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# COMPETITION AT THE BAR AND THE PROPOSED CODE OF PROFESSIONAL STANDARDS

STEPHEN K. HUBER†

The genesis of formal rules of professional behavior for lawyers in this country is Judge George Sharswood's *Essay on Professional Ethics*, published in 1854.<sup>1</sup> The principles set out therein were closely followed in a code of professional ethics adopted by the State Bar of Alabama, which in turn became the basis for the Canons of Professional Ethics promulgated in 1908 by the American Bar Association. The Canons, admittedly with some additions and amendments, survived for more than sixty years until superseded in 1969 by the Code of Professional Responsibility.<sup>2</sup> The Canons were thought to have been defective in four principal particulars:

(1) There are important areas involving the conduct of lawyers that are either only partially covered in or totally omitted from the Canons; (2) Many Canons that are sound in substance are in need of editorial revision; (3) Most of the Canons do not lend themselves to practical sanctions of violations; and (4) Changed and changing conditions in our legal system and urbanized society require new statements of professional principles.<sup>3</sup>

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1. G. SHARSWOOD, *ESSAY ON PROFESSIONAL ETHICS* (Philadelphia 1854). The essay was initially presented as a series of lectures at the University of Pennsylvania Law School. It still makes good reading according to a former chairman of the ABA Committee on Professional Ethics:

It is surprising how well Sharswood reads, even today. His division of the lawyer's duties into those which he owes his client, the public, the state, the court, and his professional brethren still has validity. The ethical principles he establishes are eternal and therefore just as pertinent today as they were more than a century ago. It is in their application to specific cases that the difficulties lie.

Armstrong, *A Century of Legal Ethics*, 64 A.B.A.J. 1063, 1063 (1978).

2. Both the Canons and the Code were adopted in every state, generally with few if any modifications. Three forms of adoption were utilized: by legislation, by a unified bar, or by order of the highest state court. The effect in each instance was the creation of rules of positive law for the violation of which lawyers could be punished.

3. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preface.

The Canons, including amendments, consisted of 47 serially numbered provisions. Sanctions

Five years were devoted to preparation of the Code.<sup>4</sup> Less than a decade after completion it has proven to be so unworkable that, despite the adoption of several major amendments, the Code is being scrapped and will be replaced by a new document, the Code of Professional Standards.<sup>5</sup> Why did the Code, a product of years of concerted effort by many diligent and able people, become outmoded so rapidly? This question requires careful consideration if the Standards are to have a longer and more useful existence than their predecessor.

This article will argue that one important reason the Code proved unserviceable is that it did not permit the delivery of legal services to be organized in an efficient and cost-minimizing manner. In recent years the Supreme Court of the United States has decided that a number of rules in codes of professional behavior served primarily to increase profits for members of those professions. Among those cases are some in which the Court has determined that competition in the delivery of legal services would serve the public better than government-imposed restraints. Making these determinations required the invalidation of state laws regulating economic behavior. The legal vehicles for reaching this result were the antitrust laws and the first amendment, rather than substantive due process, which had been utilized earlier in this century.<sup>6</sup>

Attention will first be addressed to four "group legal services" cases, which involved efforts by potential purchasers of legal services to obtain assistance on behalf of their members, and to several cases decided by the Court since 1975, which have permitted, if not mandated, substantial competitive activity among professionals, particularly lawyers. After considering these cases and some contemporaneous developments in the social organization of the practice of law, the discussion

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ranged from a private reprimand to disbarment. The Code contains three types of provisions: canons, ethical considerations and disciplinary rules. The canons, of which there are nine, state axiomatic norms. They are too general to merit analysis, and will not receive further mention. Disciplinary Rules (DR) are mandatory in character, and punitive sanctions can be imposed for violations. Ethical Considerations (EC) are aspirational in character; adherence to them is recommended but not mandatory.

4. The House of Delegates of the ABA, at the behest of its then President, Lewis Powell, created a Special Committee on Ethical Standards at its annual meeting in August 1964. The Committee's work product was adopted in its final form by the House of Delegates in August 1969. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preface. Powell thought that the Canons "were in need of major revision, particularly with respect to the relationship between the press and the bar, the representation of unpopular causes, and grievance procedures." Seymour, *The First Century of the American Bar Association*, 64 A.B.A.J. 1038, 1049 (1978).

5. The ABA appointed a Special Committee on Evaluation of Professional Standards in late 1977 to draft a document to replace the Code.

6. See text accompanying notes 10-19 *infra*.

will turn to the Code of Professional Responsibility and an examination of existing Code provisions that regulate the economic behavior of lawyers. It will be recommended that these provisions should not be retained in the Standards. Rules that operate only to control economic aspects of the practice of law have no place in a body of rules for professional behavior, especially when they serve no purpose other than to limit affordable access to lawyers.

The Code and the Canons were designed for an idealized America that no longer exists. As early as 1934 Harlan Fiske Stone had observed that "[o]ur canons of ethics are for the most part generalizations designed for an earlier era."<sup>7</sup> This statement is quoted in the preface to the Code, but is not reflected in its substantive provisions, which barely address the problem of getting attorneys and clients together at reasonable prices in a largely urban land. Karl Llewellyn described the problem in the following manner:

The canons of ethics on business-getting are still built in terms of a town of twenty-five thousand (or, much more dubiously, even fifty thousand) . . . . All the lawyers are known, and people who have legal work to do are moderately aware of it; and they have little difficulty in finding a lawyer of whose character, abilities, experience, yes, and fees, they can get some fair inkling ahead of time. . . . Turn these same canons loose on a great city, and the results are devastating in proportion to its size. . . . [T]he conditions of metropolitan legal business make it no simple thing to reach into the grab-bag and pull out a lawyer who is able, experienced in the case at hand, not too taken up with other matters, and also reasonable in fee.<sup>8</sup>

Rather than heeding these admonitions, the bar insisted that the Code follow the Canons in containing detailed provisions designed expressly to ensure that lawyers could not make their availability to and desire for clients known to the public. In addition to restrictions on competition among attorneys, participation by lay intermediaries in supplying legal services was prohibited. Bar associations exercised vigilance in protecting their turf from encroachment by outsiders. The definition of legal work was stated broadly to increase the scope of what constituted the unauthorized practice of law.

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7. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 10 (1934).

8. Llewellyn, *The Bar's Troubles, and Poultices—And Cures?*, 5 LAW & CONTEMP. PROB. 104, 115-16 (1938).

## I. THE MOVEMENT FROM PROTECTION TO COMPETITION

During the course of this century many job categories have become subject to occupational licensure. Although such licensing is always undertaken in the public interest, licensure requirements are almost universally imposed at the behest of the group to be regulated and not the public.<sup>9</sup> Licensed groups adopt codes of ethics that restrict competition among insiders and prevent encroachment on the group's domain by outsiders. Although many licensed groups have adopted restrictive rules similar to those contained in the Canons and the Code, the Supreme Court has been particularly willing to invalidate rules of ethics for lawyers, perhaps because the justices are able to recognize more clearly in their own profession than in others that rules restricting competition serve largely the interests of the profession and only incidentally those of the public. Also, the legal profession has been more successful than other groups in its efforts to restrict competition, both among its members and by outsiders.

*A. Changes in Judicial Attitude*

Until early in this century courts severely circumscribed the scope of legislative attempts at economic regulation through the doctrine of substantive due process. The position that the Constitution gives preference to no particular economic principles did not gain complete ascendancy until the early 1930's, when the Supreme Court ruled that:

[A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. . . . "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which the court need not consider or determine." . . . With the wisdom of the policy adopted . . . , the courts are both incompetent and unauthorized to deal.<sup>10</sup>

One consequence of the demise of substantive due process was that courts refused to evaluate anticompetitive rules of professional groups that succeeded in obtaining legislative approval. Justice Holmes' famous dissenting opinion in *Lochner v. New York*<sup>11</sup> was often

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9. See generally M. FRIEDMAN, CAPITALISM AND FREEDOM 137-60 (1962); B. SHIMBERG, B. ESSER & D. KRUGER, OCCUPATIONAL LICENSING: PRACTICES AND POLICIES (1972).

10. *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (quoting *Northern Sec. Co. v. United States*, 193 U.S. 197, 337 (1904)).

11. 198 U.S. 45 (1905). The *Lochner* case represented "the focal point in a judicial move to fasten on the country by constitutional exegesis unsanctioned by the Constitution a pattern of

quoted in upholding such provisions:

It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think of as injudicious or if you like as tyrannical . . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire*.<sup>12</sup>

Once this attitude was accepted, it is not surprising that the Supreme Court turned away a dentist's challenge to a state law that precluded him from engaging in truthful advertising.<sup>13</sup> When the extensive regulations that Oklahoma imposed on the preparation and sale of eyeglasses were challenged, the Supreme Court upheld the legislation and accepted as a valid objective the state's attempt to remove from the eyeglass business "all taints of commercialism."<sup>14</sup> If this policy was thought to be unwise and costly to consumers, the proper forum before which to raise the argument was the legislature.<sup>15</sup> A challenge to a Kansas statute that permitted only lawyers to engage in the business of debt adjusting was turned away for the same reason.

Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but the body constituted to pass laws for the State of Kansas.<sup>16</sup>

In this legal climate the prevention of competition both among those in the profession and from outsiders becomes a major if unarticulated, objective of bar associations. Since the *raison d'être* for professional licensing and rules of ethics is protection of the public, the desire

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economic organization believed by the Court to be essential to the fullest development of the nation's economy." Strong, *The Economic Philosophy of Lochner: Emergence, Embrace and Emasculation*, 15 ARIZ. L. REV. 419, 419 (1973).

12. 198 U.S. at 75 (dissenting opinion).

13. *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935). "[T]he community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous." *Id.* at 612.

14. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955) (emphasis added).

15. The Court noted:

The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . .

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.

*Id.* at 487-88.

16. *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963) (footnotes omitted), *quoted with approval in* *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 165-66 (1973).

to limit competition was rarely admitted. An exception is illuminating. The Jacksonville, Florida, bar established a lawyer referral service in which all local attorneys were eligible to participate and then proceeded to advertise its existence. A challenge to this scheme, based on Canon 28, which condemned advertising, was rejected because the advertisement did not involve competition among members of the profession and so did not fit within the reason for the rule.<sup>17</sup> The Florida Supreme Court noted: "Of course competition is at the root of abuses in advertising. . . . But the advertising before us represents the very antithesis of competition."<sup>18</sup> When individual lawyers advertised, they competed with one another, but when the referral service was publicized, it created business for the whole profession, and so did not violate the Canons.

The legal bases for recent decisions mandating competition in the professions have been the antitrust laws and the first amendment, but the results have been the same as might have been achieved in earlier years through the substantive due process standard.<sup>19</sup> The important question raised by these developments of the extent to which the judicial branch of government should defer to a legislative determination of the public interest will not be considered here.<sup>20</sup> The discussion that follows will focus on the impact of recent Supreme Court decisions on the organization of the practice of law. The doctrinal underpinnings

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17. *Jacksonville Bar Ass'n v. Wilson*, 102 So. 2d 292 (Fla. 1958).

18. *Id.* at 295.

19. The use of the antitrust laws to invalidate state regulation of economic activity has been sharply criticized.

Although presumably disdainful of substantive due process, the federal courts have seized upon another approach to oversee state economic regulation. Increasingly the challenge to occupational licensing and price fixing by state regulatory bodies has come in the form of application of the antitrust laws to the offensive conduct. . . . [T]hose who oppose substantive economic review of state activity under the due process clause should doubt the advisability of engaging in antitrust review of that same activity, and for precisely the same reasons.

Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328, 329-30 (1975).

20. Justice Rehnquist has argued, after the fashion of Justice Harlan before him, that the courts should defer to legislative judgments in the regulation of professions:

The Court speaks of the consumer's interest in the free flow of commercial information . . . . It goes on to observe that "society also may have a strong interest in the free flow of commercial information." One need not disagree with either of these statements in order to feel that they should presumptively be the concern of the Virginia Legislature, which sits to balance these and other claims . . . . [T]here is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions . . . .

*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 783-84 (1976) (dissenting opinion).

offered by the Court in support of its decisions will receive only cursory analysis.

### *B. The Group Legal Services Cases*

The Canons prohibited a lawyer from providing legal services to members of a group, though not to the group itself.<sup>21</sup> The group was a "lay intermediary," and the evil involved was that the group came between the attorney and the client. This rule prohibited an automobile club from providing a lawyer for its members in traffic cases,<sup>22</sup> a civil rights group from furnishing legal assistance in school desegregation cases,<sup>23</sup> and it even prevented a union from advising its members about what lawyer to retain in seeking compensation for job related injuries.<sup>24</sup> The wrong done by the lawyer depended on the manner in which he received payment. If the group reimbursed the lawyer for work done on behalf of its members, then the group was engaged in the unauthorized practice of law, and it was wrongful for the lawyer to assist the group in this illegal undertaking.<sup>25</sup> If the group acted only as a facilitator in bringing its members and the attorney together, with payment made by the client directly to the lawyer, then the evil involved was solicitation.

Until recently, groups have demonstrated little interest in providing legal services for their members on even a limited basis. A major reason is that early attempts to do so were vigorously and successfully opposed by bar associations. During the 1930's, a few automobile

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21. ABA CANONS OF PROFESSIONAL ETHICS No. 35 provided:

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. . . .

A lawyer may accept employment from any organization. . . . to render legal services in any matter in which organization the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

Charitable legal aid societies were exempted from these provisions, presumably because organizations that served only the indigent did not compete with private practitioners for clients.

In the group legal services cases, the Court decided that potential users of legal services cannot be precluded from acting in concert to obtain legal assistance. In *United Transp. Union v. State Bar*, 401 U.S. 576 (1971), Justice Harlan correctly observed that the issue was really an economic one and that these cases involved nothing more than "a combination of purchasers of services seeking to increase their market power." *Id.* at 599 (dissenting opinion).

22. *In re Maclub of America, Inc.*, 295 Mass. 45, 3 N.E.2d 272 (1936).

23. *See NAACP v. Button*, 371 U.S. 415 (1963).

24. *See Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964).

25. ABA CANONS OF PROFESSIONAL ETHICS No. 47; ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 3-101(A).



clubs attempted to provide their members with lawyers for certain situations related to the ownership and operation of automobiles, only to have this activity held to constitute the unauthorized practice of law.<sup>26</sup> At least one court saw precisely the "evil" that was involved: the club "deals at wholesale" in legal services.<sup>27</sup> In another case, a Missouri club, cognizant of the restrictions on the practice of law by automobile clubs, sought to appear in court on behalf of members who wanted a continuance or to plead guilty. The service provided by the club was purely one of convenience for its members, saving the time and trouble of a personal appearance and involving no discretion on the part of the court or the club representative. Even these ministerial activities were prohibited.<sup>28</sup>

The existence and recent growth of group legal services are the result of four decisions from 1963 to 1971<sup>29</sup> in which the United States Supreme Court held that rules of professional ethics could not be used to prevent groups from recommending attorneys to their constituents or even from hiring salaried lawyers to represent their members. It is instructive to notice who the parties were in these suits. In three instances complaints were filed by bar associations,<sup>30</sup> and in the fourth case the suit was brought by the NAACP to restrain enforcement of a state bar-ratry statute.<sup>31</sup> The legal services arrangements under attack were devised by a civil rights organization in one case and by labor unions in the others. That these groups represent people who have traditionally made minimal use of lawyers is not a coincidence. In each instance the alternative to representation through the group was no representation at all. Rules designed to protect the public were supported by the profession and used against the large majority of the public, which was (and still is) unserved by lawyers.<sup>32</sup>

The resuscitation of the role of groups in the provision of legal

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26. See Wiehofen, *Practice of Law by Motor Clubs—Useful But Forbidden*, 3 U. CHI. L. REV. 296 (1936).

27. *In re Maclub of America, Inc.*, 295 Mass. 45, 49, 3 N.E.2d 272, 274 (1936).

28. *Automobile Club v. Hoffmeister*, 338 S.W.2d 348 (Mo. Ct. App. 1960).

29. *United Transp. Union v. State Bar*, 401 U.S. 576 (1971); *UMW v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

30. See *United Transp. Union v. State Bar*, 401 U.S. 576 (1971); *UMW v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964).

31. See *NAACP v. Button*, 371 U.S. 415 (1963).

32. See generally B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* (1977); B. CURRAN & F. SPAULDING, *THE LEGAL NEEDS OF THE PUBLIC: A PRELIMINARY REPORT OF A NATIONAL SURVEY* (1974).

services began as an accidental by-product of the civil rights movement. *NAACP v. Button*<sup>33</sup> involved an attempt by the State of Virginia to enjoin the NAACP from compensating lawyers who represented impecunious litigants in school discrimination cases. The Virginia barratry statute, which the NAACP's activities contravened, had recently been expanded as part of a "general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees."<sup>34</sup> The Supreme Court observed that the NAACP was seeking to vindicate constitutional rights, and concluded that the activities of its legal staff were modes of expression protected by the first and fourteenth amendments, which a state could not prohibit under its power to regulate the legal profession.<sup>35</sup>

In *Brotherhood of Railroad Trainmen v. Virginia State Bar (Trainmen I)*,<sup>36</sup> a scheme that involved recommendations of lawyers by a union to injured members also was held to involve freedom of speech and association. The union was concerned about the cost and quality of legal assistance received by its members, as well as inadequate compensation for on-the-job injuries. It identified lawyers who were experienced in employee injury work and willing to limit their fees, and then recommended use of these attorneys to union members. The Supreme Court saw no threat to legal ethics in this activity: "The railroad workers, by recommending competent lawyers to each other, obviously are not themselves engaged in the practice of law, nor are they or the lawyers whom they select parties to any soliciting of business."<sup>37</sup> Nothing more than speech and association was involved, and the first amendment could not be abrogated under the guise of regulating the ethics of the legal profession.

The *UMW v. Illinois State Bar Association*<sup>38</sup> case presented a more difficult issue. The union employed a lawyer to represent its members without charge in workmen's compensation cases, rather than merely

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33. 371 U.S. 415 (1963).

34. *NAACP v. Patty*, 159 F. Supp. 503, 515 (E.D. Va.), *rev'd sub nom. Harrison v. NAACP*, 360 U.S. 167 (1958). *Patty* was the *Button* case at the district court level; the Supreme Court reversed and remanded with instructions that plaintiffs be allowed to seek an authoritative interpretation by the Virginia courts of the statute in question. The Virginia Supreme Court upheld the constitutionality of the statute. *NAACP v. Harrison*, 202 Va. 142, 116 S.E.2d 55 (1960), *rev'd sub nom. NAACP v. Button*, 371 U.S. 415 (1963). The organized bar unfortunately was a willing accomplice in the state scheme.

35. 371 U.S. at 428-29.

36. 377 U.S. 1 (1964).

37. *Id.* at 6-7.

38. 389 U.S. 217 (1967).

recommending lawyers as in *Trainmen I*. Members were free to refuse representation by the union lawyer and to retain another one, but at their own expense. The Court attached little significance to this difference:

Here, to be sure, the attorney is actually paid by the Union, not merely the beneficiary of its recommendations. But in both situations the attorney's economic welfare is dependent to a considerable extent on the good will of the union, and if the temptation to sacrifice the client's best interests is stronger in the present situation, it is stronger to a virtually imperceptible degree.<sup>39</sup>

The attempt to prohibit this plan was held unconstitutional because it would impair the associational rights of the union members and was not needed to protect the state's interest in high standards of legal ethics.<sup>40</sup>

These three cases, taken together, represented a frontal assault on the bar's control over initiation of client contacts and payment for the services of lawyers. The response of the organized bar, unveiled in its new Code of Professional Responsibility, was recalcitrant and myopic. Cooperation with organizations furnishing legal services was authorized "only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the service *requires* the allowance of such legal service."<sup>41</sup> Any cooperation with a group legal services plan beyond what was constitutionally mandated was declared to constitute unethical behavior, and subjected the participating lawyer to disciplinary sanctions.

After adoption of the Code, one further attempt at restricting collective action to obtain meaningful access to the courts was made by a state bar, but this effort was firmly rebuffed by the Supreme Court in *United Transport Union v. State Bar (Trainmen II)*.<sup>42</sup> This decision adds little to the legal principles adopted in the three earlier cases. Its outcome was sufficiently predictable that a member of the ABA Committee on the Unauthorized Practice of Law was moved to observe:

For the fourth time in eight years the Supreme Court had to explain to lawyers that the bar's powers of discipline could not be used to

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39. *Id.* at 224. Justice Harlan, in dissent, questioned the factual validity of this conclusion. *Id.* at 230-33 (dissenting opinion).

40. *Id.* at 225.

41. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(D)(5) (1971) (amended 1974) (emphasis added). Legal aid and defender plans, military legal assistance offices and approved lawyer referral schemes were excepted. *Id.*

42. 401 U.S. 576 (1971). *United Transport Union and Brotherhood of Railroad Trainmen* are different names for the same union. *Id.* at 577 n.1.

restrict access to the courts. You should note the rather impatient tone of the majority opinion of Mr. Justice Black, shared also by the concurring opinion of Mr. Justice Harlan. Evidently the Court is getting weary of telling the bar something it should have understood long ago.<sup>43</sup>

The Code's group legal services provisions have been amended twice since the *Trainmen II* decision was handed down.<sup>44</sup> Lawyers are now permitted to cooperate with group plans if there is no interference by the group in the attorney-client relationship.

### C. *The Expansion of Legal Aid*

The creation of a substantial federally funded legal services program in the mid-1960's as part of the war on poverty was an important precursor of the revolution in the delivery of legal services described in this article.<sup>45</sup> The organized bar, particularly the ABA, supported this effort, though there was isolated opposition at the local and state level.<sup>46</sup> The legal services program provided access to the legal system for people who could not otherwise afford it, and thereby increased utilization of lawyers without a loss of work for private practitioners. The assurance that potential paying clients would not be served by the new legal services projects was a condition of ABA support.<sup>47</sup> A few marginal lawyers lost some legal business, but on balance the private bar gained both clients and income because the legal services program had an enormous educational effect.<sup>48</sup> These projects also functioned as a lawyer referral service; applicants who exceeded program income guidelines were directed to private practitioners.

The legal aid experience demonstrated what was previously only a

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43. Stolz, *Sesame Street for Lawyers: A Dramatic Rendition of United Transport Union v. The State Bar of Michigan*, UNAUTH. PRAC. NEWS, Nov. 1971, at 14, 15.

44. Armstrong, *supra* note 1, at 1070, details the changes.

45. See E. JOHNSON, JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM (1974); Huber, *Thou Shalt Not Ration Justice: A History and Bibliography of Legal Aid in America*, 44 GEO. WASH. L. REV. 754 (1976).

46. Bethel & Walker, *Et Tu Brute*, TENN. B.J., Aug. 1965, at 11. Some of the concern stemmed from philosophical objections to government funding. Only a few years before the OEO Legal Services Program was created, a former ABA president observed: "What are the trends toward regimentation of our profession? To me, the greatest threat, aside from the undermining influences of Communist infiltration, is the propaganda and campaign for a federal subsidy to finance a nationwide plan for legal aid and low-cost legal service." Storey, *The Legal Profession Versus Regimentation: A Program to Counter Socialization*, 37 A.B.A.J. 100, 101 (1951).

47. Program guidelines provided that "fee generating cases," of which tort claims are the most obvious example, were to be referred to private lawyers.

48. The same phenomenon has been observed in England. "Far from drawing work away from private practitioners, law centers actually generated new clients for them." Zander, *Judicare or Staff?* *A British View*, 64 A.B.A.J. 1436, 1437 (1978).

matter of speculation: the majority of Americans, who rarely if ever use lawyers, do have problems that are amenable to legal solutions, but they are deterred from seeing a lawyer by concerns about cost. Within five years attorneys in federally funded legal services projects were handling more than one *million* cases per year, and most programs were turning away large numbers of potential clients. No one had imagined that such an enormous untapped desire for legal assistance existed. That the services were free certainly affected the number of people who came to legal services offices, but still the magnitude of client response was unexpected. Faced with this deluge of clients, legal services offices sought to expedite the handling of certain legal problems that recurred frequently, notably divorces, landlord-tenant disputes, and welfare matters. The use of lay advocates, paralegals, word processing equipment, and form pleadings proved that repetitive client matters could be processed rapidly, competently, and inexpensively.<sup>49</sup>

Attorney independence was a major concern of the bar, and it was met by carefully drawn program guidelines designed to ensure that no interference with the attorney-client relationship would take place. Over two thousand legal aid lawyers ethically serving clients with the blessing of the bar gave lie to arguments that restrictions on group legal services were necessary to protect the public. Apart from the source of funding, legal services programs constitute closed panel group legal services programs, with the program's attorneys constituting the panel and those who meet poverty guidelines constituting the client group. The only real difference between legal aid programs, which the bar supported, and group plans, which the bar opposed, is that the group plans threaten to deprive some lawyers of paying business. Both forms of delivering legal services benefit the public and increase access to lawyers.

#### *D. Restraints on Competition Among Lawyers*

The group legal services cases involved efforts by users of legal services to increase their market power and to obtain better or cheaper legal assistance. The discussion now will shift to a series of Supreme

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49. The one area in which legal aid lawyers were not ahead of the private bar in the rapid production of legal work was in the use of word processing equipment. Years of bare bones budgets for legal aid resulted in a fortress mentality. The investment of substantial funds in capital equipment, whether for purchase or lease, was regarded as either a luxury or a waste of money. Low secretarial salaries have for years resulted in high turnover and a staff that sometimes does not possess the skills to operate and maintain sophisticated word processing machines.

Court decisions between 1975 and 1978 involving restrictions on competition among members of professional groups. Until these cases, professionals prided themselves on their decision not to compete actively with one another. Indeed, the absence of rivalry among members was sometimes said to be one of the defining characteristics of a profession. Roscoe Pound stated the matter clearly:

There is no such thing as competition for clientage in a profession. Every lawyer should exert himself fully to do his tasks of advice, representation, and advocacy to the best of his ability. But competition with fellow members of the profession in any other way is forbidden. Competition belongs to activities which are primarily acquisitive. It is not allowable in those primarily for public service.<sup>50</sup>

The Supreme Court has now decided that under the guise of rules of ethics professional groups, particularly lawyers, impose entirely too many restraints on economic activity of their members. In the process the Court abolished the doctrine that commercial advertising was "second class" speech and therefore entitled to only limited protection under the first amendment.<sup>51</sup>

### 1. Competitive Pricing

Two decisions invalidated provisions in the codes of ethics of professional groups that prohibited certain price competition between group members. In *Goldfarb v. Virginia State Bar*,<sup>52</sup> plaintiff successfully attacked bar association minimum fee schedules, which were widely used by lawyers throughout the country. The Virginia fee schedule was unusual only in that it was mandatory. Generally, bar associations have been clever enough to state that fee schedules are merely advisory.<sup>53</sup> ABA ethics opinions have consistently taken the position that fee schedules "can only be suggested or recommended and cannot be made obligatory."<sup>54</sup>

For years the bar decreed that price fixing through minimum fee schedules was in the public interest. The Supreme Court, however,

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50. R. POUND, JURISPRUDENCE 677-78 (1959).

51. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), together with *Bigelow v. Virginia*, 421 U.S. 809 (1975), ended the commercial speech exception to the first amendment. The leading cases presenting the former rule are *Valentine v. Chrestensen*, 316 U.S. 52 (1936), and *Breard v. Alexandria*, 341 U.S. 622 (1951).

52. 421 U.S. 773 (1975).

53. DR 2-106(B) lists eight factors to be considered in determining a fee, one of which is the "fee customarily charged in the locality for similar legal services."

54. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 302 (1961).

viewed mandatory minimum fee schedules, which permit price competition only above specified dollar prices, as simple price fixing on behalf of bar members and a per se violation of the Sherman Act,<sup>55</sup> rather than as an acceptable form of professional regulation. The Court conceded that the Constitution did not mandate adherence to the ideas of Adam Smith, but it concluded that Congress had adopted competition as part of our national policy by enacting the antitrust laws, and that "anticompetitive conduct by lawyers is within the reach of the Sherman Act."<sup>56</sup> Once this conclusion was reached, bar association price fixing was easily condemned. The public interest is in lower prices not higher ones, and the bar was using professional regulation to increase profits for its members rather than to benefit the public.

Another price competition case, *National Society of Professional Engineers v. United States*,<sup>57</sup> challenged the validity of a provision in the code of ethics of the National Society of Professional Engineers that prohibited competitive bidding between engineers for contracts. The district court, court of appeals, and a unanimous Supreme Court all held that this practice constituted a violation of the Sherman Act.<sup>58</sup> The engineer's rule was condemned because it

[p]revents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace. It is this restraint which must be justified under the Rule of Reason, and petitioner's attempt to do so on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act.<sup>59</sup>

The assertion by the engineering profession that "undue" weight would be given to price considerations was properly rejected. The society's code establishes qualitative standards for engineers that do not vary with the price paid by purchasers of their services. To the extent that shoddy work by engineers is a problem, the profession has a legitimate reason for concern, but the hiding of price information is not an effective response. It is normal in selecting among competing bidders to take into account proposal quality, a bidder's experience, interviews

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55. 421 U.S. at 782-83; see 15 U.S.C. § 1 (1976).

56. 421 U.S. at 793.

57. 435 U.S. 679 (1978).

58. See 389 F. Supp. 1193 (D.D.C. 1974), *aff'd*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978).

59. 435 U.S. at 695.

with project managers, and a variety of other factors. The weight accorded to price in this equation is best decided by the purchasers of engineering services.

The services of attorneys are not ordinarily purchased by competitive bidding, but some major users of legal services might desire to obtain them in this manner. Early attempts to do precisely this were quickly rebuffed by the bar.<sup>60</sup> When a school board solicited bids for the performance of specified legal work, the ABA Committee on Professional Ethics ruled that submission of a bid to the school board would be unethical. That competition among lawyers would result was among the reasons for this conclusion.<sup>61</sup> *National Society of Professional Engineers* would dictate an opposite result if a potential client were to seek such bids today.

Read together, *Goldfarb* and *National Society of Professional Engineers* suggest that provisions in professional codes that restrict price competition are unlikely to survive judicial scrutiny. At a minimum, it will be necessary to provide concrete evidence that the challenged practice serves the public interest.

## 2. Advertisements by Professionals

Consumers need information about available market alternatives if they are to make sound decisions. Rules of professional conduct have severely limited the information that may be disseminated to the public. In 1976, however, a state statute that prohibited pharmacists from advertising the price of prescription drugs was found to be inconsistent with first amendment rights when challenged by a consumer group. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>62</sup> the Supreme Court characterized the prohibition on price advertising as "highly paternalistic" and stated that its only effect on a pharmacist was to "open the way for him to make a substantial, and perhaps even excessive, profit."<sup>63</sup> The Court chose to assume that

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60. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 83 (1953); MICHIGAN ETHICS OPINIONS, No. 133 (1950). See also H. DRINKER, LEGAL ETHICS 249-50 (1953).

61. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 292 (1957). The other reasons given were that the dignity of the profession would be lowered and that bidding would be injurious to the administration of justice.

62. 425 U.S. 748 (1976). The reasons why so much landmark litigation has involved Virginia law are considered in Falk, *Virginia Becomes a Handy Target for Lawyers Seeking Landmark Victories Before High Court*, Wall St. J., Sept. 8, 1978, at 40, col. 1.

63. 425 U.S. at 769. The Court recognized that advertising constitutes

[d]issemination of information as to who is producing and selling what product . . . and at what price. So long as we preserve a predominantly free enterprise economy, the



"people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."<sup>64</sup>

Chief Justice Burger, in a concurring opinion, agreed with this result because the services involved were routine. Today the pharmacist sells primarily prepackaged products rather than producing drugs from a supply of raw materials. Most pills and liquids are purchased in bulk by the pharmacist and sold either as is or after repackaging into smaller containers.<sup>65</sup>

*Virginia State Board of Pharmacy* explicitly left open the question whether advertising by lawyers could be banned.<sup>66</sup> The subsequent case of *Bates v. State Bar*,<sup>67</sup> however, held that truthful advertisements about the availability and terms of sale for routine legal services could not be entirely prohibited, although such advertising could be regulated in a variety of ways.

In assessing the impact of the *Bates* case, it is important to recognize that the Code, and to a lesser extent the Canons, already permitted a wide variety of advertising by lawyers.<sup>68</sup> Patent, trademark and admiralty lawyers,<sup>69</sup> as well as state certified specialists,<sup>70</sup> were already allowed to advertise. Advertisements addressed to attorneys rather than the general public were permitted if they appeared in professional announcements or "reputable" law lists.<sup>71</sup> Legal aid programs and lawyer referral services have long been allowed to publicize their availability because no competition among lawyers is involved.<sup>72</sup> And attorneys have always been permitted to communicate with existing clients for the purpose of obtaining further business.<sup>73</sup>

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allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions . . . be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

*Id.* at 765.

64. *Id.* at 770.

65. *Id.* at 773-74 (concurring opinion).

66. *Id.* at 773 n.25.

67. 433 U.S. 350 (1977).

68. The Code condones publicity that arises incidentally from the use of office signs, business cards, announcements of change in address or firm membership, running for elected office, professional publications and other sanctioned ways of having one's name and profession become known. See DR 2-101(B).

69. DR 2-105(A)(1). These specialties were exempted for historical reasons. EC 2-14.

70. DR 2-102(A)(4).

71. DR 2-102(A)(6).

72. DR 2-101(B)(6).

73. New legal rulings may be brought to the attention of existing clients but not to others, for

Within a year after the *Goldfarb* decision, the ABA had amended the Code to permit specified lawyer advertising directed to the general public.<sup>74</sup> Among the information that an attorney could convey was office location, current clients (with their consent), limitation of practice, schools attended, languages spoken, fee for initial consultation, and availability of credit arrangements. It is thus clear that the bar had largely abandoned attempts to prohibit advertising before the *Bates* decision. The present rule is that lawyer advertising is permitted,<sup>75</sup> with a few exceptions,<sup>76</sup> even though the Code does not say so explicitly.

### 3. Solicitation of Clients

The difference between advertising and solicitation is one of degree. The former involves dissemination of information to a large group of potential clients and the latter involves a message addressed to one person, or occasionally a small group.<sup>77</sup> The disdain solicitation evokes is based primarily on concern about a single situation: the obtaining of legal business from recently injured persons, most often as the result of an automobile or job-related accident. This "ambulance chasing" involves a number of unsavory practices. Some lawyers employ "runners" or "investigators" to obtain the clients, in violation of the Code. Payment is made to ambulance drivers, wreckers, hospital personnel, and others who steer business to a lawyer, even though these payments are prohibited by the Code.<sup>78</sup> Payments to public officials, notably police officers, and other violations of the criminal law are a frequent concomitant of ambulance chasing.<sup>79</sup> Potential clients are

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that would amount to thinly disguised advertising. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 213 (1941); ABA COMM. ON PROFESSIONAL ETHICS, RECENT ETHICS OPINIONS, Informal Opinion No. 1356 (Nov. 25, 1975). "Periodic notices might be sent to the client for whom a lawyer has drawn a will, suggesting that it might be wise for the client to reexamine his will to determine whether or not there has been any change in his situation requiring a modification of the will." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 210 (1941).

74. DR 2-102(A)(5). Smith, *Making the Availability of Legal Services Better Known*, 62 A.B.A.J. 855 (1976), traces the developments leading to this change.

75. See EC 2-9, -10; DR 2-101 to -105.

76. DR 2-101 to -103, -105.

77. Solicitation of clients is not limited to our legal system. Mahatma Gandhi discovered analogous practices when he began to practice law in Bombay.

He was shocked to discover that not only the most humble vakils but also the most exalted barristers all obtained cases by paying touts, who hung about the court. Gandhi felt that the touts were a disgrace to the profession, and refused to have anything to do with them, so for several months he did not get a single case.

Mehta, *Mahatma Gandhi and His Apostles*, NEW YORKER, May 17, 1976, at 38, 52.

78. DR 2-103(B).

79. These and other horrors associated with ambulance chasing are considered in Huber, *Ambulance Chasing*, HOUS. LAW., Sept. 1976, at 10; Saden, *Inquiry Into Ambulance Chasing*, 34

pressured into retaining a lawyer they do not know and may not want or need. Frequently, the potential client is unable to make a sound decision because of the effects of the accident or of drugs being used in treatment.<sup>80</sup>

In two companion cases involving the alleged solicitation of clients, the Supreme Court stated again that competition among professionals was required only when it serves the public interest. In *In re Primus*,<sup>81</sup> a state bar attempted to discipline a lawyer who, working in cooperation with the American Civil Liberties Union, sought to sue the Medicaid program in connection with the sterilization of certain women. These facts are similar to those in *NAACP v. Button* in that an attorney was raising constitutional issues; the Supreme Court had no difficulty in holding that the lawyer could not be punished for her activities.

*Ohralik v. Ohio State Bar Association*<sup>82</sup> involved a classic instance of ambulance chasing. The business of the driver of a car and her passenger was vigorously sought, both at a hospital and at their homes. Pressure was put on both of the injured parties and their parents. The driver verbally retained Ohralik, who used a hidden tape recorder to memorialize her consent, but she dismissed him a short time later. The client eventually paid legal fees to both Ohralik and the lawyer she subsequently retained. Ohralik argued that he had engaged in constitutionally protected advertising.<sup>83</sup> This claim is not implausible, for one can view solicitation as advertising focused on a very small audience instead of directed at the general public. It differs from conventional advertising, however, in that the message is delivered personally, and involves pressure on the individual being solicited, who is often particularly vulnerable to persuasion because of the recent accident. The Supreme Court emphasized that it was dealing with "in-person" solicitation. This involves a disservice to both individual and societal

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CONN. B.J. 117 (1960); Schizer, *The Brooklyn Judicial Inquiry: A Record of Accomplishment*, 29 BROOKLYN L. REV. 27 (1962); Comment, *Settlement of Personal Injury Cases in the Chicago Area*, 47 NW. L. REV. 895 (1953). See also *In re Mitgang*, 385 Ill. 311, 52 N.E.2d 807 (1944); *In re Perrello*, 260 Ind. 254, 295 N.E.2d 357, cert. denied, 414 U.S. 878 (1973); *Kentucky State Bar Ass'n v. Donoghoe*, 486 S.W.2d 703 (Ky. 1972); *In re Greathouse*, 189 Minn. 51, 248 N.W. 735 (1933); Annot., 67 A.L.R.2d 859 (1959).

80. Employers and insurance adjusters also use pressure tactics. Ambulance chasing is sometimes justified as a way to protect people from waiving important rights. See M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 113-25 (1975); Note, *Legal Ethics—Ambulance Chasing*, 30 N.Y.U.L. REV. 182 (1955).

81. 436 U.S. 412 (1978). Only Justice Rehnquist dissented.

82. 436 U.S. 447 (1978).

83. *Id.* at 455.

interests because it hinders rather than facilitates "informed and reliable decision-making," and is therefore a proper subject for state regulation.<sup>84</sup>

### *E. Competition and Professional Services Today*

This completes the review of recent decisions dealing with competition in the market for professional services. The Supreme Court has recognized the anticompetitive effect of a number of prohibitions contained in the ethical codes of lawyers and other professionals and has declared them to be unconstitutional or in violation of the antitrust laws. The Court has concluded that the public interest is best served by vigorous competition rather than by severe economic restrictions, even if those restrictions are legislatively sanctioned.

Justices Blackmun and Rehnquist, concurring in *National Society of Professional Engineers*, disagreed with the majority's intimation that "any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden."<sup>85</sup> The majority opinion continued the Court's adherence to the view that a state may conclude that "forms of competition usual in the business world may be demoralizing to the ethical standards of a professional," and therefore a state may regulate or even ban some competitive activity.<sup>86</sup> The subsequent decision in *Ohralik* constitutes evidence that the Court is really willing to treat professionals differently from other businesses, at least in the context of in-person solicitation. A similar restriction outside the professional context would clearly violate the Sherman Act. But *Ohralik* also demonstrates that the Court will uphold a professional rule that limits competition only when the rule serves the public interest.<sup>87</sup>

## II. THE CODE OF PROFESSIONAL STANDARDS: RECOMMENDATIONS

The focus of attention will now shift from past challenges of ethical restrictions to an examination of restraints presently in the Code. The Code still contains numerous provisions that have no place in a body of rules on professional conduct because they have little or no

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84. *Id.* at 457-58 (quoting *Bates v. State Bar*, 433 U.S. at 364).

85. 435 U.S. at 699 (concurring opinion).

86. *United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 336 (1952), *quoted with approval* in *Goldfarb v. Virginia State Bar*, 421 U.S. at 792; *accord*, *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 696.

87. This principle would not preclude controls over a form of legal practice if in the public interest. For example, law firms are commonly permitted to incorporate, but they may not limit their liability to clients. DR 6-102.

justification except as restraints on economic activity. These will be considered under four headings: forms of practice; obtaining business; fee arrangements between attorneys and clients; and financial dealings between lawyers and nonclients. In each instance it will be argued that present restrictions should be eliminated unless they are demonstrably beneficial to the public.

The evaluative standard will be different from that used by the courts, which assesses existing professional norms according to whether they comport with statutory and constitutional requirements. The discussion here will focus on what ought to be the content of professional rules for lawyers.<sup>88</sup> Since it will be recommended that a number of restrictions contained in the Code be eliminated, the presentation below will be organized around an examination of the relevant Code provisions. A reconsideration of the special rules of behavior for lawyers presents a good opportunity for the profession to complete the job that the courts have begun.

### *A. Forms of Practice*

The Code limits the manner in which legal assistance may be delivered. Despite the group legal services cases discussed earlier, some unwarranted restraints on group plans remain. Restrictions on ownership interests by nonlawyers in organizations that practice law and on the simultaneous practice of law and another profession should also be eliminated. Certain restrictions on business relations with clients are appropriate and should be retained.

#### 1. Group Legal Services<sup>89</sup>

Limitations on the existence and operation of group legal plans are

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88. These recommendations are not necessarily mandated by the Sherman Act, the first amendment or other legal standards.

89. The development of group legal plans, many of which are financed through prepayments by group members, is dictated by rules having little to do with the practice of law. Whether the prepayment feature constitutes "insurance" is a question of more than academic interest because in some states it will determine whether plans are subject to state insurance regulations. *See, e.g.,* *Feinstein v. Attorney Gen.*, 36 N.Y.2d 221, 326 N.E.2d 288, 366 N.Y.S.2d 613 (1975).

Groups have been and will continue to be developed in the employment context because of the favorable tax treatment given to employer contributions. Neither the money paid to a qualifying group legal services plan nor the value of legal assistance provided under such a plan constitutes income to the employee. I.R.C. § 120. Plans must qualify under I.R.C. § 501(c)(20). Labor unions have taken the lead in creating prepaid group legal plans because their members have typically been unable to afford private lawyers, but were too well off for legal aid. Collective bargaining about legal services as a fringe benefit is allowed by national labor legislation. Labor Management Relations Act § 302(c), 29 U.S.C. § 186(c)(8) (1976).

largely a matter of history. Two restrictions still remain that may be inconsistent with articulated Supreme Court standards and that should in any event be excluded from the Standards.

The Code appears to permit cooperation by lawyers with a plan that furnishes legal services to its members only if the plan includes an "opt-out" provision, which permits members to be reimbursed for retaining counsel outside the normal framework of the plan.<sup>90</sup> Since the plan that the Supreme Court approved in *UMW v. Illinois State Bar* provided free legal assistance from a single attorney employed by the union but did not include an opt-out provision, the limitation in the Code appears to be clearly unconstitutional. The requirement that an opt-out provision be included also endangers the economic basis of group plans because they depend on volume handling of the repetitive problems that frequently arise in representing a relatively homogeneous group, such as railway or mining employees. Ethical rules should not hinder the efficient handling of these repetitive legal matters.

The Code prohibits lawyers from creating groups for which they will then do legal work.<sup>91</sup> The result is that existing groups can obtain inexpensive legal services for their members, while those people who are not organized into large groups, and who therefore may be most in need of assistance, are left out. By prohibiting lawyers from forming group legal plans, the Code excludes those who are most likely to have the knowledge and desire to create them. One hopes that lawyers can create group plans at least as well as others, and therefore permitting this activity would better serve the public interest than precluding it. Accordingly, the Standards should allow lawyers to participate in the formation of groups for which they will perform legal services, subject to the rules concerning solicitation.

## 2. Ownership of a Law Practice

The Code permits only attorneys to share in profits earned from the practice of law.<sup>92</sup> The public interest surely does not require that lawyers be granted a monopoly over the profits of lawyering, and such a limitation should not appear in the Standards. If price is low and quality of service is high, clients will be happy whether the profit

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90. DR 2-103(D)(4)(e).

91. DR 2-103(D)(4)(b).

92. DR 3-102, 5-107(C)(1). Employees of a lawyer or law firm, however, may be included in a retirement plan even though it is based on a profit-sharing arrangement. DR 3-102(3); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 311 (1964).

earned goes to lawyers or others. There is no evidence that an ownership interest by nonlawyers in a law firm will lead to unethical practices. Attorneys are required to exercise independent judgment on behalf of clients, and complete fidelity is owed to the client irrespective of how or by whom the attorney is compensated.<sup>93</sup> There is no necessary relationship between attorney independence in serving clients and financial arrangements for the payment of services or the manner in which payments are subsequently divided. The pressure of large caseloads in legal aid societies and of "command influence" on military, government, and corporation lawyers are as strong as potential pressures from profit-oriented nonlawyer owners. The drive to make money is often strong in law firms, and promotion from associate to partner frequently depends on the amount of billings that an attorney generates.<sup>94</sup> The duty of fidelity to individual clients is a valid and important principle, but it can be retained without regard to who shares the profits generated by a law practice.

The rule against nonlawyer ownership precludes some possibly useful legal practice arrangements. Restricting the provision of legal services on a for-profit basis to entities owned entirely by lawyers precludes a major retailer such as Sears or H & R Block from hiring attorneys and attempting to make a profit through the sale of legal services, as Sears does with insurance and Block does with tax advice. A law school graduate seeking to obtain funds to start a practice is permitted to give the lender a debt but not an equity interest in the law practice. It cannot be seriously argued that this distinction is necessary to protect the public or to ensure ethical lawyering. The present rule may work to the detriment of new lawyers seeking to start their own practices, particularly when interest rates are high or loan capital is scarce.

Included among the Code provisions that direct lawyers to assist in the prevention of the unauthorized practice of law is a prohibition against dividing legal fees with a nonlawyer.<sup>95</sup> This ban is justified in the following manner: "Since a lawyer should not aid or encourage a layman to practice law, he should not . . . share fees with a layman."<sup>96</sup> The conclusion simply does not follow from the premise. Practicing

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93. DR 5-107(B), (C)(3).

94. One major Houston law firm prints and distributes to its lawyers on a monthly basis the billings of every attorney in the firm.

95. See DR 3-102.

96. EC 3-8. ABA CANONS OF PROFESSIONAL ETHICS No. 34 embodied the same rule.

law is one thing; sharing in the proceeds from the practice is quite another. If evidence existed that the division of legal fees or profits from a law practice frequently led to unauthorized practice or to inferior client service, such restrictions might be justified.<sup>97</sup> Absent demonstrated harm, the prohibition should be eliminated.

### 3. Dual Practice

Two distinct but similar situations are considered here. One is the practice of law and another occupation in partnership by two separate individuals, and the other is the practice of law together with another occupation by one person.

Although it is sometimes useful for a lawyer to work jointly with other professionals, the Code provides that lawyers are prohibited from forming partnerships with nonlawyers if any of the partnership activities constitute the practice of law.<sup>98</sup> For example, lawyers may be part of business consulting teams, which provide users with an array of expertise. Such partnerships easily avoid the Code restriction by billing separately for "legal" work. The net result is no more than to complicate needlessly the bookkeeping involved in the provision of a useful service.

An important aspect of the rule against forming a partnership with a nonlawyer has been the concern that the nonlawyer practitioner, whose profession might not prohibit advertising, would channel legal business to the attorney, and thereby evade the rule against advertising. Since attorneys may now advertise for clients, this justification is no longer relevant, and the prohibition should be abolished. If the nonlawyer partner engages in conduct prohibited by the Standards, the attorney partner would be accountable in the same manner as he is presently responsible for the actions of his agents, employees, and partners.

The simultaneous practice of law and another business or profession is permitted by the Code, but only if the attorney carefully disguises his dual practice.<sup>99</sup> Again, the major concern has been

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97. The prohibition on the division of fees with laymen is particularly suspect in a jurisdiction such as Texas, which permits fee splitting with other lawyers. *See* Texas Code of Professional Responsibility, DR 2-107, TEX. REV. CIV. STAT. ANN. art. 320a-1 app. (Vernon 1973).

98. DR 3-103; ABA CANONS OF PROFESSIONAL ETHICS No. 33. This rule is a specific application of the principle that legal fees may not be divided with a nonlawyer.

99. DR 2-102(E).



circumvention of advertising restrictions, and the use of the other occupation to "feed" the law practice. After the *Bates* case and the recent amendments to DR 2-101, which permit an attorney to state extensive information including technical and professional licenses, and memberships in scientific, technical and professional associations, this rule has been effectively repealed.<sup>100</sup> The Standards should do so explicitly.

#### 4. Business Relations With Clients

The Code imposes special duties on lawyers who participate in business activities with their clients.<sup>101</sup> When the interests of the lawyer and client differ, and the client expects the lawyer to exercise legal judgment on the client's behalf, then full disclosure to and consent by the client are required. This rule prevents conflicts of interest without unduly limiting the activities of lawyers, and should be retained in the Standards. Some law firms take the position that they will never assume the dual role of advisor to and coparticipant with a client in a business venture.

#### *B. Obtaining Business*

The Code and Canons both included rules about the manner in which lawyers could obtain business (advertising, solicitation) and also about work reserved exclusively for lawyers (unauthorized practice). These will be considered in turn.

##### 1. Advertising

The *Bates* case, together with the amendments to the Code recently adopted by the ABA, have abolished many restrictions on lawyer advertising.<sup>102</sup> The Code prohibits publicity by or on behalf of an attorney except as allowed by its provisions, although the exceptions have largely consumed the rule.<sup>103</sup> The Standards should adopt the opposite approach and permit advertising subject to enumerated limitations. All advertising that is not false, deceptive, or misleading should be allowed unless specific harm is demonstrated.

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100. See DR 2-101(B)(12), (13) (adopted Aug. 1977, 63 A.B.A.J. 1234, 1235 (1977)).

101. DR 5-104(A).

102. Changes in this area have come so rapidly that the present rules about attorney advertising vary substantially between states. This is the only topic discussed in this article in which the position adopted by the Code is not accepted almost universally in American jurisdictions.

103. DR 2-101, reprinted in 63 A.B.A.J. 1234, 1235 (1977).

The current state of advertising rules can be conveniently considered through an examination of the information a lawyer may want to convey to the public. The most important message is that the lawyer exists and that he can be found at the given address.<sup>104</sup> In addition, potential clients will want to know the type of work a lawyer does, the amount charged, and that the lawyer provides quality services. Although *Bates* covered only price advertising of routine legal services in newspapers, the Standards should specifically permit all accurate price information. If an hourly fee is stated correctly (for example, "we charge \$50 per hour"), it should not matter whether the legal services involved are "routine." The same is true if a contingent fee is accurately advertised. Stating a flat rate for a particular service, such as preparing a will, is not misleading or unfair so long as the attorney performs the advertised service for the amount stated. Statement of a minimum price (\$150 and up) should also be allowed. If the public can be trusted to survive the blandishments of the automobile industry, it can also deal with truthful advertisements by lawyers.

Amendments to the Code adopted in 1977 permit an attorney to advertise that his practice is limited to certain areas of law.<sup>105</sup> States should adopt lists of identifying labels for types of legal work, the use of which would be mandatory for lawyers who want to state that they limit their practice. Such a truth-in-labeling rule is necessary for meaningful information to be conveyed to consumers.

The major remaining concern about lawyer advertising relates to statements about quality. This concern is unfounded. Professional licensure guarantees a basic level of competence; with that protection clients can make decisions about lawyers as capably as they decide about other major expenditures. If a lawyer chooses to promise more than "best efforts," a warranty will be created. If a lawyer guarantees a certain result, failure to achieve it will constitute a breach of contract.<sup>106</sup> Most quality claims, however, are likely to be mere puffs (for

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104. The advertisement that probably brought the most business to a law firm said nothing specific about price or quality of services.

The Dan Walker Law Office has been established by former Governor Walker in eight cities in Illinois. The United States Supreme Court has decided that for the first time lawyers may advertise in newspapers, with certain limitations. The Supreme Court reasoned, and we agree, that legal services should be available to more people at a reasonable rate. We offer a broad range of legal services to people and businesses across the state. [Firm name, address and telephone numbers followed.]

Chicago Sun Times, July 3, 1977, at 5, col. 4.

105. DR 2-101(B)(2), -105(A)(2), *reprinted in* 63 A.B.A.J. 1234, 1235 (1977).

106. *Cf. Hawkins v. McGee*, 84 N.H. 114, 146 A. 641 (1929)(doctor-patient relationship). *See*

example, "we do a wonderful job" rather than actionable promises. At worst, this is unhelpful to the consumer. Unless one wants to argue that incomplete information is worse than none at all, however, restraints on advertising of price or quality of legal services are unjustifiable. As has already been demonstrated, the Supreme Court has become hostile to the argument that restricting market information benefits the public. At most, disclaimers should be required; these are probably unnecessary, but they represent a substantial improvement over a prohibition on information about quality.<sup>107</sup> Attorney advertising is subject to existing consumer protection and deceptive trade practice laws. The Standards might provide that the violation of such rules constitutes unprofessional conduct.

The opinion of the Court in *Bates* specifically set aside use of the broadcast media for lawyer advertising as potentially warranting special treatment.<sup>108</sup> The 1977 Code amendments authorized radio advertisements.<sup>109</sup> Several states also permitted television advertising<sup>110</sup> without apparent ill effects, and in 1978 the ABA House of Delegates approved its use by a wide margin.<sup>111</sup> There has been little sustained use of television advertising,<sup>112</sup> largely because the purchase of television time is so expensive.<sup>113</sup> Lawyers interested in television advertising are likely to make increasing use of UHF or cable channels, which reach a more localized audience and charge substantially less for their time than VHF stations.

The bar should gracefully retreat from the whole area of lawyer advertising, making provision in the Standards only for a prohibition of false, misleading, or deceptive advertisements. On balance, advertising is good for both the profession and the public.

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also Steinberg & Rosen, *Lawyers' Advertising and Warranties: Caveat Advocatus*, 64 A.B.A.J. 867 (1978).

107. The experience with health warnings on cigarette advertisements leads one to be skeptical of whether disclaimers effectively communicate information.

108. 433 U.S. at 384.

109. DR 2-101(B), reprinted in 63 A.B.A.J. 1234, 1235 (1977).

110. 64 A.B.A.J. 1341 (1978).

111. *Id.*

112. Hochberger, *Lawyer Advertising—Update After One Year*, N.Y.L.J., June 26, 1978, at 1, col. 4. Hochberger concludes that the impact of *Bates* on a national basis has been minor. *Id.* at 2, col. 5.

113. Advertisements in the yellow pages of the telephone book and in newspapers of general circulation are also expensive. In large cities a local audience might be reached most effectively by advertisements in community papers. Lawyers who specialize in the legal problems of specific groups or industries might advertise in their trade publications. See *id.* at 1, col. 4.

## 2. Solicitation

An understanding of when and why solicitation occurs is a necessary predicate to determining what, if anything, should be done about it. Solicitation is expensive in most situations and would not occur even if permitted by the Code. Ambulance chasing is the classic, and most reprehensible, form of solicitation.<sup>114</sup> It involves several features that make it attractive for business-seeking lawyers. The injured person is very likely to need a lawyer and to recognize this. The likelihood of that person being already represented by counsel is relatively low because the event causing the injury was unplanned. Conveniently, the injured potential clients are transported to centrally located hospitals. Most important, a lawyer need not be concerned about his injured client's financial status because the case, if brought to a successful conclusion, will produce a *res* out of which the attorney's fee can be paid. Widespread solicitation is unlikely to occur when this fortuitous combination of circumstances is absent.

Lawyers, like others who earn a living by selling something, long ago discovered that if they were gregarious and spent time with potential buyers the result might be to generate some business. If at a cocktail party a lawyer states his profession to a person who then mentions a problem whereupon the lawyer says he can help, has the advice of the lawyer been sought or is impermissible solicitation involved? The answer in practice is that such activity is acceptable, though it can be argued that the Code, which provides that for an attorney to recommend himself "to a non-lawyer who has not sought his advice regarding employment of a lawyer" constitutes prohibited solicitation,<sup>115</sup> requires the opposite conclusion. While professionals who constantly talk about their work may be regarded as boorish, dull or even rude, they are not unethical. If overreaching is the concern or if the Code

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114. Ambulance chasing has no real defenders apart perhaps from some lawyers who benefit from it. The closest thing to support is M. FREEDMAN, *supra* note 80 (chapter titled *Access to the Legal System: The Professional Responsibility to Chase Ambulances*). More recently Professor Freedman has recommended that the Code (1) eliminate restrictions on solicitation; (2) urge dignity in advertising; (3) prohibit communications with potential clients that violate valid laws or regulations, or would breach an obligation of a third person through whom he communicates (e.g., hospital employees, peace officers); and (4) forbid solicitation of those who prefer to be left alone. Freedman, *Advertising and Solicitation by Lawyers: A Proposed Redraft of Canon 2 of the Code of Professional Responsibility*, 4 HOFSTRA L. REV. 183, 198-203 (1976).

In the course of investigating ambulance chasing, the author spoke with several hospital administrators. Their chief concern about ambulance chasers was the problems they caused in operating the hospital, sometimes even endangering the lives of patients. See, Huber, *supra* note 79.

115. DR 2-103(A).

provision is designed to protect a potential client from making an unwise or hurried decision, a solution might be to require the contract of employment to be in writing or to provide a "cooling off" period as is done with sales in the home.

The prohibitions on seeking clients reflect a concern about the conflict of interest inherent in a lawyer suggesting the need for legal services and then performing the recommended work. The circumstances under which the client agrees to be represented by the lawyer are not a material consideration. In evaluating encounters between lawyers and potential clients, the Code makes no distinction between the person who is pressured into immediately becoming a client and the person who becomes a client by telephoning the attorney several days after their encounter. Only the former situation warrants regulation, because it involves in-person solicitation.

A final form of activity that arguably involves solicitation is direct mail. Letters containing the sender's message are mailed to the homes of selected individuals. For example, an attorney commencing practice in a town might desire to communicate his availability to the thousand richest people in the vicinity, on the theory that they are likely to be particularly desirable clients. A lawyer opening an office in a suburban area might want to notify nearby residents of this fact. In either instance assume the attorney writes a standardized letter containing information that would comply with the Code's advertising provisions if published in a newspaper advertisement. The letter is reproduced on a word processing unit so that each copy is individually typed, and each is signed by the attorney. Solicitation has two central aspects: a message directed to an individual and in-person delivery of that message. Only the latter aspect is objectionable, for it is personal contact that creates pressure. The Supreme Court in *Ohralik* emphasized that the evil involved with solicitation was the pressure inherent with in-person contacts. Personalized letters to potential clients should be permitted, though the Code now prohibits their use. Direct mail probably is constitutionally indistinguishable from the advertisement sanctioned in *Bates*.<sup>116</sup>

Solicitation is a greater problem in jurisdictions that allow full contract damages to an attorney who has been dismissed by a solicited

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116. See *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933 (Ky. 1978).

client than in those jurisdictions that limit recovery to the value of services actually rendered. The law of contract, as well as ethical proscriptions in the Standards, should be used to curb in-person solicitation by attorneys and their agents. "Cooling off" legislation might be adopted, though the efficacy of such statutes is open to question. Permitting clients to void contracts with attorneys entered into within one week after an accident or while hospitalized would have a dramatic effect on existing practices. Oral contracts of employment might also be treated as voidable by clients.<sup>117</sup>

### 3. Unauthorized Practice of Law

Unauthorized practice committees were born in a time of economic hardship to ensure that the profession did not lose business.<sup>118</sup> No more than sporadic concern about unauthorized practice was expressed prior to 1930 when the ABA created its Committee on Unauthorized Practice.<sup>119</sup> The organized bar has been active ever since in preventing competition<sup>120</sup> from outside groups.<sup>121</sup> Emphasis has been on precisely those areas of practice in which other groups can perform almost as well as lawyers, such as the sale of residential property by

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117. Waivers, releases and settlements should be voidable for a similar period of time.

118. Symposium, *The "Unauthorized Practice of Law" Controversy*, 5 LAW & CONTEMP. PROB. 1, 2 (1938).

119. Bristol, *The Passing of the Legal Profession*, 22 YALE L.J. 590 (1913), is an exception. Bristol observed that much legal business was being lost to title insurance companies and the trust departments of banks. He decried the loss of this "lucrative" work to other institutions that would do the work less expensively. He ends beseechingly:

And, my good brothers in law, you who are still within the pale of the profession, unincorporated and free to think for yourselves, how do you like it? Shall we continue to practice law as a profession, honor its traditions, cherish and live up to its high ideals, and die poor, or shall we fall in line with our more progressive brothers, pass over into the business world incorporate—exploit the public—and live rich?

*Id.* at 613.

120. This point of view is, of course, disclaimed by the bar. A former president of the ABA has observed:

Our concern in this subject matter [unauthorized practice] is governed by broad considerations of social policy and the public interest. It must not be motivated by selfishness . . . or by avaricious materialism. The lawyer who thinks that unauthorized practice work is simply a means for increasing his own income has no place in this discussion.

We are here to protect the public from the hidden dangers of dealing with the unlicensed and unauthorized practitioner; not to protect the lawyer from competition.

Marden, *The American Bar and Unauthorized Practice*, UNAUTH. PRAC. NEWS, Spring 1967, at 1, 2.

121. Often cartel arrangements, known as the "conference system," were entered into with other professional groups. The conference system is described in Perry, *Report of the Standing Committee on Unauthorized Practice of Law*, UNAUTH. PRAC. NEWS, Spring 1963, at 1. Agreements with other professions appear in 7 MARTINDALE HUBBELL, LAW DIRECTORY 71m (1978).

real estate brokers<sup>122</sup> or divorce services that sell forms and surreptitiously give "legal" advice to the purchasers.<sup>123</sup> For many routine legal tasks, performance of all the work by an individual lawyer is expensive and inefficient. To obtain these legal services at a lower cost, much of the work must be performed by nonlawyers. Paralegals are permitted to perform nearly all tasks related to serving a client except for court appearances, so long as they do it under the supervision and control of a lawyer.<sup>124</sup> A few law firms already employ several paralegals for every lawyer, in addition to other support staff. Some legal assistance can be provided quite inexpensively if a large volume of the same or similar work is involved. Largely because of the advent of group plans and lawyer advertising, this possibility is becoming a reality.<sup>125</sup>

The definition of what constitutes unauthorized practice remains a matter of state law, however. The Code simply provides that a lawyer should not aid a nonlawyer in the unauthorized practice of law.<sup>126</sup> So long as a state determines that certain activity is impermissible, the Standards cannot institute less restrictive unauthorized practice rules. Only a change in state law can accomplish this objective.

### C. *Financial Arrangements: Attorney and Client*

The Code contains several provisions that unnecessarily limit the range of permitted fee arrangements between attorney and client. The Code states that fees should not be excessive, and a lawyer can be sanctioned for charging a "clearly excessive" fee.<sup>127</sup> Apart from doubts about whether the modifier "clearly" is needed, the rule is unobjectionable, but it is also so general that it is unenforceable. In a reasonably competitive market for legal services, excessive fees will not be a problem except in isolated instances, and consumer protection laws should suffice to deal with these. To the extent that the objective is to protect unsophisticated consumers from being overcharged, rules of professional behavior that cover only the conduct of attorneys are not the best vehicle for achieving the desired result. Many of the prohibitions on

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122. See, e.g., *Chicago Bar Ass'n v. Quinlan & Tyson*, 34 Ill. 2d 116, 214 N.E.2d 771 (1966).

123. See, e.g., *People v. Divorce Associated & Publishing, Ltd.*, 95 Misc. 2d 340, 407 N.Y.S.2d 142 (Sup. Ct. 1978). The Florida State Bar Association spent \$94,000 to employ an attorney and four investigators last year to ferret out the unauthorized practice of law. Brill, *Divorce, Florida Style*, *ESQUIRE*, July 4, 1978, at 14.

124. EC 3-6.

125. Falk, *Legal Upheaval: Lawyers Are Facing Surge in Competition as Courts Drop Curbs*, *Wall St. J.*, Oct. 18, 1978, at 1, col. 1.

126. DR 3-101(A).

127. DR 2-106.

financial arrangements between attorneys and others appear to exist primarily if not totally for the protection of the bar. The key question in evaluating prohibited financial arrangements is whether they involve an actual or potential conflict of interest among the parties thereto, and if so, whether the conflict is sufficiently serious to warrant regulation.<sup>128</sup> When no substantial conflict can be demonstrated, contractual agreements should be permitted, subject to generally applicable consumer protection laws.

### 1. Contingent Fees

The Code states the general principle that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client."<sup>129</sup> The most important exception is that attorneys are permitted to enter into contingent fee agreements with clients, which provide for the attorney to receive a percentage of the client's recovery.<sup>130</sup> This permits worthy claimants to bring suit even though they otherwise could not afford to retain a lawyer. Unfortunately, some lawyers have charged exorbitant fees, upon occasion exceeding fifty percent. Courts can regulate contingent fee practices, including the imposition of maximum fees, and a few courts have done so.<sup>131</sup> Lawyers should present solvent clients with the alternative of an hourly fee for service or a contingent fee arrangement. Contingent fee abuses, often associated with ambulance chasing, can and should be curbed, but the general use of contingent fees should be retained.

Contingent fees are prohibited in criminal cases.<sup>132</sup> This provision is of little consequence because lawyers would not utilize such a fee arrangement even if permitted to do so. This rule is an example of "self-paternalism" by the bar to protect its members from their own lack of foresight. Many criminal defendants are poor and desperate, and some lawyers might, in a moment of weakness or generosity, enter

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128. In one sense all fee arrangements between lawyer and client involve a conflict of interest because the more the lawyer receives the more the client must pay. Courts could set fees and publish fee schedules, as the English have done for centuries.

129. DR 5-103(A).

130. EC 2-20; DR 5-103(A)(2). Contingent fees are forbidden in England. The arguments for and against their use are presented in Youngwood, *The Contingent Fee—Reasonable Alternative?*, 28 MOD. L. REV. 330 (1965).

131. Maximum fee schedules were upheld in *American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 66 N.J. 258, 330 A.2d 350 (1974), and *Gair v. Peck*, 6 N.Y.2d 97, 160 N.E.2d 43, 185 N.Y.S.2d 491 (1959), *appeal dismissed, cert. denied*, 361 U.S. 374 (1960).

132. DR 2-106(C).



into a contingent fee arrangement with a client. Unlike tort cases, wherein contingent fees are used most frequently, criminal cases do not produce a *res* from which the attorney can obtain a fee.<sup>133</sup> It has been suggested that the use of contingent fees in criminal cases presents a danger of corrupting justice,<sup>134</sup> but there is no concrete evidence to support this proposition. The prohibition against contingent fees in criminal cases should be omitted from the Standards. It may be foolish to accept criminal cases on a contingency basis, but doing so should not be treated as unethical.

The Code discourages, but does not prohibit, the use of contingent fees in domestic relations cases.<sup>135</sup> Nevertheless, such arrangements are frequently utilized. When divorce itself is the contingency, a lawyer is in the unfortunate position of having a large financial stake in the dissolution of the marriage. This situation is worth serious investigation to determine whether important societal values are threatened by the use of contingent fees in family law cases.<sup>136</sup>

## 2. Royalties

An attorney may not receive as his fee an interest in a publication concerning the subject matter of his employment.<sup>137</sup> A detailed justification is provided for this rule:

If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client . . . publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client.<sup>138</sup>

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133. In rare cases a fund of money may become available after an acquittal. A beneficiary of an insurance policy who is accused of murdering the insured may be entitled to the proceeds of the policy only if he is not convicted. The proceeds of a trust might be payable only if the claimant has never been convicted of a felony.

134. *Peyton v. Margiotti*, 398 Pa. 86, 90, 156 A.2d 865, 867 (1959). Perhaps the fear is that the acquitted defendant will be forced to commit a crime to pay his attorney.

135. "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified." EC 2-20.

136. The experience in Texas, which permits contingent fees in family cases, appears satisfactory, but the issue requires a judgment that is considerably more informed than that of the author. See Texas Code of Professional Responsibility, DR 2-106(c), 5-103(A)(2), TEX. REV. CIV. STAT. ANN. art. 320-1 app. (Vernon 1973); TEXAS BAR COMM., OPINIONS, No. 349 (1969).

137. DR 5-104(B).

138. EC 5-4.

In a legal system that commonly uses contingent fees, that regularly permits a lawyer to represent codefendants in criminal cases, and that sanctions the representation of insured persons by attorneys selected and paid for by insurers, it is surprising that the royalty situation should be singled out for special treatment. A royalty agreement is unlikely to create a conflict of interest between attorney and client, or to endanger the proper functioning of the justice system, though it may offend the dignity of the profession, especially if given prominent notice by the media. The Standards should not retain the prohibition against royalty agreements between attorney and client, although it does not follow that they are to be encouraged. Of course, if a lawyer does not pursue his client's best interests he will be subject to discipline under other provisions in the Standards, regardless of the fee arrangements involved.

### 3. Loans to Clients

Attorneys are permitted to pay costs related to litigation and trial preparation on behalf of their clients so long as the client bears ultimate responsibility for these expenses.<sup>139</sup> An attorney may not, however, advance funds to a client for other purposes, such as living expenses.<sup>140</sup> There is much to be said for this position as a sound way to run a law practice. The object of practicing law is to get paid by clients, not to pay them. Legal fees are difficult to collect in the best of circumstances, and the client who needs to borrow money is the very one who is least likely to pay an attorney. Expenditures of money in connection with a client's business are directed toward completion of the legal work that is the basis for earning a fee. Loans to clients for other purposes are far less likely to be beneficial to the lawyer. The rule against loans to clients is another example of self-paternalism in the Code. It serves as a crutch for soft-hearted lawyers, who can respond to imploring clients, "I would love to help you out, but rules of professional ethics prohibit me from doing so."

Although the rule against loans to clients is rarely enforced, it has upon occasion been used to discipline lawyers who advance money to indigent clients.<sup>141</sup> In labeling as unethical a lawyer who acts as a good

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139. DR 5-103(B).

140. DR 5-103(B); EC 5-7, -8. Some jurisdictions have not adopted the ABA position on advancing living expenses. *See* Texas Code of Professional Responsibility, TEX. REV. CIV. STAT. ANN. art. 320a-1 app. (Vernon 1973).

141. *Mahoning County Bar Ass'n v. Ruffalo*, 176 Ohio St. 263, 199 N.E.2d 396 (1964). The dissenting opinion noted the inequity of suspending Ruffalo from the practice of law.

Samaritan and punishing him for acts of generosity, the Code reaches a shocking result. Such a provision may enhance the income of attorneys, but it has no place in a body of rules for professional behavior. Since advancing litigation-related expenses, which may involve thousands of dollars for depositions and expert witnesses, is permitted, it is ludicrous to suggest that advances for living expenses will compromise attorney independence. The disparate effect of the present rule on impecunious clients is an additional reason for its abolition.

#### *D. Financial Arrangements: Attorney and Nonclients*

##### 1. Fee Splitting Between Attorneys

When an attorney forwards a case to another lawyer he may be compensated only for work actually performed and for the responsibility undertaken.<sup>142</sup> This rule should be abolished because it does no more than ban a market arrangement that, at least arguably, will serve client interests better than the existing rule. This conclusion is based largely on the experience in Texas, which appears to be the only state to explicitly permit forwarding fees between attorneys.<sup>143</sup>

Forwarding fees are used most commonly in tort cases. These cases are almost invariably handled on a contingent fee basis, and the cost to the client is the same whether or not the case has been forwarded. The common perception that clients will pay more for two lawyers than for one is simply not true. Only relatively valuable cases can be forwarded. Where fee splitting is banned, these cases are not

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The railroad offers a meager totally inadequate settlement—a small percentage of what a lawful judgment could reasonably be expected. In making this inadequate settlement offer, the claims department of the railroad advises that the railroad can delay final decision for years. In short, the powerful can close the doors of the courts to the weak by reason of the lack of finances of the claimant.

Under the pronouncement in the case at bar, lawyers in Ohio are not permitted to give or loan financial assistance to a client even though the injured employee or the dependents in case of death are in want and hungry.

*Id.* at 273, 199 N.E.2d at 403 (Herbert, J., dissenting).

142. DR 2-107; ABA CANONS OF PROFESSIONAL ETHICS No. 34. The attorney must, of course, obtain the consent of his client before forwarding a case. DR 2-107(1).

143. The relevant part of the Texas version of DR 2-107 reads:

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

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(2) The division is made in proportion to the services performed and responsibility assumed by each, or is made with a forwarding lawyer.

Texas Code of Professional Responsibility, DR 2-107, TEX. REV. CIV. STAT. ANN. art. 320a-1 app. (Vernon 1973) (emphasis added). The italicized language has been added in the Texas version of DR 2-107. Otherwise the two provisions are identical.

forwarded because few lawyers are so successful that they can afford to give away cases that are likely to produce a substantial fee. Most lawyers will not do so, no matter what is stated in the rules of professional conduct, with the result that for the same fee clients will receive worse rather than better lawyering.<sup>144</sup>

The fear that cases will be forwarded to lawyers who pay well rather than to those who will best serve the client is unfounded. The amount paid to the forwarding lawyer depends on the result achieved, and therefore the best available receiving lawyer will be sought out. The power to forward a case to a more qualified attorney also increases the bargaining power of less qualified attorneys, and thus inexperienced lawyers are able to obtain better settlements for their clients by threatening to refer the case to a leading trial lawyer. When lawyers are permitted to forward cases, grievance committees are better able to sanction lawyers who do an inept job of handling complex cases. For these reasons the Standards should permit fee splitting between attorneys.<sup>145</sup>

## 2. Payments to Nonlawyers

Payments to laymen for recommending a lawyer are prohibited by the Code.<sup>146</sup> It is said that the public is best served if the recommendation of a lawyer is a disinterested one.<sup>147</sup> This rule is widely ignored, and violators are rarely punished. Lawyers should be permitted to pay laymen for steering clients to them if full disclosure is made to the client, except when prohibited by law (for example, payments to law enforcement officials), by institutional rules (for example, payments to hospital staff), or when solicitation rules have been violated. The issue is whether such payments can be made the basis of disciplinary action against a lawyer, not whether they are to be encouraged.

## 3. Contingent Fee Payments to Witnesses

The Code provides that payments to witnesses may not be made

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144. The rule against forwarding fees is violated frequently throughout America. *See* Stokey, *Let's Re-Examine Fee Splitting*, 61 A.B.A.J. 1253 (1975). The forwarding lawyer typically receives one-third of the total fee. Upon occasion "responsibility assumed" is interpreted loosely as a device to avoid the proscription on fee splitting between attorneys.

145. One commentator would require that the fee arrangement be in writing, signed by the client and both lawyers, and subject to judicial scrutiny. *See id.* at 1254. *See also* G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 98-99 (1978).

146. DR 2-103(B).

147. EC 2-8.

contingent on the content of the testimony or outcome of the case.<sup>148</sup> The justification for this rule is self-evident in view of the truth-seeking purpose of trials.<sup>149</sup> The constitutionality of this prohibition was recently challenged by the plaintiff in a large antitrust case who argued that he could not afford the expert testimony needed to properly prove his claim unless he could utilize a contingent fee arrangement.<sup>150</sup> The proscription on paying contingent fees to expert witnesses was held constitutional because it did not affect a fundamental right or create a suspect classification.<sup>151</sup>

The drafters of the Standards should consider permitting such payments. The testimony of an expert witness differs in a fundamental way from that of other witnesses. Ordinary witnesses have knowledge about actual events involved in a case. The expert witness normally does not testify about the disputed facts in a case, but he presents specialized knowledge that may be useful in deciding a case. The primary problem with expert witnesses is that they are paid for their testimony. It is well known that certain experts appear repeatedly on behalf of plaintiffs or defendants. The relevant question to ask is whether this existing problem is exacerbated when the expert's payment is contingent on the outcome of the case. The Code rule is grounded in the concern that when the payment for testimony is dependent on the result of a case, the witness has an incentive to be less than truthful because a conflict between self-interest and truthfulness is involved. The purchase of testimony involves the appearance of wrongdoing, as well as an opportunity for actual impropriety. Perhaps professional pride, disclosure of the fee, and concern about disclosure during cross-examination, will cause experts compensated on a contingent basis to be as truthful as those compensated in other ways.<sup>152</sup>

The Code rule favors the wealthier party in complex cases and defendant insurance companies in tort litigation. It is not self-evident,

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148. DR 7-109(C). Payment of a reasonable fee for the professional services of an expert witness is permitted.

149. The argument that contingent payments to expert witnesses should be allowed because they are permitted for lawyers is a flawed one. The role of a lawyer is to be a partisan advocate, but the role of a witness is to be a purveyor of truth. The conflict of interest is far more serious in the latter situation.

150. *Person v. Association of the Bar*, 554 F.2d 534 (2d Cir.), *cert. denied*, 434 U.S. 924 (1977).

151. *Id.* at 539.

152. It is standard practice to elicit from an expert witness on cross-examination that he is being paid for his testimony. If contingent fees were permitted, their use would certainly be brought to the attention of the trier of fact.

however, that contingent fee payments to expert witnesses are evil. Unless it can be demonstrated that real harm is likely to occur from eliminating the present Code rule, an intermediate approach should be adopted that would allow the payment of a fee fixed in amount (either a total or a fixed hourly rate) to be made contingent on the outcome of a case, without allowing the actual amount of the fee to be contingent. Thus, a fee of \$500, or of \$100 per hour, if plaintiff wins, would be permitted, but a fee of two percent of the amount recovered by plaintiff would not.

### III. CONCLUSION

Law may be the last cottage industry. When the United States declared its independence from Great Britain, Adam Smith had already observed a pin factory in which the task of making a pin was divided into eighteen separate tasks, and ten people produced about forty-eight thousand pins a day.<sup>153</sup> Automobile assembly lines long ago demonstrated that complicated as well as simple tasks can be performed more efficiently without loss of quality through the division of labor. Some, perhaps many, legal tasks can be performed both well and inexpensively through the use of paralegals, word processing equipment, preprinted forms and similar techniques. Only in the last few years, however, has serious consideration been given to practicing law in an efficient manner; previously, the profession earned high profits but served primarily the wealthy. The rules of proper professional conduct by attorneys, as embodied in the Canons and Code, carefully guarded against competition among lawyers and, along with state enforcement of unauthorized practice rules, tried to prevent encroachment by nonlawyers. The posture of the Standards should be to avoid restrictions on competitive activity among lawyers and the efficient delivery of quality legal assistance to the entire society.

It is appropriate to close with a word of caution. Many people who have not done so previously are using the services of lawyers; these lawyers will often be provided relatively inexpensively. Mass-produced products are less expensive but quality control problems occasionally arise. Marginal producers of goods and services sometimes cut corners, and uneducated consumers often are unhappy with their

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153. A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 3 (London 1776).

purchases. The response of the professional has to be better quality control, not a limitation on competition.