Consumers of Legal Services: Unprotected and Under-served

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Abstract

One of the true ironies in the emergence of consumer law is that while its protections reach a wide range of economic activity, as varied as credit card purchases and charitable giving, it has largely failed to reach a sector where consumers spend billions of dollars each year - legal services. Because the practice of law is considered a profession and attorneys are licensed by the judicial branch of government, a system of self-regulation has emerged over the past two hundred years. Not only has this system utterly failed to protect consumers, but its existence has prevented the development of other, more effective, safeguards for those who use legal services. In addition, the system of attorney self-regulation has been abused to maintain a monopoly on the delivery of legal services, which denies consumers the ability to choose more affordable alternatives to hiring a lawyer. This paper assesses the current system of attorney self-regulation and its impact upon consumer rights, and suggests possible reforms to empower and protect consumers of legal services.

Consumers of Legal Services: Unprotected and Under-served

By James C. Turner, Thomas M. Gordon & Steven E. Serdikoff[*]

INTRODUCTION

Today, consumers who use our civil justice system have no meaningful protection from unscrupulous lawyers who take their money and fail to provide the services that they are paid to perform. The system of attorney self-regulation is an abject failure and lawyers' so-called "Rules of Professional Responsibility" do not require attorneys to provide even the most basic consumer information to prospective clients. This remarkable state of affairs contributes to widespread popular distrust of lawyers, and erodes consumer confidence in the fundamental fairness of our civil justice system. By educating people about their rights and empowering them to deal with the legal system on their own, the consumer advocacy community can begin to extend real safeguards to this last remaining economic sector where the public is largely unprotected.

We also face a crisis in access to our civil justice system that affects consumers nationwide. Each year, thirty-eight million low and moderate income households need legal help, but are denied access to the American civil justice

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system, according to the American Bar Association.[1] The vast majority of Americans who require legal assistance continue to have unmet needs because they simply cannot afford the $100 or more per hour in fees it takes to hire a lawyer. Part of the solution to this crisis in access lies in expanding the availability of less expensive legal services provided by non-lawyers. Instead of embracing these innovative methods of expanding access to the civil justice system, however, bar associations in state after state are misusing statutes that prohibit the "unauthorized practice of law" to threaten and intimidate non-lawyers who provide legal help to those who can't afford an attorney. By supporting efforts to make innovative alternatives available, particularly to low and moderate-income households, the consumer advocacy community can help to ensure that all Americans have access to our legal system.

ATTORNEY SELF-REGULATION FAILS TO PROTECT CONSUMERS

Unlike every other sector of the economy, the legal profession has avoided outside regulation. What semblance of regulation that does apply to the legal profession is run almost completely by lawyers. The interests of legal consumers are neither considered nor protected by the legal establishment's insular quasi-regulatory "honor system," and legal consumers find themselves without recourse when lawyers engage in misconduct.

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[1] See American Bar Association (1996). *Agenda for Access: The American People and Civil Justice – Final Report on the Implications of Comprehensive Legal Needs Study, Consortium on Legal Services and the Public*.

The mere fact that the legal profession is self-regulated suffices to explain most of what is wrong with the attorney discipline system. Lawyers have advanced many arguments over the years to justify this ongoing self-regulation, ranging from lofty constitutional arguments invoking the doctrine of "separation of powers" [2] to open elitism.[3] But it would be counterintuitive to conclude that lawyers, in regulating themselves, would carry out their task with the same intensity or alacrity that non-lawyers would. Much of the impetus behind outside regulation of any profession comes from the simple idea that no profession can be expected to hold itself accountable.[4]

In practical effect, there is no comprehensive regulation of lawyers in this country. There is, however, plenty of subterfuge. Bar associations may masquerade as regulatory bodies, but this just misdirects public attention away from a lack of any real attorney regulation.

Attorney discipline is handled by state and federal bar associations and by the highest court in the jurisdiction (usually state supreme courts). In both instances, discipline is meted out by attorney membership organizations (the state

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[2] The common separation of powers arguments states that the entirety of the legal system must be kept separate from the legislative or executive branches to avoid retaliatory regulation or legislation against judges or lawyers for unpopular lawsuits or decisions. The Inherent Power of the Courts to Regulate the Practice of Law; An Historical Analysis. (1983) *Buffalo Law Review 32* , pp. 525-556.

[3] "Public criticism of the bar tends to be viewed by lawyers as either ill-informed – an unfortunate problem to be dealt with through education and skillful public relations – or as an unsophisticated generalization from the conduct of a few deviants…." Steele, E. & Nimmer, R. (1976). Lawyers, Clients and Professional Regulation, *Am. B. Found. Res. J. 1976*, pp. 917, 927-928.

[4] This point is not lost on the American Bar Association, who at least recognized the problems of self-regulation in stating that "[t]he legal profession's relative autonomy carries with it a special responsibility of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." ABA Model Rules of Professional Conduct, *Preamble: A Lawyer's Responsibilities [11]* (1998).

bar associations) or by a part of the legal system (the state courts). All of these bodies are made up of lawyers. The Model Rules of Professional Conduct, which serve as a basis for most states' rules for attorney conduct, were drafted by the American Bar Association Standing Committee on Ethics and Professional Responsibility, an organization made up primarily of attorneys. Lawyers are also governed by Rules of Court, conduct regulations promulgated by judges, who themselves are, of course, lawyers.

In no instance does a disciplinary body made up of a majority of non-lawyers decide what the rules of professional conduct should be or render opinions on whether an attorney has engaged in misconduct. Given that non-lawyers are routinely called upon to decide death penalty cases and other complex and difficult questions, it is impossible to justify any argument that laypeople are unqualified to decide whether a lawyer has engaged in misconduct.

Yet, attorney self-regulation persists. This has yielded a predictable institutionalized leniency. According to the American Bar Association, in 1996, of 118,891 complaints filed against lawyers nationwide, only one-half of one percent (542 lawyers) resulted in disbarment.[5] In that same year. only 1,866 lawyers were subject to *any* punishment, including disbarment -- a figure which represents just over one and one-half percent of the total complaints filed. And even when attorneys are disbarred, almost all states allow them to return to

[5] Murray, F.J. (2000, July 20) Practitioners Almost Bulletproof When It Comes to Client Complaints. *The Washington Times*, pp. A1.

practice after a requisite period of time.[6] The leniency and lack of effectiveness of this closed system is not lost on the consuming public and it contributes to the widespread distrust of lawyers and the legal system.[7]

Attorney misconduct is not as rare is the organized bar would lead consumers to believe. One recent news item in Texas reported that one out of every four attorneys chosen by the system to represent inmates on death row had been subject to discipline at some time.[8] The presiding judge of the Texas Court of Criminal Appeals defended these appointments, half of which were made with knowledge of the lawyer's past indiscretions, saying that "[t]here are many, many, very, very competent attorneys who have had grievances and have had disciplinary sanctions that in no way reflect upon their ability to try a lawsuit."[9]

The stature of some of the attorneys who have engaged in wrongdoing also belies the bar's attempt to minimize the significance of lawyer misconduct. In New York, for example, Robert Porges, head of the largest immigrant asylum practice in the country, was recently indicted for smuggling almost 7,000 Chinese illegal aliens into the United States over a seven-year period, charging the aliens

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[6] While permanent disbarrment should not be an absolute requirement, the fact that many lawyers are let back in the profession after disbarrment for serious breaches of the public trust is indicative of the fraternal mentality inherent in the organized bar. The *Boston Globe* reported that one attorney was allowed to return to practice only three years after serving a four-year jail term for conspiracy to commit arson. Armstrong, D. (2000, September 17). Disbarred Mass. Lawyers Skirt Discipline System. *The Boston Globe.*

[7] In this sense, lawyer discipline statistics are a self-fulfilling prophesy: the organized bar approaches discipline on the assumption that the profession is marred by a few "bad apples" and applies the discipline system in a manner that confirms that assumption. This approach is furthered by a public relations campaign which advises legal consumers that "what may appear to be misconduct is often merely a misunderstanding because few lawyers engage in misconduct." HALT. (1990). *Attorney Discipline: National Survey 15*, pp. 23.

[8] 1 In 4 Death Row Lawyers Lacking. (2000, September 10). *The Dallas Morning News*, pp. A1.

[9] Amon, E. (2000, August 21) An Empty Promise. *National Law Journal.*

up to $50,000 each for his illicit services.[10] Likewise, the chair of the corporate law department at a major Philadelphia law firm was recently convicted of lying to the Securities and Exchange Commission during an insider-trading investigation.[11] Such stories are common. It is impossible to escape the conclusion that serious breaches of the public trust are occurring at all levels of the legal profession.

Client compensation funds, the organized bar's only attempt at reimbursing clients for losses incurred to dishonest lawyers, are no better at protecting consumers. The combination of poor funding, low payouts, a needlessly lengthy claims process, lack of publicity for the funds and ridiculously low compensation caps all conspire to create a system that has only negligible impact.[12] Worse, most often all other avenues of recovery must be exhausted first before a claim can even be submitted to one of the client protection funds. This may require a cheated client to wait until the attorney is disbarred before any recovery is even possible. Combine this with the leniency of the disciplinary system and it often is impossible to recover money from a dishonest attorney.[13]

Although the stated goal for such funds when recommended by the ABA was total compensation,[14] the average payout per lawyer nationwide under such funds is only about $25 - well short of the benchmark $50 payout per lawyer

[10] CNN.com, Sept. 20, 2000 (http://www.cnn.com/2000/LAW/09/20/crime.smuggling.reut/)
[11] Duffy, S.P. (2000, October 13) Fox Rothschild Partner Sentenced to probation in Insider-Trading Case. *National Law Journal.*
[12] Amon, E. (2000, August 21) An Empty Promise. *National Law Journal.*
[13] Ibid.
[14] American Bar Association (1998). *Model Rules for Client Protection*.

required to achieve 99% compensation.[15] These miniscule payouts are coupled with a willful lack of publicity and a processing scheme mired in red tape.[16] Even given the inconsequential performance of these funds, lawyers still regard what little money they actually do pay as a sign of professional benevolence, another example of the legal establishment's elitism. [17]

The compensation doled out by these funds could scarcely be called benevolent, however. One client, who was cheated out of $150,000, was offered only $1,800 by the Nebraska client protection fund, which he refused.[18] Another client, this time in Louisiana, had $200,000 stolen by an attorney, but never received compensation from the state's fund and had never even *heard* of the fund until contacted by reporters from the National Law Journal.[19]

Ironically, the legal establishment uses such funds as a basis for concluding that lawyers should be exempt from consumer protection laws and, in most states, such an exemption still exists. The organized bar argues that since they already regulate the legal profession and reimburse victims of attorney fraud under client

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[15] Only seven states paid out more than $20 per lawyer over a two-year period from 1996 to 1998 according to statistics reported in the National Law Journal, August 28, 2000. Of the states with a fund in continuous existence over that period, Wyoming and North Dakota had the lowest averages, each paying less than 40 cents per lawyer. Amon, E. (2000, August 21) An Empty Promise. *National Law Journal.*

[16] New Hampshire's fund, according to fund Chairman David Jordan, has yet to receive a claim "largely because we don't tell anyone about the fund. Half the board doesn't want the public to know about the fund because it says that lawyers are crooks." Ibid.

[17] "Not a single other profession accepts financial responsibility for maintaining its collective reputation for honesty and trustworthiness in handling client money and property." Turney, H.L. & Holtaway, J.A. (1998, February) *The Professional Lawyer*. While this is true, unlike lawyers, most professionals are required to have insurance or to be bonded to protect consumers. Further, almost all other professionals are subject to outside regulation and, at the very least, can be sued under consumer fraud statutes.

[18] Amon, E. (2000, August 21) An Empty Promise. *National Law Journal.*

[19] Ibid. It should be noted that guilt was not an issue in this case. The attorney was convicted for his theft (and also for forging painkilling prescriptions) and sentenced to four months in prison and five years probation.

compensation funds, lawyers should not be subject to the regulation of consumer fraud statutes. But as we have just seen, lawyer discipline and client compensation are scarcely forms of regulation at all. More duplicitous, when confronted with criticism that the legal disciplinary system does little to protect consumers, the organized bar states flatly "we are not a consumer protection agency!" [20] It is precisely this kind of circular logic and equivocation which creates the perception of lawyer dishonesty in the public mind.

This specious reasoning that lawyers needn't be regulated under consumer fraud statutes is all the more problematic given that, a quarter of a century ago, the U.S. Supreme Court's landmark decision in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787-88 (1975) rejected a similar argument that lawyers should be exempt from antitrust regulation. Writing for a unanimous Court, Chief Justice Warren Burger concluded that "[i]t is no disparagement on the practice of law as a profession to acknowledge that it has this business aspect." Recognizing this entrepreneurial component of a lawyer's activities, the Court has repeatedly ruled that attorneys must comply with federal protections that assure the free flow of information to the public and foster consumer choice in areas ranging from attorney advertising[21] to union-sponsored legal services and lawyer referral

[20] "[T]he public incorrectly perceives the [lawyer] disciplinary system as a consumer protection agency which it is not. It is a system designed to educate, investigate and if necessary, discipline lawyers whose conduct falls below the established minimum levels of the ethical rules governing the profession. Consumer protection and damages claims are a whole different issue and not under the cognizance of the disciplinary system." *Letter from the General Counsel of the State Bar of Texas to Ray Dittmar* (Feb. 3, 1989)

[21] *Bates* v. *Arizona State Bar*, 433 U.S. 350 (1977).

programs.[22] Accepting this reasoning, the growing trend nationwide is to apply consumer protection laws to lawyers and a few states have already removed lawyers from complete exemption.[23]

Today, in most states the only option left for the wronged legal consumer is to file a lawsuit based on common law legal malpractice. This option is just as unavailing as any of those discussed above. In order to win a claim of malpractice against an attorney, the plaintiff must establish both that the lawyer breached their duty of care to the client and that the breach was the proximate cause of the client's harm. In other words, even a lawyer who acts unprofessionally is not liable for malpractice if the client's loss in the case cannot be attributed to the lawyer's misconduct.[24] Further, the standard of care required of lawyers is remarkably low. Thus the burden of proof that must be met for a plaintiff to succeed in a legal malpractice case is one that few, if any, legal consumers could hope to carry.

Attorneys enjoy "home field advantage" when they are themselves sued and make extensive use of this advantage. In one infamous case, the California Supreme Court dismissed a claim for malpractice against an attorney who had drafted an invalid will. The court ruled that the legal doctrine that the attorney had

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[22] *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971).

[23] Consumer fraud statutes apply to lawyers in Connecticut: *Heslin v. Connecticut Law Clinics of Trantolo & Trantolo*, 461 A. 2d 938 (Conn. 1983), Washington State: *Short v. Demopolis*, 691 P. 2d 163 (Wash. 1984), Louisiana: *Reed v. Allison & Perrone*, 376 So. 2d 1067 (La. App. 1979) and Texas: *DeBakey v. Staggs*, 605 S.W. 2d. 361 (Tex. Civ. App. 1980).

[24] An attorney could even show up to a trial inebriated and still not be found liable for malpractice if the court rules that the client would not have won even if the lawyer had been sober. It might clarify the

misapplied was so complex that the lawyer could not be expected to draft the will properly.[25] The legal doctrine in question, the "Rule Against Perpetuities," while complicated, is a basic principle of wills law and is routinely taught to students in their first year of law school. This is yet another demonstration of fraternal leniency toward members of the legal profession, a common pitfall in self-regulation.

More recently, in New York, a major law firm was found not to have engaged in legal malpractice in failing to properly advise its clients on a new development in the law.[26] Had the firm advised the clients of this development, they might have been able to recover patent litigation expenses from their insurance company. Yet the firm did not even suggest this possibility to their clients, perhaps costing the firm hundreds of thousands of dollars in legal fees. The court ruled that the firm was not obligated to offer this advice to their client, even though the firm maintains a highly specialized patent practice.

Moreover, the poorly constructed and often inscrutable Model Rules of Professional Conduct cannot be used in court to establish an attorney's incompetence. Even a blatant violation of the simple rule that requires attorneys

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standard somewhat to imagine a doctor performing an operation while drunk and still not being found liable for malpractice because the patient most likely would have died anyway.

[25] *Lucas v. Hamm*, 364 P. 2d 685 (1961). While the attorney in Hamm made a mistake regarding the "Rule Against Perpetuities," a difficult concept in wills law, one could easily argue that if a law is too complex for a lawyer to be required to understand it, why does the law still exist? Further, if the lawyer lacked the requisite competence to interpret the rule, why did he not decline the representation or defer to an attorney with a specialized practice in wills law? One English commentator vehemently criticized the opinion, calling it "a slur on the profession, which, like the mule, will display neither the pride of ancestry nor hope of posterity." Megarry, R.E. *Legal Quarterly Review 81*, pp. 478, 481 (1965).

[26] Caher, J. (2000, October 25). Manhattan Firm Defeats Malpractice Claim Stemming From Fee Advice, *National Law Journal.*

to keep their clients informed about all relevant matters and to respond to their requests for information cannot establish legal malpractice in most states.[27]

One state, Washington, will not even allow an expert witness in a legal malpractice case to state that lawyer conduct rules *exist* for fear that the jury might infer that such rules set the standard for lawyer misconduct.[28] The court reasoned that because the rules stated that their purpose was not to set a standard for liability, such a use of the rules would create confusion within the law. One legal scholar commented that this reasoning has been explicitly discredited in other areas of law, noting that traffic laws, while not intended to create civil liability, are consistently used as the standard of care in automobile accident cases.[29] Put differently, just because traffic laws were intended to create criminal liability, doesn't mean that any confusion is created when a driver's failure to stop at a red traffic light is used to prove that driver's negligence in a civil suit. The inability to use attorney conduct rules to establish the standard for lawyer misconduct merely deepens the public's understandable conclusion that the phrase "legal ethics" is an oxymoron.

Many believe that the consistently low standards attorneys set for themselves regarding malpractice have allowed lawyer competence to decline

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[27] American Bar Association (1998). *Model Rules of Professional Conduct, Rule 1.4*. Not that having the Model Rules establish liability would solve many problems, at least such use of the rules would serve to better justify their existence in the first place. Interpretation and application of the rules at present is loose and inconsistent at best.

[28] *Hizey v. Carpenter*, 830 P. 2d 646 (Wash. 1992).

[29] Munneke, G.A. & Davis A.E. The Standard of Care in Legal Malpractice Cases: Do the Model Rules of Professional Conduct Define It? *Journal of the Legal Profession 22*, pp. 33-34.

significantly overall.[30] Such standards allow the existing system to inscribe a vicious circle of incompetence, fraud and leniency that leaves injured legal consumers grasping at air. Law as a profession exists in a consumer protection vacuum, devoid of even the basic protections afforded consumers of nearly every other professional service. Aware of the exceedingly low ethical standards of attorneys, the consuming public harbors a deep-seated and understandable distrust of the entire legal system, when in fact it is the leniency and ineffectiveness of the legal establishment that is largely to blame.

THE MONOPOLY ON LEGAL SERVICES CONSTRAINS CONSUMER CHOICE

Not only does attorney self-regulation fail to protect consumers, it actually harms them by helping to create a government-enforced monopoly on the provision of legal services. In most businesses, licensing serves to protect the public from incompetent or dangerous practitioners. Since in most professional licensing situations those who practice a profession are generally not the same as its regulators, regulations coincide fairly well with what is needed to protect the public. In the legal profession, however, the regulators are the same as the practitioners. This creates a conflict of interest that results in regulations that

[30] No less a figure than former Chief Justice of the U.S Supreme Court Warren E. Burger suggested that about one-third to one-half of all lawyers "are not really qualified to render fully adequate representation." Burger, W.E. The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice? *Fordham Law Review 42*, pp. 227, 234 (1978). In a nationwide survey conducted in 1978, federal and state trial judges estimated that 20% of trial lawyers were incompetent. Maddi, E. (1978). Trial Advocacy Competence: The Judicial Perspective, *American Bar Foundation Research Journal 1978*, pp. 105.

protect attorneys from competition while failing to protect consumers from attorneys who engage in misconduct.

Attorneys restrict the availability of legal services in two ways -- as administrators of the licensing procedure for attorneys, and through prosecutions for the "unauthorized practice of law." By serving as administrators of state bar examinations, attorneys act as gatekeepers to the legal profession, limiting the number of those who are eligible to join the fraternity of lawyers. This limits competition among providers of legal services, which, in turn, raises the price of those services to the consumer. In addition, by prosecuting individuals for unauthorized practice, the legal profession is able to prevent outsiders from performing tasks that lawyers perform, regardless of whether performing those tasks requires legal training.

Consumers have a continuum of legal needs, and should therefore have access to a continuum of legal services, including traditional representation, a variety of nontraditional alternatives to lawyer representation, and various mixes of the two.

The promise of diverse legal service delivery mechanisms was highlighted at an April 1999 symposium of legal service providers in Washington, D.C., where Ada Shen-Jaffe, the Director of Legal Services in Washington State, described a typical client population as presenting a pyramid of legal needs that can be served by a variety of providers:

- X Fifty percent can be served through very low-cost interventions such as self-help legal publications and software, self-help legal videos, cable-access television, and multi-lingual brochures.

- X Thirty-five percent need low-cost intervention involving a trained nonlawyer (for example, a domestic violence shelter worker or a legal forms preparer).

- X Ten percent require some help from an attorney, but the legal representation involved is low-cost and may be supplemented with paralegal or nonlawyer support.

- X Only five-percent require full-range, high-cost lawyer representation to address their more complex legal needs.[31]

The current system constrains consumer choice by forcing all consumers into a service that is appropriate for only one out of twenty of them. While Ms. Shen-Jaffe's comments were made in the context of legal services to the indigent, they apply much more broadly. As progressive journalist Phillip Stern observed two decades ago, "It is not just the very poor who lack access to legal help, *but the preponderance of middle Americans as well.*"[32] By limiting all consumers to options that only the richest can afford, the organized bar makes it impossible for most consumers to find any legal representation.

Unauthorized Practice Laws & Independent Paralegals

One consumer alternative that has been limited by the abuse of unauthorized practice laws is the availability of independent paralegals and

[31] Turner, J.C. & McGee, J.A. (1999, November). Freedom of Legal Information: Increasing Court Access for Americans of Limited Means. *Management Information Exchange Journal*, 13 (2), 58-61.
[32] Stern, P. (1980). *Lawyers on Trial*. New York: Times Books.

volunteer advocates. Non-lawyers can perform many of the functions of lawyers quite competently. Because these service providers charge less than lawyers (or, in the case of volunteers, charge nothing at all), they are an affordable alternative to hiring a lawyer for many consumers. For the same reason, these service providers are considered an economic threat by the bar, which uses unauthorized practice laws to limit the competition.

One of the most egregious examples of this abuse of unauthorized practice laws occurred in the mid-1980s, when legal secretary Rosemary Furman was charged with unauthorized practice by the Florida Bar for preparing routine divorce forms and other legal documents. Furman was eventually found guilty and faced incarceration for criminal contempt until pardoned by the Governor. Her legal secretarial service was shut down, however, and a source of low-cost assistance for Florida consumers was eliminated.[33]

In a more recent example of the anti-competitive use of unauthorized practice laws, in 1998, Oregon independent paralegal Robin Smith, who served some ten thousand people preparing uncontested divorce papers for nine years without complaint, lost her request for the U.S. Supreme Court to review actions by the Oregon State Bar that shut down her business.[34]

The lengths to which the bar will go to eliminate competition are starkly illustrated in an unauthorized practice proceeding from Delaware that is now awaiting potential review by the U.S. Supreme Court. In 1996, the Delaware

Disciplinary Counsel filed a lawsuit against Marilyn Arons for providing services, free-of-charge, to parents of disabled children in "due process" educational placement hearings in that state. Incredibly, the complaint against Arons did not come from the parents or children she serves, but from lawyers from the school districts that have lost numerous cases to her.[35]

The Florida Bar has even gone so far as to claim that certain advertising phrases are the exclusive property of attorneys. In 1998, the Florida Supreme Court upheld the Florida Bar's decision that an advertisement by a paralegal using the phrase "free consultation" constitutes unauthorized practice.[36] One wonders, then, whether a doctor offering a free consultation would also be guilty of the unauthorized practice of law.

Cases such as these do not merely affect those prosecuted for unauthorized practice. By preventing these people and others like them from giving advice, the organized bar has taken away a valuable option for consumers. Consumers should have the choice to use an independent paralegal to perform basic legal services.

Unauthorized Practice Laws & Non-Legal Services

In protecting its monopoly, the bar has prosecuted not only those who provide legal services, but also those who provide non-legal services that have

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[33] *The Florida Bar v. Furman*, 376 So.2d 378 (Fla. 1979); 451 So.2d 808 (Fla. 1984).
[34] *Smith v. Oregon Bar*, 942 P.2d 793 (Ore. 1997), *cert. denied*, 118 S. Ct. 1055 (1998).
[35] Schmitt, R. (1999, Jan. 14). Advocates Act as Lawyers and States Cry 'Objection'. *Wall Street Journal*, p. B1.
[36] *Florida Bar v. Catarcio*, Florida Supreme Court No. 88850, February 12, 1998.

also been provided by attorneys. This has occurred most often in the context of real estate transactions, where many states have required that a lawyer oversee closings. In Virginia, title insurance companies were regularly accused of unauthorized practice until 1997, when legislation was passed protecting the right of consumers to purchase a house without having to hire an attorney.[37] Similarly, in Kentucky, the state bar recently issued an opinion seeking to make nonlawyer involvement in real estate closings the unauthorized practice of law.[38]

Again, the actions of the organized bar in these situations prevent consumers from choosing among the widest array of service providers. In this case, the use of a layperson to perform a closing can save the consumer a significant amount of money, without any drop in the level of service obtained.

Unauthorized Practice Laws & Self-Help Materials

Attorneys have not limited their unauthorized practice prosecutions to people receiving a fee for service, either. The bar has been attacking "do-it-yourself" guides and other self-help materials since the late 1960's. In 1967, the New York Bar charged that the publication and sale of Norman Dacey's book, *How to Avoid Probate,* violated state prohibitions on unauthorized practice. The New York Court of Appeals disagreed, ruling that writing and publishing self-help legal materials and forms is not the practice of law.[39]

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[37] Va. Code Ann. § 6.1-2.19 et seq. (1997).
[38] Kentucky Bar Association Unauthorized Practice of Law Opinion U-58 (2000).
[39] *New York County Lawyers Ass'n v. Dacey*, 282 N.Y.S.2d 985, *reversed*, 234 N.E.2d 459 (N.Y. 1967).

Dacey's case did not end the bar's battle against self-help books, however. In Texas, a U.S. District Court banned the sale and distribution of the popular legal self-help software, *Quicken Family Lawyer*, on the grounds that it served as a "cyberlawyer" and violated the state unauthorized practice statute.[40] Tens of thousands of Texas consumers had purchased the software, and others were denied the opportunity to do so until the decision was overturned by the Fifth Circuit[41] because the Texas Legislature passed emergency legislation that excluded such materials from the definition of the practice of law.[42] Such incidents are likely to continue as technology facilitates new ways for consumers to obtain legal information.

What is most telling about the attacks on non-lawyers and publishers of self-help materials is that they usually do not rise from consumer complaints. Complaints against non-lawyers usually come directly from competing attorneys, state bar associations or the unauthorized practice committees themselves. In fact, Stanford University legal historian and past president of the American Association of Law Schools, Deborah Rhode, found that only two percent of complaints against non-lawyer practice involved any claim of injury.[43] This belies the claim often made by the bar that unauthorized practice prohibitions exist to protect the

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[40] *Unauthorized Practice of Law Committee v. Parsons Technology*, Civil Action No. 3:97-CV-2859-H, Memorandum Opinion and Order, January 22, 1999.
[41] *The Unauthorized Practice of Law Committee v. Parsons Technology Inc.*, No. 99-10388 (5th Cir. June 29, 1999).
[42] H.B. 1507, 76th Leg., Reg. Sess. (Tex. 1999).
[43] Rhode, D. (1981). Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions. *Stanford Law Review* 34, 1.

consumer. In fact, it is the legal cartel that is the primary beneficiary of these restrictions.

Full Service Accountants

Another artificial constraint which the bar has placed on legal services is the ban on so-called "multidisciplinary practices." Bar rules against splitting fees between lawyers and non-lawyers have been used in conjunction with unauthorized practice statutes to restrict services provided by attorneys working for accounting firms and other organizations.[44] Such innovative partnerships can greatly expand the options available to those seeking legal services and reduce the cost of those services.

The organized bar has long been opposed to any changes in its rules against multidisciplinary practices. The American Bar Association Commission on Multidisciplinary Practice issued a report last year recommending that the ABA abandon its ban on fee-splitting in order to facilitate multidisciplinary practices,[45] but the ABA House of Delegates overwhelmingly rejected this consumer friendly reform.[46]

Once again, the bar's actions do a disservice to consumers, who could benefit greatly from these innovative partnerships. For example, the District of Columbia has allowed fee-splitting between lawyers and non-lawyers for over ten years, and there have been no complaints about the practice. Consumers should be

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[44] American Bar Association (1998). *Model Rules of Professional Conduct, Rule 5.4.*
[45] American Bar Association Commission on Multidisciplinary Practice (1999, June 8). *Report to the House Of Delegates*.

able to get several services under one roof, which can only bring down the price of those services.

A REFORM AGENDA TO PROTECT CONSUMERS OF LEGAL SERVICES

HALT is actively promoting several reforms that attack the problems of accountability and access. These reforms are the focus of HALT's major projects: the *Freedom of Legal Information Project*, the *Small Claims Reform Project*, the *Legal Consumer Bill of Rights Project*, the *Lawyer Accountability Project*, and the *Legal Information Clearinghouse and Referral Network*.

This section describes five key reforms that address these problems. The problems in attorney self-regulation can be reduced by establishing a "bill of rights" for legal consumers and by making consumer fraud laws apply to attorneys just as they do to other service providers. The problems involving limitations on consumer choice can be handled by abolishing laws against "unauthorized practice," expanding small claims courts, and promoting innovative alternatives to traditional legal representation.

Establish a Legal Consumer "Bill Of Rights"

The first important reform necessary to protect legal consumers would be to require attorneys to provide fee and other basic consumer information up front in the retainer agreement. Consumers would then know *before* the representation

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[46] ABA House of Delegates (2000, July 11). Recommendation 10F.

begins exactly how their bill will be calculated. New York, Illinois and Florida have already adopted this reform and legal consumers throughout America would be better served if it were adopted in ever state.

Requiring lawyers to include HALT's legal consumers "Bill of Rights" in retainer agreements is one way to ensure that consumers understand what they should expect from their attorney. This provision in a retainer agreement would establish the following basic requirements for the legal profession:

- The right for legal consumers to control their own legal affairs: requiring attorneys to keep their clients fully informed at all times during a representation.

- The right to affordable legal services: requiring full disclosure of all fee arrangements in writing prior to the start of a representation. Lawyers should also fully disclose all alternative fee arrangements and agree not to exceed estimated costs without written consent.

- The right to competent legal representation: requiring lawyers to provide timely and professional services, to respect the client's rights of privacy and to ensure that representation is free from all possible conflicts of interest.

- The right to an accessible and accountable legal system: requiring the disciplinary system to include non-lawyers in all phases of the disciplinary process to insure impartiality and requiring all legal documents to be written in plain English, understandable to non-lawyers. As part of this right, the disciplinary system should also be open to public scrutiny from the moment a complaint is made by a client to the disciplinary board and all state "gag rules" which permanently ban discussion of disciplinary proceedings to outside parties that do not result in disbarment should be eliminated.

Consumer Fraud Coverage

In addition, attorneys must be made accountable under consumer fraud laws, by removing both implied and explicit exemptions for lawyers from such laws. Only four states have adopted this reform (Connecticut, Washington, Louisiana and Texas). If legal consumers are to have a clear and effective means of redressing wrongs done to them by unscrupulous attorneys, this reform must be extended nationwide. Lawyers who dishonor their profession through fraudulent misconduct in business dealings with their clients should be covered by the same consumer protection laws that apply to any other frauds.

Implementing this reform on a national scale will not only allow consumers a more meaningful opportunity to recover for the fraudulent activities of lawyers than currently exists under common law legal malpractice, but it will also allow for recovery of punitive damages, an option still not present under the current system.

Abolish Unauthorized Practice Laws

One of the most effective ways to increase consumer choice in legal services would be to abolish unauthorized practice statutes. As the simple and routine legal needs of millions of Americans continue to go unmet each year, it is critical that consumers be able to utilize independent paralegals and other nonlawyer resources.

Consumers should have access to these providers of legal services despite the strident and misguided opposition to these innovations voiced by many state and local bar authorities.

HALT's Freedom of Legal Information Project is a major effort to strengthen protections that assure consumers access both to accurate and timely legal information and to assistance from nonlawyers. At the core of this reform effort are three principles:

1. The "unauthorized practice of law" means saying you are a lawyer when you are not;

2. Innovative partnering between lawyers and nonlawyers is permissible with client consent after full disclosure of work and fee arrangements; and

3. A client or customer complaint should be required before unauthorized practice of law proceedings can be initiated.

By removing these restrictions on the types of services allowed, legal information will be made more accessible to consumers in a myriad of forms. A choice among these options will allow consumers to use the form (or forms) of legal services that best suits their situation and budget.

Greatly Expand Small Claims Courts

Even within the current framework of unauthorized practice laws, there are other means of expanding consumer access to the legal system. One key method of improving citizen access to the civil justice system is through small claims courts.

These courts ? which use simplified procedures, require plain English, provide consumer aids and often prohibit lawyers ? have tremendous promise as a means of empowering ordinary people to take charge of their own routine legal needs.

There are five key improvements that can enhance the current small claims systems in most states:

- X Raising small claims dollar limits to $20,000 (the median limit is currently $3,500);
- X Authorizing small claims judges to issue court orders, not just award money damages;
- X Expanding small claims dispute resolution programs;
- X Protecting non-lawyer litigants; and
- X Creating user-friendly courts.

Through small claims reform, accessibility to the U.S. civil justice system can be increased to meet the simple and routine legal needs of millions of Americans. Small claims courts simplify legal procedures, resolve disputes quickly and are much less expensive for the parties. These courts offer great promise as a means for opening the doors to the civil justice system for Americans who simply cannot afford to hire an attorney.

Expand Alternative Dispute Resolution

Many legal problems can be solved without even filing a lawsuit. Alternative dispute resolution programs apply a variety of non-adversary techniques to settle disputes, and are an excellent alternative to litigation because

they are speedier, less costly and generally more satisfying than “fighting it out” in court.

The two principal types of alternative dispute resolution are mediation and arbitration. In mediation, a third party facilitates discussion and has no decision-making authority. In arbitration, an arbitrator listens to testimony and examines evidence, then makes a decision.

One of the most promising areas for the use of these innovative techniques is in divorces, through a process known as collaborative law. As anyone knows who has been involved in a messy divorce case, the court proceedings through the traditional divorce courts are drawn-out, expensive, and highly disruptive in nature. Through traditional legal routes, divorce lawyers are dedicated to getting the biggest piece of the pie for their clients, no matter what the financial and human costs. Settlements, if achieved at all, are reached in the shadow of a trial under conditions of considerable tension and anxiety. Furthermore, in a divorce with significant assets, the cost of lawyers and court proceedings can range from $60,000 to $100,000.

In collaborative law, both parties retain separate, specially-trained lawyers whose only job is to help them settle the dispute without court intervention. Neither side may go to court or even threaten to do so. If such an action or threat occurs, the process terminates and both lawyers are disqualified from any further involvement in the case. Furthermore, there is a parity of payment to each attorney so that neither party is disadvantaged by a lack of funds. Through this

process, the parties maintain a decorous atmosphere throughout the proceedings, and can reduce costs to between $5,000 and $10,000.

Although collaborative law has so far only been applied to divorce proceedings, there is no reason why it could not be applied to other areas of the law. All of the various forms of alternative dispute resolution, however, share the attribute of increasing consumer choices and guaranteeing lower-priced alternatives to traditional court practice.

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By putting the reforms discussed above into practice, legal consumers will have more options when they seek legal assistance, will have the opportunity to obtain help more affordably when they need it, and will have the legitimate means to seek recovery if the representation goes awry. This combination of competition and accountability will ensure that the legal profession adheres to the same basic rules that govern the rest of the economy, and ultimately go a long way toward resurrecting the public's flagging trust in the civil justice system.

The failure of the current system of attorney self-regulation and the increasing exclusion of all but the very wealthy from our civil justice system represents a dual crisis that harms tens of millions of Americans each year. HALT – *an Organization of Americans for Legal Reform* has developed a complementary set of reform projects that attack the twin problems of accountability and accessibility through a program of consumer education and advocacy. By informing and empowering consumers of legal services, we are

working to mitigate the immediate impact of the structural problems in the civil justice system. And through our advocacy efforts, we are working for longer term systemic reforms that improve both accountability and access in the civil justice system. We hope that the consumer advocacy community will join with us in our work to restore trust in our civil justice system and to ensure that all Americans are able to use it.