules of the state in which the lawyer before them is licensed. Some federal courts, however, have adopted exceptions or additions to the state rules they commonly apply. Surprisingly, there is no one set of professional responsibility rules in effect in all federal courts.⁵¹ Many state bar associations usually review recent changes in the ABA's Model Rules and recommend to the courts of their state whether or not to adopt the changes, on occasion recommending to the courts modifications in the changes proposed by the ABA, or alternatives to the ABA changes.

In addition to the ABA Comments to the Model Rules, there are other interpretive sources helpful in clarifying the rules and their applicability. One of these sources is court opinions in litigated cases involving the meaning of the rules. Some of these opinions have recently been very significant in shaping the rules on issues of considerable importance.⁵² Another interpretive source are the opinions

50. The New York professional responsibility rules are based on an earlier ABA set of proposed rules, the ABA Code of Professional Responsibility, but with many changes, some changes influenced by the current ABA Model Rules of Professional Conduct. California has never adopted any proposed set of ABA professional responsibility rules, but many of its rules are similar to the ABA's Model Rules of Professional Conduct.

51. Commentators have criticized the disparity among federal courts in their rules of lawyer professional conduct, and various suggestions have been made for greater uniformity. *See, e.g.,* Daniel R. Coquillette, *Local Rules Regulating Attorney Conduct in the Federal Courts*, Report to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States (1995) (discussing what rules of professional conduct are in effect in each federal district and circuit, and also setting forth options available for resolving the problems of ambiguity and inconsistencies in the various federal court rules); Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?*, 64 GEO. WASH. L. REV. 460 (1996).

52. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (holding constitutional the restriction by the Florida Bar Rules of Professional Conduct on direct mail solicitation of accident victims or their relatives); *Birbrower, Montelbano, Condon & Frank, P.C. v. Superior*

of state and some larger local bar association ethics committees that are given in response to requests by lawyers for advice, usually advice on problems the lawyers are facing in their practice. The ABA also has such a committee.⁵³ The opinions of these committees are not legally binding, but a court is likely to adhere to any such opinion if a requester abides by the opinion's advice. In recent years, most of these opinions have been published and are available as guides to lawyers everywhere. Changes in the ABA Rules of Professional Conduct for lawyers, and court rules adopting these rules with or without modifications, are of course not the only recent significant changes that have occurred in the regulation of lawyers and their firms. Many additional changes also have resulted from other recent court rules, judicial opinions, statutes, and administrative regulations.⁵⁴

Court, 949 P.2d 1 (Cal. 1998) (holding that a multijurisdictional practice by an out-of-state lawyer was unauthorized practice of law) (proving later to be very influential in liberalization of the law on multijurisdictional practice by lawyers, and adoption of current Rule 8.5 of the ABA Model Rules of Professional Conduct); *Niesig v. Team 1*, 558 N.E.2d 1030 (N.Y. 1990) (setting forth the kinds of employees with whom a corporation opposing counsel cannot communicate under the Code of Professional Responsibility DR. 7-104(A)(1), a code rule that is almost identical to Rule 4.2 of the ABA Model Rules of Professional Conduct).

53. The ABA committee is the Standing Committee on Ethics and Professional Responsibility.

54. See, e.g., The Sarbanes-Oxley Act of 2002, 15 U.S.C.A. §§ 7201-7266 (2007); *Birbrower*, 949 P.2d 1 (the case that initiated major changes in the law of multistate practice by lawyers); *Florida Bar*, 515 U.S. 618 (upholding as constitutional a Florida court rule restricting direct mail solicitation of legal work by lawyers or lawyer referral services).

On the impact of the Sarbanes-Oxley Act of 2002 on accountants, see Stephen C. Gara & Craig L. Langstraat, *The Sarbanes-Oxley Act of 2002: A New Ballgame for Accountants*, 34 U. MEMPHIS L. REV. 73 (2003); Jonathan Macey & Hillary A. Sale, *Observations on the Role of Commodification, Independence, and Governance in the Accounting Industry*, 48 VILL. L. REV. 1167, 1182-87 (2003); Niels Schaumann, *The Sarbanes-Oxley Act: A Bird's-Eye View*, 30 WM. MITCHELL L. REV. 1315, 1318-25 (2004).

The Sarbanes-Oxley Act also imposes some added regulation on lawyers and law firms. See Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725 (2004); Susan P. Koniak, *When the Hurley-Burley's Done: The Bar's Struggle With the SEC*, 103 COLUM. L. REV. 1236 (2003); Peter C. Konstant, *Sarbanes-Oxley and Changing the Norms of Corporate Lawyering*, 2004 MICH. ST. L. REV. 541 (2004); Thomas D. Morgan, *Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct*, 17 GEO. J. LEGAL ETHICS 1 (2003).

On the Enron scandals that preceded passage of the Sarbanes-Oxley Act, see ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy B. Rapoport & Bela G. Dharan eds., 2004) (views of many different authors on the Enron scandal and its significance); Symposium, *Enron and the Future of U.S. Corporate Law and Policy*, 89 CORNELL L. REV. 269 (2004); William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275 (2002); Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 WASH. U. L.Q. 917 (2003). On the lessons of Enron for professional firms, including law firms, see Keatinge, *supra* note 21, at 720-21.

Non-lawyers have long been legally prohibited from practicing law.⁵⁵ An historic exception still in effect in all U.S. jurisdictions is that an individual, a natural person, may provide legal services to himself or herself, and such self-services are not the unauthorized practice of law.

An important recent development in the law of unauthorized practice is that most U.S. jurisdictions have further qualified the general prohibition on non-lawyers providing legal services with exceptions permitting certain non-lawyer occupations legally to provide certain legal services to others. Most of these changes have been in state laws, but the federal government recently has also made some important changes of this kind. The occupations included and the kinds of legal services that the non-lawyer occupations may provide vary considerably from jurisdiction to jurisdiction. Many non-lawyer occupations with legal authorization to provide legal services to others are occupations whose principal non-legal services invariably or frequently need one or more kinds of legal services essential to or supplemental to the non-legal service being provided—legal services such as legal advice or drafting of legal instruments, or title evaluations of titles to parcels of real property. Examples of principal non-legal services of non-lawyer occupations that normally are in need of legal services are real estate brokers finding buyers of real estate; commercial banks loaning money to borrowers on contract terms acceptable to lender and borrower; and title insurance companies insuring titles to real estate that are sufficiently devoid of title defects. Many different occupations recently have been granted some legal exemption by particular jurisdictions.⁵⁶

55. Some scholars take the position that benefiting lawyers is the overriding purpose of much of the law regulating what occupations may provide what legal services to clients, and that reforms are needed to greatly curtail these lawyer benefits. A prominent legal scholar who has long taken this position is Deborah Rhode. *See, e.g.,* Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law & Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996).

56. A few examples of such recent exemptions include non-attorney agents practicing before the U.S. Patent and Trademark Office on patent matters, *see* 37 C.F.R. § 10.14 (2007); a new licensed occupation created in the State of Washington, closing officers, authorized to prepare and complete legal documents incident to closing real estate and personal property transactions, *see* WASH. COURT RULES, ADMISSION TO PRACTICE RULES, R. 12 (2007); legal document assistants and unlawful detainer assistants legally authorized to aid pro se parties in selecting and filling out legal documents, *see* CAL. BUS. & PROF. CODE § 6400 (2007); real estate brokers and title insurance companies, with appropriate notice to and consent of the parties, drafting essential documents in residential real estate sales transactions and closing these transactions, *see In re* Opinion 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344 (N.J. 1995); publication and distribution on the internet of written materials on

In comparing the legal regulation of lawyers and non-lawyers it is important to note that no non-lawyer occupation active as a legal service provider is subject to as comprehensive a set of legally binding regulatory rules as the rules of professional responsibility applicable to lawyers and law firms in all U.S. jurisdictions. Trade associations of some non-lawyer occupations engaged in the business of providing legal services have adopted codes of conduct expected of those in their occupation.⁵⁷ But the codes have not been adopted as binding law, as have most of the proposed ABA rules, nor are any of these non-lawyer codes as detailed as the ABA Model Code of Professional Responsibility or the ABA Model Rules of Professional Conduct.

A major problem that has persisted in the law of unauthorized practice of law is the meaning of the term “practice of law.”⁵⁸ It obviously includes giving legal advice, drafting legal instruments, or representation of one or more parties before courts and administrative agencies.⁵⁹ But the precise meaning of each of these three kinds of conduct is ambiguous and needs further interpretation to ascertain its

the law if the products state that they are not a substitution for the advice of an attorney, *see* TEX. GOV'T CODE ANN. § 81.101 (Supp. 2007).

57. *See supra* note 48.

58. The meaning of the term “practice of law” has been considered so uncertain in some states that courts have recently adopted a very helpful court rule defining practice of law. An example is this Washington rule adopted in 2002:

RULE 24. DEFINITION OF THE PRACTICE OF LAW

(a) General Definition: The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law. This includes but is not limited to:

- (1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
 - (2) Selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).
 - (3) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
 - (4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).
- (b) Exceptions and Exclusions: Whether or not they constitute the practice of law, the following are permitted: [a list of exceptions and exclusions added].

WASH. CT. RULES, GR R. 24.

A similar but somewhat more detailed court rule was adopted in Connecticut, effective Jan. 1, 2008. CONN. SUPER. CT. RULES § 2-44A (2008).

59. The Washington Court rule adds “[n]egotiation of legal rights or responsibilities on behalf of another entity or person(s).” WASH. CT. RULES, GR R. 24(a)(4).

exact scope and to which occupations in which situations it does or does not apply. Much of the law on unauthorized law practice consists of law-making bodies, especially courts, providing interpretations, with many of these interpretive efforts having occurred in recent years as more non-lawyers and their firms have entered the legal services market. Despite the many efforts by law making bodies to clarify how extensively, if at all, particular non-lawyer occupations legally may engage in the practice of law, much of the law of unauthorized law practice in every state remains ambiguous.

Of major significance to all legal regulation, including regulation of law practice, is how extensively the laws imposed have been complied with. The compliance record of lawyers with the many laws regulating their profession has generally been good in recent years, but there were more violations than there should have been. Particularly troublesome is that every year there have been serious violations by lawyers that result in criminal convictions, disbarments, and/or large civil malpractice damage awards widely publicized in the popular media. The vast majority of U.S. lawyers, however, adhere to the many legal regulations to which they, as lawyers, are subject. One reason for this generally favorable compliance record of members of the bar is that most of the legal regulations of U.S. lawyers are consistent with the norms and values of the legal profession, which are widely accepted by members of the bar as proper ethical standards to which they, as professionals, should adhere.⁶⁰ Those few legal regulations of lawyers that are inconsistent with contemporary norms and values are likely to be extensively violated.⁶¹ Some violations no doubt also are due to ignorance of the prevailing rules by the violators.

60. On norms of lawyers and their influence, see NORMS AND THE LAW (John N. Drobak ed., 2006); Timothy P. Terrell, *Turmoil at the Normative Core of Lawyering: Uncomfortable Lessons from the "Metaethics" of Legal Ethics*, 49 EMORY L.J. 87 (2000); W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955 (2001). On the relation of social norms to law, see Amitai Etzioni, *Social Norms: Internalization, Persuasion and History*, 34 LAW AND SOC'Y REV. 157 (2000).

61. An example is Model Rule 5.5 of the ABA Model Rules of Professional Conduct (greatly restricting multijurisdictional practice by a lawyer in a jurisdiction in which the lawyer is not admitted to practice), prior to its revision by the ABA in 2002 (the revision in important respects permits considerable multijurisdictional practice by a lawyer in a jurisdiction in which the lawyer is not admitted to practice). Both the earlier rule and its revision were widely adopted by U.S. jurisdictions as binding law. One reason for the revision presumably is that the earlier version did not comply with the prevailing norms and values of most lawyers, and was being extensively violated. Another Model Rule of Professional Conduct that has been widely adopted but extensively violated is Rule 8.3. That

The compliance record by most kinds of non-lawyer legal service occupations and their firms with legal regulation of their legal service activities has not been good. The principal reason for this is the violations by many non-lawyers and their firms of law prohibiting the unauthorized practice of law. Many of the violations were obvious under then-existing laws prohibiting the unauthorized practice of law, and most of these laws still are in effect today. Many of the violations, however, are somewhat questionable due to ambiguity in the applicable laws, and also due to the realistic possibility that these laws could be and eventually would be interpreted as not applicable to the particular type of firm or its conduct.

When entering the legal services market as legal service providers, most non-lawyer firms apparently have quite consciously assumed the risks that they will be or may be engaging in the unauthorized practice of law, and be subject to possible sanctions for doing so. Why have they assumed this risk? There are a number of possible reasons. One reason may be that their legal service activities clearly are the unauthorized practice of law but that further exemptions in unauthorized-practice laws will soon be adopted that will include their particular legal service activity. Another possible reason may be that current unauthorized-practice laws are sufficiently ambiguous, so that if the firm is ever brought before a court and charged with engaging in the unauthorized practice of law, the court will construe the unauthorized-practice law as not applicable to the firm or its legal service activities. Another possible reason is that enforcement of unauthorized-practice laws is so lax in the jurisdictions where the firm is providing legal services that legal proceedings in all probability will never be brought against the firm for its unauthorized practice activities.⁶² An added possible reason, although apparently applicable to very few legal services firms, is that the firm was so naïve and uninformed when it entered the legal services market that it did not realize that its conduct was, or well might be, considered the unauthorized practice of law.

rule, with some qualifications, requires a lawyer who knows of a violation of the Rules of Professional Conduct by another lawyer to inform the appropriate professional authority of the violation. One reason for the extensive violation of this rule seems to be that the reporting requirement is inconsistent with a widely adhered to professional norm, also prevalent in many other social contexts: you do not squeal on your friends or associates.

62. On lax enforcement of unauthorized-practice laws, see ABA COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS 23-32 (1995); Deborah L. Rhode, *The Delivery of Legal Services by Nonlawyers*, 4 GEO. J. LEGAL ETHICS 209, 216-21 (1990).

In addition to the extensive recent violations by non-lawyers of unauthorized-practice laws, there have been many recent incidents of non-lawyers violating other laws when providing legal services. The best evidence of this is a scattering of judgments against non-lawyers for violating a variety of other criminal and civil laws in their legal services work.⁶³ But here again it should be noted that non-lawyers in their legal services work are subject to far fewer and less detailed legal restrictions on their legal services work than are lawyers. This is due principally to non-lawyer occupations not being subject to as comprehensive a set of legally binding practice rules as those imposed on lawyers in every U.S. jurisdiction by the rules of professional responsibility, including those rules of professional responsibility codifying the legal profession's core values. Some non-lawyer legal service occupations, however, do have rules of conduct for occupational members.⁶⁴

Enforcement of laws regulating the practice of law, including enforcement of laws regulating the professional conduct of lawyers and laws prohibiting the unauthorized practice of law, is largely a governmental function.⁶⁵ Bar associations and other professional and trade associations, however, often are important participants in the enforcement process, on occasion even bringing or threatening to bring lawsuits against violators, or filing amicus briefs in some significant enforcement cases. Bar associations, particularly state bar associations, at one time did much of the investigation, adjudication, and even the sanctioning of lawyers who violated the rules of lawyers' professional conduct. This bar association role recently has been considerably reduced, but there are states in which bar associations still regularly cooperate with and supplement governmental enforcement of lawyer

63. See, e.g., *Jamison, Money & Farmer & Co. v. Standeff*, 678 So. 2d 1061 (Ala. 1996) (accountant held liable for damages caused client by negligent tax advice); *Dail v. Adamson*, 570 N.E.2d 1167 (Ill. App. 1991) (accountant held liable for damages due to negligent tax advice); *Greenlee v. Rainbow Auction/Realty Co.*, 582 N.W.2d 93 (Wis. App. 1998). See also Jacob L. Todres, *Malpractice and the Tax Practitioner: An Analysis of the Areas in Which Malpractice Occurs*, 48 EMORY L.J. 547 (1999).

64. See *supra* note 48.

65. See ABA Center for Professional Responsibility, 2002 Survey on Lawyer Disciplinary Systems, available at http://www.abanet.org/cpr/discipline/sold/toc_2002.html. On state governmental allocation to state agencies or state officials of the obligation to enforce unauthorized-practice laws, see, for example, CONN. GEN. STAT. § 51-90 (2007); CONN. SUPER. CT. RULES §§ 2-29 to 38 (2007); FLA. RULES OF CT. ch. 10 (2007); IOWA RULES OF CT., chs. 37 & 38 (2008). On unauthorized practice of law enforcement and compliance in Connecticut, see Quintin Johnstone, *Connecticut Unauthorized Practice Laws and Some Options for Their Reform*, 36 CONN. L. REV. 303, 324-31 (2004).

professional responsibility laws and unauthorized-practice laws.⁶⁶ A major problem, however, in enforcement of lawyer disciplinary and unauthorized-practice laws is inadequate state funding of the enforcement process, with resulting inadequate enforcement staffing.

II. MAJOR SECTORS OF THE U.S. LEGAL PROFESSION AND RECENT CHANGES IN EACH SECTOR

A. *Law Firms Providing Legal Services to Clients Who Can Pay for the Services*

This sector is the one in which most lawyers earn their living, and in which the total number of lawyers has increased considerably in recent years, from 370,111 lawyers in 1980 to 672,901 lawyers in 2000.⁶⁷ The sector is often referred to as consisting of two kinds of law firms, large firms and small firms. Large firms are those firms with a large number of lawyers that represent mostly big business interests; small firms are those firms with a small number of lawyers, including one-lawyer firms (solo operations), that represent mostly ordinary individuals and small business interests.⁶⁸ This Article uses such a categorization, but it should be recognized that there is no clear and universally applicable line of demarcation between what is a big law firm and what is a small one.⁶⁹

66. Some bar associations, notably the ABA, recently have also made evaluations of and recommendations for enforcement of laws regulating the practice of law. One such report that received considerable attention and had some impact on enforcement reform was the ABA Commission on Evaluation of Disciplinary Reform (1992), often referred to as the McKay Report.

67. LAW. STAT. RPT. 2000, *supra* note 4, at 6.

68. On the increasing bifurcation of the practicing bar into firms representing large corporate business interests and those representing individuals and small businesses, sometimes referred to as separate practice hemispheres, see JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR, at xxi - xxii, 127-136 (rev. ed. 1994) (a study of the Chicago Bar); NEIL E. SOLOMON, LEGAL MANAGEMENT THEORY 41-42 (1993). For a more recent study of the Chicago bar that emphasizes the social stratification of Chicago lawyers, see HEINZ ET AL., *supra* note 2.

69. Some small firms with few lawyers, for example, represent mostly small business interests, such as small retailers or owners of small family farms, and some boutique law firms represent mostly major business interests. Boutiques are small firms with highly competent lawyers, each firm concentrating on a particular narrow field of law, usually a field of law highly relevant to business interests. Perceptions as to what is a big firm also may vary geographically. A firm that would be considered small in New York City might be large in Salt Lake City, Utah, or Boise, Idaho.

There have been many recent changes among law firms that provide legal services to clients who can pay for the services. Some of the changes have occurred in both large and small firms, others have been largely or entirely restricted to but one of the two kinds of firms. These changes include more individual lawyers in the firm concentrating their practice in one field of law;⁷⁰ firm lawyers increasingly relying on support staff, particularly paralegals, in most aspects of their legal services work; firms increasingly engaging in marketing efforts, with newer forms of marketing increasingly becoming more prevalent;⁷¹ fees more frequently set in terms more favorable to clients;⁷² and more firms increasingly engaged in multijurisdictional law practice. Many big and small firms have also become much larger in number of lawyers per

This Section of the Article does not discuss house counsel. House counsel, and the departments or other organizational subunits in which they are based, are sufficiently different from fee charging lawyers and their law firms. House counsel, therefore, are separately considered in the next Section, even though their clients can and do pay house counsel for the legal services. See *supra* Part II.B.

70. On specialization by smaller law firms in the downtown Chicago area, probably typifying such specialization by smaller firms in other big city downtown areas, see SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE 40-43 (2002).

71. A common form of law firm marketing is advertising. Legal restrictions on this form of marketing were greatly eased by a 1977 U.S. Supreme Court opinion, *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977). However, there are important legal restrictions on advertising currently in effect. See Emily Olson, *The Ethics of Attorney Advertising: The Effects of Different State Regulatory Regimes*, 18 GEO. J. LEGAL ETHICS 1055 (2005); see also WILLIAM E. HORNSBY, JR. & HARRY J. HAYNESWORTH, *MARKETING AND LEGAL ETHICS: THE BOUNDARIES OF PROMOTING LEGAL SERVICES* (3d ed. 2002). A recent innovation in law firm marketing that is becoming more common is use of the internet. On this form of marketing, see GREGORY H. SISKIND ET AL., *THE LAWYER'S GUIDE TO MARKETING ON THE INTERNET* (2d ed. 2002); Christopher Hurd, *Untangling the Wicked Web: The Marketing of Legal Services on the Internet and the Model Rules*, 17 GEO. J. LEGAL ETHICS 827 (2004). Other forms of marketing that recently have been used more extensively by law firms are firm seminars, brochures, and newsletters directed at prospective clients, including past clients, and that discuss in some detail the nature of particular legal problems and how these problems can be resolved, problems that those to whom these efforts are directed currently are or shortly will be encountering. For suggestions on how best to use these law firm marketing efforts, see BRADFORD W. HILDEBRANDT & JACK KAUFMAN, *THE SUCCESSFUL LAW FIRM: NEW APPROACHES TO STRUCTURE AND MANAGEMENT* 213-20 (2d ed. 1988). One potentially very effective form of marketing is in-person solicitation. For lawyers, however, this form of marketing is largely prohibited. MODEL RULES OF PROF'L CONDUCT R. 7.3 (2007); Monica Richey, *Modern Trends of Restrictions on Lawyer Solicitation Laws*, 29 J. LEGAL PROF. 281 (2005).

Many larger law firms are even hiring public relations counsel to assist them in their marketing efforts. See MICHAEL H. TROTTER, *PROFIT AND THE PRACTICE OF LAW, WHAT'S HAPPENED TO THE LEGAL PROFESSION* 51 (1997).

72. In many states, fees more favorable to clients are due in part to recent changes in the law imposing restrictions on lawyers' legal fees, particularly contingent fees.

firm, with many small firms moving from the small firm to the big firm category, and some of the biggest of the big firms expanding enormously, two of them now having over 3,000 lawyers each.⁷³ Although the growth in number of lawyers has been occurring in firms of all sizes, given the rapid increase in total number of lawyers in private law practice, the percentage of lawyers in each size category of firm has remained relatively stable in recent years.⁷⁴ Adding lawyers to a firm usually is accompanied by adding more support staff. However, one means of reducing the need for adding law firm staff that recently has become more prevalent, particularly by big U.S. law firms, is outsourcing routine legal work to firms overseas, especially to firms in India, that specialize in work for U.S. law firms.⁷⁵ The need for adding more full-time law firm employees is also being reduced by some firms, particularly when the firms need a high volume of short-term work, by hiring temporary or part-time lawyers or part-time paralegals.⁷⁶

Contributing to the growth in size of big law firms has been the increasing prevalence of big law firms that open and maintain branch

73. The largest law firms whose principal or largest office is in the United States are DLA Piper, with 3,623 lawyers, and Baker & McKenzie, with 3,335 lawyers. *The Two Fifty, Annual Survey of the Nation's Largest Law Firms*, NAT'L LAW J., Nov. 12, 2007, at S18-S24 [hereinafter *Annual Survey 2007*]. The total number of lawyers in the 250 largest law firms with some offices in the United States increased from 43,330 lawyers in 1985 to 128,123 lawyers in 2007, including many lawyers assigned to offices outside the United States. *Id.* at S3. On the growth of very large law firms, see Randall S. Thomas, *Megafirms*, 80 N.C. L. REV. 115, 131-36 (2001).

74. LAW. STAT. RPT. 2000, *supra* note 4, at 14.

75. India has been the principal nation to which these U.S. law firms have outsourced work because by U.S. standards, legal service costs in India are low, many educated persons in India are fluent in English, and many persons in India understand the intricacies of India's legal system, a system that is modeled on the Anglo-American legal system. Also, some of those in India doing this outsourced work are graduates of U.S. law schools. On outsourced legal work, see Jill S. Chanen, *Moving to Mumbai: More Firms Are Outsourcing Support Services to India, Will Legal Work Be Next*, A.B.A. J., Apr. 2004, at 28; Allison M. Kadzik, *The Current Trend to Outsource Legal Work Abroad and the Ethical Issues of Such Practices*, 19 GEO. J. LEGAL ETHICS 731 (2006); Eileen B. Libby, *Off-Shore Ripples Make Waves for Paralegals*, FACTS & FINDINGS, May 2000, at 20; Daniel Brook, *Made in India*, LEGAL AFFAIRS, May-June, 2005, at 10; Anthony Lin, *Legal Outsourcing to India is Growing, But Still Confronts Fundamental Issues*, N.Y. L.J., Jan. 22, 2008, at 1.

Accountants also are outsourcing some tax return preparation work. See Gary Shamis, *Outsourcing, Offshoring, Nearshoring: What to Do?*, J. ACCT., June 1, 2005, at 57.

76. On temporary law firm employees, see DEBORAH ARON & DEBORAH GUYOL, *THE COMPLETE GUIDE TO CONTRACT LAWYERING* (1995) (referring to various forms of temporary lawyer help as contract lawyering); DAVID A. ROBINSON, *PRACTICING LAW WITHOUT CLIENTS, MAKING A LIVING AS A FREELANCE LAWYER* (1996).

offices.⁷⁷ A common means by which both big and small firms increase the number of firm lawyers is by merger with other law firms.⁷⁸ Even some big firms have recently merged with other big firms,⁷⁹ and many big firms recently have taken over some small firms, especially those classified as boutiques. Boutiques that can substantially add to or enrich a particular sphere of a big firm's practice are particularly prone to big firm takeover, assuming both parties can reach acceptable takeover terms.

A potentially important development, but one that so far has been very limited, recently has occurred in a few large law firms. These firms have been offering their clients not only legal services but some significant non-legal services as well. These non-legal services are available from law firm personnel or from affiliate organizations owned and controlled by the law firm.⁸⁰ Some smaller law firms have long offered real estate brokerage services or some accounting services to their clients, but the move of some larger law firms into providing extensive business services is new and legally may be questionable.⁸¹ The long-term consequences of law firms providing non-legal services could be immense if it continues to expand and if many more law firms provide such services.

77. For example, Baker & McKenzie, a firm whose administration is based principally in Chicago, now has sixty-nine offices world-wide, nine of them in the United States. Annual Survey 2007, *supra* note 73, at S38. White & Case has the next largest number of offices of any U.S.-based law firm; it has thirty-six offices, four in the U.S. *Id.* at S50. DLA Piper, a London-based law firm, the world's largest law firm, has sixty-four offices, twenty-one in the U.S. *Id.* at S41-S42.

On the potential advantage and possible problems of law firms opening branch offices, see HILDEBRANDT & KAUFMAN, *supra* note 71, at 213-20.

78. On when law firm mergers may be desirable and how law firm mergers can be most effectively carried out, see HILDEBRANDT & KAUFMAN, *supra* note 71, at 191-211.

79. One example is the merger, in the past year, of LeBoeuf, Lamb, Greene & MacRae (713 lawyers) with Dewey Ballantine (544 lawyers). The new firm is Dewey & LeBoeuf (1,398 lawyers as of 2007). Annual Survey 2007, *supra* note 73, at S5. For other large firm mergers with other large firms in the past year, see *id.*

80. On this development, see James W. Jones, *The Challenge of Change: The Practice of Law in the Year 2000*, 41 VAND. L. REV. 683, 688-92 (1988); Leigh Jones, *Professions in Convergence: Taking the Next Step*, NAT'L L.J., May 20, 2005, at 1; Keatinge, *supra* note 21; Lowell J. Noteboom, *Professions in Convergence: Taking the Next Step*, 84 MINN. L. REV. 1359, 1364-74 (2000).

Arnold & Porter, the large law firm whose ancillary business affiliate operations are described by James Jones in the above cited article, later sold these ancillary affiliates. *Id.* at 1365 n.16.

81. The ABA has dealt with this problem by adopting ABA Model Rules of Professional Conduct Rule 5.7, which permits law firm performance of non-legal services but with extensive restrictions. Most states have not adopted Rule 5.7.

Another important change that has recently occurred in many big firms, but infrequently if at all in small firms, is firm management restructuring, including management modifications such as increased centralization of control; less influence of most partners on issues of firm policy, including future growth plans; and, in some firms, heavy reliance on non-lawyer firm employees in firm management decision-making.⁸² The obvious objective of such restructuring is to increase the efficiency and profitability of firm operations, and in some instances to expedite firm expansion plans. Another kind of restructuring that has occurred recently in many big firms is increasing the number of formal categories of firm lawyers to include equity partners, salaried partners, senior counsel who are former partners, permanent associates (more experienced associates with little or no prospect of becoming partners), and junior associates.⁸³

A further recent law firm change, largely restricted to big firms, is very substantial increases in junior associate salaries adjusted for inflation. This has resulted in many big firms now paying \$160,000 or more annually to each beginning associate for the associate's first job following admission to practice.⁸⁴ The main reasons for these large and increasingly high salaries to junior associates are to enable big firms to compete more successfully in the market for recently admitted lawyers and as an inducement for the associates not to leave the firm employing them for other jobs in or out of the legal profession. One possible consequence of these very high salaries is reduction in profitability of the firms paying such salaries. In an effort to prevent this, many big firms recently have increased the annual billable hours required of junior associates. In addition, many firms have eliminated the formerly frequent practice of rotating junior associates among various departments within the firm, something that was valued by the associates

82. This has meant that some of the largest law firms, to enhance profitability, have been shifting from the democratic model of all partners participating in firm management decisions to most firm management decisions being made by a managing partner or small committee of partners. NEAL E. SOLOMON, *TRANSFORMATION OF THE CORPORATE LAW FIRM* 114-15 (1998).

Increasing firm marketing efforts have also included many law firms, even many mid-sized law firms, adding full-time or part-time business development personnel to their staffs. Cliff Collins, *Client Quest*, 65 OR. ST. BAR BULL., June 2005, at 9.

83. See Marion Craine, *The Transformation of the Professional Workforce*, 79 CHI.-KENT L. REV. 543, 574 (2004).

84. On salaries of lawyers in various employment sectors of the legal profession in the first few years after completing law school, see RONIT DINOVTZER ET AL., *AFTER THE J.D.: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 43 (2004).

because it helped them decide which field or fields of law practice they found most attractive and would eventually concentrate on. The widespread increase in big firm annual billable hours and daily working hours for junior associates has recently received considerable attention in the legal profession media due to frequent junior associate expressions of dissatisfaction from the resulting added work pressure and the decreased time they have for their families and other non-working aspects of their lives.⁸⁵ Long working hours are especially troublesome to women lawyers with small children or to women lawyers planning to have children. Many beginning lawyer associates in large firms, despite the long-term prospects of even much higher income than what they currently are being paid, plan on leaving the firm within two years or so.⁸⁶

Retention of promising junior associates is not the only serious personnel retention problem that big firms increasingly face. Retention of valued firm partners has also become an increasingly common and troublesome problem for big law firms. In earlier eras, a big firm partner typically chose to remain at one firm for his or her entire working career, once becoming partner. But in recent years, partner

85. See, e.g., Lawrence J. Fox, *End Billable Hour Goals . . . Now*, 17 PROF. LAW. 1 (2006); Niki Kuckes, *The Hours: The Short, Unhappy History of How Lawyers Bill their Clients*, LEGAL AFF., Sept.-Oct. 2002, at 40; RHODE, *supra* note 15, at 10, 170-72; Scott Turow, *The Billable Hour Must Die*, A.B.A. J., Aug. 2007, at 32.

Reliance by law firms on hourly rates in computing fees has also been criticized as too often resulting in excessive charges to clients due to more work being performed than needed and the risk of lawyer falsification of hours actually worked. See ABA Comm'n on Billable Hours, Report, 2001-2002 (2002) (discussing the corrosive impact of emphasis on billable hours, how law firms can best work within the billable hours system, and alternative billing methods.)

86. On associate attrition in large law firms, and reasons for it, see W.S. Ricks, *I Quit*, NAT'L JURIST, NOV. 20, 2005, at 18.

Plans for only short-term employment with the big firm initially employing them often are made by law students prior to graduation from law school. This has been apparent from discussions the author has had with many third-year students at Yale Law School who have accepted large law firm associate employment upon graduation from law school. In most instances, these students had been large firm summer clerks while still in law school. The students accepted large law firm associate employment due to such benefits as high salary, added training and experience, and the reputation obtained from having worked in a prestigious large law firm as an associate. But many plan on leaving the large firm after two or three years for employment more favorable in terms of shorter hours, geographical location, public service opportunities, or some other personal goal. Some of these students, once employed in a big firm, change their plans and remain for many years with the firm at which they started. Presumably the short-term large law firm employment plans of many Yale law students typify the plans of many third-year law students at other law schools that annually place a substantial number of their graduates in associate positions at large law firms.

mobility of valued big firm partners has become far more common, often prompted by higher anticipated income.⁸⁷ Big firm partners have become more like Major League baseball players, who exhibit less employer loyalty and spend their careers with multiple employers. Although lawyer mobility has become a particularly serious problem for large law firms, a recent sample study of five thousand lawyers in all employment sectors of the legal profession nationwide who were only two or three years out of law school indicated that job mobility was high in all lawyer employment sectors.⁸⁸

The major underlying cause for most of the significant recent structural and operational changes in both big and small law firms serving clients who can pay for the services is competition, competition from both other law firms and from non-lawyer firms. Many big law firms also have recently encountered enhanced competition not only from other big firms but also from house counsel. The number of house counsel lawyers has greatly increased in recent years, as has the volume and range of legal problems regularly dealt with by house counsel rather than referred to outside counsel.⁸⁹ Big law firms have also encountered considerable enhanced competition from non-lawyer firms, especially the big accounting firms. The larger accounting firms' competition with big law firms has been particularly effective due to full-time lawyer employees of the accounting firms performing much, but certainly not all, of their legal service work for clients. The performance by accounting firms of both legal and other types of services for their clients is often referred to as multidisciplinary service (MDP). But whether the legal service work for accounting firm clients is performed by lawyer or non-lawyer employees of the accounting firm, the accounting firm is thereby providing legal services to others.

The recent competitive impact of non-lawyer firms on small law firms that provide legal services to clients who can pay for the services has been particularly severe in residential real estate transactions. In many U.S. communities, small law firms have largely been driven out of the residential real estate legal services market. The competition has come primarily from real estate brokers, title insurance companies, and from more parties to residential real estate transactions performing

87. On increased mobility of lawyers, see HEINZ ET AL., *supra* note 2, at 142-45.

88. See DINOVTZER ET AL., *supra* note 84, at 53. Of the lawyers included in the study, half the solos and 42% of those in firms of two to twenty lawyers already had moved. *Id.*

89. On the increased number and importance of house counsel, see *infra* notes 92-94 and accompanying text.

needed legal services pro se. Other legal service fields in which small law firms have traditionally been very active but in which these firms recently have encountered severe competition from non-lawyers are estates and trusts, major competitors including commercial banks; income tax advice and income tax preparation, competition largely from accountants and tax return preparers and consultants; and domestic relations cases, competition from far more parties in these cases appearing pro se even though able to pay for lawyers' services.⁹⁰ In addition to the non-lawyers mentioned above that currently provide legal services competitively with big or small law firms or both, there are other types of non-lawyer firms that frequently do so, and many of them recently have expanded the volume of their legal services to clients.⁹¹

B. House Counsel

House counsel are lawyer employees of large private organizations that perform legal services for the particular organization employing them. House counsel are to be distinguished from lawyers in private law practice retained by an organization to provide legal services to the organization. Most of the organizations with house counsel are large for-profit corporations, but some other private organizations also have house counsel, including some universities, trade associations, and trade unions. House counsel usually are assigned to a separate department in the organization employing them, commonly referred to as the law department.

The total number of U.S. lawyers that are house counsel has increased greatly in recent years.⁹² Some large U.S. corporations now have 1,000 or more house counsel lawyers each,⁹³ some of the house

90. See Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Court?*, 37 ST. LOUIS U. L.J. 553 (1993); Schwartz, *supra* note 28, at 656-57; Staudt & Hannaford, *supra* note 24.

91. Examples include collection agencies, architectural firms, non-accountant business consulting firms, and legal document preparation service firms.

92. A 2001 census study of house counsel by the American Corporate Counsel Association concluded that there were more than 65,000 house counsel employed by 21,000 for-profit and non-profit organizations in the United States. Only private organization lawyers, not those employed by government as in-house lawyers, were included in the survey. See Susan Hackett, *Inside-Out: An Examination of Demographic Trends in the In-House Profession*, 44 ARIZ. L. REV. 609, 610 (2002).

93. For example, ALM Media, Inc. (publisher of the magazine *Corporate Counsel*), discusses survey results showing General Electric Company with 1,143 house counsel lawyers, and Citigroup with 1,000 house counsel lawyers as of November, 2007. IN HOUSE LAW DEPARTMENTS AT THE TOP 500 COMPANIES 7-86 (2008).

counsel based in corporate branch offices. The principal reason that organizations hire house counsel is cost-saving. The cost of legal services by house counsel and their support staff generally is considerably less than if the services were performed by outside firms retained by the organization. A major contributing reason for the recent expansion in the number of house counsel is that the range and importance of legal work that organizations with house counsel typically assign to these lawyers has become much greater. In an earlier period, most house counsel normally performed only relatively minor and less important legal service work. Now their responsibilities generally are much greater, and they perform much or all of the legal service work of their employer, including all of the legal service work on many of their employer's most serious legal problems.⁹⁴ House counsel also typically determine which of their employer's legal problems will be assigned to outside counsel and to which outside counsel they will be assigned.⁹⁵ House counsel also negotiate the retainer terms, including legal fees, for matters assigned to outside counsel, and they monitor the work of outside firms for quality and for retainer contract compliance. In addition, many house counsel recently have been assigned responsibility for periodically reviewing their employer's activities for present and prospective legal problems not previously identified, and then recommending action to correct or to avoid these problems in the future. Although compensation of house counsel is usually less than that of many senior partners in big law firms,⁹⁶ house counsel jobs are attractive

94. See Symposium, *The Role of General Counsel*, 46 EMORY L.J. 1197 (1997) (discussing house counsel and their increasing importance); ROBERT L. NELSON, PARTNERS WITH POWER 56-58 (1987); Abram Chayes & Antonia Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277 (1985); Carl D. Liggio, Sr., *A Look at the Role of Corporate Counsel: Back to the Future -- Or is it the Past*, 44 ARIZ. L. REV. 621 (2002); Robert E. Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479 (1989).

95. See NELSON, *supra* note 94, at 57-58 (discussing the referral of house counsel responsibility to outside firms); Chayes & Chayes, *supra* note 94, at 289-300; Liggio, *supra* note 94, at 629-32; Rosen, *supra* note 94, at 504-06. The General Electric Company maintains a preferred provider list of outside law firms to which it will refer company legal work. This list was recently reduced to 108 law firms. See Jill Nawrocki, *GE Shifts Firms on its Outside Counsel Roster*, N.Y. L.J., Mar. 23, 2007, at 1.

96. Annual compensation of some corporate general counsel, the head of the company's house counsel unit, recently has exceeded several million dollars. For example, a 2006 study of the 100 highest-paid general counsel disclosed that seventy percent received a cash salary, bonus, and nonequity incentive compensation in excess of one million dollars each. *They're in the Money (The 2007 GC Compensation Survey)*, CORP. COUNS., August 2007, at 83-98. In addition to salary and bonus payments, many general counsel also receive favorable stock options. *Id.*

because working hours often are less than what is expected of big firm associates or partners; the work is interesting; and house counsel, unlike partners in big and small firms, are not under pressure to acquire and retain clients.

C. Legal Service Providers for the Poor Who Cannot Pay for the Services

In recent years, there has been a substantial increase in the number of lawyers providing legal services to the poor. Non-lawyers have not been significant providers of legal services for the poor, except as support staff for lawyers. As of the year 2000, there were 9,057 legal aid and public defender lawyers providing legal services for poor people in the United States, up from 8,239 such lawyers in 1980.⁹⁷ Currently, there also are many thousands of lawyers who provide legal services for poor people pro bono,⁹⁸ and there are lawyers in some charitable organizations and law school legal aid clinics who provide legal services for the poor.⁹⁹ Pro bono assignments often involve not only the time directly spent on a client's legal problem but also time spent in acquiring the needed background in the field of law relevant to the client's problem. Many lawyers are unfamiliar with the essential substantive and procedural laws concerning the legal problems commonly encountered by the poor. Some bar associations try to facilitate pro bono services by providing background materials and brief educational programs for pro bono lawyers encountering this lack of background in particular fields of law of relevance to the poor.

The largest volume of legal services for the poor is provided by two kinds of non-profit organizations: legal aid agencies and public defender agencies. The legal aid agencies exclusively or predominantly provide legal services to the poor in civil law matters. Most of these agencies are private organizations, but some are government agencies. Public defender agencies are mostly government agencies and exclusively or

97. LAW STAT. RPT. 2000, *supra* note 4, at 6.

98. Some of the pro bono lawyers are full-time associates of big law firms who are employed by the firms to devote full-time to pro bono services for the poor. Firms employing these lawyers likely do so to aid the poor and fulfill the firm's ethical pro bono obligations. The pro bono lawyers also ensure that the work of firm lawyers for fee-paying clients is not interrupted by time spent on pro bono legal services.

99. Examples of charitable organizations in Connecticut include the Center for Children's Advocacy, the Children's Law Center, and the Connecticut Fair Housing Center.

predominantly provide representation to poor persons charged with committing crimes.

In total volume of legal services for the poor, lawyers acting pro bono also are major providers of legal services to the poor in both civil and criminal matters,¹⁰⁰ and the total volume of pro bono services has increased considerably in recent years. The increase is partly attributable to the ABA and many state and local bar associations pushing pro bono as an ethical obligation of lawyers, although it is not a legally mandatory obligation. The current Model Rules of Professional Conduct, as adopted by the courts in many states, specify that voluntary pro-bono is a professional obligation of every lawyer but does not make it a mandatory legal obligation.¹⁰¹

In some counties, mostly counties in rural regions outside metropolitan areas, court appointment of lawyers in litigated cases is still a fairly common means of providing legal services for the poor. Court appointment, in earlier eras, was a traditional means in all U.S. jurisdictions of providing legal services for the poor in litigated matters. However, in most counties with larger populations, court appointment in litigated matters has been almost totally abandoned because other sources of legal services for the poor have become increasingly available.

100. A recent sampling of lawyers by the American Bar Association showed that two-thirds of those surveyed were providing pro bono services annually, almost half of these lawyers on average donating fifty hours of time per year to pro bono work. ABA STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICAN LAWYERS 11-13 (2005), *available at* <http://www.abanet.org/legalservices/probono/report.pdf>. The percentage of those doing pro bono work was considerably higher for lawyers in private practice than it was for corporate house counsel or government lawyers. *Id.* at 13. It should be noted, however, that the ABA survey used Rule 6.1 of the Rules of Professional Conduct in determining what constitutes pro bono services. *Id.* at 9. In addition to legal services for persons of limited means, Rule 6.1 lists other types of services as pro bono services, including, "participation in activities for improving the law, the legal system or the legal profession." See Liza Q. Wirtz, *The Ethical Bar and the LSC: Wrestling with Restrictions on Federally Funded Legal Services*, 59 VAND. L. REV. 971, 998-1006 (2006) (discussing arguments for and against pro bono). See also Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 6-41 (2004) (discussing the recent increased institutionalization of pro bono).

There is some support for requiring mandatory pro bono for all practicing lawyers. See, e.g., Steven Lubet & Cathryn Stewart, *A "Public Assets" Theory of Lawyers' Pro Bono Obligations*, 145 U. PA. L. REV. 1245, 1247 (1997); Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18 (1990).

101. MODEL RULES OF PROF'L CONDUCT R. 6.1 ("Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year . . .").

Although the volume of legal services they provide is relatively small, an increasing number of law schools now have legal clinics, staffed by faculty members, that concentrate on providing litigation and other legal services to the poor.¹⁰² Law students in these clinics perform much of the support staff work for matters taken by the clinics, and this work in representing clients is legally authorized by student practice rules. Almost all states have such rules.¹⁰³ The principal purpose of the clinics is to educate participating law students by giving them personal experience with clients and courts.¹⁰⁴ Although the total volume of clients served by law school clinics is small, the importance of the clinics has often been enhanced by many clinics taking some cases concerning major issues of law, and very thoroughly and competently presenting evidence and arguments favorable to the clients they represent. Law school clinics in some states have encountered intense opposition, even sanctions, for the kinds of persons they have represented and the kinds of cases and causes in which they have been involved.¹⁰⁵

Despite the many individuals and organizations that now provide legal services to the poor, the shortage of such services in volume and quality is very substantial. This shortage is so substantial and the consequences of the shortage so undesirable as to constitute our legal system's greatest disgrace.¹⁰⁶ Due to this shortage, a vast number of

102. As of 2003, 182 law schools in the United States had legal clinics and were staffed by more than 1,400 clinical instructors. David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 236 (2003).

103. See, e.g., FLA. BAR, RULES REGULATING THE FLORIDA BAR, R. 11 (2008), available at <http://www.floridabar.org/divexe/rrtfb.nsf/WContents?OpenView>; PA. BD. OF LAW EXAMINERS, PENNSYLVANIA BAR ADMISSION RULES, R. 321 (2007), available at http://www.pabarexam.org/Admission_Rules/Rules_and_Regulations/Rules.pdf.

104. See Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235, 264-68 (1999) (discussing the educational role of law school clinics).

105. See, e.g., *id.* (discussing recent opposition to the representational work of the Tulane Environmental Law Clinic).

106. See generally LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2005), available at <http://www.lsc.gov/JusticeGap.pdf> (discussing the shortage of legal services for the poor and what should be done about it); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 ANN. SURV. AM. L. 783 (1997) (discussing the shortage of legal services in criminal cases); Bruce A. Green, *Foreword: Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients*, 67 FORDHAM L. REV. 1713 (1999); Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL'Y REV. 369 (1998); Vijay Sekhon, *The Over-Education of*

poor people in the United States in need of legal services receive no legal services or the legal representation they receive often is inadequate. The severe shortage exists not only in representation of poor people in civil matters but in criminal matters as well. The shortage in criminal matters continues despite the constitutional right of criminal defendants to be represented by counsel.¹⁰⁷ A small minority of jurisdictions in the United States have established and funded very satisfactory public defender systems, but most jurisdictions have not. The result is that many poor persons charged with crimes and represented by public defenders receive only perfunctory representation at the trial and appellate levels due to excessive caseloads per available defense lawyer and some defense lawyers that are unqualified to defend clients satisfactorily in the kinds of criminal cases they are assigned.¹⁰⁸

The current severe shortage in quantity and quality of legal services for the poor throughout most of the United States in civil and criminal matters has been considerably enhanced by recent substantial increases in the nation's total population, and, in many communities, the recent increase in the percentage of the total population that is poor. Contributing considerably to the shortage also have been recent increases in the kinds of legal problems that poor people can be faced with. In addition to the legal problems that many poor people have long encountered, including unpaid debts, divorce, child custody, and such crimes as burglary and assault, many poor people have recently encountered additional kinds of legal problems due to new or substantially modified laws, such as laws concerning immigration, welfare payments, and health care.

The main reason for the extensive lack of legal services for the poor and the frequent inadequacy of many of the legal services that are

American Lawyers: An Economic and Ethical Analysis of the Requirements for Practicing Law in the United States, 14 GEO. MASON L. REV. 769 (2007) (asserting that lowering educational and bar examination requirements for lawyers would further increase the number of lawyers, lower legal fees, and make more persons in need of legal services able to pay for them); see also Alan Paterson & Avrom Sherr, *Legal Aid and Globalisation*, 11 INT'L J. LEGAL PROF. 157 (2004) (discussing legal aid in some foreign countries).

107. The U.S. Supreme Court initially upheld indigents' right to counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

108. See Christopher Stone, *Crisis in the Legal Profession: Rationing Legal Services for the Poor*, 1997 ANN. SURV. AM. L. 731 (1997) (discussing the shortage of adequate legal services in defending clients charged with crimes); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006); Bright, *supra* note 106; see generally Note, *Gideon's Promise Unfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062 (2000).

provided the poor is the insufficient funding of these services by both government and private sources. The total annual amount of funding for civil legal services for the poor in the United States as of 2005 was about 1 billion dollars a year, of which the federal government contribution was about thirty percent of the total amount, the state government contribution was about seven percent, and the remainder came from other public and private sources.¹⁰⁹

In 1974, with the passage of the Legal Services Corporation Act, the federal government moved heavily into funding organizations providing civil legal services for the poor, and the federal government has continued to provide funding for these organizations.¹¹⁰ By 1980, the federal appropriation for such services was \$300 million, and it was \$330 million in 2005.¹¹¹ After adjusting for inflation, however, one can see how federal appropriations have steadily declined, and, so adjusted, the 2005 appropriation was slightly less than half the 1980 appropriation.¹¹² There also are some legal restrictions on the kinds of civil legal services that those receiving federal funding may provide, restrictions strongly opposed by many legal aid organizations.¹¹³ Most disturbing is the deficiency of government funding for the poor charged with crimes, even though adequate legal services for these persons constitutionally is a government obligation. Moreover, it is reasonable to assume that assuring justice for the poor in civil matters, including funding of needed legal services, is an obligation that government should much more extensively assume, especially in a wealthy nation such as the United States.

What accounts for the current extensive shortage of government funding of legal services for the poor, a shortage that has long existed throughout most of the United States? Government does not consider legal services for the poor a sufficiently important obligation to fund

109. Comments of Alan W. Houseman, *Future Changes and Prospects for Legal Aid and Public Defender Organizations*, 24 QUINNIPIAC L. REV. 557, 562-63 (2006).

110. Legal Services Corporation Act, Subchapter X, 42 U.S.C. § 2996 (2000).

111. Houseman, *supra* note 109, at 565.

112. *Id.* at 564-65.

113. For example, recipients of federal funds may not initiate or participate in class actions, lobby in the interests of clients, or collaterally attack criminal convictions. See Restrictions on Lobbying and Certain Other Activities, 45 C.F.R. § 1612.1 (1997); Restrictions on Actions Collaterally Attacking Criminal Convictions, 45 C.F.R. § 1615.1 (1976); Class Actions, 45 C.F.R. § 1617.1 (1996). See Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187 (1999) (discussing the federal funding restrictions and their implications); Luban, *supra* note 102, at 220-26; Wirtz, *supra* note 100, at 992-93.

such services more extensively. And it should be recognized that government in this country, as well as in most countries, never adequately provides the funding required to fully fund most of the needs for which government assumes responsibility. In the continuing annual process by every federal, state, and local government of appropriating and allocating government funds, some needs are preferred over others. Influential interest groups persistently oppose added taxes that would alleviate shortages in government funding allocations. In this continuing process, the funding needs of legal services for the poor often are considered and compared with a host of other funding needs. Depending on the level of government, these other needs may include, among others, such high priority funding needs as those for criminal law enforcement, national defense, public school education, public housing, health care, street and highway construction and maintenance, and environmental protection. In the government funding allocation process, legal services for the poor commonly are balanced against many other needs, with the political influence of proponents and opponents of the various needs often a factor in the ultimate allocation decisions. It is easy to conclude that government funding for legal services for the poor should be vastly increased, but when the need realistically is viewed in relation to competing demands for government funding, the prospects for such enhanced funding seem dim.

There have been, however, some encouraging recent developments that are increasing the quantity and quality of legal services for the poor. The increase in the number of lawyers providing pro bono services is one such development. Another is the increase in efforts to enable poor persons who are representing themselves pro se to do so more effectively. When poor persons represent themselves, it is often because local legal aid agencies or other sources of legal help are overbooked and cannot take these poor persons as regular clients. To assist such poor pro se litigants, some courts and legal aid agencies provide these litigants with pamphlets, telephone support, or even some in-person assistance.¹¹⁴

Still another encouraging development are laws in many states requiring that much of the interest on lawyer trust account funds held by

114. See generally John M. Greacen, *Self-Represented Litigants Learning from Ten Years of Experience in Family Courts*, JUDGES' J., Winter 2005, at 24; Houseman, *supra* note 109, at 567. See also Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163 (2003).

banks, so-called IOLTA funds, be channeled to charitable purposes, including to legal aid organizations.¹¹⁵ IOLTA allocations as of a few years ago constituted about eleven percent of the total annual funding of civil legal aid in the United States,¹¹⁶ but very recently these allocations have increased, in some states due to laws requiring law firms to put trust account funds in banks paying higher interest rates.¹¹⁷ IOLTA funds belong to clients and are kept in lawyer trust accounts, usually for very short periods, pending their distribution to clients. Due to the short period of time that these funds are in law firm trust accounts, usually just a few days, computing the interest on each client's share in these accounts would be so costly that it is not attempted. However, the total interest in each IOLTA account can readily be calculated at any time at a very low cost. The allocation of interest on lawyer trust accounts to legal aid and other charitable purposes was held constitutional in *Brown v. Legal Foundation of Washington*.¹¹⁸

D. Recent Changes in Lawyer Employees of Government that Represent the Government

This Section considers only lawyers who are employees of government or a government agency and who represent the government.¹¹⁹ Public defenders are not included because they represent those persons charged with criminal conduct rather than the government or a government agency. Public defenders are discussed in the Section on legal services for the poor.¹²⁰

All levels of government—federal, state, and local—employ large numbers of lawyers. As of 2000, there were 31,780 lawyers employed by the U.S. federal government, up from 22,743 lawyers in 1980.¹²¹ And as of 2000 there were 60,953 lawyers employed by state and local

115. See Luban, *supra* note 102, at 226-28 (discussing IOLTA and some of the challenges against it).

116. See Houseman, *supra* note 109, at 563.

117. Terry Carter, *Expressing Their Interest: Rise in Rates Swells IOLTA, and Legal Services Gain*, A.B.A. J., June 2007, at 3.

118. *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003).

119. GOVERNMENT LAWYERS: THE FEDERAL LEGAL BUREAUCRACY AND PRESIDENTIAL POLITICS (Cornell W. Clayton ed., 1995) (discussing government lawyers); Symposium, *Government Lawyering*, 61 LAW & CONTEMP. PROBS. 1 (1998); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000) (providing a general defense of government lawyers against criticism).

120. See *supra* Part II.C.

121. LAW. STAT. RPT. 2000, *supra* note 4, at 6.

government, up from 46,907 lawyers in 1980.¹²² Almost all administrative agencies in each level of government employ lawyers on a salaried basis, mostly full-time. The pay is usually lower than what house counsel or private firm lawyers serving paying clients would receive for work of comparable responsibility and difficulty.

The functions of government lawyers can be roughly divided into four categories: litigation before courts or administrative agencies, drafting legal documents for government agencies, advising government personnel on legal problems that arise or may arise, and administering a law department or other government agency subunit of lawyers. The selection process for government lawyers varies greatly among government agencies and the type of lawyer position. The variations include appointment by persons holding elected or other high level political positions, selection by others pursuant to a merit selection system, and in a relatively few cases by election. The turnover rate for many government lawyer positions is high, and many lawyers enter or return to private practice upon leaving government service. But there are conflict of interest restrictions of which a lawyer moving from government to private practice should be aware. Rule 1.11 of the Model Rules of Professional Responsibility, now adopted by most states, recently amplified and clarified the details as to the precise scope of these restrictions.

The number and assignments of government lawyers in many government agencies vary over time as needs change and political priorities change. Contributing to major changes in the number of government lawyers and assignments of government lawyers are such events as a different political party taking power following an election; a severe downturn in the national, state, or local economy; the nation going to war; or a regional or local disaster, such as a flood, extended drought, or earthquake.

Due largely to inadequate funding, many government agencies are in need of lawyers, and the lawyers they do employ often are assigned more work than they can fully and properly handle. To some extent, paralegals or other lower-cost employees fill in by performing legal services that should be provided by lawyers. The lack of lawyer employees is a long-standing problem in all levels of U.S. government, and has persisted in the recent past, with the problem being particularly acute in some agencies of large central cities.

122. *Id.*

E. Judges and other Adjudicators

Essential to the legal system of the United States, as well as legal systems of most all countries, are adjudicators that make determinations as to whether laws have been violated by particular parties, and before whom plaintiffs and defendants may appear and be heard on alleged violations of the law. If an adjudicator concludes that violations by those charged actually occurred, the adjudicator then typically imposes sanctions. The adjudicator's decision generally is final unless one or both parties appeal. Judges are very extensively relied on as adjudicators in the United States. They also are highly important in creating and clarifying legal concepts, and, in doing so, often shape political institutions and political values, including those established by the federal and state constitutions.¹²³ Judges not only create and clarify legal concepts in their judicial opinions on adjudicated matters, but some judges or committees of judges are legally authorized to issue separate court rules that are binding law on some kinds of matters, among them professional conduct of lawyers. Most judges are lawyers, although in some states a substantial number of lower level judges are not.¹²⁴ Most judges also are full-time, although in some low-population judicial districts particularly, some are part-time. Judges are government officials and all levels of government have judges. Almost all judges have support staffs.

The number of authorized judges in the United States as of a year ago was 32,359.¹²⁵ Of these, 1,784 were authorized federal judges (198 supreme court and appellate court judges, including nine Court of International Trade judges, and 1,586 trial court judges, all district court judges classified as trial judges),¹²⁶ and 30,773 were authorized state and local judges (29,485 trial court judges and 1,288 appellate and supreme

123. See generally Symposium, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1037 (2006).

124. For example, as of 2007, approximately seventy-five percent of the New York town and village justices were non-lawyers. N.Y. STATE COMM'N ON JUDICIAL CONDUCT, ANNUAL REPORT 12 (2007), available at <http://www.nysl.nysed.gov/scandoclinks/ocm04122482.htm>.

125. Administrative Office of the United States Courts, Report on the Number of Federal Judges as of September 20, 2006 [hereinafter Admin. Office Report] (unpublished, internal report, on file with author).

126. *Id.*

court judges).¹²⁷ In most jurisdictions at any time, there may be more authorized judicial positions than serving judges. For example, in 2006 there were 1,784 authorized federal judges but only 1,706 serving federal judges.¹²⁸ There recently has been some increase in the number of authorized judges. For example, in 1998, the total number of authorized state and local judges was 26,614,¹²⁹ compared to the very recent number of 30,773 authorized state and local judges. Despite the modest recent increases in number of judges, the number of judges in most all U.S. courts currently is far short of what is needed to meet caseload demands, demands that keep growing.¹³⁰ The result is that in many courts there are long delays in judges considering and deciding each case that has been filed, and often less judicial time and attention devoted to each individual case than is needed. Also, due in part to the shortage of judges and consequent delays, there has been a decline in the percentage of cases filed in state and federal courts that are resolved by trial.¹³¹

Why is there a serious shortage of judges in most courts? Lack of sufficient government funding is the principal reason, as most all judges and their support staffs are funded largely by government.¹³² Government funding sources have perceived the judicial system as

127. See Nat'l Ctr. for State Courts, State Court Structure Charts, http://www.ncsconline.org/D_Research/csp/2006_files/StateCourtStructureCharts.pdf (last visited May 25, 2008).

128. Admin. Office Report, *supra* note 125.

129. U.S. DEP'T OF JUSTICE, BUREAU OF JUDICIAL STATISTICS, STATE COURT ORGANIZATION 1998, at 13-17 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf>.

130. NAT'L CTR. ON STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2005: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 14 (2005). Annual case filings in many courts recently have been increasing, as have the total caseloads of all courts in many jurisdictions. In the decade ending in 2004, the volume of cases filed in all state courts increased annually by eleven percent to a total of about 100 million cases filed in the year 2004. *Id.* It is important to note that the increase in the volume of cases is "largely attributable to comparable percentage increases in the country's population." *Id.* The total incoming volume of state court cases in 2004 by case type was traffic, 54.7 million; criminal, 20.7 million; civil, 16.9 million; domestic, 5.7 million; and juvenile, 2.1 million. *Id.* at 15.

131. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDIES 459 (2004). The Galanter piece is one of fifteen articles on the vanishing trial appearing in that issue of the *Journal of Empirical Legal Studies*.

132. See AMER. BAR. ASSOC. & FEDERAL BAR ASSOC., FEDERAL JUDICIAL PAY: AN UPDATE ON THE URGENT NEED FOR ACTION 20-26 (2003), available at <http://www.abanet.org/poladv/documents/2003judpay.pdf>. See generally Daniel J. Hall et al., *Balancing Judicial Independence and Fiscal Accountability in Times of Economic Crisis*, JUDGES' J., Summer 2004, at 5.

capable of adequately meeting growing caseloads largely by stretching existing judicial resources, particularly by judges taking on even greater caseloads.

Some recent court reforms have helped somewhat in reducing caseload demands on some judges or in enabling some judges to more effectively deal with high caseloads. One such reform adopted in some states is adding to the number of specialty courts. Due to the similarities of most cases before specialty courts, the judges of these courts can more quickly, and often more satisfactorily, consider cases before them, and thereby better dispose of a high volume of cases than can judges whose caseloads consist of a much greater variety of cases.¹³³ Examples of specialty courts are community courts,¹³⁴ drug courts,¹³⁵ and unified family courts.¹³⁶

Another court reform followed in a few states is the use of unpaid volunteer attorneys to serve as appellate judges or conduct pretrial conferences, thereby reducing caseload burdens on regular judges.¹³⁷ A widely followed practice by many trial judges that recently has become more prevalent is for the judges in many of the cases before them to

133. See EDWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 469-97 (2d ed. 2002) (discussing specialized federal courts); Tim A. Baker, *The Expanded Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661 (2005). At the federal level, the caseload demand on district court judges has recently also been lessened by the expanded role of magistrate judges.

134. See Quintin Johnstone, *The Hartford Community Court: An Experiment that has Succeeded*, 34 CONN. L. REV. 123 (2001) (discussing particular community courts); MICHELLE SVIRIDOFF ET AL., *DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT* (1997) (discussing the Midtown Community Court in New York City).

135. JAMES L. NOLAN JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* (2003); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000); Eric L. Jenson & Clayton Mosher, *Adult Drug Courts: Emergence, Growth, Outcome Evaluations, and the Need for a Continuum of Care*, 42 IDAHO L. REV. 443 (2006). But drug courts have encountered troublesome problems from sharp cuts in federal funding. See Vesna Jaksic, *Drug Courts Stumble Under Funding Cuts: Partnerships, Local Funding are Sought*, NAT'L. L. J., May 14, 2007, at 1. Federal funding for drug courts declined from \$50 million in 2002 to \$10 million in 2006. Reduced funding resulted in a major drug court, that of Miami-Dade County, to refuse any additional cases for a four-month period in 2006. *Id.*

136. See Anne H. Geraghty & Wallace Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435 (2002); Andrew Schepard & James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation and Evaluation: Reflections on a Survey of Unified Family Courts*, 37 FAM. L.Q. 333 (2003) (discussing unified family courts).

137. Thomas B. Marvell & Carlisle E. Moody, Research Note, *Volunteer Attorneys as Appellate Judges*, 16 JUST. SYS. J. 49 (1992); J. Read Murphy, *The Parajudicial Program in the Connecticut Federal Courts*, CORNELL LAW FORUM, Mar. 1999, at 9.

encourage the parties to settle their controversies prior to trial. One obvious reason for the judges encouraging parties to settle is to reduce caseload burdens on the judges. But settlement without trial also often benefits litigants by eliminating the long delays between case filing and adjudication, which can be greatly exacerbated by the shortage of judges, and also by eliminating the additional fees to lawyers for trying cases.

Other matters of major relevance to judges that recently have received considerable attention in many jurisdictions are judicial selection and judicial compensation. Each of these matters raises difficult and troublesome problems. Judicial selection raises problems of how political the selection process should be, who should do the selecting, how long the terms of those selected should be, and whether judicial positions in some courts should be full-time or part-time.¹³⁸ Judicial compensation raises problems of what compensation is required to obtain and retain qualified and able judges; whether compensation should be great enough to obtain a judiciary of varied backgrounds and experience; and what, if any, business or other professional activities, including compensated activities, judges should be permitted to engage in. Salaries of most judges in most jurisdictions have gradually increased in recent years, largely in response to inflation.¹³⁹

Judges are not the only important types of adjudicators in the United States. Highly important also are government administrative law judges (ALJs) and those persons performing adjudicatory functions in alternative dispute resolution proceedings (ADR), the latter proceedings

138. See Anthony Champagne, *Modern Judicial Campaigns*, JUDGES' J., Summer 2002, at 17 (discussing judicial election problems and possible reforms); Stan Greenberg & Linda A. Divall, "Courts Under Pressure" - A Wake-Up Call from State Judges, JUDGES' J., Summer 2002, at 11.

139. U.S. DEP'T OF LABOR, *supra* note 18, at 203. According to a 2004 survey by the National Center for State Courts, salaries of chief justices of state high courts averaged \$130,461, and ranged from \$95,000 to \$191,483. Annual salaries of associate justices of the state highest courts averaged \$126,159, and ranged from \$95,000 to \$175,575. Salaries of state intermediate appellate court judges averaged \$122,682, and ranged from \$94,212 to \$164,604. Salaries of state judges of general jurisdiction trial courts averaged \$113,504, and ranged from \$88,164 to \$158,100. Lynne Marek, *Pay Hikes for U.S. Judges Challenged: New Research Questions Flight from Bench and Efficacy of Pay Increases*, NAT'L L.J., Jan. 7, 2008, at 4.

The annual salary of each federal district court judge in 2007 was \$165,200, up from \$96,600 in 1990; the salary of each federal circuit court judge in 2007 was \$165,200, up from \$118,600 in 1990; the salary of each associate Supreme Court justice was \$203,000 in 2007, up from \$118,600 in 1990; and the salary of the Supreme Court chief justice was \$212,100, up from \$124,000 in 1990. *Id.*

including mediation or arbitration, procedures often involving issues of law.¹⁴⁰ In recent years, there has been very extensive reliance on adjudications before ALJs and on adjudications before ADR adjudicators. The cases before many ALJs involve alleged violations of agency regulations, and ALJs usually have a high level of expertise on the kinds of matters that come before them. Given the similarities in many of the cases they consider, ALJs with high case loads often are able to fairly rapidly consider and decide the cases assigned to them. Many ALJs are not lawyers but generally are very well informed on the laws pertaining to cases they consider.

Appeal to the courts from decisions of ALJs normally is available. The government agencies that have ALJs usually favor adjudication before these adjudicators rather than before judges because cases before ALJs usually are decided more rapidly and at lower cost to the agencies, and because there is greater likelihood that agency policies will be furthered by the adjudicators' decisions.¹⁴¹

The extensive resort to ADR as a means of resolving disputes is attributable to ADR often being a more rapid means of resolving disputes than resort to the courts, its lower cost to the parties than resort to the courts, and often greater privacy of the proceedings and the decisions than if before a court.¹⁴² To some extent, the increased resort to ADR also is due to more judges, in appropriate circumstances, encouraging or requiring that certain cases before them be diverted to ADR as a means of resolving the controversies.¹⁴³ Reducing judicial caseload burdens is one reason for such diversion efforts by judges.

140. Some commentators also include negotiation as a form of ADR. See, e.g., ABRAHAM P. ORDOVER & ANDREA DONEFF, *ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION, AND THE ART OF DISPUTE RESOLUTION* 5-2 (2d ed. 2002).

141. See KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM* 173-213 (4th ed. 2004) (discussing the merits and demerits of administrative tribunal hearings).

142. See ORDOVER & DONEFF, *supra* note 140, at 5-7 (discussing ADR and its utilization); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. OF EMPIRICAL LEGAL STUD. 843 (2004); STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* (4th ed. 2003) (discussing a comprehensive coverage of ADR and many supplemental citations); Roger Alford, *Report to the Law Revision Commission Regarding Recommendations for Changes in California's Arbitration Law*, 4 PEPP. DISP. RESOL. L.J. 1, 3-4 (2003) (discussing the merits of arbitration and its problems); Diane P. Wood, *The Brave New World of Arbitration*, 31 CAP. U. L. REV. 383, 410-11 (2003); Harry N. Mazadoorian, *Customers Should Dictate the Arbitration Process*, CONN. L. TRIB., Oct. 1, 2007, at 24.

143. See, e.g., John A. Martin & Steven Weller, *Mediated Child Protection Conferencing: Lessons from the Wisconsin Unified Family Court Project*, JUDGES' J., Spring 2002, at 5.

Without the availability and increasing reliance on administrative agency tribunals and on ADR in the adjudication of controversies, the caseload and delay problems of the courts would generally be greater.

F. Bar Associations

Bar associations are highly influential and important legal profession organizations. Most occupations have trade or professional associations, but in their number and the variety of their activities bar associations differ from the trade or professional associations of most other occupations. Similar to trade associations and other professional associations, bar associations seek to further politically and competitively the interests of those they represent. However, in the variety of social and political causes they seek to further, and in the intensity of their efforts to further these causes, bar associations differ from most comparable associations of other occupations.

There are two different kinds of bar associations: comprehensive bar associations¹⁴⁴ and specialty bar associations.¹⁴⁵ Comprehensive bar associations in this country include the American Bar Association, the state bar associations of each state, and local bar associations in many counties and cities. The membership of comprehensive bar associations includes lawyers in all types of practices and all types of law firms within a particular geographic area, and they seek to further not only the interests of their members but most all aspects of the justice system as well. Specialty bar associations concentrate their membership and activities on one major segment of law practice or the special interests of one group of lawyers, such as trial lawyers, lawyers whose practice consists largely of family law matters, prosecutors, house counsel, judges, women lawyers, or lawyers of one minority racial group.¹⁴⁶

144. For a more detailed discussion and evaluation of comprehensive bar associations as of a decade ago, see Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y. REV. 193 (1996).

145. *Id.* at 193-94.

146. Judith Kilpatrick, *Specialty Lawyer Associations: Their Role in the Socialization Process*, 33 GONZ. L. REV. 501 (1997/1998) (considering specialty bar associations generally, and two such associations (the Association of Trial Lawyers of America, now the American Association of Justice, and the American College of Real Estate Lawyers) in some detail). Among the many specialty bar associations are the American Corporate Counsel Association, the National District Attorneys' Association, the National Bar Association (an association of African-American lawyers), and the National Association of Women Lawyers. See ENCYCLOPEDIA OF ASSOCIATIONS 673-93 (Kimberly N. Hunt ed., 18th ed. 2007).

Membership in most bar associations is voluntary, but membership in a majority of state bar associations is obligatory, and all lawyers licensed to practice law in the state must be members. These obligatory membership bar associations are commonly referred to as unified bar associations.¹⁴⁷ Unified bar associations have encountered some constitutional limits on their operations.¹⁴⁸ Their mandatory membership can also result in membership opposition that prevents the bar association from taking a position, or a more unequivocal and aggressive position, on some highly contentious issues.¹⁴⁹ In number of members, the American Bar Association is by far the largest bar association in the United States, with over 350,000 lawyer members.¹⁵⁰ The California State Bar Association, a unified bar association, is the largest state bar association, with over 215,000 members, up from 171,000 members in 1998,¹⁵¹ and the New York State Bar Association is the largest voluntary state bar association, with over 72,000 members as of 2005, up from 57,688 members in 1998.¹⁵² By far the largest local bar association is the Association of the Bar of the City of New York, with over 24,000 members as of 2005, up from 21,000 members in

147. ABA DIV. FOR BAR SERVS., 2005 BAR ACTIVITIES INVENTORY § 4 (Joanne O'Reilly ed., 2006) [hereinafter 2005 ABA INVENTORY] (providing a list of the thirty-four unified state bar associations, and information regarding nomination/selection of officers, governing bodies, and delegates).

148. See, e.g., *Keller v. State Bar of Cal.*, 496 U.S. 1, 2 (1990) (holding that the State Bar's use of petitioners' compulsory dues to finance political and ideological activities with which petitioners disagree violates their First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services). See also Hazard & Hodes, *supra* note 43, § 66.7; James B. Lake, Note, *Lawyers, Please Check Your First Amendment Rights at the Bar: The Problem of State Mandated Bar Dues and Compelled Speech*, 50 WASH. & LEE L. REV. 1833 (1993).

149. See Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. U. L. REV. 35 (1994) (purporting that there are no longer any advantages to the unified bar).

150. In 2008, the ABA had 354,264 lawyer members, up from 302,893 members in 1985 and 347,903 members in 1998. In 2008, the ABA also had 178,211 law student members and 13,890 associate members (paralegals). Amer. Bar Assoc., June 2008 Section Membership Report, available at <http://www.abanet.org/dch/committee.cfm?com=YY990990>. Historical data on ABA membership in 1985 and 1998 provided to the author by the ABA Membership and Marketing Division.

151. State Bar of California, Member Demographics, <http://members.calbar.ca.gov/search/demographics.aspx> (last visited June 30, 2008). Historical membership data for 1998 provided to the author by the California Bar Association.

152. See 2005 ABA INVENTORY, *supra* note 147. For 1998 statistics, see ABA DIV. FOR BAR SERVS., 1998 BAR ACTIVITIES INVENTORY § 4 (Joanne O'Reilly ed., 1999) [hereinafter 1998 ABA INVENTORY].

1998.¹⁵³ The largest specialty bar association is the American Association of Justice, formerly the Association of Trial Lawyers of America, with over 60,000 members, up from about 40,000 members in 1998.¹⁵⁴

Although the size of most voluntary bar associations recently has increased, as a percentage of all lawyers in the jurisdiction or jurisdictions from which they draw their memberships, many of these bar associations have had a percentage decline in recent years.¹⁵⁵ Sustaining and increasing membership remains a very troublesome problem for voluntary bar associations. There are a number of possible reasons for this. One is that for many lawyers, or for many law firms if they are paying their lawyers' dues, the benefits of association membership are not worth the dues charged for that membership. Another reason is that many lawyers may be strongly opposed to the position a bar association has taken on a political or professional issue, and hence they refuse to become or remain members of that bar association. A further reason is the apparent declining interest in recent years, prevalent throughout society, of individuals becoming members of voluntary membership organizations of all kinds, bar associations included.

In efforts to increase membership and to increase member participation in association activities that further association professional and political goals, most bar associations in recent years have added new programs and expanded some of their existing ones.¹⁵⁶ Many have added new committees or sections to further their programs, and have redirected or intensified their legislative lobbying efforts¹⁵⁷ and their efforts to influence the judiciary as to the provisions of court rules.

153. See 2005 ABA INVENTORY, *supra* note 147. For the 1998 statistics, see 1998 ABA INVENTORY, *supra* note 152.

154. On the 60,000 membership number, see *ENCYCLOPEDIA OF ASSOCIATIONS* (Kimberly N. Hunt ed., 18th ed. 2007). The approximately 40,000 membership number was an estimate provided to the author by the American Association of Justice.

155. A good example of this is the ABA. The ABA lawyer membership from 1985 to 2008 increased by about 17%. For the precise numbers, see *supra* note 150. But in the same period, the number of licensed lawyers in the U.S. increased from almost 650,000 to about 1,200,000. On these latter numbers, see LAW STAT. RPT. 2000, *supra* note 4.

156. See Stephen P. Gallagher, *Bar Associations in Transition: Part 1* (Mar.-Apr. 2006), available at <http://www.leadershipcoach.us/pdf/ABE%20-%20Bar%20Associations%20in%20Transition%20-%20Part%201-%20Final.pdf> (discussing proposals for sustaining and increasing bar association memberships).

157. See Rhonda McMillon, *Taking the Case to Capitol Hill: ABA Supports Bills that Would Bolster Protections for Attorney-Client Privilege*, A.B.A. J., Feb. 2008, at 67 (discussing the recent lobbying efforts by the ABA); Rhonda McMillon, *After a Decade, ABA*

Conducting new or expanded programs can be very costly to a bar association and may require additional paid staff. Increased dues help pay for these added costs, but the income of most all bar associations is substantially supplemented by gifts, grants, and other sources of income, which help pay for new or expanded programs. Most bar associations, both unified and voluntary, currently receive a third or more of their income from sources other than membership dues.¹⁵⁸ Although many bar associations have very recently increased somewhat the number of their paid staff,¹⁵⁹ for the great majority of their work they rely on the services of their members, and the members are not paid for these services.

Although most bar associations are powerful and effective organizations, they do have serious limitations. Each bar association is member-controlled and disagreements among members as to association policies and programs can restrict association accomplishments. Members also hold most leadership positions in bar associations, typically with annual turnover in most top leadership positions, which can adversely affect the continuity and priority of some important association programs. Another limitation is that, in effect, bar associations compete with one another for members, and particularly for members who will actively participate in association programs, including assuming leadership responsibilities. This competition obviously influences every voluntary bar association in efforts to attract members, and every voluntary and unified bar association in efforts to attract members who will assume leadership positions.

Despite their limitations, bar associations have long been, and in recent years have continued to be, highly influential organizations in

Day Continues to Grow as a Key Lobbying Effort by the Bar, A.B.A. J., June 2006, at 70; Robert A. Stein, *Paving the Way for Justice: The ABA Commission on Homelessness and Poverty Takes the Law to the Streets*, A.B.A. J., July 2005, at 63; James Podgers, *Wait and See: ABA Urges Congress to Give Advisory Sentencing Guidelines a Chance to Work*, A.B.A. J., Apr. 2005, at 62; Rhonda McMillion, *Late Gains on the Hill: ABA Scores Successes as 106th Congress Winds Down Its Session*, A.B.A. J., Feb. 2001, at 84; Donald D. Phillips, *CBA Realizes Successes During Challenging 2007 Legislative Session*, CONN. LAWYER, Aug.-Sept. 2007, at 16-18 (discussing examples of state bar association lobbying efforts).

158. See 2005 ABA INVENTORY, *supra* note 147, § 3.

159. For example, the mean number of unified state bar association employees, for those unified bar associations included in the ABA's 1998 inventory, was fifty-two, but in 2005 was fifty-nine full-time and six part-time. Compare 1998 ABA INVENTORY, *supra* note 152, § 1, with 2005 ABA INVENTORY, *supra* note 147, § 1. The mean number of voluntary state bar association employees for those voluntary bar associations included in the ABA's 1998 inventory was thirty, but in 2005 was thirty-one full-time and two part-time. *Id.*

furthering the interests of lawyers, and in furthering political and social causes they consider merit their support.

G. Law Schools

Legal education in the United States is and has long been dominated by law schools.¹⁶⁰ The great majority of U.S. law schools are separate units within universities.¹⁶¹ The American Bar Association has established standards for law schools, and has approved those schools that meet the standards.¹⁶² In all but a few states, a Juris Doctor (J.D.) degree from an ABA approved law school, or a sufficiently equivalent course of study from a foreign law school, is required to take the state's bar examination.¹⁶³ There are now 195 U.S. law schools approved by the ABA that, with one exception, confer J.D. degrees,¹⁶⁴ and in the fall of 2006, their total enrollment was 141,031, up from 98,402 students in ABA approved law schools in 1972.¹⁶⁵ In addition to ABA approved

160. See THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES (Steve Sheppard ed., 1999) (discussing the history of law schools in the United States); ROBERT STEVENS, LAW SCHOOL LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (describing and assessing the contemporary law school education as preparation for professionals).

161. Among more prominent law schools that are not units within a university are Lewis & Clark Law School, in Portland, Oregon; John Marshall Law School, in Chicago; and New York Law School, in New York City.

162. See AMER. BAR ASSOC., 2007-2008 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2007); see also ABA-LSAC OFFICIAL GUIDE, *supra* note 8, at 31-32; John A. Sebert, *Symposium on Accreditation*, 45 J. LEGAL EDUC. 415 (1995) (discussing and criticizing the law school accreditation process); George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091 (1987); Herb D. Vest, *Felling the Giant: Breaking the ABA's Stranglehold on Legal Education in America*, 50 J. LEGAL EDUC. 494, 496-501 (2000); Molly McDonough, *See You in 18 Months: Education Department Puts ABA Accreditation Process on 'a Short Leash'*, A.B.A. J., Feb. 2007, at 64; Robert A. Stein, *Maintaining High Standards: The ABA's Law School Accreditation Program Underpins Our System of Legal Education*, A.B.A. J., Mar. 2006, at 62.

163. See, e.g., N.Y. RULES OF COURT § 520.6 (McKinney 2008); Vesna Jaksic, *States Review Licenses for Foreign Attorneys: Temporary Practice and 'Legal Consultant' Status May be Expanded*, NAT'L L.J., June 4, 2007, at 4 (discussing how the vast majority of lawyers educated outside the United States who take a U.S. bar exam take the New York bar exam, and of the 3,571 foreign-educated lawyers who took a U.S. bar exam in 2005, all but 234 of them took the New York exam).

164. The exception is the U.S. Army Judge Advocate General's School, which only offers a specialist program, an officer's resident graduate course, beyond the J.D. See ABA-LSAC OFFICIAL GUIDE, *supra* note 8, at 31.

165. *Id.*

law schools, there are about fifty more law schools in the United States, most of them located in California, whose graduates are permitted to take the bar examination in one or more states.¹⁶⁶

A major recent change in law school enrollment has been a very substantial increase in the number of women and minority law students. In 2006, there were 66,085 women enrolled in ABA approved law schools' J.D. programs, up from 11,878 women students in these schools' J.D. programs in 1972; and in 2006, there were 30,557 minority students enrolled in ABA approved law schools' J.D. programs, up from 6,730 minority students in these schools' J.D. programs in 1972.¹⁶⁷ Women now make up almost half of all J.D. students in ABA approved law schools, and minorities comprise about 22% of all J.D. students in these schools.¹⁶⁸

Job opportunities for a recent law school graduate can vary considerably depending upon the general reputation of his or her law school's quality of faculty, students, and educational program. The most frequently referred to ranking of law schools is that of a popular and widely-read magazine, *U.S. News & World Report*, which ranks law schools annually and publishes the rankings. However, currently there is strong opposition to this magazine's ranking by many law school administrations, including those in some of the magazine's top-ranked law schools. The opponents consider the rankings unmerited, misleading, or inaccurate.¹⁶⁹

Most law schools recently have increased considerably the size of their faculties, both full-time and part-time.¹⁷⁰ Some law schools have

166. There are eighteen law schools not accredited by the ABA that are accredited by the Committee of Bar Examiners of the State of California, and whose graduates may take the California bar examination. There are also thirty-one law schools not accredited by the ABA that are registered with the Committee of Bar Examiners of the State of California, and whose graduates may take the California bar examination. See State Bar of California, California Law Schools, http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10115&id=5128 (last visited June 30, 2008).

167. ABA-LSAC OFFICIAL GUIDE, *supra* note 8, at 31.

168. *Id.* There has been, however, a slight drop in the past several years in the percentage of women students applying to and enrolling in U.S. law schools. See Leigh Jones, *Fewer Women are Seeking Law Degrees: A Rejection of the 'Lawyer's Life' Seen*, NAT'L L.J., Oct. 1, 2007, at 1.

169. See Terry Carter, *Rankled by the Rankings*, A.B.A. J., Mar. 1998, at 46. But see Mitchell Berger, *Why the U.S. News and World Report Law School Rankings are Both Useful and Important*, 51 J. LEGAL EDUC. 487 (2001). See also ABA-LSAC OFFICIAL GUIDE, *supra* note 8, at 16.

170. For example, compare the number of each law school's faculty members in the latest academic year, with the number of faculty members in the same school ten or twenty-five years earlier. Compare ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS

done so principally because of increases in the number of their enrolled students, but many have done so to enable the schools to greatly increase the number and variety of courses they are offering, including legal aid clinic courses. Another very important reason for the recent increase in number of faculty members per school is to enable faculty members to spend more time in research and writing of publishable books and articles on legal subjects. Scholarly writing has always been an important function of law school faculty, but it recently has become even more important in the time and effort expected of full-time faculty members.¹⁷¹ An added reason for the increased number of full-time faculty members in most law schools, but a reason rarely admitted, is to encourage many of the best and the brightest lawyers, mostly younger lawyers, to become full-time law teachers with shorter working hours and less work pressure than in the private practice jobs for which these lawyers are qualified. To be sure, law school pay is generally less, but it is sufficient for a comfortable life style.

Interdisciplinary scholarship has long characterized much of the research, writing, and teaching of some law school faculty members,¹⁷² but in recent years, it has become the dominant approach of an increasing number of full-time faculty members. Contributing to this trend is the recent increase in the number of U.S. full-time law faculty who have earned not only a law degree but also a doctoral degree, most of them a degree in one of the social sciences.¹⁷³

Most law schools are offering new courses and modifying the coverage of established courses as changes in the law occur and as some

DIRECTORY OF LAW TEACHERS (1985-1986), with ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS (2006-2007).

171. See ANTHONY T. KRONMAN, THE LOST LAWYER 265-70 (1993) (discussing the tension between the aims of legal scholarship and the requirements of law teaching).

172. See, e.g., Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943) (citing an example of such scholarship; but one that attempted systematically to combine the knowledge and theories of different social and behavioral science fields in analyzing law and law reform needs, is the law, science, and policy approach of Myres McDougal and Harold Lasswell in the 1940s and thereafter); Harold D. Lasswell & Myres S. McDougal, *Jurisprudence in a Policy-Oriented Perspective*, 19 FLA. L. REV. 486 (1967). See also KRONMAN, *supra* note 171, at 201-09 (discussing one very knowledgeable contemporary legal scholar's perspective as to the continuing relevance of the McDougal & Lasswell approach to legal scholarship and legal education).

173. This increase in number of U.S. full-time law teachers with a law degree and additional doctoral degree is evident by comparing the educational degrees of law school full-time faculty this past year with those of years ago. Compare ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS (1985-1986), with ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS (2006-2007).

fields of law become more important to practitioners and scholars. An example of this is the recent increase in many law schools of courses and course coverage of transnational law and transnational legal perspectives, a response to increased globalization of law and its consequences for some types of law practice.¹⁷⁴ Prevailing current course coverage and teaching techniques, however, have recently been under considerable criticism. The most common criticism is that law schools fail to provide adequate instruction in many aspects of lawyering, particularly the tasks, skills, and legal and moral obligations needed to practice law successfully and responsibly.¹⁷⁵ These criticisms have had some impact on law schools. They have been contributing reasons for more law schools initiating or expanding their legal clinic programs, many law schools increasing their course offerings or course coverage of lawyer professional responsibility obligations, and some law schools employing more practicing lawyers as part-time law teachers.

Law school funding needs have increased greatly in recent years because as the number of law students has increased in most schools, the number of law school administrative staff employees has increased, the number of law school faculty has increased, and the salaries paid law school faculty members have increased. The result is that law student tuitions have increased much more rapidly than the overall cost of living, a tremendous burden on most students and their parents. This burden is further enhanced by the high cost of the students' undergraduate education, often with high unpaid loans for student undergraduate tuition and living expenses, loans frequently not paid off when the students enter law school.¹⁷⁶ Tuition increases, however, are inadequate to pay

174. See Sadiq Reza, *Transnational Legal Education: Transnational Criminal Law and Procedure: An Introduction*, 56 J. LEGAL EDUC. 430 (2006).

175. See, e.g., ABA SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992), available at <http://abanet.org/legaled/publications/onlinepubs/maccrate.html>; EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW (William Sullivan et al. eds., 2007); Wallace Loh, *Introduction: The MacCrate Report – Heuristic or Prescriptive?*, 69 WASH. L. REV. 505 (1994); Jill Schachner Chanen, *Re-engineering the J.D.*, A.B.A. J., July 2007, at 42; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y.L. SCH. L. REV. 465 (2004-2005).

176. Some universities very recently have eased the tuition burden on lower- and middle-income families by substantially reducing the undergraduate tuition for children of those families. For a review of these tuition reductions at Harvard and Yale, and for local reactions to the Yale reductions, see Mary E. O'Leary, *Take that, Harvard! Yale Cuts Fees: Decision Reduces Burden on Students, Families*, NEW HAVEN REGISTER, Jan. 15, 2008; Caitlin Roman, *Yale Overhauls Financial Aid; Reform Targets Middle Class*, YALE DAILY NEWS, Jan. 15,

for the increased law school costs, and all law schools, even those that are part of state or local government universities, are relying heavily on non-tuition funding sources. Among these other funding sources are annual contributions from many alumni, private endowments, and government funding allocations, especially government grants to law schools that are part of state or local government universities.

Law school educational programs for J.D. students are not the only type of formal legal educational programs. Some law schools also offer advance degree programs for post-J.D. students.¹⁷⁷ LL.M. programs are offered by a minority of law schools for post-J.D. students seeking more expertise in a particular major practice area, such as income tax or intellectual property. There also are schools that offer LL.M. and J.S.D. programs to domestic and foreign students who have a J.D. degree from a U.S. law school or an equivalent degree from a foreign law school and are interested in further legal education that will enable them to obtain better law practice jobs or law school faculty appointments. The ABA, most state bar associations, and many local bar associations offer much more limited and much less demanding legal educational programs to their members, often referred to as continuing legal education programs.¹⁷⁸ Many states even require periodic participation in continuing legal education programs as a prerequisite to the continued right of lawyers to practice law in the state.¹⁷⁹

2008, available at <http://www.yaledailynews.com/articles/22929>; Thomas Kaplan, *On the Road, Levin Pitches Aid Upgrade*, YALE DAILY NEWS, Jan. 16, 2008, available at <http://www.yaledailynews.com/articles/view/22971>; John A. Sebert, *The Cost and Financing of Legal Education*, 52 J. LEGAL EDUC. 516 (2002) (discussing recent increases in law school tuition and its implications for students and law schools). One way in which some law students deal with the debt problem is by working at a full-time or part-time salaried job while attending law school part-time. Forty-two percent of ABA-approved law schools have substantial part-time programs. *Id.* at 526.

177. For a listing of ABA-approved U.S. law schools that offer LL.M., J.S.D., or equivalent degrees, see ABA-LSAC OFFICIAL GUIDE, *supra* note 8, at 63-69.

178. For a listing of bar associations that offer CLE programs, see *id.* § 4.

179. See, e.g., STATE BAR OF CAL., RULES OF THE STATE BAR OF CALIFORNIA: REGISTERED LEGAL SERVICES ATTORNEY PROGRAM R. 7, available at http://calbar.ca.gov/calbar/pdfs/certification/MJP_Leg-Serv-Rules.pdf (indicating that active members of the state bar are required to complete twenty-five hours of approved CLE every thirty months); ILL. S. CT., ILLINOIS SUPREME COURT RULES R. 794(a) (2007), available at http://www.state.il.us/court/SupremeCourt/Rules/Art_VII/artVII.htm#794 (indicating that most active members of the state bar are required to complete twenty hours of CLE within their first two years of practice); Amer. Bar Assoc., Summary of MCLE State Requirements, <http://www.abanet.org/cle/mclevew.html> (last visited May 25, 2008) (indicating that, in New York, most non-retired attorneys are required to complete twenty-four hours of CLE every two years).

Although law school faculty members are probably the major source of published scholarship on law and legal institutions, there are many other such sources as well. Examples of these are the publications on law and legal institutions by faculty from other university schools and departments, law student notes published in law reviews, and publications of the research staff of the American Bar Foundation.¹⁸⁰ Some judges and members of the practicing bar also publish books and articles on law-related subjects that provide important scholarly contributions. The recent electronic publication of legal sources and past legal scholarship has greatly facilitated legal research, especially the ready availability of such materials to students, law school faculty, and others engaged in professional or scholarly legal research.¹⁸¹ Electronic publication is also reducing the size and cost of law school library collections. Legal scholarship is a vast undertaking in this country, and electronic publication is making it cheaper, easier, and potentially more influential.

III. POSSIBLE FUTURE CHANGES IN THE U.S. LEGAL PROFESSION

Predicting the future always is speculative, but can be helpful, even essential, to lawyers and law firms in preparing for what is to come. This Part first considers possible changes in the U.S. legal profession in the near-term, and then considers the possible long-term changes. Predicting the near-term future, changes in the legal profession in the next quarter century or so, is much less speculative than predicting the profession's long-term future.

A. Possible Near-Term Changes in the U.S. Legal Profession

In the near-term future, the underlying causes of recent past changes in the U.S. legal profession will continue to cause further change. This means that client demand and need for legal services will increase; the supply of legal service providers, both lawyers and non-lawyers, including clients acting *pro se*, will continue to increase; competition among legal service providers will become even more

180. The American Bar Foundation publishes a periodical, *Law and Social Inquiry*, with articles by its research staff and others, many of the articles by persons with special interest in law and sociology.

181. Richard Danner, *Electronic Publication of Legal Scholarship: New Issues and New Models*, 52 J. LEGAL EDUC. 347 (2002) (discussing the electronic publication of legal source materials and scholarly writings).

intense; and legal restrictions on many non-lawyer occupations providing legal services to clients will be further eased. These causative factors will continue to influence the near-term future of all sectors of the U.S. legal profession.

As to law firms representing clients who can pay for the legal services they receive, these firms undoubtedly will remain major providers of legal services in the near-term future. Due to increased competition from non-lawyers, however, law firms' share of the legal services market seems likely to decline. This decline in market share presumably will vary somewhat from state to state and among subfields of practice. For example, law firm market share of legal services may remain higher in rural states than in states that are predominantly urban. And law firm market share of litigation services before courts may remain quite high. Although law firms' market share of legal services in the United States is likely to decline in the near-term future, the total volume of legal services that law firms provide clients who can pay is likely to increase in the near-term future as the total market for legal services in the United States continues to expand due to such factors as population growth and greater overall market activity.

The near-term future of other sectors of the U.S. legal profession is mixed. The near-term future of house counsel appears to be favorable. As corporations and other organizations with extensive legal service needs become larger, more of them will employ house counsel or expand the number of house counsel they employ. Outsourcing overseas will probably increase, but not enough to prevent an increase in the number and importance of house counsel employed in the United States. Competition from non-lawyers will likewise not prevent the near-term expansion in the number of house counsel or the importance of house counsel as legal service providers.

The near-term prospects of legal services for the poor in need of such services but unable to pay for them is very discouraging. The number of such poor people seems certain to increase considerably, but the number of lawyers available and willing to provide adequate legal services to these poor people seems certain to decline. The principal reason for this likely decline will be the lack of funding to pay for the needed services, particularly funding from government. Combined government funding from each level of government for legal services for the poor, when adjusted for inflation, seems unlikely to increase in the near-term and quite possibly may decrease. Moreover, IOLTA funding, a current major source of legal services for the poor, may soon be

terminated as advances in technology enable the interest on lawyer trust accounts to be calculated at a low enough cost to make it financially feasible to pay interest to clients who own the principal in the trust accounts. There also is a slight chance that in the near-term future, many or all states will adopt mandatory pro bono, requiring a certain amount of gratuitous legal services for the poor by every practicing lawyer, but even if adopted, the services provided will be far short of what is needed. The disgraceful present-day shortage of adequate legal services for the poor in need of legal service promises to become an even greater disgrace in the near-term future.

Lawyers who are employees of government and who represent the government seem likely to have a near-term future very similar to their recent past. There will be some increase in the total number of government lawyers as the U.S. population and economy grow, continued inadequate funding of most government agencies to enable the agencies to employ enough lawyers to more satisfactorily fulfill their needs and legal obligations, and frequent turnover of government lawyers in many government agencies. Contributing to the near-term change in the number, assignments, and qualifications of government lawyers at all levels of government will be new laws and the perceived importance of some existing laws. Such changes regularly occur in some laws of all levels of government, and changes often are accelerated shortly after new administrations take office following elections. For example, at the national level, this no doubt will occur following the upcoming presidential election irrespective of which candidate becomes president. And under the new president, there will be new appointees to some of the top lawyer positions in the federal government.

Adjudicators and adjudication institutions also may change in significant respects during the near-term future. One such change probably will be even greater resort to ADR proceedings as a means of resolving law-related problems. A consequence of this will likely be major efforts by some lawyers and bar associations to impose and enforce unauthorized-practice restrictions on non-lawyers representing parties or acting as adjudicators in ADR proceedings that involve issues of law. Another near-term future change in adjudicative institutions may well be expansion in the number and variety of specialty courts, which can process cases more promptly, efficiently, and often with better results than can general jurisdiction courts. In the near-term future, it also seems probable that the shortage of judges in most courts will

remain a very serious problem due principally to continued inadequate government funding of the court system.

Bar associations in the near-term future seem certain to be under increasing pressure from their members to try and reduce the growing competition lawyers are encountering from non-lawyers in providing legal services to clients. The response, especially by many state bar associations and those specialty bar associations representing lawyers whose practices are most threatened by competition from non-lawyer occupations, will be to try and curtail that competition by legal means. This will include bar association efforts to expand and clarify unauthorized-practice laws to prohibit more occupations from providing certain legal services to their clients, and to require or facilitate more rigorous enforcement of unauthorized-practice laws. These bar association efforts also will likely include increased lobbying of state legislatures for more extended and clearly applicable statutes prohibiting non-lawyer occupations from providing legal services to others; increased pressure on, and increased cooperation with, state law enforcement authorities to more extensively investigate possible unauthorized-practice activities of non-lawyers, and to force violators to desist from their illegal activities; and some bar associations bringing legal proceedings against some non-lawyer firms to force these firms to cease engaging in unauthorized law practice.

In response to the increased competition encountered by law firms, competition both from non-lawyers and other law firms, bar associations can be expected in the near-term to offer more programs aimed at making lawyers and their firms more successful and profitable participants in the legal services market. Another important near-term activity of bar associations, most notably the ABA with cooperation of state bar associations, will be continued periodic revisions of the Model Rules of Professional Conduct and the Model Code of Judicial Conduct, a service that the ABA has performed successfully and effectively in the past.

Law schools in the near-term future will be faced with two big problems: very high and continually expanding tuitions, and many course offerings that most practicing lawyers consider largely or totally irrelevant to the work of lawyers and the concerns of the legal profession. Both of these problems have been apparent in the recent past, but will likely be much more troublesome to law schools in the near-term future. Regarding the tuition problem and its consequences for many law students and their parents who are assuming large debts to

finance the students' higher education, more law schools can be expected to make changes to alleviate the problem. Among these changes are more schools reducing tuition for students from lower- or middle-income families;¹⁸² more law schools offering a wide range of courses in the late afternoon or evening so as to enable many of their students to work full- or part-time while attending law school and paying some or all of their tuition cost from such employment; and some law schools sharply reducing their costs and hence their tuitions by substantial reduction in the size of their faculty and increasing the teaching loads of faculty members they retain. Many law schools also will reduce costs considerably by reducing new library acquisitions of published materials that are readily available online.

B. Possible Long-Term Changes in the U.S. Legal Profession

The long-term future of legal service providers in the United States is highly conjectural. One can predict with certainty that demand for legal services will remain high and that there will be an adequate supply of providers to fill that demand. But most predictions beyond that are so speculative as to be largely guesswork. Speculative possibilities, however, are worth considering, if for no other reason than to underscore how very different legal service providers, their operations, and their institutions may be in the more distant future from what they are now. Some of these speculative possibilities appear below in each of the remaining paragraphs of this Section.

Very large law firms with many branch offices will provide most legal services for individuals and small businesses that can pay for the services. These law firms will rely on high volume, extensive marketing efforts, reliance on advanced technologies, frequent use of standardized documentation, and low fees to attract a very large number of clients. Some of these firms' smaller branch offices will be staffed with paralegals who will take over initial consultations with clients, but with readily available telephone or e-mail contact with central office lawyers who will provide the clients with needed legal advice and needed drafting of legal documentation. Firm lawyers will also represent parties

182. See *supra* note 176 and accompanying text. Some universities recently have instituted lower tuition charges for undergraduate students from lower- and middle-income families. More universities seem certain to make similar tuition reductions in the near-term future and they also may provide similar reductions for law students from lower- and middle-income families.

in any needed litigation. To increase convenient availability to clients, some of the firms' branch outlets will be located in shopping centers or large retail stores, similar to the outlets today of some large banks. In addition to efficiently processing a high volume of routine non-litigated matters at low fees, the firms also will acquire many lucrative contingent fee matters, such as those resulting from auto accidents and defective building maintenance. In many respects, these very large law firms will resemble the present-day operations of H&R Block and Wal-Mart.

A federally subsidized National Legal Services program (NLS) will provide legal services to all individuals, rich or poor, in need of legal services and who choose to make use of the service.¹⁸³ All lawyers engaged in private law practice may choose whether to accept NLS clients. The NLS program will be somewhat similar to the current Medicare program for medical services but with no age limitation on service recipients. NLS fees will be determined by fee schedules established by the federal agency administering the program, and the maximum fees that may be charged will generally be lower than comparable fees normally charged in each local area. Separate schedules of maximum NLS fees will be set for each geographic region or locality. These schedules also will set forth what percentage of any maximum fee may be charged to each annual income category of clients, with high-income clients paying full maximum scheduled fees and very poor clients paying no fees. For every NLS client, however, both high- and low-income, the lawyer serving the client will be entitled to the scheduled fee for the highest-income clients. The NLS agency will pay lawyers providing legal services to clients with less than top scheduled incomes the difference between what these lower-income clients are scheduled to pay and what the highest-income clients would be scheduled to pay for the same service. The federal government will fund these NLS agency payments, and the annual cost to the federal government will be many billions of dollars.

Except for house counsel, most legal service operations serving clients who can pay for the services will be taken over by multidisciplinary firms, some of these firms owned and controlled by lawyers, some by non-lawyers. Each firm will provide a wide range of legal services, as well as a wide range of non-legal services, with lawyers performing much of the legal services work. Some of these

183. Marvin E. Frankel, *Proposal: A National Legal Service*, 45 S.C. L. REV. 887 (1994) (providing a description of one version of such a program by a former federal judge who favors such a program).

MDP operations will concentrate on serving individuals, while others will concentrate on serving corporations. Additional legal regulations will be adopted to prevent conflict of interest and other conduct by these firms that are potentially harmful to their clients.

Due largely to non-lawyer competition, lawyers will disappear from the legal services market, except for their representation of clients before the courts. Legal services for clients, except representation before the courts, will be provided by non-lawyers, including, among others, accountants, real estate brokers, bankers, and business and financial consultants.

Lawyers will entirely disappear as a separate occupation, including representation of clients before the courts. A group of separate licensed occupations, each of which will be legally authorized to practice in but one or a limited group of the major specialty fields that all licensed lawyers currently are legally authorized to practice in, will replace lawyers. Examples of these fields of practice are criminal law, wills and probate, real estate transactions, taxation, family law, and personal injuries. Unauthorized-practice laws will further restrict who may practice in each specialty field. A variant on the above may be a different segmentation of licensed legal services occupations, with the separate occupations being legal information specialists, legal consultants, and legal processors.¹⁸⁴ Whatever form of occupational segmentation occurs, separate university-level educational schools or departments will provide pre-training for each occupation, and each occupation will have its own professional or trade association.

Regulation of legal service providers in the United States will change from being regulation primarily by the states to regulation primarily by the federal government, a recognition of the market for legal services having increasingly become interstate and transnational, and a recognition that legal service providers are competent to master and apply the law of multiple jurisdictions. Federal regulation will include licensing of legal service providers. The federal government also will be the sole domestic U.S. government legally regulating foreign legal service providers' operations in this country.

184. Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917 (2002) (discussing the functional segmentation of possible future legal service providers). Kritzer estimates the scope of such an occupational transformation occurring as one in three. *Id.* at 938.

CONCLUSION

It is inevitable that the U.S. legal profession will change considerably in the future. Twenty-five years from now, and much more so fifty years from now, the legal profession, in important respects, undoubtedly will be quite different from what it is now. Every sector of the legal profession is vulnerable to change, not only in its structure but in the kinds of services it provides and in the volume and quality of its services. These changes will be significantly influenced by how satisfactorily the more serious and troublesome problems currently facing some sectors of the profession are dealt with in the future. Among such problems are the following:

- competition from non-lawyers and non-law firms in providing legal services to clients who can pay for the services, and also the scope and enforcement of unauthorized-practice laws applicable to these non-lawyers and non-law firms;
- the shortage of legal services for the poor and the shortage of government funding for such services;
- the shortage in number of judges and judicial support staff relative to need;
- the shortage in number of government lawyers relative to need; and
- the number and scope of courses offered by each law school that are of major relevance to practicing lawyers, and which of those courses must each student take and successfully complete prior to graduation; also, the high tuition cost for students who attend law school.

Increased attention, both from within and outside the legal profession, should be given to how best to resolve each of the above problems, and to do so in a way that not only will improve the justice system in this country but also have realistic prospects for successful implementation in the very near-term future. Each proposed solution to each problem should also include viable procedures for achieving what is proposed. This is a very challenging undertaking and one that some of the most thoughtful and knowledgeable members of each sector of the legal profession should consider a priority for them to try and resolve. The legal profession inevitably will be changing, and the most qualified members of the legal profession should be providing guidance as to how best to influence the change process.

