Legalizing Nonlawyer Proprietorship in the Legal Clinic Industry: Reform in the Public Interest

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Recommended Citation
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LEGALIZING NONLAWYER PROPRIETORSHIP
IN THE LEGAL CLINIC INDUSTRY:
REFORM IN THE PUBLIC INTEREST

The legal profession is under an ethical obligation to make its services available to the public, an obligation recognized in the American Bar Association's Code of Professional Responsibility.¹ Yet, it is apparent that many Americans lack adequate access to the legal system² and that in this area the Code, to paraphrase

1. ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1978) [hereinafter cited as CODE OF PROFESSIONAL RESPONSIBILITY]. Canon 2 provides that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." The obligation has been stated as follows: "It is not only the right but the duty of the profession as a whole to utilize such methods as may be developed to bring the services of its members to those who need them, so long as this can be done ethically and with dignity." Id. EC 2-1 n.4 (quoting ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 320 (1968)).

The Code of Professional Responsibility is organized into three parts: Canons, Ethical Considerations, and Disciplinary Rules. "The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct . . . ." Preamble to id. The Canons also serve as chapter headings, under which are found the Ethical Considerations and Disciplinary Rules which expand upon the particular statement in the Canon. The Ethical Considerations come immediately after the Canons or subject headings, and are identifiable by their "EC" numeration. Ethical Considerations are "aspirational in character," id., and serve to explain the meaning of the Disciplinary Rules. The Disciplinary Rules, which come last under the Canons, are identified by their "DR" numeration. These rules are mandatory in character, stating minimum levels of conduct "below which no lawyer can fall without being subject to disciplinary action." Id. The Code of Professional Responsibility is also heavily footnoted with quotes from and citations to ABA opinions on ethics, law review articles, books, reports, court decisions, and other secondary material.


A wide gap separates the need for legal services and its satisfaction, as numerous studies reveal. Looked at from the side of the layman, one reason for the gap is poverty and the consequent inability to pay legal fees. Another set of reasons is ignorance of the need for and the value of legal services, and the ignorance of where to find a dependable lawyer. There is fear of the mysterious processes and delays of the law, and there is fear of overreaching and overcharging by lawyers, a fear stimulated by the occasional exposure of shysters.


An ABA special committee estimated that effective access to legal services is being denied to 70% of the population. ABA SPECIAL COMMITTEE ON PREPAID LEGAL SERVICES, A PRIMER OF PREPAID LEGAL SERVICES 7 (P. Murphy ed. 1974), cited in
Anthony Amsterdam, has been "of as much use to [the public] as a Valentine card would be to a heart surgeon in the operating room." Nevertheless, in recent years the profession has evolved a number of responses to the middle class’s need for readily available, and affordable, legal counsel. Group and prepaid legal services emerged first, followed by the judicially sanctioned use of lawyer advertising, as means of increasing the awareness of and availability of legal services.


In a very limited private survey by Professor James G. Frierson of East Tennessee State University, it was found that middle class people overestimated lawyers’ fees by 91% for the drawing of a simple will, 340% for reading and giving advice on an installment contract, and 123% for a half hour of consultation and advice. See Frierson, Legal Advertising, BARRISTER, Winter 1975, at 8.

3. Preface to M. FREEDMAN, LAWYER’S ETHICS IN AN ADVERSARY SYSTEM vii (1975) (quoting A. Amsterdam).

4. For a provoking discussion of the elasticity of the need, or demand, for legal services for the middle class, see B. CHRISTENSON, LAWYERS FOR PEOPLE OF MODERATE MEANS 18-39 (1970). See generally Meserve, supra note 2.

5. Group legal-service plans involve an agreement between an organized group of potential clients and one or more attorneys for the provision, by the attorney(s), of legal services. These plans provide a benefit pattern which typically includes a certain amount of free consultation and the provision of other services at a prearranged rate—usually lower than the normal rate for individual clients. W. PFENNIGSTORF & S. KIMBALL, LEGAL SERVICE PLANS 42 (1977) [hereinafter cited as LEGAL SERVICE PLANS].

Prepaid legal-service plans are similar in some respects to group legal-service plans—that is, they involve a preexisting arrangement between a potential client or group of clients and a legal-services organization. In addition, these plans include a risk-carrying or insurance element. Thus, for a fixed yearly "premium" the client receives an unlimited amount of legal services within a contracted-for benefit pattern. Id. at 47.

6. Blanket suppression of all lawyer’s advertising was held to be unconstitutional in Bates v. State Bar, 433 U.S. 350, 363-82 (1977). This Court stated that commercial speech, such as lawyer’s advertising, "serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking." Id. at 364 (citation omitted). The Court recognized that lawyers’ advertising, by providing the consumer with information he needs to make an intelligent decision concerning legal services, may assist in overcoming the cost and quality fears of consumers who are hesitant about employing attorneys to assist them with their problems. Id. at 370-71; see Freedman, supra note 2, at 184-86. Professor Freedman wrote of the underutilization of the legal system as resulting in part from the proscription of lawyer’s advertising in the Code of Professional Responsibility. He criticized those provisions as effectively blocking "any real efforts to provide relevant and necessary information to members of the public [thereby making] a mockery of the overriding professional obligation to provide access to the legal system." Id. at 186.
Another major development, facilitated by the authorization of advertising, has been the emergence of low-cost, mass-practice of law, the so called legal clinics.\textsuperscript{7} The legal-clinic industry could play a significant role in the effort to increase the availability of legal services to the middle class. However, its growth has been hampered by mismanagement and by the lack of unfettered access to financial resources,\textsuperscript{8} prompting speculation that the clinics will be unable to continue to provide legal services to the public without major industry-wide changes.\textsuperscript{9} One proposed solution, nonlawyer proprietorship of the clinics, may be responsive to the financial and management needs of the clinic industry. However, if a recent Florida Supreme Court case\textsuperscript{10} is any indication, the legal\textsuperscript{11} and ethical\textsuperscript{12} constraints on nonlawyer ownership may thwart this response.

This Note explores the possibility of relaxing restraints on nonlawyer proprietorship in terms of its potential effect on the public interest. The first section examines the Florida Supreme Court decision, which presents the organizational questions at issue and demonstrates the current treatment of lay ownership by the legal system. The legal and ethical concerns are then explored, with particular emphasis given to proposed revisions of lawyer's rules of ethics implicating these concerns.\textsuperscript{13}

The final section will propose a methodology for policy analysis of the potential problems inherent in lay proprietorship.\textsuperscript{14} The methodology involves consideration of three sets of factors, each relating to the effect of lay proprietorship on the public interest: (1) the risk of injury to the public; (2) the opportunities for risk mini-

\textsuperscript{7} Legal Service Plans, supra note 5, at 41. A legal clinic may be an individual lawyer, a firm, or some other multilawyer facility organized to provide legal services for low and moderate income clients at maximum efficiency and at minimum cost.


\textsuperscript{9} See id. at 1349-50; Winter, Legal Clinics: Searching for an Image, 66 A.B.A.J. 1348 (1980).

\textsuperscript{10} Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 So. 2d 797 (Fla. 1980) (per curiam). This case indicates that the present treatment is to suppress the efforts of nonlawyers to open legal clinics. See id. at 801; text accompanying notes 17-55 infra.

\textsuperscript{11} See text accompanying notes 56-118 infra.

\textsuperscript{12} See text accompanying notes 119-163 infra.

\textsuperscript{13} See text accompanying notes 145-163 infra.

\textsuperscript{14} See text accompanying notes 164-212 infra.
mization; and (3) the potential benefits of lay ownership. Drawing on these factors, the analysis is to compare outcomes, in terms of meeting the profession's responsibility to provide adequate access to quality legal services, under alternative policies. It will be suggested that under this analysis a blanket suppression of lay ownership in the legal-clinic field is neither justified nor desirable, and that a system of risk minimization—including the licensing of nonlawyer proprietors and the use of contract and disclosure methodologies—should replace the present legal response. The Note concludes with suggested steps for legalizing the lay-owned law clinic, focusing on the reform of lawyers' rules of ethics, the necessity for legislative action, and the establishment of review procedures to ensure that the lay-owned clinic serves a public interest by increasing the availability of legal services without becoming an independent source of harm to the public.

THE FLORIDA BAR V. CONSOLIDATED BUSINESS AND LEGAL FORMS, INC.

The question whether laypersons may lawfully own and operate a legal clinic was presented by The Florida Bar v. Consolidated Business and Legal Forms, Inc. The respondent legal clinic, later to be known as Consolidated Systems, Inc., was organized in Florida as a corporation for profit. The principal stockholders and officers were not lawyers, nor had they any legal training. Consolidated was engaged in the business of offering legal services to the public through a chain of legal clinics. These clinics were staffed by lawyers who were members of the Florida Bar, as well as by support personnel. Services offered to the public through

15. See text accompanying notes 212-215 infra.
17. 386 So. 2d 797 (Fla. 1980) (per curiam).
18. Id. at 798.
19. Id. The Florida court never used the term "legal clinic" in its decision. However, court papers filed in the case, including the Florida Bar's Petition Against Unauthorized Practice, indicated that Consolidated did business as Consolidated Legal Clinic and also under the name Consolidated Services. Petition at 1, Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 So. 2d 797 (Fla. 1980) [hereinafter cited as Petition]. The description comports with the United States Supreme Court's description of a legal clinic in Bates v. State Bar, 433 U.S. 350, 381 (1977) (legal clinic as operation "that is geared to provide standardized and multiple services.") The term has utility in describing the kind of limited high volume practice in which Consolidated was engaged, and also has utility in conceptualizing consumer expectations in this particular attorney-client relationship.
20. 386 So. 2d at 799.
the lawyer-employees included, but were not limited to, representation in uncontested adoptions and divorces, personal bankruptcy matters, and change-of-name proceedings, and the preparation of "simple wills." The record did not reflect that anyone other than licensed attorneys actually performed legal services for Consolidated's clients.

The Florida Bar filed a petition in the Florida Supreme Court charging Consolidated with engaging in the unauthorized practice of law. The court issued an order directing Consolidated to show

21. Id.
22. Id. at 798.
23. The Petition charged, inter alia, the following:

VII

Respondent has engaged in the unauthorized practice of law in the State of Florida, by one or more of the following acts:

8. Although the attorney employees perform the legal services for the corporation's clients, the attorney employees are under the supervision and control of the corporation's Board of Directors.
9. The corporation fixes policy which determines which cases the attorney employees may accept.
10. The corporation has access to the files and work product generated by its attorney employees.
11. The corporation maintains bank accounts into which it deposits fees paid by its clients and trust accounts into which it deposits cost advances paid by its clients.
12. The corporation does not maintain any malpractice insurance to protect the public from its negligence or incompetence or from the negligence or incompetence of its attorney employees.

Petition, supra note 19, at 3-5. The petition was brought under article 5, section 15 of the Florida Constitution and article II, section 2 of the Integration Rule of the Florida Bar.

FLA. CONST. art. 5, § 15 provides: "The supreme court shall have exclusive jurisdiction to regulate the admissions of persons to the practice of law and the discipline of persons admitted."

This section has been held to give the Florida Supreme Court the power to prevent the unauthorized practice of law. See Florida Bar v. Escobar, 322 So. 2d 25, 26 (Fla. 1975).

Article II, section 2, of the Integration Rules of the Florida Bar read at the initiation of the Consolidated case:

No person shall engage in any way in the practice of law in this state unless such person is an active member of The Florida Bar . . . except that a practicing attorney of another state, in good standing, who has professional business in a court of record of this state may, upon motion, be permitted to practice for the purpose of such business only, when it is made to appear that he has associated and appearing with him in such business an active member of The Florida Bar.

cause why it should not be enjoined from continuing to do business. Consolidated filed a motion to dismiss, which was denied. Hearings were held by a referee, a Florida circuit court judge, who filed his findings and recommendations with the court. The supreme court adopted the referee’s findings and recommendations in full, and on June 5, 1980, permanently enjoined Consolidated from providing legal services to the public.24

In adopting the referee’s recommendations, the court based its conclusions on several lines of reasoning. One rationale put forward was that the degree of control exercised by nonlawyers over the lawyer-employees established that Consolidated was engaged in the unauthorized practice of law.25 A related concern was that Consolidated “through its lay employees establishes rules and policies normally reserved to a duly licensed practitioner.”26 It was found that the lay owners could set and collect fees charged for the legal services rendered by the lawyer-employees27 and could require payment-in-full, in advance, for services.28 In addition to these functions, normally reserved to members of the bar, the lay owners were said to establish limitations on client conference time per individual case.29 The referee found that the use of standardized

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24. 386 So. 2d at 801. The referee’s findings were sharply disputed by the attorney for Consolidated who filed his exceptions to and a brief in opposition to the findings. It is fair to say that most of the referee’s findings were disputed in this way, particularly in the areas of lay control over the lawyer’s activities, lay access to client’s files, and corporate policy setting. Brief for Respondent at 11-14, Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 So. 2d 797 (Fla. 1980) [hereinafter cited as Respondent’s Brief]. For example, the referee found that the corporation was made up of three corporate officers, all laymen, 386 So. 2d at 799; yet in Consolidated’s brief the fact emerges that the Board of Directors was made up of 11 persons, 8 of whom were licensed attorneys and employees of the corporation. Respondent’s Brief, supra, at 5.

25. 386 So. 2d at 798-99. The referee noted that “the petitioner cites many instances of control by lay officers of the corporation to establish that the respondent is engaged in the unauthorized practice of law and this Referee does find that the evidence supports no other conclusion.” Id.

26. Id. at 799. Consolidated insisted in its brief that this finding was not supported by the record, and that corporate rules or policies could not be set without the approval of the employee-lawyers who dominated the Board of Directors. Respondent’s Brief, supra note 24, at 11.

27. 386 So. 2d at 799. The respondent took exception to this finding: “Contrary to the findings of the Referee, the evidence shows that the various attorneys established their own fees . . . .” Respondent’s Brief, supra note 24, at 11.

28. 386 So. 2d at 799.

29. Id. The Respondent again took exception to this finding: “Contrary to the findings of the Referee . . . there is no limitation on client conference time . . . .” Respondent’s Brief, supra note 24, at 11.
forms was encouraged or mandated, that lawyers' time in court was organized to maximize their time in the office (and hence increase their availability for client intake), and that lawyers were compensated on the basis of salary plus a percentage of gross fees, thus encouraging them "to conduct a high volume turnover of clients in order to increase [their] income." It was also found that Consolidated advertised its services to the public. The referee concluded that these practices were indicative of a concern with "maintaining cost efficiency and profit" and that pursuit of these practices evinced disregard for the individual interests of clients.

Another rationale underlying the prohibition was that the presence of lay ownership constituted a deviation from the normal attorney-client relationship, thus entailing "inherent dangers" for clients. These dangers derive not only from the potential for lay interference with the professional activities of lawyers, but also from the possibility that lay proprietors will take advantage of their position in the organization to inflict harm on clients by directly engaging in improper and unethical activities.

30. 386 So. 2d at 799. The use of standardized legal forms is a practice of long standing. See Engel, Standardization of Lawyer's Services, 1977 AM. B. F. RES. J. 817, 832-34.
31. 386 So. 2d at 798.
32. Id. (Hardly a novel concept.)
33. Id. at 799. The U.S. Supreme Court has noted that lawyer's advertising is not only permissible, but that such advertising may lead to the establishment of legal clinics "that emphasize standardized procedures for routine problems" and that "it is possible that such clinics will improve service by reducing the likelihood of error." Bates v. State Bar, 433 U.S. at 378-79 (1977).
34. 386 So. 2d at 798. It is clear that lawyers in traditional practice share this concern for cost efficiency and profit. For a sampling of some of the literature on law office efficiency, see M. ALTMAN & R. WEIL, HOW TO MANAGE YOUR LAW OFFICE (1979); ABA SECTION OF ECONOMICS OF LAW PRACTICE, THE LAWYER'S HANDBOOK (Rev. ed. 1979); ABA & CBA, LAW OFFICE EFFICIENCY (1972); ABA STANDING COMMITTEE ON ECONOMICS OF LAW PRACTICE, PROCEEDINGS OF THE THIRD NATIONAL CONFERENCE ON LAW OFFICE ECONOMICS AND MANAGEMENT (1969); HOW TO CREATE-A-SYSTEM FOR THE LAW OFFICE (R. Ramo ed. 1975).
35. 386 So. 2d at 801. The Florida Supreme Court, in adopting the referee's report in its opinion, stated the following: Synthesized, the report of the referee reflects the inherent danger of the intervention of lay persons or organizations in the attorney-client relationship. The actual practices of the respondent demonstrate vividly the conflict which inheres in such a relationship. The old admonition that "one cannot serve two masters" is borne out by this record.
36. For example, the lay owners were said to put themselves in a position to mishandle clients' funds. Id. at 799; see note 23 supra (allegation 11). Licensed attor-
In *Consolidated*, this concern manifested itself in a finding that the lay owners were not trained to, and did not attempt to, balance the provisions of the Code of Professional Responsibility against their own profit motive.\(^{37}\) For example, one or more lay officers of the corporation had authority to sign checks drawn on escrow accounts which contained advanced cost-deposits paid by clients to be held in trust by lawyer-employees.\(^{38}\) The lay employers also had access to client files and were said to "exercise a proprietary interest" in them.\(^{39}\) In addition, questionable practices were said to attend staff turnovers. When an attorney employed by Consolidated was terminated, a new attorney would take over the open files.\(^{40}\) To effectuate this, lawyer-employees were required to sign substitution forms in blank, without consultation with or the consent of the client.\(^{41}\) Clients were not provided the address or other location, or the phone number, of departing attorneys with whom they had previously dealt.\(^{42}\)

In many respects the inherent-danger problem, which included risks created by direct action of the lay owner, and the lay-control problem, which included risks created through lay interference in the professional activities of lawyers, overlap. For instance, the limitation of client-counseling time was both an interference

\(\text{\textsuperscript{37}}\) 386 So. 2d at 798.
\(\text{\textsuperscript{38}}\) Id. at 799-800. This finding was contradicted by Consolidated:
4. The Referee erred in his findings in paragraph 11 as the same are contrary to the evidence and testimony presented at the Hearing. The evidence shows that escrow funds are not transferred into the general account but rather are retained by the individual lawyers at the various offices in their respective accounts. Only fees of the various offices are transferred to the corporation's general account.
Respondent's Exceptions to Findings and Recommendations of Referee at 3, Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 So. 2d 797 (Fla. 1980) [hereinafter cited as Respondent's Exceptions].
\(\text{\textsuperscript{39}}\) 386 So. 2d at 799. "The attorneys employed by Respondent testified that all files were under their exclusive control and custody." Respondent's Brief, *supra* note 24, at 14.
\(\text{\textsuperscript{40}}\) 386 So. 2d at 800.
\(\text{\textsuperscript{41}}\) Id. This finding was contradicted by Consolidated:
5. The Referee erred in his findings in paragraph 12 as the same are contrary to the evidence and testimony presented at the Hearing. Several lawyers who were terminated took all of their clients with them and other lawyers refused to keep their clients even after being asked by the corporation to do so. All matters of attorney-client relationships are within the full prerogative of the attorneys and are not controlled by the corporation.
\(\text{\textsuperscript{42}}\) 386 So. 2d at 800. Again, this finding was contradicted by Consolidated. *See* note 41 *supra*. 

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with the professional conduct of lawyers (thus considered to create the inference that the lay owner was engaged in the unauthorized practice of law) and was fraught with inherent danger for clients (giving rise to the inference that such activity should be prohibited for the benefit of prospective clients). In addition, the allegation that the nonlawyers supervised and controlled the day-to-day business of the corporation certainly involved both the control and inherent-danger problems.

The concerns expressed went beyond mere regard for theory. The referee found that "[t]he profit oriented manner in which the respondent's business is operated by lay officers has resulted in injury or inadequate representation of respondent's clients." One client was said to have received inadequate representation in a bankruptcy matter "by reason of the inexperience of respondent's employee lawyer"; another to have received inadequate representation in a dissolution-of-marriage proceeding "by reason of the inadequacy of respondent's form pleadings and/or lack of proper attention to his case by respondent's employee lawyer." The third instance of client injury reported involved a case in which Consolidated did not perform a service because the client had failed to pay her fee, which was due in advance.

Another potential basis for the prohibition was Consolidated's alleged violation of Florida's criminal unauthorized-practice statute. The statute provides that it will be a misdemeanor for a

43. Although the two problems do overlap in many ways, it should be made clear that the control problem implicates a value in itself, being the protection of the attorney from outside interference with his professional independence. See CODE OF PROFESSIONAL RESPONSIBILITY, supra note 1, EC 5-23. The inherent danger problem is analogous to the more typical concerns, under unauthorized-practice principles, with the placing of unregulated laymen, who may lack the lawyer's commitment to standards of ethical conduct, in the position of trust normally occupied by an attorney. See id. EC 3-1, EC 3-2, EC 3-3.

44. 386 So. 2d at 798. Although only three persons were named in the opinion as non-lawyer officers, it appears that Consolidated had offices in eight cities. Id. at 799. This arrangement raises serious questions as to the actual day to day control the nonlawyers could exercise.

45. Id. at 800. Note that the court did not find that the harms produced resulted from the fact of lay ownership or interference with lawyer's activities, but rather from the "profit nature of the operation."

46. Id.

47. Id.

48. Id.

49. Id. at 798; see FLA. STAT. ANN. § 454.23 (West Supp. 1980):

Any person not licensed or otherwise authorized by the Supreme Court of Florida who shall practice law or assume or hold himself out to the public as qualified to practice in this state, or who willfully pretends to be, or willfully takes or uses any name, title, addition, or description implying that he
nonlawyer to practice law or hold himself out as qualified to practice law within the state.\textsuperscript{50} The court did not seem to rely too heavily on this rationale, mentioning it only in passing.\textsuperscript{51}

The referee, and by adoption the court, proposed a final reason for the prohibition of lay ownership which avoided the need for a showing of either lay interference or enhanced risk for clients. Simply stated, this approach suggests that all nonlawyer participation in any law practice is to be prohibited, regardless of the nature of the lay proprietor's conduct, so long as the owners derive income from the provision of legal services.\textsuperscript{52}

The referee's ultimate conclusion, adopted by the court, was that the operation of Consolidated's business, in the provision of legal services, constituted the unauthorized practice of law and that no modification of procedures would allow Consolidated to engage in business lawfully.\textsuperscript{53} Interestingly, the court's "no modification" position suggests that concern with the public interest, manifested in the Code of Professional Responsibility as a call for adequate access and quality representation,\textsuperscript{54} may not have been the dominant factor in the \textit{Consolidated} decision.

\textbf{The Unauthorized Practice of Law}

The owners in \textit{Consolidated} suffered mightily under the unauthorized-practice doctrines. This section introduces those doc-

\textsuperscript{50} Id. See note 49 supra.

\textsuperscript{51} See 386 So. 2d at 798. The Referee invoked the statute as follows: "We find here the unique circumstances wherein the owners of a business are prohibited by law from rendering the services which they offer to the public (F.S. 454.23) \ldots ." Id. This was the only mention made of the statute or any criminal liability.

\textsuperscript{52} Id. at 799. This approach comports with the analogous ethical rules under which a lawyer may be disciplined for practicing in a professional corporation or association, organized for profit, where a nonlawyer owns an interest therein or is a director or officer thereof. \textit{Code of Professional Responsibility, supra} note 1, DR 5-107(C). \textit{But see ABA Commission on Evaluation of Professional Standards, Model Rules of Professional Conduct, Discussion Draft \S 7.5 (1980) (Comments) [hereinafter cited as Model Rules of Professional Conduct]; Roscoe Pound-American Trial Lawyers Foundation, The American Lawyer's Code of Conduct, Discussion Draft \S 4.7 (1980) (Comments) [hereinafter cited as American Lawyer's Code of Conduct].}

\textsuperscript{53} 386 So. 2d at 800.

\textsuperscript{54} \textit{Code of Professional Responsibility, supra} note 1, EC2-1.

\textsuperscript{55} Id. EC1-1, EC1-2.
trines in terms of the policies and established practices in this area of the law with particular emphasis placed on the problem of lay intermediaries.

The prevention of the unauthorized practice of law is both a matter of professional ethics and a matter of state law. The immediate purpose of the unauthorized-practice doctrine is to prevent unlicensed persons from practicing law. A primary policy objective justifying the exclusion of unauthorized persons is the protection of the public from the acts of incompetent or unethical practitioners who are not subject to the supervision of the courts. Unlicensed lay practitioners, such as real estate brokers, accountants, and insurance adjusters, may have greater expertise than lawyers in their field of specialty; yet they may cause harm to their clients through an inability to recognize legal issues that are tangential to their particular field. Laypersons attempting to represent others in adversary proceedings may be unable to vigorously represent their clients due to unfamiliarity with complex matters of law and procedure. The public may also be injured by unli-

56. See Code of Professional Responsibility, supra note 1, Canon 3: “A Lawyer Should Assist in Preventing the Unauthorized Practice of Law.”

In this Note the public interest is given priority as the objective in light of which unauthorized-practice policies, such as those embodied in the Consolidated decision, must be evaluated. There is of course another policy at work in this area: the natural inclination of the bar to maintain its near monopoly over the delivery of legal services. See Llewellyn, The Bar’s Troubles, and Poultsies—And Cures?, 5 L. & Contemp. Prob. 104 (1938); Reeves, UPL: The Lawyer’s Monopoly Under Attack, 51 Fla. B.J. 600 (1977); Weckstein, supra, at 652, 674. One commentator suggests that while the self-interest of the profession is a powerful factor in the fashioning of unauthorized-practice policy, it should not obscure the importance of the public-interest ideal as the paramount value in this area. Id. at 674-80. Further, while the courts typically invoke the public interest in sustaining the profession’s attacks on unauthorized practice, a commitment to the public interest is by no means a commitment to the status quo. See id.
59. See Lawyers and Their Work, supra note 58, at 175; Weckstein, supra note 58, at 651.
60. See Weckstein, supra note 58, at 650. Implicit here is the assumption that lawyers are more competent and more ethical than laypersons. The argument for this as-
licenced practitioners who by definition are not subject to the ethical restraints which to some degree govern the activities of licensed attorneys.\textsuperscript{61}

There are a variety of mechanisms intended to combat these problems by controlling or prohibiting the unauthorized practice of law. Many states have criminal statutes providing penalties for unlicensed persons who engage in, or hold themselves out as qualified to engage in, the practice of law.\textsuperscript{62} Some states also have statutes specifically authorizing injunctive relief against unlicensed practitioners.\textsuperscript{63} Aside from these statutes, there are others which grant to members of the bar the exclusive right to practice law.\textsuperscript{64} Judicial authority to prohibit the unauthorized practice of law may be derived from such statutes.\textsuperscript{65}

\begin{quote}
\textit{sumption is that lawyers are subject to strict entrance requirements—supposedly testing their competence to practice law—and are subject to the ethical constraints of the disciplinary machinery of their state bar under the Code of Professional Responsibility. See id. However, even the lay practitioner who is perfectly competent is subject to attack under the unauthorized-practice doctrines. See Agran v. Shapiro, 127 Cal. App. 2d 807, 820, 273 P.2d 619, 631 (1954) (accountant who obtained huge tax savings for client found to be engaged in the unauthorized practice of law).}
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\textit{127 Cal. App. 2d 807, 820, 273 P.2d 619, 631 (1954) (accountant who obtained huge tax savings for client found to be engaged in the unauthorized practice of law).}
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\textit{A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession. Id.}
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\textit{62. See, e.g., CAL. BUS. & PROF. CODE § 6126 (West 1974); MASS. GEN. LAWS ANN. ch. 221, § 41 (West 1958); N.Y. JUD. LAW § 485 (McKinney 1968); N.Y. JUD. LAW § 750 (McKinney 1975). See generally Unauthorized Practice Handbook, supra note 57, at 100-06.}
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\textit{63. See, e.g., MINN. STAT. ANN. § 481.02, subd. 8 (West 1971); N.H. STAT. ANN. § 311:7a (Supp. 1979); N.Y. JUD. LAW §§ 476-a to 476-c (McKinney 1968). See generally Unauthorized Practice Handbook, supra note 57, at 100-06.}
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\textit{65. See, e.g., Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 So. 2d at 798 (Fla. 1980) (per curiam) (integration rule permitting only bar members to practice law in Florida as basis for judicial prohibition of unauthorized practice). Statutory definitions of the practice of law include the representation of others before judicial or administrative bodies, the advising of others on their legal problems regularly and for a fee, and the drafting of legal instruments. See, e.g., LA. REV. STAT. ANN. § 37:212 (West Supp. 1980); R.I. GEN. LAWS § 11-27-2 (1969). See generally Unauthorized Practice Handbook, supra note 57, at 15-20.}
\end{quote}
In addition to judicial and legislative remedies, licensed attorneys police the unauthorized practice of law through internal procedures. Canon 3 of the Code of Professional Responsibility provides that "A Lawyer Should Assist in Preventing the Unauthorized Practice of Law." The Code presents a "functional" definition of law practice, stating that it "relates to the rendition of services for others that call for the professional judgment of a lawyer," and prohibits certain specific activity between lawyers and nonlawyers. Finally, the courts have broad constitutional and inherent supervisory powers, beyond their statutory authority, to prohibit the unauthorized practice of law. This power stems from their authority to admit persons to practice and draws with it broad power to define the practice of law.

In order to implement the overall scheme, the courts have evolved a number of theories to apply in deciding whether a nonlawyer, undertaking what appear to be "legal" activities, is engaged in impermissible lay practice of law. The theories tend to focus on the relation of the nonlawyer's legal activities to his or her normal trade or business, the level of complexity of the legal tasks undertaken, whether the activity is one traditionally per-
formed by licensed attorneys, whether the nonlawyer is compensated for the work, and the effect of the nonlawyer's activity on the public interest.

Notwithstanding the statutory, constitutional, and inherent supervisory powers of the courts to forbid the unauthorized practice of law, there exists a variety of areas in which nonlawyers may perform legal services. For instance, a layperson may act on his or her own behalf. The preparation of opinions on land titles, once the sole province of licensed attorneys, is now largely performed by title companies which may or may not have attorneys performing the legal work. The courts have upheld the power of Congress to permit nonlawyers, including accountants and "patent agents," to practice before federal agencies, and a few states have held that a real estate broker may in the regular course of his or her business prepare deeds and other instruments relating to a real estate transaction. The legislative establishment of the political office of ombudsman suggests the creation of yet another category of laypersons permitted to encroach on the lawyer's monopoly.

The Problem of the Lay Intermediary

The unauthorized practice rules are not concerned solely with the direct provision of legal services to others by laypersons. The doctrines also embrace the situation which arises when a layperson, a corporation, or an association of any kind is interposed between

72. LAWYERS AND THEIR WORK, supra note 58, at 166; see, e.g., State Bar Ass'n v. Connecticut Bank and Trust Co., 145 Conn. 222, 140 A.2d 863 (1958).
73. UNAUTHORIZED PRACTICE HANDBOOK, supra note 57, at 140; see, e.g., Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 So. 2d 797 (Fla. 1980) (per curiam); Fichette v. Taylor, 191 Minn. 592, 254 N.W. 910 (1934); Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855 (1952). Also see the discussion of the profit-nonprofit distinction made in the Code of Professional Responsibility's approach to the lay-intermediary problem, in text accompanying notes 131-143 infra.
74. LAWYERS AND THEIR WORK, supra note 58, at 167; see note 58 supra.
75. LAWYERS AND THEIR WORK, supra note 58, at 166.
76. See id. at 273-314.
78. See, e.g., Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957); State ex rel. Reynolds v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (1961).
lawyer and client, or undertakes to provide attorneys to others.\textsuperscript{80} A layperson or entity engaged in bringing lawyer and client together in this way may be engaged in the unauthorized practice of law and may be permanently enjoined from continuing this activity.\textsuperscript{81} This lay-intermediary problem, which was presented in the \textit{Consolidated} case where nonlawyer intermediaries provided lawyers through the establishment of legal clinics, appears to be a major obstacle to the establishment of lay proprietorship in the legal-clinic industry.

Various questions are raised where an attorney is employed by a layperson to represent a third person. First, to whom does the attorney owe allegiance? This inherent conflict-of-interest problem led the \textit{Consolidated} court to invoke the old admonition that “one cannot serve two masters.”\textsuperscript{82} The Code of Professional Responsibility warns that in such situations the lawyer must be on guard against the wishes of persons other than the client, lest their desires result in an erosion of the lawyer’s professional freedom.\textsuperscript{83} This problem may be illustrated as follows: Attorney A is employed by bank B to represent C, a customer of the bank, in the drafting of a will. It is in the bank’s interest to have itself named as the exec-


\textsuperscript{81} State Bar Ass’n v. Connecticut Bank and Trust Co., 145 Conn. 222, 140 A.2d 863 (1958) (bank, which could not legally practice law directly, could not evade the law by employing competent lawyers to practice for it); Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 So. 2d 797 (Fla. 1980) (per curiam); People ex rel. Chicago Bar Ass’n v. Goodman, 366 Ill. 346, 8 N.E.2d 941, \textit{cert. denied}, 302 U.S. 728 (1937) (layman running “workmen’s compensation bureau” prohibited from hiring lawyers to handle common law claims of his customers); \textit{In re Cooperative Law Co.,} 198 N.Y. 474, 92 N.E. 15 (1910); Cuyahoga County Bar Ass’n v. Gold Shield, Inc., 52 Ohio Misc. 105, 369 N.E.2d 1232 (C.P. Cuyahoga County 1975) (corporation formed to create consumer group to bargain for legal services held to be an impermissible lay intermediary and to violate pre-1975 version of the Code of Professional Responsibility). \textit{But see} United Mine Workers Dist. 12 v. Illinois State Bar Ass’n, 389 U.S. 217 (1967) (state’s interest in protecting the public through the eradication of lay intermediaries outweighed by the constitutional rights of group members to associate for purposes of obtaining access to legal counsel).

\textsuperscript{82} 386 So. 2d at 801; \textit{see} People ex rel. Chicago Bar Ass’n v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1937). In \textit{Goodman}, a layman was enjoined, under the lay intermediary theory, from running a “workmen’s compensation bureau” in which he hired attorneys to represent his customers where a common law remedy was available. This practice was said to be in derogation of the fiduciary and confidential relationship between attorney and client. The court noted that the employer, Goodman, was the attorney’s real client and paymaster, and hence was the one to whom the attorney owed his allegiance. \textit{Id.} at 356, 8 N.E.2d at 947.

\textsuperscript{83} \textit{Code of Professional Responsibility, supra} note 1, EC 5-23.
utor of estates, thus becoming entitled to executor's commissions. The bank informs the attorney that it would like to be so named in all the wills A drafts. On the other hand, it is to C's advantage to have a family member named as executor of the estate, thus passing the executor's commission on to the family member. The economic power of the employer over the employee-lawyer in such a situation clearly increases the risk that the attorney will attempt to influence his or her client in a way which may not coincide with the client's best interests. This conflict of interest and opportunity for lay influence may be reflected in many of the lawyer's professional judgments: hence, the erosion of professional freedom. The limitation on the lawyer's professional autonomy, if left unremedied, also obviously enhances the risk of injury to the public.

The second question inherent in the lay-intermediary situation is whether the unregulated lay intermediary will engage in unethical activities. Licensed attorneys are subject to the supervision of the courts and are bound by the Code of Professional Responsibility, as adopted by the states. Laypersons are not subject to such ethical restraints, or to the sanctions of disciplinary action or disbarment, and thus are not similarly deterred from engaging in unethical activities. As such, the risk is enhanced that lay employers may mishandle client funds, charge an improper or exorbitant fee for legal services, engage in improper solicitation of business, or place false advertising.

Finally, it must be asked whether a layperson should be

84. This illustration demonstrates a problem slightly different from the legal-clinic situation in that in the bank hypothetical the lay intermediary has a pecuniary interest in the substantive content of the lawyer's work. Arrangements wherein banks attempt to "practice law" through employee-attorneys have been prohibited as the unauthorized practice of law, see State Bar Ass'n v. Connecticut Bank and Trust Co., 145 Conn. 222, 140 A.2d 863 (1958), and condemned as a breach of lawyer's ethics, see ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 377 (1967). But see Opinion 349, 59 ILL. B.J. 767, 768 (1971) (firm of lawyer who sits on bank's Board of Directors may name bank officer as executor of estates in wills if done without the knowledge of the bank officer).

85. Improper handling of client's funds by an attorney is a disciplinary violation. CODE OF PROFESSIONAL RESPONSIBILITY, supra note 1, DR9-102.

86. It is a disciplinary violation for an attorney to charge an illegal or excessive fee for his services. Id. DR2-106.

87. A lawyer may not engage in certain forms of solicitation of business. Id. DR2-103.

88. A lawyer may not engage in false, fraudulent, misleading, deceptive, unfair, or self-laudatory advertising. Id. DR2-101.
permitted to exploit the status and image of the legal profession for personal economic gain. It has been suggested that this concern, which involves essentially the self-interest of the bar rather than the public interest, is a concern of somewhat lesser dignity. This Note adopts the public interest as the paramount value in evaluating unauthorized-practice policies; as such it need not concern itself with the perhaps separate and natural interest of the profession in maintaining the status quo in this area, except insofar as that interest impacts upon the broader public interest.

The lay-intermediary doctrine has been used to attack the activities of tax preparers who promise through advertising to provide legal counsel to customers after an audit, collection agencies that hire attorneys to assist in the collection of their customers' accounts, private "workmen's compensation bureaus" that handle workmen's compensation matters for their clients and hire attorneys to pursue their clients' common law remedies (if any), and in various other situations. The doctrine has also been exercised in a slightly different context—challenges to group legal services, lay-owned law clinics, lawyer-referral services, legal aid, and similar entities organized specifically to bring lawyer and client together, either for profit or to further particular social goals.

Notwithstanding the risk of harmful effects on clients, there are a number of areas in which laypersons and entities are permitted to employ attorneys to represent others. Legal aid societies, although they may be administered or sponsored by nonlawyers and may hire lawyers on behalf of indigent clients, are gener-

89. B. CHRISTENSON, supra note 4, at 256-60; see Weckstein, supra note 58, at 662.
93. See generally cases collected in UNAUTHORIZED PRACTICE HANDBOOK, supra note 57, at 152-56.
95. Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 So. 2d 797 (Fla. 1980) (per curiam).
96. See Touchy v. Houston Legal Foundation, 432 S.W.2d 690 (Tex. 1968).
ally not considered impermissible lay intermediaries,\textsuperscript{98} and neither are casualty insurers that hire attorneys to settle claims for their policyholders, despite the obvious conflict of interest.\textsuperscript{99}

However, the most noteworthy area in which lay intermediaries are permitted is in the area of group legal services. Many social, political, and economic organizations provide legal-service plans for their memberships.\textsuperscript{100} In four landmark decisions, \textit{NAACP v. Button},\textsuperscript{101} \textit{Brotherhood of Railroad Trainmen v.}

\textsuperscript{98} See Azzarello v. Legal Aid Soc'y, 117 Ohio App. 471, 185 N.E.2d 566 (1962) (the procuring of legal counsel for the indigent is the performance of a needed public service). It has been suggested that the social value of legal aid societies far outweighs the potential for injury to the public due to any lay interference with the lawyers' professional judgment in these situations. Hence the approach has been to define legal aid as essentially falling outside the scope of the intermediary problem. See Christenson, \textit{Regulating Group Legal Services: Who is Being Protected—Against What—And Why?}, 11 ARIZ. L. REV. 229, 241 (1969).

\textsuperscript{99} See CODE OF PROFESSIONAL RESPONSIBILITY, supra note 1, EC 5-17. The problem of the lawyer employed by an insurance company to represent an insured party is troubling. The general approach seems to be to permit the three-way relationship and to hold the attorney to standards of ethical conduct. In American Employers Ins. Co. v. Globe Aircraft Specialties, 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 401 (Sup. Ct. N.Y. County 1954), it was held that when counsel paid by the insurance company undertakes to represent the policyholder he owes the policyholder his undeviating and single allegiance. If the interests of the insurance carrier and the policyholder are or are likely to become diverse, the attorney may not represent both. \textit{Id.}

This diversity of interest standard was reflected in \textit{ABA Formal Opinion 282} where it is stated that “it is evident at the outset that a community of interest exists between the company and the insured growing out of the contract of insurance with respect to any action brought by a third person against the insured within the policy limitations.” ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 282, at 621-22 (1967). What is indicated here is a presumption of propriety rooted in the “community of interest” concept.

The present position of the ABA, reflected in the Code of Professional Responsibility at EC 5-17, essentially treats the casualty insurer and the insured as multiple clients of the lawyer and states that whether the lawyer can protect all interested parties depends on an analysis of each case. CODE OF PROFESSIONAL RESPONSIBILITY, supra note 1, EC 5-17.

The presumption that an attorney will act properly vis-a-vis the insured might best be understood as an accommodation of practical exigencies in order to foster the settlement of disputes by insurance counsel. Balanced against this value, the risk of a conflict of interest between carrier and insured affecting the lawyer's representation of the insured seems worth taking. See Christenson, supra note 98, at 241.

\textsuperscript{100} See LEGAL SERVICE PLANS, supra note 5, at 1-7.

\textsuperscript{101} 371 U.S. 415 (1963). This case involved the NAACP's actions in providing the services of staff counsel to members and others in litigation involving racial discrimination. The State of Virginia sought to enjoin the civil rights group's actions as improper solicitation in violation of Virginia law and the Canons of Professional Ethics. \textit{Id.} at 419. The Supreme Court held that the activity of the NAACP was protected political expression under the first and fourteenth amendments to the Consti-
Legalizing Nonlawyer Proprietorship in the Legal Clinic Industry:

Virginia ex rel. Virginia State Bar, United Mine Workers District 12 v. Illinois State Bar Association, and United Transportation Union v. State Bar, the U.S. Supreme Court was faced with the situation wherein a state or a state bar association sought to prevent civil rights groups or labor unions from providing legal services to others. An essential issue...

102. 377 U.S. 1 (1964). This case involved a union program to aid injured railroad workers or the families of workers killed on the job in their prosecution of claims against the railroads. The union maintained a Department of Legal Counsel which functioned to recommend to the union members and their families the names of lawyers believed by the union to be honest and competent, and also provided a staff to investigate accidents and gather evidence for use at trial. Id. at 4. The Virginia State Bar obtained an injunction which prohibited the union from carrying on these activities, which were said to constitute the solicitation of legal business and the unauthorized practice of law. Id. at 2. The U.S. Supreme Court vacated the decree, basing its opinion on the constitutional rights of union members to associate together to preserve and enforce their rights. Id. at 7.

103. 389 U.S. 217 (1967). This case involved a union plan for employing attorneys on a salary basis to represent any member who wished representation in workmen's compensation claims. The Illinois Bar sought to have this activity enjoined, and the trial court found that employment of an attorney by the union for this purpose constituted unauthorized practice of law and permanently enjoined it from employing attorneys to represent members. Id. at 218. The Illinois Supreme Court rejected the union's constitutional attack on this action and affirmed the trial court's order. Id. at 219. The U.S. Supreme Court vacated the decree and remanded the case for further proceedings, holding that "[t]he decree at issue . . . substantially impairs the associational rights of the Mine Workers and is not needed to protect the State's interest in high standards of legal ethics." Id. at 225.

104. 401 U.S. 576 (1971). This was yet another case in which a state bar association sought to enjoin a union from engaging in group legal activity. The Bar obtained an injunction on the ground that the activity—essentially referring members to pre-screened lawyers—violated a state statute prohibiting the solicitation of clients. Id. at 578. In striking down the injunction, the Supreme Court stated that the common thread running through the Button line of cases was that collective activity undertaken to obtain meaningful access to the courts is a fundamental right protected under the first amendment. Id. at 585.

105. See note 101 supra.
106. See notes 102-104 supra.
107. See note 101 supra.
108. See notes 102-104 supra.
109. See notes 101-104 supra.
emerging from these cases was whether the state’s interest in regulating the legal profession in order to protect the public from the evils of the lay-intermediary syndrome was sufficient to justify the impairment of the freedom of group members to associate in order to obtain access to legal counsel and the legal system.\textsuperscript{110} In each case the state’s interest was deemed an insufficient reason for prohibiting group legal activity.\textsuperscript{111} These cases established, as a matter of constitutional law, the right of lay organizations—labor unions, civil rights groups, and other associations—to provide legal services to others through licensed attorneys notwithstanding the state’s interest in regulating the unauthorized practice of law.

The Supreme Court’s analysis was fairly simple. First, the Court focused on the risks involved in the lay-intermediary situation: the possibility for baseless litigation (presumably stirred up through unethical lay solicitation), the conflict of interest between the association and the individual client, and the ability of the association to bring economic pressure to bear on the attorney to pursue the employer’s interests to the injury of the client.\textsuperscript{112} The


\textsuperscript{111} See notes 101-104 supra; text accompanying notes 112-116 infra.

\textsuperscript{112} See United Mine Workers Dist. 12 v. Illinois State Bar Ass’n, 389 U.S. 217, 222-23 (1967). The Mine Workers Court took the decisions in Button and Trainmen as controlling on the question of whether the state’s interest in regulating the legal profession could be permitted to significantly impair the value of associational freedoms. \textit{Id.} In reviewing the Button and Trainmen decisions, the Court first focused on the element of risk. The Court stated that

in \textit{Button, supra}, we dealt with a plan under which the NAACP not only advised prospective litigants to seek the assistance of particular attorneys but in many instances actually paid the attorneys itself. We held the dangers of baseless litigation and conflicting interests between the association and individual litigants far too speculative to justify the broad remedy invoked by the State, a remedy that would have seriously crippled the efforts of the NAACP to vindicate the rights of its members in court. Likewise in the \textit{Trainmen} case there was a theoretical possibility that the union’s interests would diverge from that of the individual litigant members, and there was a further possibility that if this divergence ever occurred, the union’s power to cut off the attorney’s referral business could induce the attorney to sacrifice the interests of his client. Again we ruled that this very distant possibility of harm could not justify a complete prohibition of the Trainmen’s efforts to aid one another in assuring that each injured member would be justly compensated for his injuries.

\textit{Id.} Thus the Court found that the apprehension of speculative and distant harms was an insufficient reason to prohibit lay-administered group legal activity. \textit{Id.} Rather, the Mine Workers Court looked for actual injury to clients:

The decree at issue here thus substantially impairs the associational rights of the Mine Workers and is not needed to protect the State’s interest
Court considered the significance of these risks and concluded that, without a showing of actual harm to clients, the injury to the public due to the theoretical presence of these risks was not great.\footnote{113}

The Court next examined the important social values involved, which in the view of the Court were fundamental rights protected under the Constitution.\footnote{114} In \textit{Button} the Court identified the NAACP's right to engage in political expression, protected under the first and fourteenth amendments, as a right to be balanced against the risk of improper solicitation and the other inherent dangers of the intermediary arrangement.\footnote{115} In \textit{Trainmen, Mine Workers,} and \textit{United Transportation Union,} the constitutional right of union members to associate in order to obtain meaningful access to the courts—another important social value—was considered and balanced against the identified risks.\footnote{116} In each case the constitutional values were held, in effect, to justify taking on a slight risk of injury.\footnote{117}

The Court thus engaged in a familiar sort of balancing process. This process has merit outside the constitutional context as a vehicle for policy analysis of questions involving the regulation of the legal profession. This Note, in its proposal, will consider some of the relevant factors for such a policy analysis of all intermediary situations whether or not the social values involved carry the shield of constitutional protection.\footnote{118} Before reaching this proposal, however, a brief analysis of the profession's provisions for self-governance will be offered.

\begin{section}{Lawyers' Rules of Conduct}

Since 1908 all American lawyers have been subject to more-or-less uniform rules of professional conduct.\footnote{119} The first code of ethics adopted by the American Bar Association was the Canons of in high standards of legal ethics. In the many years the program has been in operation, there has come to light, so far as we are aware, not one single instance of abuse, of harm to clients, of any actual disadvantage to the public or to the profession, resulting from the mere fact of the financial connection between the Union and the attorney who represents its members.

\textit{Id.} at 225.

\footnote{113} \textit{Id.}
\footnote{116} 401 U.S. at 585; 389 U.S. at 225; 377 U.S. at 7.
\footnote{117} See notes 101-104 \textit{supra}.
\footnote{118} See text accompanying notes 164-212 \textit{infra}.
\footnote{119} M. FREEDMAN, \textit{supra} note 3, at 127.
Professional Ethics, which encountered much criticism for its generality, vagueness, and internal inconsistency, and for having concentrated heavily on anticompetitive practices such as minimum fee schedules and restrictions on advertising.120

In 1969 the ABA adopted the Code of Professional Responsibility, with the goal of replacing the generalizations of the Canons with rules sensitive to the effect of lawyers’ activities on “the welfare of society as a whole.”121 The Code of Professional Responsibility, however, has also come under attack. Blanket suppression under the Code of all lawyers’ advertising was held to be unconstitutional in 1977122 and its proscription of lawyers’ solicitation has also seen constitutional challenge.123 It has been said that the Code is monopolistic in tone,124 consistently self-serving,125 and “inconsistent, incoherent, and unconstitutional.”126

In response to these criticisms, the ABA, only ten years after promulgating the Code of Professional Responsibility, again set out to reconsider the ethical rules guiding the profession. On January 30, 1980, the ABA Commission on Evaluation of Professional Standards promulgated a discussion draft of a proposed new code of lawyers’ ethics: The Model Rules of Professional Conduct.127 A final version of the Model Rules is expected to be submitted to the ABA House of Delegates in 1982.128 The acceptance of the Model Rules is in doubt, however, as it too has encountered substantial criticism.129

120. Id.
121. CODE OF PROFESSIONAL RESPONSIBILITY, supra note 1, at i.
125. Id. at 704.
126. Birnbaum, Preface to AMERICAN LAWYER’S CODE OF CONDUCT, supra note 52, at 1.
127. MODEL RULES OF PROFESSIONAL CONDUCT, supra note 52.
128. The Model Rules of Professional Conduct was originally to be considered by the ABA House of Delegates in 1981. However, due to the opposition encountered by the drafters, yet another version of the Model Rules will be prepared by the ABA Commission—complete with explanatory notes and bases of authority for the recommendations. The new draft is to be submitted to the ABA House of Delegates for a vote in 1982. Slonim, Kutak Commission After More Time, 66 A.B.A.J. 1350 (1980).
LEGALIZING NONLAWYER PROPRIETORSHIP

To complicate the landscape, an independent group, the Roscoe Pound—American Trial Lawyers Foundation, has promulgated its own draft of a new code of ethics: The American Lawyer’s Code of Conduct. They are circulating this draft in competition with the Model Rules. This section presents the position taken by the profession on the lay-intermediary problem as expressed in the Code of Professional Responsibility and in the two competing documents.

The Code of Professional Responsibility

Under the Code of Professional Responsibility, it is a disciplinary violation for a lawyer to practice with or in a professional association or corporation organized for profit if a nonlawyer has an ownership or management interest therein. The basic rationale for this Disciplinary Rule is stated in an Ethical Consideration which articulates the familiar concern that a lawyer should not practice in a lay-owned professional legal corporation due to the possibility of lay interference with the lawyer’s professional independence.

130. AMERICAN LAWYER’S CODE OF CONDUCT, supra note 52, at 1.
131. CODE OF PROFESSIONAL RESPONSIBILITY, supra note 1, DR 5-107(C). DR 5-107(C) provides:
   (C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit if:
      (1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
      (2) A non-lawyer is a corporate director or officer thereof; or
      (3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

Id. (footnotes omitted).
132. Id. EC 5-24. EC 5-24 provides:
   To assist a lawyer in preserving his professional independence, a number of courses are available to him. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a non-lawyer. Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstand-
However, under the present code a lawyer may accept employment from a lay agency to represent third parties if the lay intermediary is a not-for-profit organization. This exception would permit not-for-profit organizations, such as labor unions, civil rights groups, and legal aid offices, to employ or enter into other arrangements with lawyers to provide legal representation to their memberships. The Code, however, warns the attorney who accepts this kind of employment that some employers "may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client." In order to protect the client from possible

Id. (emphasis added) (footnotes omitted).

133. Id. DR 5-107(A). DR 5-107(A) provides:
(A) Except with the consent of his client after full disclosure, a lawyer shall not:
   (1) Accept compensation for his legal services from one other than his client.
   (2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.

See also id. DR 2-103(D). DR 2-103(D) lists a number of organization types for which a lawyer may work, including legal aid offices, nonprofit group legal services, and military legal assistance offices.

134. See id. EC 5-24, quoted in note 132 supra; text accompanying notes 100-118 supra.

135. CODE OF PROFESSIONAL RESPONSIBILITY, supra note 1, at EC 5-23. EC 5-23 provides:

A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the action of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

Id. (footnotes omitted).
deleterious effects of lay interference in these not-for-profit arrangements, the Code requires that two steps be taken. First, the lawyer must act only with the consent of his client after full disclosure. Second, the lawyer "shall not permit" the employer to "direct or regulate his professional judgment in rendering" legal services. To facilitate this second precautionary step, the Code suggests diligence on the lawyer's part in accepting employment and the desirability of a written agreement between lawyer and employer defining the relationship and providing for lawyer independence.

No explanation is put forward in the Code to explain why the absolute prohibition of lay management (or ownership) extends only to organizations established to practice law for a profit. One possibility is that the Code drafters, in seeking to protect the public, were of the view that lay employers whose primary motivation is profit are more likely to interfere with the lawyer's professional independence than are those with political or social goals. A second possibility is that the Code drafters sought to prevent all lay interference but felt constrained to accommodate the Supreme Court decisions on the associational rights accorded members of political and economic groups.

Under these rules, it would appear to be a disciplinary violation for an attorney to accept employment with a profit-motivated professional corporation where one of the stockholders is a layperson, even though the layperson has no power or right to interfere

136. Id. DR 5-107(A). An interesting question is, however, just what is required to be disclosed? The existence of the lay intermediary? The lay intermediary's social, political, or economic motivations? The concrete risks involved? Must the lawyer tell the client at what precise point he will likely disregard the interests of the client in order to advance those of the lay employers? The Code is silent on this question, perhaps leaving the issue open to an analysis rooted in the informed-consent doctrines of the law of negligence.

137. Id. DR 5-107(B). DR 5-107(B) provides: "(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." Id. (footnotes omitted).

138. Id. EC 5-24. The text of EC 5-24 is quoted at note 132 supra.

139. Although this theory evidences a healthy distrust of men whose strongest motivation is profit, it does not seem like the kind of factor on which an ethical distinction ought to be based. The Ethical Considerations, which are not mandatory, see note 1 supra, appear to treat political, social, and economic motivations as comparable factors. The distinction is drawn only in the Disciplinary Rules. Compare Code of Professional Responsibility, supra note 1, EC 5-22, EC 5-23 with id. DR 5-107.

140. See text accompanying notes 101-118 supra.
with the lawyer's activities. Yet that same lawyer may accept employment with, for example, the Worker's Legal Action Committee, a hypothetical nonprofit organization which, inter alia, employs lawyers to represent members in law suits against their employers, as long as the clients know about the connection between the Committee and their lawyer (disclosure) and as long as the lawyer exercises proper discretion not to let the Committee influence him.

What is suggested here is that the Code deploys two standards, one for profit-motivated organizations and one for nonprofit organizations, which may not be truly responsive to the actual risks of lay interference. Of course, the first arrangement—the corporation with the lay stockholder—may be permanently enjoined as unauthorized practice of law. The Worker's Committee, on the other hand, is immune from the charge of unauthorized practice because of the first amendment rights of its membership to associate for the purpose of petitioning the government for the redress of grievances.

The Model Rules of Professional Conduct

The ABA Commission on Evaluation of Professional Standards, in its Model Rules of Professional Conduct, has fashioned a new approach to the lay-intermediary problem. Rule 7.5 of the proposed ethical code provides that:

A lawyer shall not practice with a firm in which an interest is owned or managerial authority is exercised by a nonlawyer, unless services can be rendered in conformity with the Rules of Professional Conduct. The terms of the relationship shall expressly provide that:

141. See note 135 supra and accompanying text.
142. Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 So. 2d 797 (Fla. 1980).
143. United Mine Workers Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) (holding that nonprofit groups such as labor unions may employ attorneys to represent their membership notwithstanding the state's interest in regulating the legal profession and in preventing the unauthorized practice of law by unlicensed lay intermediaries).
144. MODEL RULES OF PROFESSIONAL CONDUCT, supra note 52.
145. The Model Rules of Professional Conduct defines a "law firm" as: A lawyer practicing with the assistance of other persons in the service of a client, including partners, associates, lawyers "of counsel" to a firm, and employees of a firm, and lawyers employed in the legal department of a corporation or other organization, in the legal department of a government agency, or in a legal services organization.

Id. at 6.
(a) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(b) The confidences of clients are protected as required by Rule 1.7;\footnote{146} and
(c) The arrangement does not involve advertising or solicitation prohibited by Rules 9.2\footnote{147} and 9.3;\footnote{148} and
(d) The arrangement does not result in charging a client a fee which violates Rule 1.6.\footnote{149}

The essential improvement of this rule over the approach taken in the Code of Professional Responsibility is the conscious elimination of the bifurcated standard for addressing the propriety of the relationship between lawyer and lay employer. Under this rule the profit-oriented legal-services organization and its not-for-profit counterpart are to be evaluated in the same way. This makes sense since, although the two types of organizations may have radically different motivations, the risks involved—(1) lay interference with the professional independence of and ethical judgment of lawyer-employees, and (2) unethical conduct by the unregulated lay employers—are the same. The rule identifies some of the concrete risks involved: breaches of confidentiality;\footnote{150} improper advertising and solicitation;\footnote{151} and improper fees.\footnote{152}

The comment to Rule 7.5 further explains the ABA Commission's intent in drafting the rule. The comment states that "[i]n professional corporations it is sometimes essential or convenient that a nonlawyer be an officer or director"\footnote{153} and that "if nonlawyers were prohibited from having managerial authority in a legal services organization, management efficiency could be hampered in private law firms and community participation in legal aid would be curtailed."\footnote{154} With this foundation recognition in place, the comment reiterates basic concerns about lay intermediaries and calls for adherence, in the lay-intermediary situation, to fundamen-
tal requirements of ethical practice.\textsuperscript{155} To facilitate adherence to ethical principles the comment suggests that written specifications be established concerning the independence of the attorney’s professional judgment.\textsuperscript{156}

Rule 7.5 of the Model Rules represents a desirable approach to the problem of the lay intermediary. By focusing on elimination or control of the actual risks involved in administering these arrangements, rather than on organizational structure, it goes further to serve the ethical norm of ensuring fidelity to the clients’ interests without making the profit-nonprofit distinction and without unduly restricting the freedom of the legal profession to evolve alternative systems for the delivery of legal services.

\textit{The American Lawyer’s Code of Conduct}

The American Lawyer’s Code of Conduct calls upon the lawyer to give “undivided fidelity to the client’s interests as perceived by the client, unaffected by any interest of the lawyer or of any other person, or by the lawyer’s perception of the public interest.”\textsuperscript{157} Under this proposed code of ethics a lawyer may accept employment from a person or organization other than his or her client provided that this does not interfere with the lawyer’s fidelity to the client’s interests.\textsuperscript{158} The Code also permits an attorney to form a partnership with a nonlawyer\textsuperscript{159} provided that, in such an arrangement, “the terms of the partnership shall be consistent with

\begin{itemize}
  \item\textsuperscript{155} \textit{Id.}
  \item\textsuperscript{156} \textit{Id.} at 117.
  \item\textsuperscript{157} \textit{AMERICAN LAWYER’S CODE OF CONDUCT}, supra note 52, \S 2.1.
  \item\textsuperscript{158} \textit{Id.}, \S 2.3. Section 2.3 provides: “A lawyer may accept a fee or salary from a person or organization other than the client, subject to rules 2.1, 2.2, and 2.4.” \textit{Id.}
  \item\textsuperscript{159} \textit{Id.}, \S 2.4.
\end{itemize}
the lawyer’s obligations under this Code, with particular reference to Rule 2.1, requiring undivided fidelity to the client.”

The American Lawyer’s Code of Conduct thus takes a streamlined approach to the lay-intermediary problem. Under this Code, the primary question is whether the attorney is meeting his or her obligation of fidelity to the client’s interests. If so, the structure of the legal services organization in which the attorney practices is irrelevant. The American Lawyer’s Code emphasizes the primary risk—breach of the lawyer’s duty to the individual client—and counsels the attorney to make full use of the opportunity for risk minimization through disclosure to the client of the possible conflicts in the attorney’s allegiances.

Whether or not the Code of Professional Responsibility is replaced by either of the proposed codes, it seems fairly obvious that these documents demonstrate a willingness on the part of the legal-ethics community to reconsider the ethical dimension of the lay-ownership problem. This may signal the future acceptance, from the point of view of legal ethics, of legal-services organizations owned or partially owned by nonlawyers.

A PROPOSED BASIS FOR ANALYSIS

This section proposes that lay-intermediary problems of the sort presented in the Consolidated case should be analyzed, from a policy perspective, with regard to three factors: (1) the risk of injury to the public resulting from nonlawyer ownership of a law clinic; (2) steps, short of prohibition, to be taken to minimize that risk; and (3) the social value of nonlawyer ownership.

In an article on the subject of group legal services, written shortly after the Supreme Court decision in United Mine Workers District 12 v. Illinois State Bar Ass’n, Barlow Christenson, a re-

160. Id.
161. Id., §§ 2.1, 2.3.
162. See id., §§ 2.1-2.5 (Comments). Informed consent and disclosure requirements are found throughout the American Lawyer’s Code. See id., § 1.2 (client must consent before an attorney may reveal a confidence); § 2.4 (client must consent before attorney may represent potentially adverse interest); § 6.2 (client’s informed consent necessary before attorney may withdraw from representing that client).
163. The Model Rules of Professional Conduct have been recognized as a source for future amendments to the Code of Professional Responsibility. See Slonim, supra note 128.
164. Christenson, supra note 98, at 229.
search attorney with the American Bar Foundation, proposed an alternative method for evaluating legal-services organizations presenting the risk of lay interference. He based his analysis, at least in part, on the Supreme Court's treatment of the Button,\textsuperscript{166} Trainmen,\textsuperscript{167} and Mine Workers\textsuperscript{168} cases. He first distilled a constitutional principle from those decisions, which he stated as follows:

State restrictions on professional conduct that operate to impair or interfere with the constitutionally protected right of citizens to take concerted action to obtain help with their individual legal problems are justifiable only when genuinely necessary to prevent some real evil, demonstrable in terms of actual and substantial injury to the public.\textsuperscript{169}

Mr. Christenson noted that a similar rationale apparently underlies the profession's position on permitted lay intermediaries, such as casualty insurers and legal aid organizations, where the utility of the arrangements had been deemed to far outweigh any risk of actual and substantial harm to the public.\textsuperscript{170} He then proposed an overriding rationale which may be applied in all lay-intermediary cases:

An intermediary arrangement—group or otherwise—that does not impair the independence of professional judgment and action of the participating lawyer presents no significant risk of injury to the public and should be permitted. An arrangement impairing the lawyer's independence risks injury to the public; however, it should not be prohibited \textit{unless} such impairment and the resultant risk of injury are sufficiently serious to override both the constitutionally protected rights that may be involved and whatever social value the arrangement may have.\textsuperscript{171}

In other words, when determining whether an activity such as a group-legal-services plan or a lay-owned law clinic should be permitted, the risk of harm from lay interference with the attorney's judgment should be weighed against the constitutional rights involved and any social utility of the activity. Mr. Christenson noted that in intermediary situations that do not involve constitu-

\textsuperscript{169} Christenson, \textit{supra} note 98, at 233.
\textsuperscript{170} \textit{Id.} at 241.
\textsuperscript{171} \textit{Id.} at 242 (emphasis in original).
tional rights it would be appropriate to weigh the risk of injury against the social value of the activity alone.\textsuperscript{172}

The practical effect of utilizing this rationale to make decisions about specific organizational structures is to permit the lay intermediary where the arrangement has a high social value, even though the risk of injury is high.\textsuperscript{173} Such a situation exists, it was argued, in the group-legal-services context.\textsuperscript{174} Conversely, where there is a high risk of injury to the public, but a low social value, the activity should be prohibited.\textsuperscript{175} Christenson’s article suggests that a program “in which general legal services were to be sold commercially by a profit-making corporation” would be a good candidate for suppression.\textsuperscript{176}

In expressing his fears about profit-oriented lay-owned law firms, Mr. Christenson focused on the risk of a conflict of interest between employer and client and on the risk of the lay employer controlling the lawyer’s activities.\textsuperscript{177} However, his cursory analysis of the for-profit lay-owned law office overlooked two factors. First, the social value of the profit-oriented lay-owned law office was understated. While the social-value consideration includes what are commonly thought of as constitutional values, there are other social values rooted in concepts of free-market economics, management efficiency, and in a fundamental sense of human freedom,\textsuperscript{178} that should also be weighed in the analysis.

A second overlooked factor is the possibility of deploying risk-minimizing mechanisms for dealing with potential injury to clients. The law is quick to prohibit a lay-intermediary arrangement in order to eradicate the underlying risk. Yet it may be that the public could be equally well protected by a system that institutionalizes a

\textsuperscript{172} Id. at 243.
\textsuperscript{173} Id. at 242.
\textsuperscript{174} Id. at 242-43.
\textsuperscript{175} Id. at 243.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 244.
\textsuperscript{178} The concept of freedom has been central to the tradition of European individualism and liberalism. Western notions of freedom refer primarily to the condition characterized by the absence of coercion or constraint imposed by another. This foundation principle may be stated as follows:

[A] man is said to be free to the extent that he can choose his own goals, or course of conduct, can choose between alternatives available to him, and is not compelled to act as he would not himself choose to act, or prevented from acting as he would otherwise choose to act, by the will of another man, of the state, or of any other authority.

\textsuperscript{3} \textsc{Encyclopedia of Philosophy} 232 (P. Edwards ed. 1973).
number of traditional risk-minimizing devices, including mandatory disclosure, contract, and a licensing program for lay owners. An analysis which ignores these factors will not yield a fair evaluation of the propriety of permitting organizations such as the lay-owned law clinic.

Risk, Risk Minimization, and Social Benefit

The Code of Professional Responsibility, the Consolidated case, and other lay-intermediary cases, suggest a number of concrete risks that the presence of nonlawyer-owners or managers in legal-services organizations may present. One area of risk involves the danger that lay owners, neither bound by any set of ethical rules nor subject to discipline by the courts, may act in a manner inconsistent with accepted principles of lawyers' ethics. For example, the unregulated lay proprietor may attempt improper solicitation of clients, make improper use of clients' funds, or betray clients' confidences to which he or she may have access.

A second area of risk is the danger that lay owners, motivated by the profit incentive, will act in a way that institutionalizes lay interference with a lawyer's professional judgment. For example, the lay owners may "mandate" the use of inadequate preprinted legal forms, arrange lawyers' schedules so that they have

179. See text accompanying notes 195-197 infra.
180. See text accompanying notes 198-199 infra.
181. See text accompanying notes 201-202 infra.
182. See text accompanying notes 22-55, 80-88, 131-143 supra.
183. In Consolidated it was found that: "There is no evidence that the respondent has made any attempt to balance the requirements of the Code of Professional Responsibility against its profit motives nor that the owners have the training or ability to make such an evaluation." 386 So. 2d at 798.
184. Licensed attorneys are subject to disciplinary rules concerning improper solicitation. See CODE OF PROFESSIONAL RESPONSIBILITY, supra note 1, DR 2-103.
185. See Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 So. 2d at 799-800. Attorneys are subject to disciplinary rules concerning the use of clients' funds. See CODE OF PROFESSIONAL RESPONSIBILITY, supra note 1, DR 9-102.
186. The protection of clients' confidences is of paramount concern to licensed attorneys. See CODE OF PROFESSIONAL RESPONSIBILITY, supra note 1, Canon 4; AMERICAN LAWYER'S CODE OF CONDUCT, supra note 52, §§ 1.1-1.6 (Alternative A); id., §§ 1.1-1.4 (Alternative B); MODEL RULES OF PROFESSIONAL CONDUCT, supra note 52, § 1.7.
187. The Consolidated court found that: "Notwithstanding conflicts in the testimony, it is clear that the respondent, through its non-lawyer officers, maintains a degree of control over the legal services it furnishes through its lawyer employees for the purpose of maintaining cost efficiency and profit." 386 So. 2d. 797, 798.
188. See id. at 799.
inadequate time to spend in court,\textsuperscript{189} or limit the amount of time the lawyers may spend with each client.\textsuperscript{190}

A third area of risk is the danger that lay owners may attempt to impose their own judgment upon lawyers in substantive matters and in matters of office priority, using their economic power over the lawyer-employees to enforce their position.\textsuperscript{191} Yet another area of possible risk stems from the suggestion that, by instilling the profit motive in lawyer-employees through manipulation of compensation schedules, the lay owner may cause lawyer-employees to forego their professional responsibility and render substandard legal services to the public.\textsuperscript{192}

The potential for harm resulting where an attorney accepts employment from a layperson to represent others is significant. Nevertheless, there are a number of risk-minimizing mechanisms that could be deployed by legal-services organizations and by legislatures seeking to curb abuses which could greatly change the overall picture in this area.

A first check on the risks engendered through lay interference is the professional responsibility of lawyer-employees. Lawyers' ethics clearly preclude the lawyer from allowing any outside influence to preempt his professional judgment.\textsuperscript{193} Unlike nonlawyer-employers, attorneys are subject to court supervision in their activities, and their licenses represent their livelihood. It seems improbable that an attorney will forego his ethical duties, risking his professional reputation and, perhaps, his right to practice, in order to comply with the wishes and demands of his employer.\textsuperscript{194}

\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} CODE OF PROFESSIONAL RESPONSIBILITY, supra note 1, EC 5-23.
\textsuperscript{192} The Consolidated court found that: “The manner in which the lawyer employees are compensated [salary plus percentage of gross receipts] encourages the lawyer to conduct a high volume turnover of clients in order to increase his income.” 386 So. 2d at 798.

The same court also found that: “The profit oriented manner in which the respondent's business is operated by lay officers has resulted in injury or inadequate representation of respondent's clients.” Id. at 800.

\textsuperscript{193} CODE OF PROFESSIONAL RESPONSIBILITY, supra note 1, DR 5-107(B); see MODEL RULES OF PROFESSIONAL CONDUCT, supra note 52, § 7.5; AMERICAN LAWYER'S CODE OF CONDUCT, supra note 52, § 2.1.

\textsuperscript{194} However, it has been suggested that the Code of Professional Responsibility is seldom enforced against bar members. One commentator argued that the filing of a complaint against an attorney has such a devastating effect on his career and professional investment that the disciplinary system is seldom utilized. See Hunter & Klonoff, supra note 79, at 28-29.
This would seem to be so at least in cases of gross impropriety.

A second check on the risks involved would be mandatory disclosure to potential clients of the existence of the lay owners and of the possibility of a conflict of interest between the lawyer's fidelity to the interests of the client and to those of his employer.195 Further, if the lay employer has introduced unorthodox procedures for the purpose of improving cost efficiency, the client should be made aware of this.196 The disclosure approach to risk minimization is already mandated by the Code of Professional Responsibility in dealing with the conduct of permitted (i.e., nonprofit) lay intermediaries.197

The relationship between lay ownership and staff attorneys should be governed by a contract, in a form approved by the state bar association.198 Such a contract could provide that the laypersons may not interfere with the professional activities of the lawyers, nor interfere in the attorney-client relationship.199 The contract could also require the lay owners to respect the ethical

195. For a general discussion of disclosure as a risk-minimizing precaution, see id. at 29.
196. For example, if the owner has taken to the use of computer-generated matrimonial complaints, the client should be made aware of this and of the possibility that these documents may not be "tailored" to his particular problems.
197. Code of Professional Responsibility, supra note 1, DR 5-107(A).
198. The contract approach to risk minimization is advocated in the Model Rules of Professional Conduct, supra note 52, § 7.5, at 116 (Comment).
199. In his article on group legal services, Barlow Christenson stated that an important element relating to whether the lay entity has potential power or opportunity to control the lawyer was whether the terms and conditions of the employment agreement obligate the organization to respect the lawyer's independence of professional judgment. Christenson, supra note 98, at 244. The employment contract between Consolidated and its lawyer-employees had such a provision, reprinted here in full:

Relationship Between the Parties. Subject to the National and State Canons or Rules of Ethics and subject to the rules of professional conduct promulgated by the Supreme Court of Florida, the Board of Directors of the Corporation shall manage the business affairs of the Corporation. The power of the Board of Directors to direct and control the activities of the Attorney shall be subject to the ethics of the profession and the law pertaining to the Corporation. The Attorney shall have the final and absolute determination of whether to accept or reject representation of a client or to withdraw from the representation of a client. Nothing contained in this agreement or in the actual employment shall be construed to alter the professional relationship between the Attorney and his clients or to modify the attorney-client privilege specified by statute, rule, regulation or any comparable common law privilege. The integrity of the Attorney shall be paramount to any right of the Corporation.

rules of the legal profession in their activities. With a proper understanding of the lawyer’s ethical obligations—including the duty of absolute fidelity to the client’s interests—and with the understanding that consumers of legal services depend on the ethical standards of lawyers in areas such as professional competence and confidentiality, the lay owners may voluntarily comply with these contract provisions.

In a legal-services organization, lawyers should make the decisions concerning legal policy and should also have input on management issues affecting their professional independence. To facilitate this, lawyer-employees, as part of their contractual obligations, could serve on the organization’s board of directors or could participate in some other institutionalized way in corporate policymaking affecting areas of professional activity.200

A major source of lay-intermediary problems is the fact that the lay employer is essentially unregulated, and hence is able to overstep the ethical bounds constraining the traditional legal-services organization.201 Lay owners are not subject to court supervision, nor do they have a promulgated code of ethics. A licensing program may provide a significant tool to deal with this problem.202 Under such a program, a layperson or organization seeking to employ attorneys to provide legal services to others would be required to obtain an operating license. Licensees would be subject to standards of conduct responsive to the various risks of lay ownership. Such a licensing program would give the state a tool for enforcing minimum standards, for disciplining lay owners who act unethically, and for excluding persons and entities who demonstrate an inability to refrain from causing harm through improper meddling with the professional activities of lawyer-employees.

Allowing laypersons to participate in expanding the legal-clinic industry may very well yield substantial social benefits. The following suggestions are offered to foster critical thought and research on the possible social and economic benefits of permitting lay financial and managerial participation in the legal-clinic industry.

200. The Florida Supreme Court apparently ignored the fact, brought out in Consolidated’s brief, that the lawyers employed by Consolidated also served on its Board of Directors and that no corporate rules or policies could be set without the approval of the lawyer-employees. Respondent’s Brief, supra note 24, at 5, 11.

201. See text accompanying notes 84-88 supra.

202. For a discussion of the costs and benefits of licensing nonlawyers to practice in limited areas of law (e.g., estate planning), see Hunter & Klonoff, supra note 79, at 30-37.
The owners in *Consolidated* felt that they were engaged in a legitimate business venture and that, essentially, they got a "raw deal" in the hands of the Florida courts.\(^2\) The first benefit of allowing lay participation in this area would be to preserve and enhance the freedom of business entrepreneurs to engage in an occupation in which they feel that they can make a positive contribution.\(^2\) Not all legal-services organizations provide the same services to clients. In fact, there is a considerable range of legal services in terms of kind, quality, and price. A second benefit of legalizing the lay-owned private law clinic would be to preserve and enhance the freedom of consumers to choose the kind, quality, and price of the legal services they wish to employ.\(^\)\(^2\)

Many qualified lawyers have considerable difficulty finding legal employment. Legalizing the lay-owned law clinic would increase the employment opportunities for trained lawyers, especially in the neglected area of general legal services for persons of modest means, and may have the "trickle down" effect of increasing employment opportunities throughout the profession. A clinic such as Consolidated's could provide an economically viable structure in which lawyers may practice in the general-legal-services area. This stability might have the effect of enticing lawyers to stay with these organizations and develop experience and expertise in serving the needs of the moderate-income client.

There is a demonstrated need for more legal services for persons of modest means.\(^2\) By allowing laypersons with venture capital to participate in this industry, it is likely that there will be an increase in the number of clinics offering badly needed, moderately priced legal services.\(^2\) An increase in the number of legal-

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204. The owners in the *Consolidated* case challenged the Florida Bar's actions on constitutional grounds, claiming that their right to engage in the legal-clinic business was both a "liberty" right and a "property" right protected from state deprivation or undue influence under the fourteenth amendment. Respondent's Brief, supra note 24, at 9. These claims, whether or not supported by the Constitution (the Florida Supreme Court said no, 386 So. 2d at 800), represent a powerful and fundamental value—the desire for human freedom—which underlies much of this analysis. *See* note 178 *supra*.


206. *See* note 2 *supra*.

207. It has been suggested by one clinic owner that legal clinics often require more start up money than traditional firms, and therefore depend more heavily on the availability of outside financing. It has also been contended that eliminating the "artificial constraints" on outside financing of law firms embodied in the Code of
services organizations may well have the effect of increasing overall competition in the profession. The result may be greater efficiency, thus driving the quality of legal services up and the cost of these services down. Moreover, by presenting legal services in a commercial setting, free from the imposing historical baggage of traditional law firms, the average consumer may be encouraged to make greater use of the legal system.\textsuperscript{208}

Finally, a chain of storefront law offices such as Consolidated's may well be able to effect certain cost efficiencies unachievable in more traditional practices. Certain management and financial functions could be centralized, lawyers could be relieved of administrative duties unrelated to the practice of law, and office procedures could be standardized. These steps may serve to free the attorneys to work solely on their clients' problems. While it is true that lawyers who manage can also utilize cost-efficient techniques, it seems equally obvious that legal training is unnecessary to effect cost-effective procedures based on centralized management.\textsuperscript{209}

This section has set forth a number of factors that suggest a basis for principled analysis of the problem presented in the Consolidated case. Such an analysis should focus on three major policy alternatives: Alternative A is to maintain the status quo and allow

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\textsuperscript{208} As an example of this kind of thinking in action, it appears that legal services are now being offered in department stores in some areas; also, some clinics (and some more traditional firms) are beginning to perform mass advertising on radio and T.V., touting their efficiency and middle-class orientation to the public. See Newsday, Jan. 18, 1981, at 76, col. 1.

\textsuperscript{209} The comment to Rule 7.5 of the Model Rules of Professional Conduct recognizes the benefits of lay management in certain instances and notes that many firms have hired laymen to handle important management functions. MODEL RULES OF PROFESSIONAL CONDUCT, supra note 52, § 7.5, at 116 (Comment). This has also been a practice in British law firms for some time. See LAWYERS AND THEIR WORK, supra note 58, at 425-41.

Recently the Block Management Company, a subsidiary of the H & R Block income tax service chain, took over the administrative chores of Hyatt Legal Services. As part of the arrangement, a senior partner in the Hyatt clinic (formerly president of the American Legal Clinic Association) became a vice president in the Block Management Company. The Hyatt partner has stressed the opportunity for the Block organization to provide management advice to other, fledgling clinics, so that they may streamline law office procedures, and promotion of overall growth in the legal-clinic industry. See Winter, H & R Block: Help for Legal Clinics?, 66 A.B.A.J. 1349 (1980); Winter, supra note 9.
the law's suppression of nonlawyer participation in this field to continue. Pursuit of this policy results in injury to the public involving the frustration of an array of potential social benefits. Alternative B is to lift all restrictions on unauthorized practice in this field and allow lawyers and nonlawyers to establish whatever business associations they wish. Pursuit of this policy is certain to result in injury to the public involving the exposure of clients to a number of fairly well-defined risks. Alternative C is to lift the blanket suppression of nonlawyer financial and managerial participation in the legal-clinic industry and to utilize a combination of risk-minimizing mechanisms in order to reduce the deleterious effects such arrangements may have on the public interest. Pursuit of this policy would permit the realization of the benefits of nonlawyer participation in the industry without unduly enhancing the normal risks attending the attorney-client relationship.

The methodology suggests that we choose the policy likely to result in the least harm. The case for choosing policy C is strong. The potential harm from licensed and otherwise restrained nonlawyer legal-clinic operators does not seem to be great. On the other hand, continued suppression of nonlawyer participation in this field deprives the public of a source of moderately priced legal services and the legal-clinic industry of a potentially fruitful source of financial backing. Taking these factors into account, policy C seems likely to produce the minimum level of overall harm, and as such the blanket prohibition of nonlawyer participation in this field under the unauthorized-practice doctrines seems unjustified.

CONCLUSION

At present a nonlawyer is not allowed a proprietary or management interest in a legal-services organization. For reasons of sound social policy, it may be desirable to allow nonlawyers to enjoy such an interest. The problem is that laypersons, on entering into such a business relationship with practicing lawyers, are in a position to harm the clients of those lawyers both directly and indirectly. The question then becomes what to do about this risk of

210. See text accompanying notes 203-209 supra.
211. See text accompanying notes 182-192 supra.
212. See text accompanying notes 193-202 supra.
214. See text accompanying notes 203-209 supra.
harm. One answer is simply to disallow the relationship altogether. This is the approach taken by the states in their unauthorized-practice laws and by the ABA in its Code of Professional Responsibility.

Another approach—the one advocated in this Note—would be to allow the relationship to exist and to establish mechanisms for policing the relationship in order to prevent improper interference. In order to implement this second approach a number steps would have to be taken.

Assuming that the American Lawyer's Code of Conduct and the Model Rules of Professional Conduct are both rejected by the organized bar, it would be necessary to revise the Code of Professional Responsibility to reflect the reasoning of the proposed codes on the issue of lay ownership.\textsuperscript{215} This would clear the way for attorneys to associate themselves with the clinics without fear of disciplinary action.

State statutes should also be changed to reflect a more rational approach to the lay-intermediary problem. Specifically, the statutes should authorize the ownership by nonlawyers of legal clinics, establish a licensing authority to regulate the lay proprietors, establish standards of conduct for the lay owners, and incorporate the other risk-minimizing suggestions put forth in this Note.

Situations presenting problems of interference or unethical conduct by the lay proprietors could then be resolved on a case-by-case basis. The tribunal could analyze the individual situation by focusing on the effect, or lack thereof, of the risk-minimizing measures employed (i.e., whether the proprietors lived up to the terms of the license and/or contract) and on any actual injury to clients produced due to improper conduct of the nonlawyer. A rule of reason could be employed in these adjudications. Isolated incidents of injury to the public or de minimus violations of licensing provisions could be dealt with through a system of penalties or, perhaps, damage awards. On the other hand, a substantial showing of harm caused by the conduct of lay owners would create a strong presumption against the effectiveness of risk-minimizing precautions. Such a showing would indicate the presence of the enhanced risk

\textsuperscript{215} The National Organization of Bar Counsel has recommended that the organized bar retain the present Code of Professional Responsibility rather than adopt the Model Rules of Professional Conduct; however, the group also proposes that the Code of Professional Responsibility be amended using suggestions gleaned from the Model Rules. See Slonim, \textit{supra} note 128.
against which the profession rightfully seeks to protect the public and which may not be offset by enhanced social values. Where such major problems arise or where a pattern of interference, violations, and/or injury to clients emerges, more substantial sanctions, including permanent withdrawal of the operating license, could be utilized.

By adopting this modest proposal for law reform, the freedom of all parties—owners, clients, and attorneys—could be preserved and enhanced. At the same time, the state's interest in protecting the public from unethical or incompetent practices would be satisfied, a more uniform system for excluding unethical lay exploitation of the profession would be established, and the public would receive the potential benefits of another alternative system for the delivery of legal services.

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