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LexisNexis Summary

... The most significant aspects of bar associations' involvement with law schools, however, are the ABA's long-standing program of setting law school accreditation standards, approving schools that are in accord with these standards, and making periodic accreditation inspections of most schools. ... The ABA's proposals have helped persuade government authorities in some states to provide lawyer disciplinary systems ultimately controlled by the judiciary, not by legislatures or bar associations, and enforced by full-time disciplinary counsel. ... Among the many troublesome issues raised by the monopoly are whether lay legal service providers would subject clients to such greater risks of incompetence, conflict of interest, and dishonesty that their exclusion from practicing law would be justified; whether any such risks would be sufficiently reduced by licensing lay providers, perhaps with demanding educational and examination prerequisites; and whether the cost to clients for satisfactory services would be less in most instances if made available by lay providers practicing independently. ... Within their primary sphere of concern, most sections and committees can develop their own programs with few restrictions, although taking public positions, lobbying, and other law reform advocacy efforts may require approval of the association leadership. ... The result is apparent in bar association positions on issues such as contingency fees, and in a few provisions of the Model Rules of Professional Conduct and Model Code of Professional Responsibility, both of which originated with the ABA. ... Conversely, comprehensive bar associations, and particularly unified associations, have a similar restrictive effect on membership and dues income of the specialty associations. ... Although the comprehensive bar associations are large, influential organizations that make a variety of contributions to the legal profession and the justice system, their effectiveness is subject to serious limitations, as previously indicated. ... There would be sufficient law school cooperation, however, to test important new experimental approaches to CLE and to improve existing programs, if those schools could be assured of adequate funding and convinced of the bar associations' commitment to more effective continuing education.

Text

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Bar associations are an integral part of the legal profession and, along with law firms, courts, legislatures, and law schools, essential features of the modern American legal system. Despite their prominent place in the legal field, however, bar associations have received surprisingly meager scholarly attention. ¹ This Article seeks to help

¹ For two excellent recent studies of important local bar associations, see Terence C. Halliday, Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment (1987) (concentrating on Chicago Bar Association) and Michael J. Powell, From Patrician to Professional Elite: The Transformation of the New York City Bar Association (1988). See also 3 Lawyers in Society 130-33 (Richard L. Abel & Philip S.C. Lewis eds., 1988-1989) (comparing bar associations in many common law and civil law countries, including United States).

remedy this oversight by examining the contribution of bar associations to the legal system at large. In particular, it identifies the principal policies pursued by the associations and evaluates how effectively they further these policies. In addition, the Article addresses some of the bar associations' major limitations and makes recommendations for their improvement.

There are substantial variations among bar associations, but two principal types stand out: comprehensive associations and specialty associations. This Article concentrates on the major comprehensive organizations, which include the American Bar Association (ABA), each of the state bar associations,² and the largest of the local bar associations.³ Both the specialty associations and [*194] the comprehensive associations are structured geographically, with membership drawn from a national pool or from a particular state or local area.⁴ But in terms of membership, financial resources, and range of activities, the comprehensive organizations are significantly more influential than the specialty organizations. Whereas specialty associations focus on a particular type of practice⁵ or a particular group of lawyers,⁶ the comprehensive bar associations contain a broad cross-section of lawyers and are concerned with these lawyers' varied interests.⁷

² In its statistical classifications, the ABA includes as state bar associations the two bar associations in the District of Columbia (one of which is mandatory), the Puerto Rico Bar Association, and the Virgin Islands Bar Association. See ABA Div. for Bar Servs., 1995 Bar Activities Inventory 2 (Joanne O'Reilly ed., 1995) [hereinafter ABA Inventory]. North Carolina, Virginia, and West Virginia each have two state bar associations, membership in one being mandatory to practice in the state. See id.

³ According to the ABA, there are 24 of these associations with 3500 or more members. They are (with the size of their memberships as of 1995 in parentheses) as follows: the Los Angeles County Bar Association (22,786); the Chicago Bar Association (21,665); the Association of the Bar of the City of New York (20,100); the Philadelphia Bar Association (12,500); the New York County Lawyers Association (10,200); the Houston Bar Association (9537); the Bar Association of San Francisco (9000); the Dallas Bar Association (7400); the Denver Bar Association (7257); the Allegheny County Bar Association (Pennsylvania) (7175); the Boston Bar Association (7086); the San Diego Bar Association (7004); the Bar Association of Metropolitan St. Louis (6100); the Orange County Bar Association (California) (6000); the Atlanta Bar Association (5500); the Cleveland Bar Association (5196); the King County Bar Association (Washington) (4385); the Columbus Bar Association (Ohio) (4300); the Maricopa County Bar Association (Arizona) (4100); the Dade County Bar Association (Florida) (3951); the Cincinnati Bar Association (3593); the Santa Clara County Bar Association (California) (3704); the Multnomah Bar Association (Oregon) (3503); and the Kansas City Metropolitan Bar Association (3500). See id.

⁴ Not surprisingly, most associations' interests are centered heavily on the geographical area from which they draw their members. In addition to the national, state and local organizations, there are a few regional bar associations, like the New England Bar Association, and a few international associations, like the Inter-American Bar Association (with headquarters in Washington, D.C.) and the International Bar Association (with headquarters in London, England).

⁵ For example, the American Academy of Matrimonial Lawyers; the American Immigration Lawyers Association; the Association of Trial Lawyers of America. The Association of Trial Lawyers of America, with over 60,000 members, is the largest specialty bar association in the country. See 1 Encyclopedia of Associations 738 (Sandra Jaszczat ed., 1996).

⁶ For example, the National Association of Women Lawyers; the Hispanic National Bar Association; the National Bar Association. On the history and activities of the National Bar Association, an African-American organization with over 16,000 members, see Gloria Wilson Shelton, National Bar Association: Champions for Justice, 38 Md. B.J. 10 (1995). On minority bar associations generally, see Karol Corbin Walker, Serving a Purpose Then and Now: The Continuing Role of Minority Bar Associations, N.J. Law., Nov.-Dec. 1992, at 36. In addition to these organizations, some specialty associations cater to lawyers from a particular employment setting. See, e.g., the American Corporate Counsels Association; the National District Attorneys Association; the National Association of Attorneys General; the National Association of Bar Executives.

⁷ Comprehensive bar association memberships include lawyers from general practice as well as different kinds of specialty practices, from different sizes and types of law offices, and with different kinds of client bases (rich and poor, private and public, corporations and individuals). There are usually a number of nonpracticing members, including some judges, full-time law professors, retired lawyers, and corporate and government officials.

In addition, many comprehensive bar associations have a separate membership category for law students and nonlawyer employees of law offices (such as paralegals and legal administrators). There are, in fact, independent national associations of

Many of the existing major comprehensive bar associations were organized over a hundred years ago. The Association of the Bar of the City of New York, for example, was founded in 1870, the Chicago Bar Association in 1874, and the ABA in 1878.⁸ Among the first state bar associations were the Iowa State Bar Association, organized in 1874, and the New York State Bar Association, organized in 1876.⁹ The memberships of the earliest comprehensive bar associations were largely restricted to the more respected members of the bar. In addition to providing social opportunities for lawyers with common interests, the early associations were concerned with such matters as eliminating unprofessional behavior by lawyers, cleaning up corruption in local government, imposing higher pre-admission educational standards on lawyers, and occasionally pushing legal reform.¹⁰

As the memberships of the major comprehensive bar associations have grown and become more diverse,¹¹ the range of association programs has expanded. In addition, organizational structures of the associations have become more complex, budgets have become larger, and more administrative work has been turned over to full-time employees. These forms of expansion have increased the opportunities as well as the problems of the associations.

Although there are sharp differences among them in policy priorities and implementation, the major comprehensive bar associations today are remarkably similar in the policies they seek to advance. As their activities and declarations of purpose reveal,¹² the associations aim to benefit three principal target groups: individual lawyers, the legal profession generally, and the public at large. In general, the associations aim to benefit individual lawyers by providing them with opportunities to improve their professional skill and knowledge, to develop useful professional contacts, to expand their client base, and to increase their income. They aim to benefit the legal profession generally by helping to maintain a competent, respected, and ethically responsible body of lawyers and

nonlawyer specialists working in law offices, including two paralegal organizations (the National Association of Legal Assistants and the National Federation of Paralegal Associations) and an association of law office administrators (the Association of Legal Administrators). See generally John J. Michalik, Legal Administrators, 36 Law Off. Econ. & Mgmt. 306 (1995) (discussing Association of Legal Administrators).

⁸ On the history of American bar associations, see James Willard Hurst, The Growth of American Law: The Law Makers 285-94 (1950) and M. Louise Rutherford, The Influence of the American Bar Association on Public Opinion and Legislation 7-34 (1937). Among the histories of individual bar associations are George Martin, Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York, 1870-1970 (1970) and Edson R. Sunderland, History of the American Bar Association and its Work (1953).

⁹ See Roscoe Pound, The Lawyer From Antiquity to Modern Times 259 (1953).

¹⁰ On the early concerns and activities of comprehensive bar associations, see Halliday, *supra* note 1, at 63-73; Powell, *supra* note 1, at 6-11; Norbert Brockman, The Politics of the American Bar Association (1963) (unpublished Ph.D. dissertation, Catholic University of America) (on file with the Yale Law School Library).

¹¹ Bar associations have grown in size along with the number of lawyers in the United States. The number of lawyers in America doubled between 1900 and 1960, and then tripled between 1960 and 1990. See Robert L. Nelson, The Future of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society, 44 Case W. Res. L. Rev. 345, 390 (1994). As of 1991, there were 805,872 lawyers in the United States, though this figure included retired lawyers and lawyers working outside the profession. See U.S. Bureau of the Census, Statistical Abstract of the United States 212 (1995).

¹² The ABA's statement of purposes, for example, reads:

The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the profession and of the public.

ABA Const. 1.2.

by protecting the profession from unqualified legal service competition. They aim to benefit the general public by protecting and strengthening the administration of justice, by enhancing public understanding of and respect for law and legal institutions, and by identifying and advocating [*196] needed changes in the law and opposing those they consider undesirable.

The major comprehensive bar associations play a significant role in representing an influential profession. This Article is an attempt to assess that role and to identify the major limitations preventing associations from being even more effective. Part I considers the resources available to bar associations and stresses that the associations' members are their most important resource. Part II focuses on the organizational structures of bar associations and notes their weaknesses. Part III examines the various programs that bar associations conduct, and their mixed record of effectiveness. Part IV discusses more generally the limitations to greater bar association effectiveness. And finally, Parts V and VI present some recommendations for improving the organizations and some conclusions about their future.

I. Resources

Like organizations of all kinds, bar associations depend on, and are limited by, the resources available to them. The principal resource of bar associations is their members. In addition to providing most of the funding and leadership of the organizations, members do most of the work. In contrast to many trade associations, bar associations are composed of individual members, not firms. The ABA is by far the largest bar association in the United States, with a lawyer membership of 339,000 from throughout the nation,¹³ or about forty percent of the nation's lawyers. The largest of the state bar associations is the California Bar Association, with almost 115,000 members.¹⁴ Of the hundreds of comprehensive local bar associations in the United States,¹⁵ the twenty-four largest have over 3500 members each; the three largest - the Los Angeles County Bar Association, the Chicago Bar Association, and the Association of [*197] the Bar of the City of New York - have over 20,000 members each.¹⁶

Thirty-five of the fifty-seven state bar associations¹⁷ are unified, meaning that a statute or court rule requires membership in the association for a lawyer to practice in the state.¹⁸ Since they are mandatory, unified

¹³ See Robert A. Stein, Executive Director's Report, Mission: Membership, A.B.A. J., Aug. 1996, at 116 [hereinafter Stein, Mission: Membership]. This figure is down from 362,000 in 1993, though the ABA is apparently still the largest professional association in the world. See Robert A. Stein, Executive Director's Report, Plenty to Be Proud About, A.B.A. J., Jan. 1996, at 92 [hereinafter Stein, Plenty to Be Proud About]. The ABA considers its membership decline the number one issue with which it is faced. See Stein, Mission: Membership, *supra*; cf. Darryl Van Duch, Associations Face Declining Member Rolls, Nat'l L.J., Jan. 15, 1996, at A1 (discussing risks of membership decline facing other comprehensive bar associations). In addition to its regular membership, the ABA has 42,000 student and associate members. See Stein, Mission: Membership, *supra*.

¹⁴ See ABA Inventory, *supra* note 2, 2. The next largest state bar associations in terms of membership are the District of Columbia Bar Association (64,000 members); the State Bar of Texas (62,500); and the New York State Bar Association (55,500). See *id.* The smallest state bar associations are the Virgin Islands Bar Association (570 members); the West Virginia Bar Association (1271); and the Bar Association of North Dakota (1700). See *id.* About one third of the state bar associations have associate or affiliate paralegal members. See Steven Cohn, Welcome to the Club, Legal Assistant Today, Sept.-Oct. 1995, at 54.

¹⁵ There are at least 150 local bar associations with over 300 members each, see ABA Inventory, *supra* note 2, 1, though there are presumably more since this figure excludes associations that failed to respond to the ABA questionnaire. See *id.* at 1. In addition, there are many county and city bar associations with fewer than 300 members.

¹⁶ See *supra* note 3.

¹⁷ See *supra*, note 2.

¹⁸ Bar associations in the following jurisdictions are unified: Alabama, Alaska, Arizona, California, District of Columbia, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Puerto Rico, Rhode Island, South Carolina, South Dakota, Texas, Virgin

associations are generally more regulated than other associations. In non-unified bar associations, membership is voluntary, although a number of these associations limit membership to those in a particular jurisdiction or type of practice.

Bar association members in leadership positions are unpaid,¹⁹ and almost all maintain full-time jobs in law offices or other legal service agencies while attending to their association responsibilities. Leaders not only donate their time and effort to association affairs, but their firms commonly donate staff time to assist with association administrative duties. Beyond their leadership, all major comprehensive bar associations have paid staff members. The ABA and the California State Bar each have a total of around eight hundred employees,²⁰ while the largest local association - the Los Angeles County Bar Association - has ninety-five employees.²¹ Some of the smaller state bar associations have as few as ten paid staff members each.²²

The associations' staffs have become increasingly essential resources as association activities have increased. They now perform much of the routine administrative work of the associations, while top staff employees frequently exert some policy influence on association affairs (for instance by giving guidance to newly elected or appointed leaders). Although subordinate to the member leadership, the executive director is a full-time association employee with substantial influence on association affairs. Other employees common to larger associations, such as lobbyists, staff attorneys, and the director of continuing legal education (CLE), also exert substantial influence.

Most bar association income comes from annual member dues, so the [*198] number of members and the rate of dues are crucial resource considerations.²³ Additional sources of income include publication sales and advertising, CLE fees, section membership fees, gifts, foundation grants, and insurance programs that an association may provide or sponsor.²⁴ The ABA, with its large membership and considerable ingenuity in attracting funds from other sources, has by far the highest annual income of any bar association, currently totaling 137 million dollars.²⁵ Among state bar organizations, the California Bar Association leads in annual income, with

Islands, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and Utah. See ABA Inventory, *supra* note 2, 2; see also Larry J. Rector, *Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis*, 66 Neb. L. Rev. 762, 763, nn.5-7 (1987) (listing when bar associations became unified and whether requirement was imposed by statute, court rule, or combination of two). For illustrative examples of the legal requirements for unified bar associations, see Ariz. Sup. Ct. R. 31 (1996), *Cal. Bus. & Prof. Code 6000-6052* (West 1996), and Wis. Sup. Ct. R. chs. 10, 11 (1996).

¹⁹ The ABA is an exception to this rule, paying annual stipends to its President (\$ 100,000) and President-Elect (\$ 50,000). There is an assumption that these are essentially full-time jobs. See James Podgers, *Presidential Aid*, A.B.A. J., Oct. 1994, at 101.

²⁰ See ABA Inventory, *supra* note 2, 2; Van Duch, *supra* note 13.

²¹ See ABA Inventory, *supra* note 2, 2.

²² The State Bar of South Dakota, for example, has only four paid staff members while the Vermont Bar Association has six. See *id.*

²³ Aside from the benefits of exposure and continuing legal education, bar associations offer their members a number of benefits in exchange for their dues. In addition to the programs mentioned *infra* in Part III, the associations sometimes offer reduced rates on items like insurance coverage, office supplies, and auto rentals. See ABA Inventory, *supra* note 2, 3-VI, 4-VI; *Ten Smart Ways to Maximize Your ABA Membership* (1996) (pamphlet) (publicizing advantages of ABA membership); *The Professional Advantage* (pamphlet) (publicizing advantages of New York State Bar membership), included in N.Y. St. B.J., Sept.-Oct. 1995, at 32.

²⁴ See ABA Inventory, *supra* note 2, 3-XVIII, 4-XVIII (providing statistical data on sources of bar association income other than dues).

²⁵ See M. Peter Moses, *American Bar Association Treasurer's Report*, A.B.A. J., Jan. 1996, at 97.

ninety-five million dollars,²⁶ while the Los Angeles County Bar Association has the highest income of local bar associations, at 9.5 million dollars.²⁷ Meanwhile, some of the smaller state bar associations have annual incomes of under one million dollars each.²⁸ Annual dues for members vary considerably among associations.²⁹ For example, annual dues are \$ 190 for most active members of the Florida Bar,³⁰ \$ 275 for ABA members who have been members of the bar for ten or more years,³¹ and \$ 478 for most California State Bar members.³² Member resistance has made the associations hesitant to increase dues; in fact, in some instances, associations have been forced to reduce dues.³³

In addition to membership resources, another valuable asset of major comprehensive bar associations is their reputation in important circles, both public and private. Well-known and highly regarded members help further association policies through their contacts, and they often support their proposals with carefully prepared position papers or draft legislation. Their [*199] reputations have helped the associations develop cooperative ties with other legal organizations and have facilitated relations with courts and government agencies. The associations' reputations usually assure a serious hearing when association representatives make statutory or other law-reform proposals.³⁴ It helps, of course, that many of those whom the associations seek to influence are lawyers and association members.

In comparison to large business corporations and many government agencies, the major comprehensive bar associations' financial resources are limited. As with many other nonprofit organizations, therefore, bar associations must rely heavily on nonfinancial resources, especially volunteer services, to achieve their goals. Fortunately for the bar associations, their members are from a skilled profession, so those who volunteer their services are generally highly skilled.

II. Organization

In addition to sufficient resources, bar associations need proper organization to carry on their activities most effectively. Poor organization results not only in waste and inefficiency but also increases the possibility of disruptive internal dissension. This Part examines the organizational structure common to most comprehensive bar associations. This structure, it is argued, significantly limits organizational effectiveness as it is conducive to weak leadership at the top and undue risk of inept performance below.

²⁶ Dues constitute 77% of the California Bar Association's income. See Budget: Courage or Folly, Cal. St. B.J., Jan. 1996, at 8.

²⁷ See ABA Inventory, *supra* note 2, 2.

²⁸ See *id.*

²⁹ Associations charge lower dues to some members, such as inactive members of the bar, lawyers recently admitted to practice, and student and associate members. See *id.* 3-V, 4-V.

³⁰ See Fla. Stat. Ann. ch. 1.7.3(a) (Harrison 1993).

³¹ See ABA Policy and Procedures Handbook, 1995-1996, at 53 (1995) [hereinafter ABA Handbook].

³² See Towery Works Toward Dues Decrease, Cal. St. B.J., Dec. 1995, at 5 (reporting bar president's goal to reduce 1997 dues and noting higher cost of medical society fees in California). One reason for the fact that the California State Bar's dues are relatively high is that the association pays a majority of the cost associated with the state's unique and expensive disciplinary system. For more on this system, see *infra* note 104.

³³ See James Towery, Bar's Chief Welcomes Member Vote, Cal. St. B.J., Nov. 1995, at 5 (discussing leadership sensitivity to bar association dues).

³⁴ A bar association's lack of influence with important figures and groups may hamper some of its reform efforts. For example, in the past, the lack of influence with local political figures and nonelite bar groups by the Association of the Bar of the City of New York obstructed the adoption of some important reforms. See Powell, *supra* note 1, at 193-211.

The major comprehensive bar associations typically follow a common organizational pattern, including membership-controlled governance, part-time unpaid members in leadership positions, and decentralized control over operations.³⁵ The full membership elects officers and a legislative body to head the association, and occasionally elects an executive board as well.³⁶ Significant control over association affairs, however, lies in semiautonomous subgroups of association members called sections and committees.³⁷ These subgroups have their own officers, and usually operate free from interference by the top leadership of the associations. The leadership usually does, however, [*200] have the power to appoint section officers. Sections have their own meetings, frequently have their own publications, and often initiate their own law reform proposals.

Most sections concentrate on one specialty field of law practice, such as criminal law, taxation, or litigation, and members of these sections are often specialists in their field. Other sections, however, focus on different issues, for instance the concerns of young lawyers,³⁸ senior lawyers,³⁹ minority lawyers,⁴⁰ or women lawyers;⁴¹ or the special concerns of solo and small firm practitioners,⁴² government lawyers,⁴³ or lawyers employed by corporate law departments.⁴⁴ In addition, there are sections on different aspects of professional practice such as law office management,⁴⁵ alternative dispute resolution,⁴⁶ and legal education and admission to the bar.⁴⁷

³⁵ In its basic outline, the governance structure of the ABA resembles the usual bar association format: officers, a house of delegates, a board of governors, and sections, committees, and other member subunits. See generally ABA Handbook, supra note 31, at 1-52. For a typical state bar association's governance structure, see Conn. B. Ass'n Const. arts. V-VIII.

³⁶ The executive board has authority to act for the legislative body on many matters when the latter is not in session.

³⁷ Some associations do not have member subgroups called sections but have committees that take over section functions. In addition to sections and committees, many associations have additional member subunits, such as task forces, boards, divisions, and commissions.

³⁸ Most bar associations make a special effort to attract young members. For example, the Chicago Bar Association's Young Members Section offers a variety of programs for its 11,000 members, including educational and career service seminars, athletic programs, social events, and a series of programs providing legal and nonlegal assistance to disadvantaged children in the Chicago area. See Elizabeth E. Lewis, Thoughts From the Chair, CBA Rec. (Chicago Bar Association), Jun.-Jul. 1995, at 46; Linda M. Rio, Thoughts From the Chair, CBA Rec. (Chicago Bar Association), May 1995, at 40; cf. Jeffrey M. Paskert, As Always Public Service is Primary Mission of Division, Nat'l L.J., Aug. 5, 1996, at C21 (discussing activities of ABA's Young Lawyers Division).

³⁹ For example, the Connecticut Bar Association's Senior Lawyers Section; the ABA's Senior Lawyers Division.

⁴⁰ For example, the Texas Bar Association's Committee on Opportunities for Minorities in the Profession.

⁴¹ For example, the California State Bar's Women in the Law Committee. On the activities of this committee, see Karen L. Bizzini, The State Bar Committee on Women in the Law, L.A. Law., Apr. 1995, at 13.

⁴² For example, the ABA's General Practice, Solo and Small Firm Section; the ABA's Standing Committee on the Solo and Small Firm Practitioner. On the efforts of these bodies, see Robert A. Stein, A Solo and Small Firm Majority, A.B.A. J., May 1996, at 105. For similar efforts by a local bar association, see Douglas M. Case, The Solo and Small Firm Practitioners Committee, CBA Rep. (Cincinnati Bar Association), June 1995, at 8.

⁴³ For example, the Hawaii State Bar Association's Government Lawyers' Section. On this section, see Government Lawyers' Section Annual Report, Haw. B.J., Feb. 1995, at 30.

⁴⁴ For example, the Connecticut Bar Association's Corporate Counsel Section.

⁴⁵ For example, the ABA's Section on Law Practice Management; the Wisconsin State Bar's Section on Law Office Management.

⁴⁶ For example, the State Bar of Michigan's Section on Alternative Dispute Resolution.

The principal purpose of most sections is to provide a forum in which association members with a special interest in a particular field of law may further their knowledge, develop contacts, and influence changes in the law. Sections are usually open to any association member upon payment of a separate section membership fee. Some of the larger associations have sections with more than one thousand members,⁴⁸ and many bar associations have [*201] twenty or more sections.⁴⁹ In general, a majority of association members belong to at least one section. Large sections carry out many of their activities through their own subcommittees.⁵⁰

Unlike sections, committees are typically composed of members appointed by the bar association leadership. The primary goal of these committees is rarely to benefit their members, but rather to provide services to the general membership or to some outside public group, to maintain cooperative relations with other professions or organizations, or to develop and encourage needed law reforms in a particular area. Typical committees include those on Professional Ethics, Continuing Legal Education, General Practice, Judicial Selection, Lawyer Referral Services, and Legal Aid.⁵¹

Major bar associations generally have as many or more committees as they do sections.⁵² The range of committees is usually wide and differs from association to association.⁵³ Committees are normally much smaller than sections, generally having fifty or fewer members. Many committees issue reports, have their own publications, and lobby or litigate to further their objectives. Many committees, especially those overseeing programs with considerable administrative work, have staff employees assigned to help them.

In addition to sections and permanent standing committees, major comprehensive bar associations have a miscellany of other organizational subunits. Occasionally, ad hoc task forces may be created to investigate a

⁴⁷ For example, the ABA's Legal Education and Admission to the Bar Section. This section, established in 1893, was the ABA's first. See generally Susan K. Boyd, *The ABA's First Section, Assuring a Qualified Bar* (1993).

⁴⁸ Each of the ABA's sections has more than 3000 members. See Stein, *Mission: Membership*, supra note 13. The largest section, Litigation, has more than 56,000 members, although the Young Lawyers Division, which is analogous to a section, has more than 107,000 members. See id. For reports on ABA section and division activities, see Paskert, supra note 38, at C3-C21. One of the larger state bar association sections is the Texas Bar Association's Litigation Section, with more than 7000 members. See John F. Nichols, *Litigation Section Report*, 58 Tex. B.J. 748 (1995).

⁴⁹ See ABA Inventory, supra note 2, 2. The Illinois State Bar Association and the State Bar of Texas have 37 sections each. See id. The ABA has 22 sections and five divisions, which are analogous to sections. See ABA Handbook, supra note 31, at 31-39. The ABA's divisions are Government and Public Sector Lawyers, Judicial Administration, Law Students, Senior Lawyers, and Young Lawyers. See id.

⁵⁰ The ABA's Litigation Section, for example, has 44 subcommittees, most of which focus on a particular litigation subpractice area. Section members may join subcommittees at no extra cost. For a list of section subcommittees, see Section Newsletter, *Litig. News*, Oct. 1994, at 5.

⁵¹ See ABA Handbook, supra note 31, at 39-51.

⁵² The Bar Association of San Francisco, for example, has 78 committees and 35 sections, while the Florida Bar Association has 56 committees and 20 sections. See ABA Inventory, supra note 2, 2. The Association of the Bar of the City of New York has 181 committees and no sections. See id.

⁵³ The range of bar association committees is illustrated by the Connecticut Bar Association. Among its 44 committees are the following: Alternative Methods of Dispute Resolution, Insurance Programs for the Bar, Law Office Management, Lawyers Concerned for Lawyers (aiding lawyers with substance abuse problems), Legal Assistants, Liaison With State Courts, Standards of Title, Gender Bias in the Profession, and Veterans' and Military Affairs. See Conn. B. Ass'n, *Annual Reports of Committees and Sections to the House of Delegates*, 1994-95 (1995) [hereinafter Connecticut Reports].

particular problem and report back to the leadership or take other action.⁵⁴ Units of staff employees reporting to the executive director or other full-time [*202] staff officials may be assigned to execute the more mundane administrative operations of an association, like making arrangements for association meetings and conferences, distributing association publications, maintaining current membership records, and billing members for annual dues and section fees. The largest associations, especially the ABA, have complex administrative staff structures for association operations.⁵⁵ This complexity is due to both the large size of memberships and the broad range of programs that these associations administer.

Many of the comprehensive bar associations have close ties with local, state, or national foundations. These foundations, which are funded largely by donations and bequests, often contribute substantially to bar association projects. The American Bar Endowment, for example, an organization established by the ABA to advance research and education on the administration of justice, is the principal funding source of the American Bar Foundation, the largest empirical research center on law and legal institutions in the United States.⁵⁶ Similar foundations have been established by other bar associations.⁵⁷

The American Bar Foundation is not as useful as it could be, either to the ABA or to bar associations generally. Bar associations need more accurate and complete data on the effectiveness of American legal institutions and the problems facing both American lawyers and the agencies and organizations with which American lawyers regularly interact. While some American Bar Foundation studies are of value to bar associations,⁵⁸ many are useless to the associations, whatever merit they may have as contributions to social science.⁵⁹ [*203]

While a significant organizational feature of the comprehensive bar associations is their independence, many of them maintain connections with other organized bar groups. The ABA, for instance, maintains cooperative ties with state and local bar associations - and even with some specialty bar associations. The association distributes

⁵⁴ The Louisiana State Bar Association's Task Force on Women in the Courts and the Mississippi Bar's Task Force on the Criminal Justice System are two examples. See Board of Governors Synopsis of Minutes, 42 La. B.J. 550 (1995); James L. Robertson & Michael H. Hoffheimer, Bar Committee Undertakes Rewrite of Criminal Code, Miss. Law., May-June 1994, at 12.

⁵⁵ The ABA, for example, has a Service Center to answer member inquiries, a Legal Technology Resource Center to aid members in effective use of office computers and other equipment, and a Member Advantage Program to give member discounts on many goods and services, from rental cars to fax machines. See Ten Smart Ways to Maximize Your ABA Membership, supra note 23. The ABA also administers a Fund for Justice and Education, which raises over \$ 20 million a year to aid ABA public service programs. See ABA Handbook, supra note 31, at 70-73.

⁵⁶ The annual budget of the American Bar Foundation in 1994-95 was \$ 4,587,681, of which \$ 3,090,500 came from the American Bar Endowment. See Report of the American Bar Foundation 39 (1995) [hereinafter ABF Report]. The American Bar Endowment gave the ABA's Fund for Justice and Education, its other grant recipient, \$ 1,590,500 during this period. Much of the Endowment's income comes from an insurance program it sponsors for ABA members, under which a portion of the insurance policy dividends revert to the Endowment. See ABA Handbook, supra note 31, at 73-74; Making a Difference: The American Bar Endowment, 1995, A.B.A. J., Nov. 1995, at 106.

⁵⁷ See, e.g., the Cincinnati Bar Foundation. This foundation was founded in 1961 by the Cincinnati Bar Association. See Cincinnati Bar Foundation Annual Report, 1994-1995, in Cincinnati Bar Association Report 23 (1995).

⁵⁸ Studies made under the auspices of the American Bar Foundation by Barbara Curran, Terence Halliday, John Heinz, and Robert Nelson have been particularly relevant to bar association concerns.

⁵⁹ See, for example, the recent listing of working papers, publications, and presentations by Foundation personnel in ABF Report, supra note 56, at 23-30. One measure of the foundation's social scientific bias is the disproportionate number of its research staff with Ph.D.s in history or the social sciences rather than law degrees. Of the 24 members of this staff in 1995, 15 were lacking in law degrees. See id. at 35. In addition, most of the foundation's visiting research fellows were social scientists. See id.

useful information and commentary ⁶⁰ to state and local bar groups and has both a division and a committee to promote and coordinate contact with state and local bar associations. ⁶¹ In addition, the ABA's legislative body, the House of Delegates, has representatives from state, larger local, and some specialty bar associations. ⁶² State bar associations also make outreach efforts, including meetings between state and local bar leaders, ⁶³ and newsletters and other publications directed to local bar association members.

Despite these efforts by the ABA and other associations, bar association activities remain poorly integrated and unduly duplicative. In addition, the exchange among associations of information pertaining to many matters of common concern is inadequate. Data on the legal profession and information on the successes and failures of organizational and programmatic innovations have often been insufficiently circulated. ⁶⁴ As a result of these problems, the associations are less efficient and influential than they might be, particularly in education programs directed at lawyers and the public, and in law reform efforts at the federal level.

One form of bar association organization, the unified state bar, has become a contentious issue in some states where it has been instituted. Many lawyers in unified bar states are opposed to mandatory membership due to positions taken by the associations on public and professional issues, the regulatory restrictions and obligations imposed on members, and the amount of annual dues that the associations charge. ⁶⁵ Opposition to the unified bar format has [*204] been particularly strong in California and Wisconsin. In the spring of 1996, pursuant to a legislative directive, a plebiscite of all California lawyers was held to determine if the unified form should be retained. ⁶⁶ Sixty-five percent of those voting supported the unified bar. ⁶⁷ In 1988, the Wisconsin Supreme

⁶⁰ Such materials include The Bar Leader, a bimonthly periodical published by the ABA, and the Bar Activities Inventory, a compilation of detailed statistical data about state and local bar associations. The most recent version of the latter was issued in 1995. See ABA Inventory, *supra* note 2.

⁶¹ The division is the Division for Bar Services. The committee is the Bar Activities and Services Committee. On the division, see ABA Handbook, *supra* note 31, at 9; and on the committee, see *id.* at 40.

⁶² Each state bar association and each local bar association with more than 2000 members is entitled to a minimum of one delegate. The largest state associations, however, can have up to six delegates. See ABA Const. 6.4. The specialty bar associations and other organizations entitled to delegates are listed in *id.* 6.8. The representation of other organizations in the House of Delegates was authorized in 1936 in response to calls for a federation of bar associations similar to that in the medical profession. See Hurst, *supra* note 8, at 291-92.

⁶³ A number of states have a separate bar presidents' committee or council composed of local bar presidents and chaired by the state bar president or president-elect. See, e.g., Report of the Connecticut Council of Bar Presidents, in Connecticut Reports, *supra* note 53, at 42.

⁶⁴ ABA meetings and ABA publications like The Bar Leader fill some of this need for the exchange of information, but much more is needed.

⁶⁵ For an excellent analysis of the unified bar concept, see Theodore J. Schneyer, The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case, 1983 Am. B. Found. Res. J. 1. Schneyer concludes that the unified bar should be abolished. Wisconsin's experience with the unified form, he asserts, demonstrates that too many difficulties arise in trying to maintain "an organization that is at once a voluntary private association, a closed shop union, and a public agency." *Id.* at 87. He claims that the form has led to uncertainty about the Wisconsin bar association's powers, has required the state supreme court to devote too much time and resources to internal bar disputes and bar housekeeping problems, and has worsened court-bar relations. See *id.* at 96. For other views critical of the unified bar format, see Bradley A. Smith, The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession, 22 Fla. St. U. L. Rev. 35 (1994); John Carson, Reinventing the State Bar of California, L.A. Law., May 1995, at 11; Edmund D. Kahn, A Unified Bar, Con: How the Mandatory State Bar Union Spends Our Money, Ariz. Att'y, Nov. 1995, at 22; Stephanie J. Johnston, Members to Unified Bars: Get Back to Basics, B. Leader, July-Aug. 1993, at 5.

⁶⁶ See 1995 Cal. Legis. Service ch. 782, 2 (West). The outcome of the plebiscite was advisory only.

Court suspended mandatory lawyer membership in its state bar after a federal district court ruled that such membership violated the First Amendment.⁶⁸ Despite considerable resistance among lawyers, the Wisconsin court reinstated the unified bar in 1992⁶⁹ after the United States Supreme Court upheld the constitutionality of this form in *Keller v. State Bar* of California.⁷⁰ Opposition to the unified bar concept has surfaced recently in other states as well.⁷¹

The problems of unified bars have been aggravated by judicial decisions. Principal among these is the Court's 1990 decision in *Keller*, which, while upholding the constitutionality of the form, held that the First Amendment prohibits a unified bar from using a member's dues to fund political or ideological activities with which the member disagrees.⁷² The Court held that "[*205] a unified association may only use member dues to fund activities germane to regulating the legal profession and to improving the quality of legal services, as these activities are consistent with the purposes of the unified form."⁷³ Efforts to comply with *Keller* by many of the unified bar associations have caused confusion, expense, and increased dissatisfaction with the unified format.⁷⁴

⁶⁷ See Nancy McCarthy, Lawyers Vote 2 to 1 to Keep California's State Bar Unified, Cal. St. B.J., July 1996, at 1. Fifty-one percent of eligible lawyers voted. See *id.* Before the plebiscite, there was a spirited, often acrimonious, campaign. For the arguments on both sides of the issue, see Carson, *supra* note 65, and Nancy McCarthy, Forces Mobilize to Decide Bar's Fate, Cal. St. B.J., Dec. 1995, at 17.

⁶⁸ See *Levine v. Supreme Court*, 679 F. Supp. 1478 (W.D. Wis. 1988) (holding unified bar unconstitutional).

⁶⁹ See *In re State Bar*, 485 N.W.2d 225 (Wis. 1992); see also Trayton L. Lathrop, A Comment on the June 17, 1992 Compulsory Bar Association Opinions of the Wisconsin Supreme Court, 40 Fed. B. News & J. 288 (1993). On opposition within the Wisconsin bar to reunification, see Smith, *supra* note 65, at 68-70. See also Nancy McCarthy, In Wisconsin, The Battle to Kill Mandatory Bar Fails, Cal. St. B.J., Dec. 1995, at 1 (discussing long history of controversy in Wisconsin over mandatory state bar).

⁷⁰ *496 U.S. 1* (1990); see also *Gibson v. Florida Bar*, 502 U.S. 104 (1991), denying cert. to *906 F.2d 624* (11th Cir. 1990).

⁷¹ See, e.g., Robert Cecil Flick, 1994 Oregon State Bar Economic Survey, 36 Law Off. Econ. & Mgmt. 362, 377 (1995) (reporting that 28% of Oregon lawyers surveyed would not join bar association if membership was voluntary); Stephanie J. Johnston, Members Continue to Sing "The Unified Bar Blues," B. Leader, May-June 1995, at 8 (discussing proposed legislation to deunify Rhode Island Bar Association); Annual Lawyer's Survey, Miss. Law., Jan.-Feb. 1995, at 30 (reporting survey results in which almost one-third of Mississippi lawyers opposed unified bar).

⁷² See *Keller*, 496 U.S. at 5. For different evaluations of *Keller*, see David F. Addicks, Renovating the Bar After *Keller v. State Bar* of California: A Proposal for Strict Limits on Compulsory Fee Expenditure, 25 U. San Fran. L. Rev. 681 (1991), David Luban, The Disengagement of the Legal Profession: *Keller v. State Bar* of California, 1990 Sup. Ct. Rev. 163, James B. Lake, Note, Lawyers, Please Check Your First Amendment Rights at the Bar: The Problem of State-Mandated Bar Dues and Compelled Speech, 50 Wash. & Lee L. Rev. 1833 (1993). For a review of other case law on unified bar associations, see John S. Skilton, Litigation Against the Unified Bar, B. Leader, Sept.-Oct. 1994, at 12.

⁷³ See *Keller*, 496 U.S. at 14.

⁷⁴ Some unified bar associations have sought to comply with *Keller* by raising non-dues funds or by introducing dues reduction options. In *Crosetto v. State Bar*, 12 F.3d 1396 (7th Cir. 1993), the Seventh Circuit upheld a Wisconsin rule enabling any state bar member to withhold the percentage of bar dues that the state bar asserts are for political or ideological activities. On post-*Keller* developments in Wisconsin, see John S. Skilton, President's Perspective, To Speak or Not to Speak, Wis. Law., Oct. 1995, at 5. In Florida and Michigan, the state bar associations adapted to *Keller* by prohibiting a range of bar lobbying and other activities. See Smith, *supra* note 65, at 50-58.

Proponents of the unified bar continue to maintain that unified bars can provide more and better service to the legal profession and the public than voluntary bars can provide because they possess more funds and greater authority. See, e.g., Carson, *supra* note 65, at 12; Harriet L. Turney, A Unified Bar, Pro: What's Right About It?, Ariz. Att'y, Nov. 1995, at 23. But see Larry J. Rector, Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis,

In sum, the major comprehensive bar associations, whether unified or not, are not organized in a way that maximizes their efficiency or efficacy. The structure and nature of the highest positions in the organization mean that the top leadership is often weak, while the lack of coordination between different associations results in duplication and inefficiency. It remains to be seen how these issues affect the particular programs of each association, if at all. Part III, therefore, examines and evaluates the kinds of programs usually pursued by major comprehensive bar associations.

III. Programs

The major comprehensive bar associations seek to fulfill their policy objectives through an extraordinary number and variety of programs relating to the justice system generally, and to the legal profession in particular. While the bar associations have the potential for great influence, their programs have mixed records of success.

The large number and variety of programs conducted by the major comprehensive bar associations reflect the associations' perception of themselves as representatives and guardians of the entire legal profession. In addition, the associations' objective of building and sustaining large and [*206] inclusive memberships contributes to the range of programs offered.⁷⁵ Indeed, even the comprehensive associations that formerly were elitist and restrictive in their memberships are now seeking to become more inclusive by attracting members from all professional specialties and kinds of law offices and by increasing the portion of their memberships composed of women and ethnic and racial minorities.⁷⁶

The number and range of bar association programs is best revealed by a brief review of the kinds of programs most commonly offered. The next few Sections, therefore, highlight the kinds of programs offered and examine how effectively bar associations achieve their policy goals. In particular, these Sections examine legal education, professional conduct, the unauthorized practice of law, legal services for the poor and persons of moderate means, litigation, and substantive law reform.

A. Legal Education

All major comprehensive bar associations are heavily involved in the post-admission legal education of lawyers. Some of these educational programs are open to lawyers generally while others are available only to the offering association's members. Continuing legal education programs are widely offered and available to any lawyer who

66 Neb. L. Rev. 762, 768-69 (1987); Schneyer, *supra* note 65, at 96-106; James Towery, A "Yes" Vote Means a Loss of Power, Cal. St. B.J., May 1996, at 7; James Towery, Scare Tactics, or Real Loss of Control?, Cal. St. B.J., Apr. 1996, at 12.

⁷⁵ In addition to the programs they offer, all the major comprehensive bar associations offer some goods and services - such as office equipment, telephone service, automobile rentals, and equipment leasing - at reduced cost. Some state bar associations have helped form insurance companies to provide malpractice insurance to lawyers on favorable terms. See, e.g., Thomas V. Flaherty, President's Page, Sources of Parental Pride, W. Va. Law., Sept. 1995, at 4 (describing formation in late 1980s of Attorneys Liability Protection Society by consortium of state bar associations); see also 1995 Report of the Professional Liability Fund, Ore. St. B. Bull., Nov. 1995, at 33 (commenting on mandatory malpractice insurance provided to all active Oregon lawyers). A few bar associations, mostly large local associations, also provide substantial law library facilities and restaurant facilities to their members.

⁷⁶ On the evolution of one major local bar association, the Association of the Bar of the City of New York, toward a larger and more inclusive membership, see generally Powell, *supra* note 1. As the number of female lawyers has rapidly increased, major comprehensive bar associations have made special efforts to fill leadership posts and other positions of responsibility with women. Roberta Cooper Ramo, for example, became the first female president of the ABA when she was elected in 1995, and women led the Connecticut Bar Association for three successive years, from 1992 to 1995.

Many associations have also sought to publicize and discourage gender discrimination within the legal profession generally. See, e.g., ABA Comm'n on Women, Elusive Equality: The Experiences of Women in Legal Education (1996); ABA Comm'n on Women in the Prof'n, Unfinished Business: Overcoming the Sisyphus Factor (1995). Similar efforts have been made with respect to racial discrimination in the profession. See, e.g., The Arizona Minority Counsel Program: Melting the Plexiglass Ceiling, Ariz. Att'y, Feb. 1996, at 46.

wishes to attend. ⁷⁷ A course fee is usually charged for these programs. ⁷⁸ CLE credit is given in those jurisdictions with [*207] CLE requirements, and credit toward certification granted in jurisdictions with lawyer certification programs. The subjects of instruction vary greatly, but they often cover developments in an important field of law or useful techniques in a particular area of practice. ⁷⁹ The traditional CLE approach offers practical, hands-on information and advice likely to help in representing clients. Supplementary instructional materials are distributed in many CLE courses; some courses also make available instructional audiotapes or videotapes. ⁸⁰ While many of these materials can be used for self-study, CLE offerings commonly have one or more class instruction sessions. Most instructors are experienced practitioners, though occasionally a law professor or judge will act as a teacher. Classes are generally given in lecture form and only rarely are examinations administered. Occasionally, bar associations have offered special CLE programs for those willing to take on pro bono cases but lacking a background in poverty law matters.

In the thirty-eight states with CLE requirements, all but a few exempted lawyers must regularly take CLE courses. ⁸¹ In most of these states, the requirement calls for fifteen hours of instruction each year in a wide range of approved courses. ⁸² Much of the mandatory CLE instruction is given by or [*208] under the auspices of bar associations. In recent years many CLE programs have been offered by the ABA, in conjunction with state and local bar associations, through closed-circuit television at numerous sites around the country. Some associations

⁷⁷ See ABA Inventory, *supra* note 2, 3-VII, 4-VII (compiling statistical data on bar association CLE programs). Bar associations do not have a monopoly on CLE; other organizations, like the American Law Institute, and some law schools offer their own CLE courses as well. See Lawrence Osborne, CLE Business: Academic Centers and the Sun-Blessed Cashing In, *Nat'l L.J.*, Feb. 19, 1996, at 15.

⁷⁸ See Susan O. Scheutzow, Quality CLE: A Tradition of Our Bar Association, *Cleveland B.J.*, June-July 1995, at 16 (stressing that CLE fees are major source of bar association income). The Los Angeles Bar Association recently instituted an innovative arrangement allowing members to attend most association CLE programs for an annual charge. See John Carson, President's Page, Meeting Our Members, CLE Needs, *L.A. Law.*, Oct. 1994, at 9.

⁷⁹ In 1995 and 1996, for example, the New York State Bar Association held over 225 CLE seminars on 42 subjects at various locations in the state. These seminars covered such subjects as estate planning and will drafting; the commencement of civil litigation; basic criminal practice; the litigation of automobile accident cases; New York gains, transfer and mortgage taxation; federal and state commercial litigation; and legal aspects of trade in the Americas. See NYSBA: Resources for Professional Development, in NYSBA Report to the Membership 10 (pamphlet), included in *N.Y. St. B.J.*, July-Aug. 1996, at 32.

⁸⁰ The State Bar of Wisconsin publishes books on Wisconsin practice and is also the nation's largest producer of video training tapes for law practice management, law office training, and client education. In a recent ten-year period, the association distributed 25,000 videotapes, many to law firms outside Wisconsin. See *Wis. Law.*, Nov. 1994, at 40 (advertisement). More typical of state bar association self-study programs is that of the Connecticut Bar Association, which offers nearly fifty packages of videotapes and supplemental written materials on such topics as drafting contracts, estate administration, title searching, elder law practice, and accounting for lawyers. A complete list of offerings appears in Connecticut B. Ass'n, Continuing Legal Education Self Study Packages (1995).

⁸¹ See Rocio T. Aliaga, The Framing of the Debate on Mandatory Continuing Legal Education: District of Columbia Bar's Consideration of MCLE, 8 *Geo. J. Legal Ethics* 1145, 1145 n.1 (1995). In some states, failure to fulfil the mandatory CLE requirement results in suspension. See, e.g., No CLE, No License, *Tenn. B.J.*, Jan.-Feb. 1995, at 8 (reporting suspension of 62 Tennessee lawyers, many working outofstate, for failure to fulfil CLE requirement).

⁸² The Idaho Bar Association, for example, approves programs for which mandatory CLE credit will be given. A total of 932 CLE programs throughout the United States has been approved for credit in Idaho. See *Advocate* (Idaho Bar Association), Sept. 1995, at 22 (listing CLE programs). In some states, lawyers are required to take instruction in professional responsibility as part of their CLE programs. See *CLE J. & Reg.*, Mar. 1995, at 17. All law schools accredited by the ABA are required to teach professional responsibility as well. See *Standards for Approval of Law Schools Standard 302* (1991). In California, lawyers who have been disciplined are required to attend an eight-hour ethics course and to take an examination, unless otherwise ordered by the state supreme court. See *Discipline Now Requires Ethics School*, *Cal. St. B.J.*, Nov. 1995, at 29.

also administer specialist lawyer certification programs with instructional and examination components.⁸³ In addition, some bar associations have established mentoring programs so that young lawyers can seek the help of experienced practitioners in establishing their practices.⁸⁴

While additional lectures, workshops and educational publications are not formally included as CLE offerings, bar associations do provide them for members. Advanced specialist education and annual membership meetings with educational sessions are testimony to the importance of education to bar associations. Indeed, expanding member knowledge of the law and legal institutions is a major objective of bar associations whether through formal CLE programs or otherwise.

This objective extends to future lawyers as well, through association involvement with law school education. A bar association will occasionally provide moot court or other instructional assistance to law schools, and some offer financial assistance to these educational institutions.⁸⁵ The most significant aspects of bar associations' involvement with law schools, however, are the ABA's long-standing program of setting law school accreditation standards, approving schools that are in accord with these standards, and making periodic accreditation inspections of most schools.⁸⁶ In most states, [*209] statute or court rules mandate that only graduates of ABA approved law schools may take the bar examination and become qualified to practice law.⁸⁷

Recently, the ABA has become involved in another significant effort to influence law school education. The impetus for this endeavor came from proposals made in a 1992 book-long report by an ABA task force.⁸⁸ The report, often

⁸³ See generally Standards for Accreditation of Specialty Certification Programs for Lawyers (1992). Specialist certification of lawyers resembles board certification of physicians: While certification does not usually provide for exclusive practice rights, it can aid in attracting clients. In California, where certification is available in eight fields, there are 3000 certified lawyer specialists. See 449 Attorneys Pass Exam to Be Certified as Specialists, Cal. St. B.J., Feb. 1996, at 3. In Florida, where the state bar allocates certification responsibility to specialist committees, there are 11 specialist fields. See Standing Policies of the Board of Legal Specialization and Education, Board Certified Lawyers, Fla. B.J., Sept. 1995, at 47.

⁸⁴ See, e.g., Freddie Baird, A Step in the Right Direction: Mentor Program for Lawyers, 58 Tex. B.J. 144, 144-46 (1995) (discussing mentoring program of State Bar of Texas); Ken Howard, Mentoring Program Will Aid Transition from Law Student to Lawyer, Advocate (Idaho Bar Association), Apr. 1995, at 6 (discussing similar program in Idaho).

⁸⁵ In Georgia, for example, a state bar committee holds orientation sessions on professionalism for first-year students in four Georgia law schools. See President's Report, Ga. St. B.J., Fall 1994, at 48.

⁸⁶ The ABA House of Delegates makes accreditation decisions based on the recommendations of the Section on Legal Education and Admissions to the Bar. See ABA Const. 45.9. For an historical review of ABA law school accreditation by the association's consultant on legal education, see James P. White, The American Bar Association Law School Approval Process: A Century Plus of Public Service, [30 Wake Forest L. Rev. 283 \(1995\)](#).

The ABA's accreditation standards were recently revised following an antitrust consent decree. See Standards for Approval of Law Schools (1996). The consent decree placed limits on the number of law school personnel that can serve on the accreditation committee, prohibited the ABA's setting faculty salary requirements, and required a review of accreditation requirements in six areas. See Henry J. Reske, One Antitrust Battle Over, A.B.A. J., Aug. 1996, at 44; Richard C. Reuben, Accreditation on Review, A.B.A. J., Oct. 1995, at 107. The ABA's involvement, however, remains significant. See generally Andy Portinga, Note, ABA Accreditation of Law Schools: An Antitrust Analysis, [29 U. Mich. J.L. Reform 635 \(1995-96\)](#).

⁸⁷ See generally ABA Section of Legal Educ. & Admission to the Bar & Nat'l Conference of Bar Exam'rs, Comprehensive Guide to Bar Admission Requirements, 1995-96 (1995) [hereinafter Bar Admission Guide].

⁸⁸ See The Task Force on Law Schools and the Profession, Legal Education and Professional Development - An Education Continuum (1992) [hereinafter The MacCrate Report]. In 1994, the ABA House of Delegates recommended the implementation of the task force's report. See Richard C. Reuben, Changing Legal Education, A.B.A. J., Apr. 1994, at 13.

In 1996, another ABA body, following a survey of law school ethics and professionalism courses and programs, made detailed recommendations for enhanced professionalism training at the undergraduate, law school, and post-admission levels. See ABA

referred to as the MacCrate Report after its chairman, distinguished New York City lawyer and former ABA president, Robert MacCrate, has generated extensive discussion among practicing lawyers and law teachers. Among other things, the report strongly urges that law schools give more attention and care to developing lawyering skills and values in the training of their students. It also suggests that more consideration be given to skills and values instruction in the law school accreditation process. While the report is consistent with a growing movement toward increased emphasis on skills training by law schools, it has elicited a negative reaction from many in the law school community.⁸⁹ There is an often unstated opinion among many law teachers that the practicing bar should not dictate to law schools what or how to teach.

Bar associations do not restrict their legal educational efforts to lawyers and law students. Many associations, for example, have instituted informational programs directed to elementary, high school or college students,⁹⁰ designed to increase respect for the law and legal institutions.⁹¹ And there are programs directed to community groups or the public at large intended to provide free [*210] advice and assistance over the telephone.⁹² One of the main objectives of these education programs is to respond to media attacks on the legal profession that the associations consider baseless.⁹³

Bar association educational efforts directed at licensed lawyers are of mixed educational value. They clearly help to fill a major need, as legal education should not end with law school. But the programs typically offered by bar associations are most helpful to lawyers recently admitted to practice or to those in the process of shifting specialties. Except as a means of keeping up with new developments, there is little that the experienced practitioner can learn from the usual how-to-do-it kind of educational presentation. Other weaknesses in bar association education are that many presentations lack thorough preparation, and little time is accorded to meaningful audience participation. Despite the advantages of continuing education as a bar association funding device or as a public relations ploy intended to show that lawyers are keeping current with new developments in the law, making CLE mandatory has not expanded the learning process effectively. Where it exists, the benefits of required attendance are often undermined by the limited number of required credit hours and the limited nature of learning demands.

In the other highly important sphere of legal education, education by the law schools, bar association influence is quite limited. Although historically the ABA was a powerful force in establishing higher admission, staffing, library, and teaching standards for American law schools,⁹⁴ as the law schools became more powerful and the

Section of Legal Educ. & Admission to the Bar, Teaching and Learning Professionalism (1996) [hereinafter Teaching and Learning Professionalism]. The Committee viewed its report as an extension of The MacCrate Report. See id. at 1.

⁸⁹ See, e.g., John J. Costonis, The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education, 43 J. Leg. Ed. 157 (1993); Phoebe A. Haddon, Education for a Public Calling in the 21st Century, [69 Wash. L. Rev. 573 \(1994\)](#); Carrie Menkel-Meadow, Narrowing the Gap by Narrowing the Field: What's Missing From the MacCrate Report - of Skills, Legal Science and Being a Human Being, [69 Wash. L. Rev. 593 \(1993\)](#); see also The MacCrate Report: Building the Educational Continuum, Conference Proceedings (Joan S. Howland & William H. Lindberg eds., 1994) (compiling papers from 1993 conference sponsored by ABA, University of Minnesota and West Publishing Co.); Symposium on the 21st Century Lawyer, [69 Wash. L. Rev. 505 \(1994\)](#).

⁹⁰ See ABA Inventory, supra note 2, 3-XII, 4-XII.

⁹¹ See, e.g., Julie Gamble Warner, Getting a Foot in the Door, Tenn. B.J., Jan.-Feb. 1995, at 13 (describing Tennessee program where lawyers work with primary and secondary school teachers to develop law-related teaching material).

⁹² See ABA Comm'n on Nonlawyer Practice, Nonlawyer Activity in Law-Related Situations 101-03 (1995); ABA Inventory, supra note 2, 3- XII, 4-XII. Some associations also publish brochures for lawyers to give to clients to help answer common legal questions. See, e.g., La. B.J., Aug. 1995, at 132 (listing Louisiana State Bar Association brochures); Maine B.J., Mar. 1995, at 83 (listing Maine State Bar Association brochures).

⁹³ See Roberta Cooper Ramo, President's Message, Let's Not Take It Anymore, A.B.A. J., Mar. 1996, at 6.

⁹⁴ See generally Bar Admission Guide, supra note 87; Albert J. Harno, Legal Education in the United States 122-60 (1953); Robert B. Stevens, Law School: Legal Education in America From the 1850s to the 1980s, at 92-130, 172-90, 205-31 (1983).

Association of American Law Schools became their primary representative body, the influence of the ABA in legal education declined. In sustaining law school accreditation standards generally favored by the **Association** of American Law Schools and most of its members, however, the ABA continues to be a valuable ally. But the significance of the ABA's accreditation criteria may be weakened by a recent antitrust consent decree, resulting in a possible cutback in standards by a number of law schools.⁹⁵

Overall, the effectiveness of the comprehensive **bar associations** in furthering legal education varies. The **associations** provide a significant number of helpful educational opportunities of which many practicing lawyers take advantage to improve their knowledge and ability. But the educational quality [*211] of offerings differs considerably. The published and taped materials generally are excellent; many of the in-person lecture presentations are mediocre. As they now stand, mandatory CLE programs are a waste of time for many of those required to attend.

B. Professional Conduct

Comprehensive **bar associations** have also given extensive attention to encouraging and enforcing ethical and professionally responsible behavior by members of the **bar**. Different programs exist for dealing with different aspects of this concern. The Model Rules of Professional Conduct, drafted by an ABA commission, the Kutak Commission, and adopted in 1983 by the ABA House of Delegates, set forth in considerable detail how lawyers should behave in a broad range of professional situations.⁹⁶ With some variation from state to state, the Model Rules have been adopted as rules of court in most states.⁹⁷ A minority of states still follow an earlier set of model standards, the Model Code of Professional Responsibility, which was adopted by the ABA in 1969.⁹⁸

Questions have arisen in a host of situations as to what the Rules and the Code mean and how they should be applied. A considerable body of case law has developed construing the Rules and the Code, and a few provisions have been held unconstitutional.⁹⁹ To clarify ambiguous sections of the Rules or Code, it is a common practice for the professional ethics committees of **bar** [*212] **associations** to give written interpretive opinions.¹⁰⁰ These

⁹⁵ See supra note 86.

⁹⁶ See generally ABA Ctr. for Prof'l Responsibility, *The Legislative History of the Model Rules of Professional Conduct* (1987); Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, in *Lawyers' Ideals/Lawyers' Practices* 95-143 (Robert L. Nelson et al. eds., 1992).

The ABA has also adopted a Model Code of Judicial Conduct, setting forth ethical obligations for judges. This code has been adopted as rules of court in most states. See generally Lisa L. Milord, *The Development of the ABA Judicial Code* (1992).

In addition to the ABA's model codes of conduct, some specialist **bar associations** have adopted codes of their own to deal with ethical issues encountered in their specialty practices. See, e.g., *Bounds of Advocacy, Standards of Conduct* (American Academy of Matrimonial Lawyers 1991). See generally Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for Various Specialties*, 7 *Geo. J. Legal Ethics* 149 (1993); Mark H. Aultman, *Cracking Codes*, 7 *Geo. J. Legal Ethics* 735 (1993) (responding to Sporkin).

⁹⁷ Many of the changes made to the Model Rules in the course of adoption were proposed by state or local **bar associations**.

⁹⁸ California is an exception, having adopted neither the Model Rules nor the Model Code. In many ways, however, the California Rules of Professional Conduct resemble the Model Rules and Model Code.

Where adopted, provisions of the Rules and the Code (except those stated to be aspirational only) are binding on lawyers and those who violate them are subject to disciplinary sanctions. See Charles W. Wolfram, *Modern Legal Ethics* 49-53 (1986).

⁹⁹ Restrictions on lawyer advertising and client solicitation have been especially vulnerable to constitutional attack. See, e.g., *In re Primus*, 436 U.S. 412 (1978) (solicitation); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (advertising).

¹⁰⁰ See Mark F. Howard, *The Bar Association Ethics Committee: Beyond the Ivory Tower*, N.H. B.J., June 1995, at 23-25. In California, the state **bar** operates a confidential ethics hotline for lawyers; in 1994, the service received 20,000 inquiries. See Cal. St. B.J., Aug. 1995, at 37.

opinions, though not binding, are frequently cited favorably by the courts. Moreover, if the opinions are adhered to, those who requested them are unlikely to be charged with unprofessional conduct. The usual sanctions available for Rule or Code violations are disbarment, suspension from practice for a period of time, or reprimand.¹⁰¹ These sanctions are often publicized in bar journals and official court reports.

As the Model Rules stress what lawyers must do rather than what might be more ethically desirable, the ABA and some of the other comprehensive bar associations have prepared creeds of professionalism to guide further lawyers in their conduct with clients and others.¹⁰² The creeds are much shorter than the Model Rules or Model Code and, unlike the latter, are generally considered aspirational rather than obligatory. They have had much less impact on lawyers' behavior than the Model Rules or Model Code. The creeds raise problems due to the lack of unanimity about ideal lawyer behavior.¹⁰³ In addition, it is not clear whether the creeds will remain fully voluntary or whether the courts will consider them relevant authority in disciplinary cases, thereby giving them a mandatory aura.

The major comprehensive bar associations have not only been heavily involved in developing and interpreting standards of professional conduct for lawyers, but many of the associations also play significant roles in enforcing the standards. In some states, including some of the largest, the disciplinary process is principally a state bar association responsibility, although the state's high court may and commonly does determine the final sanction on appeal.¹⁰⁴ [*213] In these states, complaint processing, investigation, prosecution, and initial determination of sanctions are state bar association responsibilities.¹⁰⁵ These tasks constitute one of the associations' most expensive operations.¹⁰⁶ The current trend, however, is for lawyer disciplinary enforcement functions to be performed by government bodies rather than by the bar. These government bodies screen and investigate complaints, and in cases with sufficient evidence of a serious infraction, seek disbarment or other sanctions from

¹⁰¹ For statistics on lawyer disciplinary sanctions, see *infra* note 137.

¹⁰² About half the state bar associations, many local associations, and even some courts have promulgated creeds of this sort, often referred to as pledges or oaths. See Rob Atkinson, A Dissenter's Commentary on the Professionalism Crusade, *74 Tex. L. Rev.* 259, 278 n.74 (1995). For the ABA Pledge of Professionalism, approved in 1988, see Thomas D. Morgan & Ronald D. Rotunda, 1996 Standards of Professional Responsibility 623-33 (1996).

¹⁰³ See Atkinson, *supra* note 102, at 303-17.

¹⁰⁴ In California, although ultimate authority over lawyer discipline is in the state supreme court, much of the responsibility for the lawyer disciplinary process is in the State Bar of California, a unified state bar association. See Cal. Sup. Ct. R. 951 to 954 (1996); William T. Gallagher, Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar, *22 Pepp. L. Rev.* 485, 593-96 (1995). California is unique in having a separate state bar court. The court has seven full-time judges and its own review panel. See *Cal. Bus. & Prof. Code* 6085.5, 6086.65 (West 1990). Alaska and Florida are among the other states with substantial bar association responsibility for lawyer disciplinary enforcement. See Alaska B.R. 10 (1986); Fla. Sup. Ct. R. 3 to 3.2 (1993). In a few states, the state bar's board of governors retains adjudicative functions. See Lawyer Regulation for a New Century 93 (Report of the ABA Comm'n on Evaluation of Disciplinary Enforcement 1992) [hereinafter McKay Comm'n Report]. In Mississippi, the state bar association has developed an innovative consumer assistance program to deal with minor complaints against lawyers, the more serious complaints proceeding to traditional disciplinary institutions. See Glen Waddle, The Mississippi Bar Consumer Assistance Program - How It Works, *Miss. Law.*, Mar.-Apr. 1995, at 12.

¹⁰⁵ This, of course, does not extend to some kinds of lawyer misconduct, like criminal prosecutions, contempt matters, and malpractice cases, in which bar associations generally have no involvement. Many state bar associations are involved with malpractice insurance, however. See *infra* notes 123-124 and accompanying text.

¹⁰⁶ The State Bar of California spends more money on disciplinary matters than any other state bar association. In 1996, for example, 70% of its \$ 46 million budget was earmarked for lawyer discipline. See Budget: Courage or Folly, *supra* note 26. By comparison, in Oregon, an adjoining unified bar state, only 32.4% of bar members' dues is allocated to lawyer discipline. See Celene Green, A Glance at Your OSB, *Or. St. B. Bull.*, Nov. 1995, at 5 (insert).

the courts. Whether or not **bar associations** are deeply involved in lawyer disciplinary enforcement, however, most states fund their lawyer disciplinary systems almost entirely from assessments on lawyers.¹⁰⁷

Over the past twenty-five years or so, the ABA has had considerable influence on the expansion and restructuring of the lawyer disciplinary process. This influence has come largely through the reports and recommendations of two highly respected ABA bodies, the Clark Committee¹⁰⁸ and the McKay Commission,¹⁰⁹ and from the ABA's Model Rules for Lawyer Disciplinary Enforcement.¹¹⁰ The ABA's proposals have helped persuade government authorities in some states to provide lawyer disciplinary systems ultimately controlled by the judiciary, not by legislatures or **bar associations**,¹¹¹ and enforced by full-time disciplinary counsel.¹¹² In many states, however, the existing systems still fall short of what the ABA considers desirable. [*214]

There are other programs commonly carried on by comprehensive **bar associations** that also concern the professional behavior of lawyers. These programs aim either at reducing possibilities of professional misconduct or at reducing its adverse consequences. The programs include character and fitness screening of applicants to the **bar**, aiding lawyers with substance abuse problems, providing client security funds, and sponsoring lawyer malpractice insurance. **Bar associations** have a long history of investigating the moral fitness of those seeking admission to the **bar**.¹¹³ The purpose of these screening procedures is to exclude from admission those who are perceived as professional conduct risks. In some states, these character and fitness investigations are conducted by state **bar association** representatives.¹¹⁴ The question of the requisite moral fitness to practice law has occasionally raised difficult questions. Courts have had to consider, for example, whether admission should be denied based on past affiliation with the Communist Party,¹¹⁵ on evidence of sexual misconduct with minors,¹¹⁶ or on suspension from law school because of plagiarism.¹¹⁷

¹⁰⁷ See McKay Comm'n Report, supra note 104, at 90.

¹⁰⁸ The Clark Committee, which made its report in 1970, gained its name from its chairman, former United States Supreme Court Justice Tom C. Clark. The committee's formal name was the Special Committee on Evaluation of Disciplinary Enforcement.

¹⁰⁹ The commission was called the McKay Commission after its initial chairman, Robert McKay. The commission's formal name was the Commission on Evaluation of Disciplinary Enforcement. In its appendix, the commission's report reviewed the considerable progress made in implementing the Clark Committee's recommendations. See McKay Comm'n Report, supra note 104, at 89-129.

¹¹⁰ These rules were adopted by the ABA House of Delegates in 1989, replacing Standards for Lawyer Disciplinary and Disability Proceedings (1979) and Model Rules for Lawyer Disciplinary Enforcement (1985). Also, an ABA commission has developed written Standards for Imposing Lawyer Sanctions (1986).

¹¹¹ There is resistance in some states, however, to reducing substantially **bar association** responsibility for the lawyer disciplinary system. In Washington, for example, a joint task force of the bench and **bar** recently rejected a proposal, made by an ABA audit team, to shift responsibility for lawyer discipline from the **bar association** to the state supreme court. See Lindsay T. Thompson, Refining Lawyer Discipline in Washington: A Multifaceted Approach, Wash. St. B. News, Aug. 1995, at 15.

¹¹² In California, there are more than 60 such counsel; in New York, there are more than 30; and Florida and Pennsylvania each have more than 20. See McKay Comm'n Report, supra note 104, at 90.

¹¹³ See Wolfram, supra note 98, at 858-64; Deborah L. Rhode, Moral Character as a Professional Credential, [94 Yale L.J. 491 \(1985\)](#).

¹¹⁴ In Michigan, for example, the State **Bar Association** Committee on Character and Fitness conducts the investigations and reports its admission recommendations to the State Board of Law Examiners. On request of an applicant, the board has authority to review any adverse recommendations. See Mich. Sup. Ct. R. 15 (1996).

¹¹⁵ See, e.g., [Konigsberg v. State Bar of California, 353 U.S. 252 \(1957\)](#) (holding that mere membership in Communist Party does not disqualify candidate from admission to practice law); cf., e.g., [Konigsberg v. State Bar of California, 366 U.S. 36 \(1961\)](#) (holding that refusal to answer questions concerning membership in Communist Party may justify refusal of admission). See generally Rhode, supra note 113, at 566-70.

Many **bar associations** also make efforts to identify and provide peer support and counseling referrals to lawyers with substance abuse problems.¹¹⁸ These programs not only help save the careers of many impaired lawyers, but they reduce the risks of professional misconduct. Client protection funds, available to reimburse clients for lawyer misconduct, like misappropriation of client property, also exist in nearly all states.¹¹⁹ In many instances, state **bar associations** administer these funds, financing them with **bar** dues or lawyer assessments.¹²⁰ Most of these funds have caps on total payment per claim, ranging from \$ 5000 to \$ 200,000.¹²¹ Many also have caps on how much will [*215] be paid per lawyer against whom claims are made, ranging from \$ 5000 to \$ 800,000.¹²²

Client security funds raise a troublesome question: Why should lawyers who behave pay for lawyers who do not? This, of course, is a question raised by any form of mandated insurance coverage. Insurance marketed explicitly as lawyer malpractice insurance is, in fact, available everywhere in the United States, often sponsored by state **bar associations**.¹²³ This insurance coverage is optional in all states except Oregon, where it is mandatory for lawyers practicing within the state.¹²⁴

In approaching problems of professional conduct, **bar associations** have been influenced in recent years by a widely prevalent view among lawyers that the **bar** is losing its sense of professionalism.¹²⁵ Just what is meant by professionalism is often vague, but a variety of common behavioral traits have been cited for evidence of its decline.¹²⁶ Matters often stressed include the frequent lack of civility in lawyers' relations with opposing counsel and

¹¹⁶ See, e.g., [Vaughn v. Board of Bar Exam'rs, 759 P.2d 1026 \(Okla. 1988\)](#) (denying admission to **bar** applicant because of alleged sexual relations with 14-year-olds when applicant was their teacher, although criminal charges had been dismissed).

¹¹⁷ See, e.g., [In re Zbiegien, 433 N.W.2d 871 \(Minn. 1988\)](#) (holding single incident of plagiarism in law school not sufficient to deny applicant admission).

¹¹⁸ See, e.g., State **Bar** of Texas Annual Committee Reports, 58 Tex. B.J. 732, 737 (1995) (reporting that Texas Lawyers' Assistance Program has helped more than 1500 attorneys recover from substance abuse problems since 1989).

¹¹⁹ See ABA Ctr. for Prof'l Responsibility, Client Protection Fund Survey at iii (1993). As of 1993, all states except Maine and North Dakota had client protection funds. See *id.*

¹²⁰ See *id.* at iv-v.

¹²¹ See *id.* at vi.

¹²² See *id.*

¹²³ See ABA Standing Comm. on Lawyers' Prof'l Liab., Lawyers Professional Liability Update, 1995, at 1.1-1.30 (1995).

¹²⁴ See [Or. Rev. Stat. 9.080\(2\)\(a\)](#) (1995) (authorizing state **bar association** to require that active members carry professional liability insurance). Current cost of this coverage is \$ 1800 per year per lawyer. See Nicole A. Cunitz, Note, Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion?, 8 Geo. J. Legal Ethics 637, 642 (1995).

¹²⁵ See, e.g., " ... In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism (ABA Comm'n on Prof'lism Report 1986), reprinted in [112 F.R.D. 243 \(1986\)](#) [hereinafter Comm'n on Prof'lism Report]; Teaching and Learning Professionalism, *supra* note 88; Warren E. Burger, The Decline of Professionalism, [63 Fordham L. Rev. 949 \(1995\)](#); Nancy J. Moore, Professionalism Reconsidered, 1987 Am. B. Found. Res. J. 773 (reviewing Comm'n on Prof'lism Report, *supra*); Edward F. Shea, The President's Corner, Professionalism, Wash. St. B. News, Mar. 1996, at 15.

¹²⁶ See, e.g., Comm'n on Prof'lism Report, *supra* note 125, at 261; Michael J. Kelly, Lives of Lawyers: Journeys in the Organization of Practice 12-18 (1994); Robert L. Nelson & David M. Trubek, Arenas of Professionalism: The Professional Ideologies of Lawyers in Context, in Lawyers' Ideals/Lawyers' Practices, *supra* note 96, at 177; Timothy P. Terrell & James H. Wildman, Rethinking "Professionalism," [41 Emory L.J. 403 \(1992\)](#). For criticisms of Terrell and Wildman, see Richard C. Baldwin, "Rethinking Professionalism" - And Then Living It!, [41 Emory L.J. 433 \(1992\)](#); Jennifer Gerarda Brown, Rethinking "The Practice of Law," [41 Emory L.J. 451 \(1992\)](#); Monroe H. Freedman, The Professional Project: A Response to Terrell and Wildman, [41 Emory L.J. 473 \(1992\)](#); Robert E. Rodes, Jr., Professionalism and Community: A Response to Terrell and Wildman,

judges; overly aggressive and confrontational tactics in litigation; and excessive concern with profitability, causing both a decrease in client loyalty and internal law firm collegiality and an increase in advertising and other promotional efforts. According to these critics, law practice increasingly resembles business in its goals, operations, and sense of service. Many within the profession believe that bar associations have an obligation to help counter this trend,¹²⁷ [*216] and fulfilling this obligation has become a significant motivation for bar association attempts to encourage and enforce more professionally responsible behavior. Some associations even have a separate committee to help improve lawyer professionalism.¹²⁸

The promulgation and interpretation of standards of professional conduct are among the bar associations' most successful and commendable activities, despite the problems and controversies pertaining to these programs. The standards themselves, most notably the Model Rules of Professional Conduct, are, generally speaking, a fair balance between competing interests and values. Most of the credit for this goes to the ABA and its drafting commission. While there are, of course, many ambiguities in the Model Rules and the Model Code, this is inherent in any extensive written compendium of legal requirements. Moreover, the ambiguities are gradually being reduced through interpretive opinions of courts and bar association committees. There also is significant opposition to some Rule and Code provisions on policy grounds, like the provisions (and supporting case law) that permit advertising by lawyers,¹²⁹ those pertaining to whistleblowing when a lawyer is aware of wrongdoing within a client organization,¹³⁰ and those requiring that lawyers disclose misconduct by fellow lawyers.¹³¹

Efforts to enforce the Rules and the Code have encountered problems and, indeed, these efforts have been severely criticized.¹³² The effectiveness of enforcement is restricted because of the cost and a desire to avoid intrusive inquiries. The process of uncovering violations is, therefore, limited largely to [*217] complaints volunteered by clients and others.¹³³ Most of these complaints come from clients dissatisfied with their lawyers' fees, or some other aspect of the lawyer-client relationship. When reviewed by screening personnel (who, in many

[41 Emory L.J. 485 \(1992\)](#); Jack L. Sammons, Jr., & Linda H. Edwards, Honoring the Law in Communities of Force: Terrell and Wildman's Teleology of Practice, [41 Emory L.J. 489 \(1992\)](#).

¹²⁷ See, e.g., Comm'n on Prof'lism Report, *supra* note 125, at 271-90 (recommending that bar associations help in training newly-admitted law associates on ethical issues that arise in practice); Teaching and Learning Professionalism, *supra* note 88, at 25-31. But see Ted Schneyer, Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study, 35 Ariz. L. Rev. 363 (1993) (arguing that resort to idiom of professionalism can have negative consequences for formulation of public policy on acceptable conduct by lawyers and law firms).

¹²⁸ See, e.g., ABA Handbook, *supra* note 31, at 49 (summarizing purposes of Standing Committee on Professionalism); Annual Report: Committees of the Florida Bar, Fla. B.J., June 1996, at 58 (reporting activities of Professionalism Standing Committee).

¹²⁹ See Model Rules of Professional Conduct Rule 7.2; Model Code of Professional Responsibility DR 2-101 to 2-103. Many lawyers oppose lawyer advertising because they assume that it contributes significantly to negative public perceptions of the legal profession. Recent studies, however, have shown that this widely prevalent assumption is incorrect. See William F. Hornsby, Jr. & Kurt Schimmel, Regulating Lawyers Advertising: Public Images and the Irresistible Aristotelian Impulse, 9 Geo. J. Legal Ethics 325, 351-57 (1996) (summarizing results of ABA Commission on Advertising study).

¹³⁰ See, e.g., Monroe Freedman, Understanding Lawyers' Ethics 201-05 (1990) (critically evaluating Model Rules of Professional Conduct Rule 1.13); Stephen Gillers, Model Rule 1.13c Gives the Wrong Answer to Corporate Counsel Disclosure, 1 Geo. J. Legal Ethics 289 (1987) (same).

¹³¹ See, e.g., Michael J. Burwick, Note, You Dirty Rat! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct, 8 Geo. J. Legal Ethics 137 (1994) (criticizing Model Rules of Professional Conduct Rule 8.3).

¹³² See Richard L. Abel, American Lawyers 143-50, 156-57 (1989); McKay Comm'n Report, *supra* note 104, at xv-xx. Professor Rhode has been one of the most severe critics of the lawyer disciplinary enforcement process. For a summary of her criticisms, see Deborah L. Rhode, Institutionalizing Ethics, [44 Case W. Res. L. Rev. 665, 694-700 \(1994\)](#).

¹³³ See McKay Comm'n Report, *supra* note 104, at 99-100. In most states, however, disciplinary counsel is authorized unilaterally to initiate investigation of lawyer misconduct. See *id.*

states, are bar association committee members), most complaints are found to be groundless.¹³⁴ This screening process, however, has been criticized as being inefficient, overly secretive, and unduly lenient.¹³⁵ Inefficiencies, where they exist, are largely the result of staffing inadequacies, including undue reliance on lawyer volunteers or a dearth of paid employees.

Critics who say that the complaint screening process is overly secretive point to the fact that the names of the lawyers who have been charged and the charges against them are commonly not made public unless further enforcement action is pursued. It is also frequent practice not to disclose names and charges if a private reprimand alone is given. The rationale for these secretive practices is that publicizing complaints found to be groundless or indicating only very minor infractions can unfairly damage the reputation, and thereby the practice, of the lawyer charged.¹³⁶

Critics who say that the disciplinary enforcement process is too lenient point to the comparatively small number of lawyers each year who receive serious sanctions and the large percentage of complaints that are dismissed or result in only a private reprimand.¹³⁷ The assumption is that these figures are strongly indicative of leniency. Moreover, this ostensible leniency is often attributed to favoritism allegedly inherent in an enforcement process that relies so heavily on professional self-regulation.¹³⁸ Self regulation, it is claimed, [*218] leads to self-serving results. These changes, however, have not been proven. Moreover, it may be argued that a large measure of professional self-regulation leads to more effective control due to the added authority and influence of respected persons inside the profession.

The contributions of the major comprehensive bar associations, particularly the ABA, in drafting and interpreting standards of lawyer professional conduct have been very creditable. The associations' record in enforcing the standards is less commendable, although in most states their role in enforcement, and hence their responsibility for the process, has been greatly curtailed in recent years.

C. Unauthorized Practice of Law

Lawyers have a substantial, but limited, legal monopoly over the right to practice law, and the major comprehensive bar associations have been active in attempting to protect and expand that monopoly. In almost

¹³⁴ The McKay Commission found that some jurisdictions dismiss up to 90% of all disciplinary complaints against lawyers because the conduct alleged does not violate disciplinary rules. See *id.* at xv. More detailed data are available for Illinois, where enforcing lawyer discipline is a state commission responsibility. During 1995, of 6845 lawyer disciplinary matters acted on in the preliminary stage, 6493 (or 95%) were closed after initial review or investigation failed to reveal provable misconduct. See Attorney Register & Disciplinary Comm. of the Illinois Supreme Court, Annual Report 8 (1995). In only 277 of the remaining matters were formal charges filed. See *id.* The state supreme court, the only body with authority to order sanctions more severe than reprimands, sanctioned only 160 lawyers, 54 with disbarment. See *id.* at 11. In total, seven percent of all registered Illinois lawyers were the subject of complaints in that year. See *id.* at 6.

¹³⁵ See *supra* note 132.

¹³⁶ See McKay Comm'n Report, *supra* note 104, at 34-39. The commission recommended that such proceedings be open and public only when the disciplinary body finds probable cause to proceed. See *id.* at 33. But see Roger C. Cramton, Delivery of Legal Services to Ordinary Americans, [44 Case W. Res. L. Rev. 531, 613 \(1994\)](#) (recommending that disciplinary proceedings be open and public from time complaint is filed).

¹³⁷ See, e.g., Abel, *supra* note 132, at 156. In any given year, only about three hundred lawyers are disbarred nationally, although several hundred more resign from the bar voluntarily when charges are pending against them. See ABA Standing Comm. on Prof'l Discipline & Ctr. for Prof'l Responsibility, Statistical Report, Sanctions Imposed in Public Discipline of Lawyers 1985-1989, at 5 (1990). Each year, approximately one thousand lawyers are suspended for some period of time. See *id.*; see also *supra* note 134.

¹³⁸ See, e.g., Rhode, *supra* note 132, at 697.

every state, the monopoly is backed by statutes or by court rules prohibiting the unauthorized practice of law. In many states, unauthorized practice is a crime.¹³⁹

What is considered to be "the practice of law" is not always clear, but it generally includes representing others before courts and administrative agencies and providing legal advice or legal drafting services to others. Examples of lay conduct judicially held to constitute illegal practice of law include legal advice by an accountant to a client unrelated to auditing, bookkeeping or tax return preparation;¹⁴⁰ preparation of legal documents by a real estate broker in connection with the conveyance of real estate;¹⁴¹ and legal advice by the owner of a secretarial service to persons seeking uncontested divorces.¹⁴²

The principal rationale for excluding lay individuals and organizations from practicing law is that consumers of legal services need to be protected from the possible incompetence and dishonesty of lay legal service providers.¹⁴³ Not only are consumers insufficiently informed to determine whether lay providers are competent and honest, the risks are too great to allow them to make that choice. The usual arguments given against lawyers' monopoly privileges are that the monopoly results in clients paying higher than necessary legal fees; [*219] that availability of substantial numbers of lay legal service providers could relieve the unmet legal service needs of low- and moderate-income persons; and that where lay providers are operating, legally or illegally, their clients appear to be satisfied with the services they are receiving.¹⁴⁴

The lawyers' monopoly over the right to practice law has often been under attack as unjustified or overbroad. Among the many troublesome issues raised by the monopoly are whether lay legal service providers would subject clients to such greater risks of incompetence, conflict of interest, and dishonesty that their exclusion from practicing law would be justified; whether any such risks would be sufficiently reduced by licensing lay providers, perhaps with demanding educational and examination prerequisites; and whether the cost to clients for satisfactory services would be less in most instances if made available by lay providers practicing independently. Stated differently, the basic issues are whether or to what extent the market for legal services should be open to lay providers. Would lay competition result in lawyers becoming more efficient and providing as good, or better, legal services at lower prices than without lay competition? Or would lay competition result in forcing out lawyers entirely from some important fields of law practice?

Based on available data, answers to the above questions can adequately be answered only by conjecture. However, it is clear that lay practice does not pose the same threat to all kinds of law practices. The threat is lowest to the kinds of practices engaged in by big law firms representing major business enterprises and individuals of great wealth than it is to the practices of lawyers representing ordinary people in such matters as real estate conveyances, administering decedents' estates, organizing small businesses, divorce and child custody cases, and tort claims.

¹³⁹ See generally ABA Comm'n on Nonlawyer Practice, Nonlawyer Activity in Law-Related Situations, A Report With Recommendations 16-32 (1995) [hereinafter Nonlawyer Practice Report]; Geoffrey C. Hazard, Jr., et al., The Law and Ethics of Lawyering 936-56 (2d ed. 1994); Wolfram, *supra* note 98, at 824-49.

According to Terence Halliday, the legal profession was more concerned with maintaining its monopoly before the profession was firmly established and could take its market position for granted. See Halliday, *supra* note 1, at 347-56. This position assumes that monopoly benefits for much of the bar are more firmly established than currently is true.

¹⁴⁰ See [In re Bercu, 78 N.Y.S.2d 209, 216-18 \(App. Div. 1948\)](#).

¹⁴¹ See [Chicago Bar Ass'n v. Quinlan & Tyson, 21 N.E.2d 771 \(Ill. 1966\)](#).

¹⁴² See [Florida Bar v. Furman, 451 So. 2d 808, 809-10 \(Fla. 1984\)](#).

¹⁴³ See Quintin Johnstone & Dan Hopson, Jr., Lawyers and Their Work 174 (1967).

¹⁴⁴ See *id.* at 175-76; Roger Hunter & Robert Klonoff, A Dialogue on the Unauthorized Practice of Law, 25 Vill. L. Rev. 6, 10-15 (1979); Deborah L. Rhode, The Delivery of Legal Services by Nonlawyers, 4 Geo. J. Legal Ethics 209, 229-331 (1990).

Bar association efforts to protect or expand the lawyers' monopoly have included lobbying pressure to obtain statutes or court rules supportive of the monopoly, instigating litigation against alleged unauthorized practitioners to force termination of asserted illegal practices, and even agreements with other occupational **associations** in furtherance of the monopoly. In addition, the Model Rules of Professional Conduct and Model Code of Professional Responsibility expressly prohibit lawyers from engaging in or assisting others in engaging in the unauthorized practice of law.¹⁴⁵ **Bar association** efforts in relation to the unauthorized practice of law are usually centered in unauthorized [*220] practice committees, which are frequently assisted by paid **association** counsel.¹⁴⁶

Beginning about twenty years ago, the ABA and many of the other major comprehensive **bar associations**, took a much less active approach to the unauthorized practice of law.¹⁴⁷ This decline in activity against unauthorized practice by so many major comprehensive **bar associations** is somewhat anomalous, since preserving and expanding the market share for its constituents - by reliance on legal protections when feasible - is such an important function of most professional and trade **associations**. The retreat seems to have been a reaction to rising popular opposition to monopolies generally, including those that are legally authorized. Furthermore, attempts by **bar associations** to protect the **bar's** monopoly can result in damaging media campaigns by the **bar's** opponents.¹⁴⁸ In addition, there is some principled opposition within the profession to most monopolistic privileges granted lawyers.¹⁴⁹ **Bar associations** have also encountered antitrust problems in some of their monopoly-related practices.¹⁵⁰

In the past few years, there has been a revival of concern about unauthorized practice in some of the major comprehensive **bar associations**, including the ABA.¹⁵¹ Much of this renewed concern is over whether and how extensively lay legal technicians should be licensed to practice law independently. The term "legal technicians" refers to what in effect, are lay paralegals legally authorized to practice law on their own. There is growing interest-group support and some popular support for permitting legal technicians to practice law independently as a means of expanding the availability of legal services at acceptable cost. Licensing legal technicians to practice law independently is [*221] very controversial.¹⁵² Licensing proposals have generated considerable support in some

¹⁴⁵ See Model Rules of Professional Conduct Rule 5.5; Model Code of Professional Responsibility DR 3-101(A), (B).

¹⁴⁶ Some unauthorized practice committees will, on request, give opinions on whether or not certain conduct constitutes unauthorized practice. See, e.g., Report of Committee on Unauthorized Practice of Law, in Connecticut Reports, *supra* note 53, at 62.

¹⁴⁷ In 1977, for example, the ABA ceased publication of the Unauthorized Practice News, a periodical that had served for many years as an important resource for **bar** groups trying to prevent unauthorized practice. As recently as 1992, only 22 state **bar associations** had active unauthorized practice committees. See State Legislative Clearinghouse Briefing Book: Unauthorized Practice of Law 96 (1992).

¹⁴⁸ See Rhode, *supra* note 144, at 219.

¹⁴⁹ See, e.g., Barlow F. Christensen, The Unauthorized Practice of Law: Do Good Fences Make Good Neighbors - Or Even Good Sense, 1980 Am. B. Found. Res. J. 159; Rhode, *supra* note 132, at 728; Rhode, *supra* note 144, at 222-33.

¹⁵⁰ Law school accreditation and minimum fee schedules are two areas in which **bar associations** have encountered antitrust problems. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (holding **bar association** minimum fee schedules subject to antitrust laws); *supra* note 86 (discussing recent antitrust consent decree restricting ABA's accreditation standards). On Goldfarb, see Wolfram, *supra* note 98, at 40-42.

¹⁵¹ In Florida, for example, the state **bar** recently doubled the budget of its unauthorized practice of law department to almost one million dollars annually. See John A. DeVault III, President's Page, Trusts, Adoptions, Divorces - Cheaper Without a Lawyer, Fla. B.J., May 1996, at 8. In Arizona, the revival of concern about unauthorized practice is evidenced by the state **bar's** aggressive lobbying effort for a criminal unauthorized practice statute. See Michael D. Kimerer, President's Message, UPL - The Fight Goes On, Ariz. Att'y, Dec. 1995, at 8.

¹⁵² Compare Robert L. Ostertag, Nonlawyers Should Not Practice, A.B.A. J., May 1996, at 116, with Deborah L. Rhode, Meet Needs With Nonlawyers, A.B.A. J., Jan. 1996, at 104. See generally Carl M. Selinger, The Retention of Limitations on the Out-of-Court Practice by Independent Paralegals, 9 Geo. J. Legal Ethics 879 (1996).

state legislatures¹⁵³ and it appears that support efforts will increase. The threat to lawyers' practices, and arguably to the quality of available legal services, is so substantial that it seems inevitable that bar associations will become increasingly involved in this escalating controversy. The ABA's renewed concern over the lay practice problem manifested itself in the ABA's appointment in 1992 of a diverse, sixteen-member Commission on Nonlawyer Practice to "conduct research, hearings and deliberations to determine the implications of nonlawyer practice for society, the client and the legal profession."¹⁵⁴ Special attention was given to the work of paralegals and legal technicians. The commission issued a detailed report in 1995 extensively surveying and analyzing nonlawyer activity in law-related situations but with a vague and indecisive set of recommendations.¹⁵⁵

Comparison of the ABA's involvement in monopoly-related problems with that of its parallel organization in medicine, the American Medical Association (AMA), is instructive. In many respects the two organizations are strikingly similar. Established over one hundred years ago, they both are voluntary national organizations with less than half of those in their profession as members, and are similarly organized and run by their members with considerable help from employee support staff.¹⁵⁶ They have many comparable programs on professional education, professional conduct, and furthering the public interest through advancing knowledge and advocating legal controls on matters within their respective fields of expertise.¹⁵⁷ Both also have [*222] concerns in the professional monopoly area: protecting their occupation's share of the professional services market and control over that market. But it is on this monopoly issue that the approaches of the two associations diverge. The ABA, in recent decades, has generally shown little interest in political advocacy as a means of protecting its profession's monopoly. The AMA, however, has been heavily involved in such advocacy. The AMA has lobbied strenuously, mostly at the federal level, on issues which are perceived to threaten its profession, such as Medicare, national health insurance, and managed health care,¹⁵⁸ often resulting in damaging criticism from within and without the organization.¹⁵⁹ In its lobbying, the AMA commonly has opposed government regulation of the medical profession and favored solo practice by physicians, with private practitioner autonomy in doctor-patient relations.¹⁶⁰ The

¹⁵³ See, e.g., Nonlawyer Practice Report, *supra* note 139; Quintin Johnstone, Lawyer Obligations to Moderate-Income Persons, 21 Cap. U. L. Rev. 845, 847-49 (1992); Kathleen Eleanor Justice, Note, There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law, 44 Vand. L. Rev. 179 (1991). Most of the recent state bills to permit legal technicians to provide legal services have, however, died in committee. See Nonlawyer Practice Report, *supra* note 139, at C-1.

¹⁵⁴ Nonlawyer Practice Report, *supra* note 139, at xiii.

¹⁵⁵ See *id.* at 73-158. Among other things, the commission recommended that the role of traditional paralegals be expanded, that the ABA review its policies and standards to promote further the delivery of affordable legal services, and that states adopt an analytical approach to the regulation of nonlawyer activity, measuring such variables as the risk of harm and the ability of consumers to evaluate qualifications. For a summary of the commission's recommendations, see *id.* at 11-12.

¹⁵⁶ Of the approximately 650,000 licensed physicians in the United States, about 38% are AMA members. See Howard Wolinsky & Tom Brune, The Serpent on the Staff: The Unhealthy Politics of the American Medical Association 5-6 (1994). In addition, the AMA has about 32,000 medical student members. See *id.* The AMA has a support staff of about 1200. See *id.* at 8. For comparable figures on the legal profession, see *supra* notes 13-14 and accompanying text.

¹⁵⁷ For discussions of the AMA, see generally Frank D. Campion, The AMA and U.S. Health Policy Since 1940 (1984); James A. Johnson & Walter J. Jones, The American Medical Association and Organized Medicine: A Commentary and Annotated Bibliography (1993); Paul Starr, The Social Transformation of American Medicine (1982); Wolinsky & Brune, *supra* note 156. For an excellent (but unsigned) overall analysis of the AMA as of the early 1950s, see The American Medical Association: Power, Purpose, and Politics in Organized Medicine, 63 Yale L.J. 938 (1954).

¹⁵⁸ See Campion, *supra* note 157, at 253-83, 305-28; Wolinsky & Brune, *supra* note 156.

¹⁵⁹ See Johnson & Jones, *supra* note 157, at 189-90. Controversy over the AMA's efforts to prevent the adoption of Medicare was particularly troublesome for the organization. See Campion, *supra* note 157, at 253-83. For the "scars of conflict" created by AMA efforts to block an earlier compulsory health insurance program, one endorsed by President Truman, see James G. Burrow, AMA: Voice of American Medicine 373-74 (1963).

¹⁶⁰ See Johnson & Jones, *supra* note 157, at 189; Starr, *supra* note 157, at 146.

AMA has spent large sums in lobbying and operates one of the nation's largest-spending political action committees, the American Medical Political Action Committee (AMPAC).¹⁶¹ The AMA has suffered major political losses in its lobbying efforts, but over time has adjusted to these losses, changing its position when necessary, and often been astute in moving from an aggressive confrontational approach to one of adapting and negotiating.¹⁶²

For the ABA, the AMA's political advocacy experience provides some lessons. It shows that vigorous political intervention by a profession's leading national association is inevitable if the profession's monopoly privileges are very seriously threatened. Such intervention is not only financially expensive to the association and its affiliates, but also can lead to troublesome dissension within the association and decline in its public reputation. Moreover, while the association will lose on some issues over time, these losses can be limited if the association is willing to negotiate, adapt, and compromise rather than hold out for all it wants when defeat seems likely. However reluctant it is now, the [*223] ABA may again be drawn back into political advocacy on the unauthorized practice issue. If this happens, the AMA's experience indicates the commitment needed and the risks involved. Self-serving political advocacy can be rewarding to a professional association and those it represents. Such advocacy can also be damaging.

D. Legal Services for the Poor and Persons of Moderate Means

In principle, major comprehensive bar associations have strongly supported providing needed legal services to the poor at little or no cost to clients. The associations consider access to the legal system by all, rich or poor, an essential feature of a democratic order.¹⁶³ There have been some association lobbying successes on legal aid and public defender funding, especially the ABA's strong stance with Congress on behalf of the Legal Services Corporation. These efforts undoubtedly helped considerably in obtaining continued funding for this beleaguered agency and in preventing the agency's termination.¹⁶⁴ Some state bar associations have also engaged in lobbying efforts to support legal aid.¹⁶⁵ Pro bono representation is another program of legal services to the poor that bar associations have helped foster. They have done so by publicizing the need for such services, conducting recruitment of pro bono volunteer attorneys, and providing training in poverty law for pro bono volunteers.¹⁶⁶

¹⁶¹ See Wolinsky & Brune, *supra* note 156, at 68-93, 226-39. In 1993 and 1994, AMPAC made political contributions totaling almost two million dollars, more than almost any other political action committee. See Sven Steinmo & Jon Watts, *Its the Institutions Stupid! Why Comprehensive National Health Insurance Always Fails In America*, 20 J. Health Politics, Pol'y & L. 329, 364 (1995). In the first half of 1996, the AMA spent \$ 8.5 million in lobbying at the federal level, on Medicare, Medicaid, tobacco regulation, health care, and liability reform. See *Lobbyists Spent More than \$ 400 Million in 1st Half of '96*, AP, Sept. 23, 1996, available in LEXIS, Nexis Library, US News File.

¹⁶² See Rosemary Stevens, *American Medicine and the Public Interest* 532 (1971); Wolinsky & Brune, *supra* note 156, at 217-18; see also *id.* at 44-67 (discussing AMA's profitable adjustment following significant political loss in fight over adoption of Medicare).

¹⁶³ See generally *Civil Justice: An Agenda for the 1990s* (1991) [hereinafter *Civil Justice*] (compiling papers from conference sponsored by ABA and Tulane Law School on access to legal system by poor and persons of moderate means); Findings of the Comprehensive Legal Needs Study (1994) (reporting results of national interview study on legal needs of low- and moderate-income households, conducted by ABA Consortium on Legal Services and the Public and Temple University Institute for Survey Research).

¹⁶⁴ See Rhonda McMillion, *LSC Down But Not Out*, A.B.A. J., Aug. 1996, at 118.

¹⁶⁵ Leaders of the Texas State Bar, for example, lobbied members of the Texas delegation to Congress to preserve federal funding for legal services. See *LSC: Fighting for Survival*, 58 Tex. B.J. 500 (1995). In Tennessee, the state bar association lobbied successfully for a litigation tax to help fund legal aid. See Harris A. Gilbert, *President's Perspective, Lawyers Should Remain Leaders in the Legislative Process*, Tenn. B.J., May-June 1995, at 3.

¹⁶⁶ See *Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Moderate Means* (1996). For statistical data on pro bono programs, see ABA Inventory, *supra* note 2, 3-XIII, 4-XIII.

The Connecticut Bar Association has been particularly successful in recruiting lawyers to give some of their time to pro bono representation. Two thousand volunteer pro bono attorneys take part in its "Law Works for People" program and receive free

Mandatory pro bono has been extensively debated within bar associations but generally rejected.¹⁶⁷ It was, however, approved in early [*224] discussion drafts of the ABA Model Rules of Professional Conduct.¹⁶⁸ There has been a scattering of other bar association efforts helpful in providing more or better legal representation to the poor, such as administering Interest on Lawyer Trust Account (IOLTA) programs that provide funding for legal aid;¹⁶⁹ advocating better procedures for court appointment of attorneys for indigent parties when such appointments are necessary;¹⁷⁰ and pro se training programs for litigants who wish to represent themselves.¹⁷¹

The major comprehensive bar associations have also given some attention to the legal representation problems of another sizable under-represented group: low- and moderate-income persons with incomes above what would qualify them for legal aid. It is recognized that many in this low- to moderate-income range fail to seek legal representation. This usually is due to those in need not knowing that they have a legal problem, not knowing how to select a suitable lawyer, apprehension over likely legal fees, or an inability to pay substantial legal fees absent contingent fee possibilities. Bar associations frequently make some attempts to increase representation opportunities for these people, most often by operating lawyer referral programs in which inquirers seeking help in finding a lawyer are directed to appropriate lawyers for the type of problem involved, commonly with assurance that there will be no fee or only a low fixed fee for the initial consultation.¹⁷² Inquiries normally are by telephone to a central location and referrals made only to lawyers willing to participate in the program.¹⁷³ Obviously these programs can be of benefit not only to the potential clients, most of whom are in the low- to moderate-income range, but also to the lawyers receiving referrals. The ABA has adopted model rules for [*225] lawyer referral services¹⁷⁴ and collects and publishes detailed statistics on such services.¹⁷⁵ Some bar associations have

training in family law, Social Security law, and other common legal fields of pro bono practice. See Pro Bono Committee Report, in Connecticut Reports, *supra* note 53, at 57.

¹⁶⁷ No state bar association has imposed a mandatory pro bono requirement on its members. See Hazard et al., *supra* note 139, at 1043-49; Kendra Emi Nitta, An Ethical Evaluation of Mandatory Pro Bono, *29 Loy. L.A. L. Rev.* 909 (1996). A few local bar associations, however, have done so. See John R. DeSteiguer, Comment, Mandatory Pro Bono: The Path to Equal Justice, *16 Pepp. L. Rev.* 355, 365 (1989). In 1990, the Association of the Bar of the City of New York endorsed a proposal to require that each New York lawyer donate a minimum of 40 hours every two years to pro bono representation, with certain cash or service substitutes possible. The state's highest court rejected the proposal. See Roger C. Cramton, Mandatory Pro Bono, *19 Hofstra L. Rev.* 1113, 1114-15 (1991).

¹⁶⁸ See Stephen Gillers & Roy D. Simon, Jr., Regulation of Lawyers: Statutes and Standards 317 (1996). In one of its few aspirational provisions, the Model Rules provide that a lawyer should "aspire" to render at least 50 hours of pro bono services per year. See Model Rules of Professional Conduct Rule 6.1. In addition to Rule 6.1, the ABA has adopted several resolutions supporting pro bono on a voluntary basis. See ABA Handbook, *supra* note 31, at 263.

¹⁶⁹ See Arthur J. England, Jr., Modern Day Alchemy: Interest on Lawyers' Trust Accounts, in Civil Justice, *supra* note 163, at 561. Most states have IOLTA programs and the ABA operates a clearinghouse to provide information and technical assistance to them. Besides Oregon, California and North Carolina, however, the IOLTA programs are usually administered by bar foundations rather than bar associations.

¹⁷⁰ See, e.g., Michigan Bar Committee on Defender Systems and Services Report, 73 Mich. B.J. 792 (1994).

¹⁷¹ See, e.g., Pro Bono In Iowa, Iowa Law., Oct. 1994, at 6 (discussing efforts by Iowa Bar Association to educate domestic abuse victims and lay counselors about available legal steps). While persons may represent themselves, a nonlawyer officer or employee is generally prohibited from representing corporations and other organizations in court. See Wolfram, *supra* note 98, at 803-06.

¹⁷² There are at least 325 such referral programs nationwide, most of which are operated or sponsored by state or local bar associations. See ABA Standing Comm. on Lawyer Referral and Info. Servs., Characteristics of Lawyer Referral Programs, 1990 Survey Results 1-2 (1991) [hereinafter Lawyer Referral Survey]; see also ABA Inventory, *supra* note 2, 3-XIII, 4-XIII.

¹⁷³ The referral volume in some programs is tremendous. In 1995, for example, the program operated by the Florida Bar Association made nearly 95,000 referrals. See Report of the Lawyer Referral Service Committee, Fla. B.J., June 1996, at 74.

¹⁷⁴ Model Supreme Court Rules Governing Lawyer Referral Services (1993).

also tried to help low- and moderate-income people with their legal problems through programs informing them about common legal problems. ¹⁷⁶ A few bar associations even provide free clinics staffed by volunteers for low- and moderate-income persons. ¹⁷⁷

Other than lobbying support for legal aid and helping to add more legal services through pro bono programs they sponsor, the major comprehensive bar associations have had little impact on expanding the availability and quality of legal services for those in poverty. Underlying this problem are basic questions of public policy as to who should bear the financial responsibility for providing needed legal services to those in poverty. Should lawyers provide these services for free or should the cost be borne by government or the broader charitable community? If lawyers must assume the financial obligation, can and should they pass the cost back to their other clients through higher fees so that much of the client community ultimately pays? And if lawyers ultimately should carry much of the cost, what should be the responsibilities, if any, of bar associations in requiring lawyers to bear this cost? These questions have proven troublesome to the bar associations. The associations' approach has largely been limited to pushing for continued government funding of legal aid organizations and urging lawyers voluntarily to provide some no-fee legal representation to the poor. ¹⁷⁸ American society is in a quandary as to what kinds of aid should be available to those in poverty, on what terms, and who should bear the cost of this aid. Needed legal services are merely a part of this much larger dilemma.

The impact of the comprehensive bar associations on legal services to low- and moderate-income persons above the legal aid level has likewise been modest. But the problems of providing more and better legal services to this group are considerably different from that of providing such services to those in poverty, and in some respects more difficult. Most of those in the somewhat higher income range can afford to pay typical lawyers' fees charged for most legal services they need, although payment in many instances may entail considerable financial sacrifice. Assuming that those in this potential client group are aware of their legal needs and that lawyers can be of help, the problems largely are market ones. Should one be concerned about those who can afford to pay market fees but refuse to seek help because they consider the fees too high? Are the market legal fees typically charged this low- to moderate-income group by lawyers so high and so burdensome that fees should [*226] legally be regulated? Should most legal services to this group be brought under some kind of mandatory insurance scheme or perhaps subsidized? Is the lawyers' monopoly part of the problem and would a desirable solution lie in abolishing or substantially reducing lawyers' monopoly privileges so that cheaper legal service providers can enter the market? Can law firms restructure themselves, voluntarily or with legal inducements and coercion, so that they can cut costs and cut fees? Finally, what role, if any, should the major comprehensive bar associations assume in relation to these questions? These are all questions with which the profession at large, bar associations included, must struggle. They have a direct bearing on such difficult issues as unauthorized practice of law, lawyer advertising, and expansion in alternative dispute resolution systems. Clearly, lawyer referral programs, although helpful, are insufficient answers. More attention needs to be given to ways in which lawyers can remain competitive in the low- to moderate-income market for legal services, especially as to matters in which contingent fees are not appropriate.

E. Litigation

Most aspects of litigation are of concern to major comprehensive bar associations. The judiciary is often the focus of attention, including recommendations by some associations to fill judicial vacancies. The ABA's Standing Committee on the Federal Judiciary regularly makes such recommendations for vacancies on the federal bench, the Supreme Court included, and is the best known example of bar association action of this kind, ¹⁷⁹ but many

¹⁷⁵ See Lawyer Referral Survey, *supra* note 172.

¹⁷⁶ See *supra* note 92 and accompanying text.

¹⁷⁷ See Nonlawyer Practice Report, *supra* note 139, at 103.

¹⁷⁸ See *supra* notes 165-168 and accompanying text.

¹⁷⁹ See generally ABA Standing Committee on the Judiciary: What It Is and How It Works (1988); William G. Ross, Participation by the Public in the Federal Judicial Selection Process, *43 Vand. L. Rev.* 1 (1990); R. Townsend Davis, Jr., Note, The American

state and larger local **bar associations** make recommendations to fill state or local judicial vacancies.¹⁸⁰ There are also **bar associations** that administer regular lawyer evaluations of sitting judges and judgeship candidates.¹⁸¹ Some **bar associations** have taken public positions on such matters pertaining to the judiciary as judicial salaries and retirement funding,¹⁸² and on the rotation of judges.¹⁸³ The relevant committees of **bar associations** also frequently propose amend- [*227] ments to court rules¹⁸⁴ and jury charges for different kinds of cases.¹⁸⁵ Alternative dispute resolution (ADR) is still another subject that has attracted considerable **bar association** consideration and proposals for expansion and improvement.¹⁸⁶ The ABA has taken a leadership position in promoting the ADR concept.¹⁸⁷ In addition, the ABA has adopted a Model Code of Judicial Conduct that sets widely followed standards of judicial behavior.¹⁸⁸ The ABA also has been particularly active recently in broad evaluations of judicial administration problems and has adopted prescriptive standards.¹⁸⁹ A number of state and local **bar associations** have been developing better solutions to basic problems of judicial administration as well.¹⁹⁰

The major comprehensive **bar associations** not surprisingly exert considerable influence on the litigation process, most notably in shaping procedural rules and selecting judicial personnel. Much of this influence comes from proposals by **bar association** sections and committees especially concerned with one aspect or another of the litigation process. Courts and legislatures can be expected to take seriously proposals for improving judicial operations when these proposals come from practitioners who regularly appear before the courts. In judicial selections, legislatures and executive branch officials with responsibility for judicial appointments are especially prone to weigh heavily judicial recommendations from the **bar**. **Bar association** recommendations seem to be particularly effective in states with merit selection commissions and less effective in states where judges are popularly elected.¹⁹¹ At the federal level, controversy over ABA judicial recommendations is an indication of the seriousness with which these recommendations are taken by political [*228] decisionmakers.¹⁹²

Bar Association and Judicial Nominees: Advice Without Consent?, [89 Colum. L. Rev. 550 \(1989\)](#); Robert A. Stein, Executive Director's Report, For the **Benefit** of the Nation, A.B.A. J., Mar. 1996, at 104.

¹⁸⁰ See generally Charles H. Sheldon, The Role of State **Bar Associations** in Judicial Selections, 77 *Judicature* 300 (1994).

¹⁸¹ See, e.g., John B. Simon, President's Page, CBA Rec. (Chicago **Bar Association**), June 1994, at 10 (reporting that 47% of subcircuit judgeship candidates were not recommended in evaluation by **bar association** Judicial Evaluation Committee).

¹⁸² See, e.g., John Carson & Richard Chernick, President's Page, Report from Sacramento, L.A. Law., Feb. 1995, at 11.

¹⁸³ See, e.g., Committee on Rules of Judicial Administration Report, Fla. B.J., June 1995, at 73.

¹⁸⁴ See, e.g., Committee on Court Rules Report, 58 Tex. B.J. 734 (1995). The Florida **Bar** has 10 different court rules committees. For recent reports by these committees, see Fla. B.J., June 1996, at 65-72.

¹⁸⁵ In 1994, the State **Bar** of Texas had five separate committees preparing jury instructions for different fields of law. For reports on these committees, see 57 Tex. B.J. 778 (1994).

¹⁸⁶ See, e.g., Section on Alternative Dispute Resolution Report, 58 Tex. B.J. 745 (1995).

¹⁸⁷ See ABA Blueprint for Improving the Civil Justice System: Report of the ABA Working Group on Civil Justice System Proposals 31-43 (1992) [hereinafter *Blueprint for Improving the Civil Justice System*].

¹⁸⁸ See *supra* note 96.

¹⁸⁹ See 2 Standards of Judicial Administration (1992) (Standards Relating to Trial Courts); 1 Standards of Judicial Administration (1990) (Standards Relating to Court Organizations); see also *Blueprint for Improving the Civil Justice System*, *supra* note 187; Standards for Criminal Justice, Fair Trial and Free Press (3d ed. 1991).

¹⁹⁰ See, e.g., Report of the Judicial Administration, Selection, and Tenure Committee, Fla. B.J., June 1996, at 54.

¹⁹¹ See generally Sheldon, *supra* note 180.

¹⁹² Compare Henry J. Abraham et al., Judicial Selection: Merit, Ideology and Politics, 101-46 (1990), and David M. Leonard, Note, The American **Bar Association**: An Appearance of Propriety, 16 Harv. J.L. & Pub. Pol'y 537, 555-56 (1993), with Abner J.

F. Substantive Law Reform

Substantive law in all fields is, of course, always subject to change and proposals for change are frequent. As major comprehensive **bar associations** are concerned with this dynamic, they regularly review current proposals - especially pending legislation - and often seek to influence the final adoption process by initiating their own proposals.

Much **bar association** law reform activity is carried out by **association** committees and sections. Collectively, committees and sections cover nearly every field of law. A variety of approaches are taken by **bar associations** to law reform. For example, through committees or sections, they commonly evaluate bills currently before the state legislature in particular fields, then publicly declare their support or opposition to those in which the **association** has a special interest. They also make in-depth studies of troublesome legal problems and prepare drafts of recommended statutes or regulations. In some instances they merely declare publicly their position on a matter, perhaps issuing press releases, thereby relying on the merits of their position and their reputations to influence the ultimate outcome.¹⁹³ Sometimes, **bar associations** do much more. For example, through their own staff lobbyists or influential **association** members, they may either meet privately with individual legislators or other important government decisionmakers to urge backing for the **association's** position on a proposed legal change or testify at legislative hearings in support of the **association's** position.¹⁹⁴ Occasionally, too, **bar associations** file amicus curiae briefs reflecting **association** preferences on matters that raise important legal issues.¹⁹⁵ In rare instances they will litigate issues they consider highly important.¹⁹⁶ [*229]

Since the Supreme Court's decision in *Keller v. State Bar* in California,¹⁹⁷ one large group of state **bar associations**, the unified **associations**, are considerably restricted in their lobbying efforts on contentious social issues.¹⁹⁸ Although *Keller* is unclear as to just what **bar association** actions are proscribed, it has had a substantial deterrent effect on unified **bar associations'** lobbying efforts, as well as their filing of amicus briefs.¹⁹⁹ Although not bound by *Keller* restrictions, the ABA and other voluntary **bar associations** have occasionally been faced with the controversial question of whether they should take positions on social problems, such as abortion, that may lead to member resignations and other organizational disruptions.²⁰⁰ A number of voluntary **associations** have self-imposed restrictions on involvements of this kind.²⁰¹

Mikva, Criticism and Controversy at the ABA, Conn. L. Trib., July 8, 1996, at 25, and Stein, *supra* note 179. See generally Gary A. Hengstler, In Political Year, ABA Policies are Something to Talk About, A.B.A. J., Aug. 1996, at 108.

¹⁹³ See, e.g., ABA Handbook, *supra* note 31, at 129-92 (enumerating policy positions taken by ABA on hundreds of legislative and professional issues).

¹⁹⁴ See, e.g., William B. McGuire, NJSBA Tort Reform Update: What Your **Association** is Doing for You, N.J. Law, Jan. 1995, at 4; Minutes of Special Business Meeting of the Maine State **Bar Association** (June 17, 1994), in 9 Maine B.J. 299, 302 (1994); Paul L. Stevens, Strengthening PBA's Presence on Capitol Hill, Pa. Law., Mar.-Apr. 1995, at 4.

¹⁹⁵ In *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995), for example, 27 **bar associations** joined in an amicus brief urging the United States Supreme Court to reconsider *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which had restricted the authority of states to regulate lawyer advertising. See *supra* note 99 and accompanying text.

¹⁹⁶ See, e.g., *Florida Bar v. Furman*, 451 So. 2d 808 (Fla. 1984) (holding in contempt nonlawyer who prepared pleadings and gave legal advice on family law matters after being enjoined from doing so); *Greenwell v. State Bar of Nevada*, 836 P.2d 70 (Nev. 1992) (enjoining typing service from engaging in unauthorized practice of law and ordering state **bar** to formulate rules regarding supply by nonlawyers of simple legal services).

¹⁹⁷ 496 U.S. 1 (1990).

¹⁹⁸ See *supra* notes 72-73 and accompanying text.

¹⁹⁹ See *supra* note 74.

²⁰⁰ See, e.g., Steven Keeva, Cooper Wants to Reverse ABA Focus, A.B.A. J., Oct. 1995, at 104 (discussing view of then-incoming ABA president that social issues should be downplayed); Leonard, *supra* note 192, at 547-49 (arguing that ABA is

Where not deterred by Keller, the major comprehensive bar associations have actively supported or opposed a broad range of substantive legal proposals.²⁰² This is not surprising given the diversity of interests of the associations' sections and committees. But how successful are the associations when they intervene? As is to be expected of organizations that regularly seek to influence law reform, their record is mixed.²⁰³ Presumably, the record of success is higher for those associations which go beyond merely issuing press [*230] releases and exert added pressure on lawmakers.

G. Conclusions

Whatever the effectiveness of each individual program, like many nonprofit organizations, most comprehensive bar associations have overextended themselves, spreading their resources too thinly over too many activities. Some of the associations are recognizing this problem and taking steps to realign their organization and operations. The Oregon State Bar, for example, is engaged in a comprehensive performance review of all its programs, pursuant to which ineffective programs will be modified or discontinued.²⁰⁴ Part III discussed some of the specific problems facing bar association programs. In Part IV the Article moves from the specific to the more general, discussing some limitations on the effectiveness of associations broadly speaking.

IV. Limitations on Effectiveness

Like other organizations, the major comprehensive bar associations have limitations that tend to prevent or deter effective association performance. These limitations are important reasons for the mixed effectiveness record of association programs and the associations' failure to advance more fully their policy objectives. One of the associations' principal limitations is financial. For organizations with so many programs, the major comprehensive bar associations are very restricted in the funds with which they have to work. Moreover, their funds come largely from members' dues; hence, if membership declines, income normally declines. There also is considerable member resistance to raising dues and, in some associations, even pressure to lower existing dues.²⁰⁵

Another limitation on more effective action by major comprehensive bar associations is their reliance on member volunteers for a high percentage of association work. Members who assume these work assignments are

excessively politicized and should avoid taking stances on public policy issues); James Podgers, Which Way ABA? Pondering New Directions, A.B.A. J., Dec. 1992, at 61 (reviewing ABA positions on social issues and reactions to these positions).

²⁰¹ The Bar Association of Metropolitan St. Louis, for example, has adopted guidelines for intervention on social issues. They provide that before taking any positions on a matter of public policy, the board of governors should: determine that the issue is not clearly inappropriate; have sufficient facts concerning the issue; believe that the position to be taken would be supported by an informed membership; believe that the issue is of general significance to lawyers; and believe that the position taken by the association would have an effect on the outcome. See Deirdre O. Smith, President's Report, Where We Stand, St. Louis B.J., Winter 1995, at 3.

²⁰² See, e.g., Rhonda McMillion, ABA Targets Legislative Priorities, A.B.A. J., May 1995, at 105 (reporting ABA's support for handgun and weapon controls and opposition to federal legislation preempting state product liability laws); Kevin N. Reynolds, CBA 1996 Legislative Proposal, Conn. Law., June-July 1996, at 4 (reporting Connecticut Bar Association's support for state business corporation act that would make state more attractive for businesses); Legislative Bulletin, Pa. Law., Nov.-Dec. 1995, at 36 (reporting Pennsylvania Bar Association's support for uniform planned community act); Legislative Summary, Neb. St. B. Ass'n Newsl., Feb. 1996, at 7 (reporting Nebraska State Bar Association's opposition to sales tax on services).

²⁰³ Bar association efforts to influence substantive law reform appear to be successful only about one-third of the time. In California, for example, an average of only 35% of bills sponsored by the California State Bar usually become law. See Kathleen O. Beitiks, Plebiscite Signed by the Governor; Other Bar Bills Become Law, Cal. St. B.J., Nov. 1995, at 1. In New York, on the other hand, only seven of 24 bar-sponsored legislative proposals in a recent year became law. See Maxwell S. Pfeiffer, President's Message, Strategic Planning, N.Y. St. B.J., Dec. 1995, at 4.

²⁰⁴ See Karen L. Garst, Measuring Outcomes, Or. St. B. Bull., Feb.-Mar. 1996, at 29. The New York State Bar Association recently initiated a similar evaluation process. See Pfeiffer, *supra* note 203, at 3.

²⁰⁵ See *supra* notes 32-33 and accompanying text.

volunteers: They are unpaid and willingly assume certain duties, such as drafting proposed legislation or professional ethics opinions, lecturing at legal education sessions, participating in association-sponsored pro bono representation programs, taking part in committee or governing board deliberations, or advising on internal management problems. In many instances, members are appointed by the association's leadership to perform designated tasks, but selection for top association and section leadership positions may be by election. For some assignments, such as participation in association pro bono [*231] efforts, any member who requests the assignment ordinarily will be accepted. Association reliance on unpaid member volunteers for so much association work is partly due to the associations' financial limitations but is largely attributable to the perception of many members that active involvement in association work is a benefit, even a duty, of membership. But volunteer workers can create problems: Volunteers are greatly restricted in the amount of time they can give, some of them shirk their responsibilities, and supervision is difficult. This extensive reliance on volunteers can also contribute to the lethargy and inertia that too often characterize association performance. Moreover, paid support staffs are small given the need, and most of the paid staff have little authority.

There are also serious weaknesses in association leadership structures. Not only are top association officers, governing legislative board members, and section and committee officers all volunteers, but typically the president and other top officers hold their positions for very short terms. The president in almost all cases holds office for only one year and is prohibited from running again. Short terms of the top leadership result in a lack of continuity for priorities for many associations. On assuming office, it is common for a bar association president to declare and publicize one or more priority objectives for his or her one-year term of office.²⁰⁶ These priorities fade at the end of the president's term to be replaced by one or more new priorities that the new president declares.

Another member-related limitation of the major comprehensive bar associations is the diversity of their membership in so many respects: age, gender, income, practice specialties, political ideologies, and racial, ethnic and class backgrounds. Membership diversity certainly has benefits, including strengthening association claims of representing the entire profession regionally or nationally, and on many issues diversity helps create common bonds among disparate professional groups. However, membership diversity in some situations can be a limitation on association effectiveness by causing internal divisions that make it difficult or impossible to pursue a particular program of action or that result in compromises that hamper a program's results. So, for example, bar association support of civil rights legislation favored by politically liberal association members has on occasion been blocked by more conservative members.²⁰⁷ Interests represented by members of at least one state bar association section are so diverse that the section has adopted a policy of [*232] engaging in no lobbying or other political advocacy on matters within its sphere of concern.²⁰⁸ The comprehensive bar associations, being open to widely diverse memberships, are particularly vulnerable to the inhibiting influence of member differences on programming.²⁰⁹ Yet the comprehensive bar associations all seek large memberships, and the greater income and influence

²⁰⁶ See, e.g., David Beck, State Bar of Texas, A New Agenda, 58 Tex. B.J. 660 (1995); Harris A. Gilbert, President's Perspective, New President Sets Goals, Tenn. B.J., Jul.-Aug. 1994, at 3; Roberta Cooper Ramo, President's Message, Defending American Democracy, A.B.A. J., Sept. 1995, at 8; Roberta Cooper Ramo, President's Message, Letter From the Front, A.B.A. J., Nov. 1995, at 8.

²⁰⁷ In the 1950s and 1960s, for example, the Chicago Bar Association's Civil Rights Committee was unable to obtain the association's backing for state and federal civil rights legislation. See Halliday, *supra* note 1, at 237-45.

²⁰⁸ This section is the Health Law Section of the Florida Bar Association. Although it does not engage in lobbying, the section provides technical assistance to the state legislature on non-tort-related health law matters, subject to approval by the association's board of governors. See Lewis W. Fishman, Health Law Section Report, Fla. B.J., June 1996, at 42.

²⁰⁹ In considering the implications of bar association membership diversity, Heinz and Laumann make this general observation:

Herein lies the dilemma of every professional association. The more its membership reflects the diversity of the larger society, the more limited and noncontroversial will be the goals that it is able to achieve. Conversely, the more limited or elitist its recruitment, the more it is able to take clear stands on controversial issues, but the less it is able to serve as an effective vehicle for mobilizing both public and professional opinion behind particular courses of action.

that accompany such memberships. The unified bar concept even legally requires large and fully open memberships. What follows almost invariably from large memberships in comprehensive bar associations is more membership diversity and consequent added risk of stultified programmatic action.

This risk, however, has been reduced appreciably in most comprehensive associations by allowing association sections and committees a large measure of autonomy. Within their primary sphere of concern, most sections and committees can develop their own programs with few restrictions, although taking public positions, lobbying, and other law reform advocacy efforts may require approval of the association leadership.²¹⁰ This fragmentation of authority decreases the possibilities of the broader membership blocking or qualifying association programs. When the rather frequent differences between different committees or sections develop, leadership usually intervenes to resolve the differences by favoring one side over the other, accepting the position of neither side, or working out some kind of compromise arrangement.²¹¹ If the differences are over law reform proposals, such a compromise agreement may consist of permitting each side to express its views before appropriate government authorities without the larger association's endorsement of any view. [*233]

Still another member-related limitation faced by the ABA and all but a few state bar associations is the wide geographic distribution of their members. This dispersion restricts the frequency of meetings and other in-person sessions, and it further restricts the effectiveness of top leadership who often reside some distance from association headquarters. It also results in many association activities being crammed into the few days devoted each year to the annual meeting. This limitation of scattered membership does not, of course, exist for local bar associations or for state bar associations in states that are geographically small, such as Rhode Island and Connecticut.

An added significant limitation for the major comprehensive bar associations is the potential inconsistency between two of the associations' most basic policy goals. The two policy goals are furthering members' interests and furthering broader public interests. The associations are committed to both goals and usually the two do not conflict, but how the associations should react when the two are or are perceived to be in conflict can be highly contentious and can subject the associations to extensive criticism from within and without the profession. Examples of issues that have been embroiled in professional interest/public interest controversies, and on which the bar associations have been under pressure to take sides include: the right of paralegals or legal technicians to practice law independently,²¹² the need to impose more severe legal restrictions on lawyers' contingency fees,²¹³ and the need for tort law reform that would cut back on plaintiffs' available remedies.²¹⁴ If the interests of bar association members, or a large percentage of them, are seriously affected by a particular issue, the position and action the association takes on that issue, however rationalized, will in all probability be in accord with member self-interest. This result is true of most all professional and trade associations. The American Medical

John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* 272 (1982); see also Powell, *supra* note 1, at 115-38 (discussing deterrent impact on association programs of diverse association membership and consequent internal dissension with reference to Association of the Bar of the City of New York). But see *id.* at 137-38 (arguing that dominance of association by elite segment of bar can reduce deterrent effect of more diverse membership as to positions and programs favored by this elite).

²¹⁰ An ABA section, for example, must follow detailed internal procedures before presenting a statement to a governmental agency. See ABA Handbook, *supra* note 31, at 77-80. The ABA has similar procedures with respect to the filing of amicus curiae briefs in the name of the association. See *id.* at 80-86.

²¹¹ See Powell, *supra* note 1, at 115-38.

²¹² See *supra* notes 139-155 and accompanying text.

²¹³ See, e.g., Lester Brickman, Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark, [37 UCLA L. Rev. 29, 34-35 \(1989\)](#); Michael Horowitz, Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform, [44 Emory L.J. 173, 179-81 \(1995\)](#).

²¹⁴ See, e.g., Martha Middleton, A Changing Landscape, A.B.A. J., Aug. 1995, at 60; Henry J. Reske, A Classic Battle of Lobbyists, A.B.A. J., June 1995, at 22.

Association, for example, is now experiencing the result of members' self-interest in its stands on current proposals to restructure the medical profession and its funding.²¹⁵ The result is apparent in **bar association** positions on issues such as contingency fees, and in a few provisions of the Model Rules of Professional Conduct and Model Code of Professional Responsibility,²¹⁶ both of which originated with the [*234] ABA. Even the concepts of mandatory lawyer professional conduct standards, such as those articulated in the Rules and the Code, have a self-interest element to them, for they help create a more favorable public perception of lawyering as a profession with estimable and widely followed principles of lawyer conduct.

External factors also limit **bar association** performance. Among these forces are legal restrictions and obligations imposed on the **associations**. For instance, court rules or statutes impose the unified state **bar association** format in most states, prescribe how unified **associations** may be structured, and mandate that they have open memberships.²¹⁷ In addition, recent case law has added important restrictions on how unified **bar association** dues may be spent.²¹⁸ The antitrust laws also limit some **bar association** activities, such as the setting of minimum fee schedules or accreditation standards for law schools.²¹⁹ There also are constitutional limits on the extent to which standards of professional conduct (the drafting and revising of which have largely been a **bar association** function) may restrict advertising²²⁰ and client solicitation by lawyers.²²¹ Another example is specialty certification of lawyers, a procedure in which **bar associations** often are involved and that is regulated by court rule in some states.²²²

A further external limitation on all comprehensive **bar associations** is competition for members, funds, and influence from specialty **bar associations**. There are many specialty **bar associations**; a few have large memberships, but most have relatively small memberships and generally quite limited financial assets. Collectively, however, the specialty **bar associations** do have an effect in drawing away members, money and influence from the comprehensive **associations**.²²³ There are many lawyers who belong to both comprehensive and specialty **bar associations**, but many others belong only to a specialty **association**.²²⁴ Conversely, comprehensive **bar associations**, and particularly unified **associations**, have a similar restrictive effect on membership and dues income of the specialty **associations**. Similar to specialty **bar associations**, but usually not referred to as **bar associations**, are a number of other lawyer [*235] organizations that also have some effect in drawing resources

²¹⁵ See Wolinsky & Brune, *supra* note 156, at 34-43, 217-25.

²¹⁶ See, e.g., Model Rules of Professional Conduct Rule 1.6(b)(2) (permitting disclosure of confidential information relating to representation of client "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client"); Model Code of Professional Responsibility DR 4-101(C)(4) (same); Model Rule 6.2(b) (permitting lawyer to avoid court appointment as counsel for client if representation would be unreasonable financial burden on lawyer); Model Rule 1.8(d) (effectively permitting lawyer, on concluding representation of client, to contract for literary or media rights drawing on information obtained during representation); Model Code DR 5-104B (same).

²¹⁷ See *supra* note 18.

²¹⁸ See *supra* notes 72-74 and accompanying text.

²¹⁹ See *supra* notes 86 & 150 and accompanying text.

²²⁰ See [Zauderer v. Office of Disciplinary Counsel](#), 471 U.S. 626 (1985); [Bates v. State Bar of Arizona](#), 433 U.S. 350 (1977); *supra* note 99.

²²¹ See [Florida Bar v. Went For It, Inc.](#), 115 S. Ct. 2371 (1995); [Ohralik v. Ohio State Bar Ass'n.](#), 436 U.S. 447 (1978); [In re Primus](#), 436 U.S. 412 (1978).

²²² See *supra* note 83.

²²³ See Van Duch, *supra* note 13, at A22.

²²⁴ One deterrent to multiple **bar association** membership by individual lawyers is the unwillingness of many law firms to pay their lawyers' dues in more than one **association**. See *id.*

and influences away from comprehensive bar associations. Such organizations include bar foundations, the American Judicature Society, and the National Lawyers Guild.

An obvious limitation on all comprehensive bar associations, particularly relevant to their law reform efforts, is that they are pressure groups, rarely lawmakers, and as pressure groups can influence legal change but lack the power finally to effectuate change. How successful they are in helping to bring about or block change varies with the type of issue, what opposition they have, the lawmaking body involved, and how convincing their arguments are to the final decisionmakers.

The associations cannot be expected to do much about most of the limitations that they face. Some limitations are beyond the associations' authority to change, such as their position as mere pressure groups rather than as final decisionmakers on most law reform matters. Also, some limitations, like reliance on volunteer work, are now so deeply ingrained in conventional bar association practices that change is probably impossible. Some limitations are so dictated by circumstances that there is no feasible way of overcoming them; one such limitation is the necessity of relying on members for a substantial percentage of association funding. However, it is possible to ease a few limitations, with resulting improvements in what the associations can accomplish. For example, there are a number of ways in which the associations could be made more efficient; these methods include strengthening top leadership by giving more authority to paid, full-time officials employed long-term, and integrating and streamlining association operations. Some of the recommendations in the next Part, if followed, would have the effect of at least easing the adverse consequences of some association limitations.

V. Recommendations

Despite limitations, comprehensive bar associations have a generally positive influence on the legal profession and the administration of justice. They help to create and maintain a strong sense of common professional identity among lawyers - a vital contribution, given the increasing diversity of the profession - and they offer valuable services to enhance the competence and income of members of the bar, including lectures, discussion sessions, and publications covering a wide range of legal topics. In addition, associations provide many opportunities for members to make personal contacts and to widen their exposure, which can be helpful in an occupation where career success is so often based on one's visibility and network of acquaintances.

Although the comprehensive bar associations are large, influential organizations that make a variety of contributions to the legal profession and the justice system, their effectiveness is subject to serious limitations, as previously indicated. For the most part, little can realistically be done to [*236] overcome these deficiencies. Bringing about significant change in mature and relatively successful nonprofit organizations is usually a difficult process, and proposals for meaningful change will certainly meet strong resistance if they begin to attract support. Nevertheless, recommendations for dealing with some of the limitations are outlined below; each of these proposals has some chance of generating enough support over time to be adopted.

1. Strengthen top leadership. To deal with the lack of continuity in top leadership and the limited time that volunteer officers can give to association affairs, full-time executive directors should enjoy more authority and higher status. Under this proposal, an executive director would resemble a chief executive officer of a typical large business corporation and would be employed on a permanent basis rather than a short-term basis. The full membership or the board of governors would select the executive director, often from a pool of prominent lawyers. The board of governors would resemble the board of directors of a typical corporation and would be composed of unpaid members elected by the association's full membership. There would no longer be part-time unpaid officers. By granting more authority to full-time executives with indefinite tenure, the associations should prove more efficient and productive, with the full membership retaining a large measure of ultimate control. The volunteer leadership structure that currently prevails, even in the larger associations, may have worked in the past when associations had fewer members and activities; such a leadership structure, however, is ill-suited to the larger and more multi-faceted associations of today.

2. Consolidate and streamline operations. The organized bar could increase its effectiveness if the efforts of different bar associations were better integrated. For ideological reasons, some bar associations bitterly oppose

the objectives of others, but the policy goals and programmatic efforts of the different groups are generally not antagonistic. For better efficiency, comprehensive bar associations and compatible specialty bar associations should cooperate more closely on matters of common interest. In some instances, sections of some comprehensive associations might even merge with the specialty bodies. In addition, the ABA should provide more service and guidance to other comprehensive bar associations, with the expectation that local and state organizations would assume more responsibility for implementing programs. All too often, the ABA duplicates an existing function of the state and local comprehensive associations. Examples include the ABA's educational programs, much of its review of state and local laws, its interpretive opinions of the Rules of Professional Conduct, and its pro bono programs. The ABA, with its national network of contacts and affiliations, can best initiate closer integration. A tightly knit federated system controlled from the top is neither feasible nor desirable, but a better coordinated, less redundant organizational structure is both possible and necessary. The associations should [*237] also develop better means of exchanging information among themselves, especially regarding organizational experiments and program innovations. Here again, the ABA is already active, especially through its Division of Bar Services and its Bar Activities and Services Committee,²²⁵ but more activity is necessary.

Furthermore, all major comprehensive bar associations, including the ABA, need to have a common core of sections and committees, whatever additional subunits they might have. The core group of ABA sections and committees would include among its members official delegates from state and local sections and committees. Each core ABA section and committee would act as an exchange center for information about problems, successes, and failures on matters of common concern, as well as the development of national programs and standards. In particular, state and local delegates would inform other members about innovative approaches to such matters as CLE, review of proposed legislation, lobbying, media contacts, and the funding of association programs. Where appropriate, ABA core sections and committees would help not only to develop but also to generate state and local support for ABA-sponsored federal law reform, model state and local laws, and model standards and creeds of professional conduct.

Since bar associations cannot be all things to all lawyers, they should try seriously to keep their activities within appropriate limits, taking the Oregon State Bar's performance review process as a model.²²⁶ Each major comprehensive association should periodically review its priorities and examine the efficiency of its programs. Programs found unsatisfactory should be modified or canceled; most sections and committees with few members should be terminated; CLE offerings should be regularly evaluated, and those that provide little of substance should be discontinued; inessential, loss-incurring publications should be eliminated; and, finally, support staff should not be wasted on low-priority programs.

3. Reconsider the unified bar concept. There has been widespread opposition among lawyers to the unified bar concept in a number of unified bar states. The Supreme Court's opinion in *Keller v. State Bar of California*²²⁷ has added to the opposition by restricting association activities and income. Where opposition is strong, and especially where it appears to be growing, unified organizations should be formally reconsidered, preferably by a statewide lawyer referendum, as California recently did. The final decision to unify should be by the bar, not by the courts or the legislature. Lawyers should not be forced into organizations that most of them oppose. [*238]

4. Improve the disciplinary process. Where major comprehensive bar associations are expected to remain extensively involved in disciplining lawyers,²²⁸ they should have enough funding to hire staff. Uncompensated

²²⁵ See supra note 61. The Bar Activities Inventory provides an example of the useful information assembled and distributed by this division. See ABA Inventory, supra note 2.

²²⁶ See supra note 204 and accompanying text.

²²⁷ [496 U.S. 1 \(1990\)](#).

²²⁸ The McKay Commission recommended that courts appoint disciplinary officials and that "elected bar officials, their appointees and employees ... have no investigative, prosecutorial, or adjudicative functions in the disciplinary process." McKay Comm'n Report, supra note 104, at 24. Self-regulation, the commission declared, creates an appearance of conflict of interest.

appointees can take over some of the complaint review and hearing work, but a full-time, paid staff can best perform investigations and presentments, as well as much of the supporting administrative work. Since bar disciplinary proceedings examine the behavior of state licensees, state government should help pay for the proceedings. In addition, bar associations could force disciplined lawyers to pay for their own proceedings, an option not sufficiently utilized in most states. Moreover, the McKay Commission has recommended that disciplinary counsel may, with the consent of the respondent lawyer, refer cases of minor infractions for nondisciplinary action, such as fee arbitration, mediation, substance abuse treatment, or psychological counseling.²²⁹ This recommendation deserves wider adoption. The disciplinary procedures in each state also should be periodically evaluated to ensure fairness and efficiency,²³⁰ preferably pursuant to directives from the state's highest court. Random spot checks of individual cases might prove helpful as well. High dismissal rates at the screening stage, where they exist, should be regularly monitored to guard against favoritism or undue leniency.

If lawyer security funds had sufficient financing to pay all legitimate claims, clients would be more adequately protected from lawyer malpractice. Absent this unlikely financing, lawyer malpractice insurance should be mandatory, and bar associations in unified bar states should adopt and administer the Oregon mandatory malpractice insurance plan.²³¹ Mandatory insurance not only protects clients but also strengthens the competitive position of lawyers relative to lay providers of legal services, most of whom do not provide such client protection.

5. Increase concentration on the justice system's most serious problems. Major comprehensive bar associations should persistently and aggressively try to resolve the most serious problems facing the American justice system. Among these problems are: (1) court congestion and delay, including the need for more judges and more opportunities to use alternative dispute resolution [*239] techniques; (2) pro bono legal representation for those in poverty; (3) cheaper and more readily available legal services for the poor and those of moderate income who can afford to pay reasonable lawyers' fees; and (4) the improvement of incarceration facilities and alternatives to incarceration for those convicted of crimes. The associations are concerned with all these problems, but their efforts to deal with them have been disappointing. Arguably they have not tried hard enough, perhaps because the issues are too political to attract sufficient association support, or because activists within the associations are discouraged by slow progress, or because top leadership lacks sustained focus. Whatever the reasons, efforts by the associations are inadequate. Since each new association president commonly supports a different action agenda during her year in office, association efforts to solve important problems are less effectual than might otherwise be the case. The most crucial problems facing the justice system deserve the continued and concentrated attention of top association leadership over a protracted period, normally much longer than a year.

Furthermore, support for research, including staff, should be made available, and coordinated action with other bar associations should be initiated whenever helpful. Each association should also give clear instructions to its commissions, task forces, or committees involved with a crucial problem area, and such groups should be pushed to meet deadlines set for them.

The unauthorized practice of law, especially the growing movement to license legal technicians to practice law independently (without supervising lawyers), is another problem demanding more attention from bar associations. This issue potentially has very important implications for the justice system in general and the legal profession in particular. The bar associations should carefully consider how to respond and then take action accordingly. Among the possible responses, the associations could categorically oppose all proposals for licensing legal

See *id.* at xvi. In many states, however, bar associations still have responsibilities for processing lawyer disciplinary cases. Moreover, given the added authority that comes from professional self-regulation and the financial savings possible from the use of unpaid bar association officials, the commission's unqualified opposition to association involvement in the process is unjustified.

²²⁹ See *id.* at 48-49.

²³⁰ California has such a requirement. See [Cal. Bus. & Prof. Code 6086.11](#) (West Supp. 1996) (requiring annual audits of complaint closures and other matters handled by disciplinary counsel).

²³¹ See *supra* note 124 and accompanying text.

technicians to practice law independently of lawyers. Alternatively, the associations could support licensing of these technicians only in a limited number of practice areas but with rigorous educational prerequisites. Certain kinds of businesses, such as banks, insurance companies, real estate brokers, and accounting firms, would be prohibited from using this licensing device as a means to move more extensively into providing legal services to others. If it is assumed that independent legal technicians, and other lay groups as well, will increasingly be engaged in the practice of law, bar associations could greatly expand their efforts to help lawyers meet this competition through greater efficiency, lower fees, enhanced advertising, and other promotional efforts. Whatever the bar associations perceive their options to be, they should recognize the seriousness of the licensed legal technician problem and promptly take adequate steps to address it.

If the ABA wishes to influence the resolution of these issues, it must do [*240] much better than its Commission on Nonlawyer Practice has done.²³² The work of the Kutak Commission and the McKay Commission, among others, shows that ABA commissions can come up with many constructive proposals on difficult and contentious issues affecting the legal profession.

6. Avoid highly disruptive issues. Although some important issues deserve more attention from the major comprehensive bar associations, others should be avoided. The latter are the occasional highly contentious law reform issues that can cause extreme internal disruption, especially when an association decides either to advocate a position or to intervene by taking further action. An association should limit or avoid involvement with an issue if that involvement threatens to cause a substantial number of its members to resign or become inactive, or if that involvement threatens the association's general effectiveness. Caution is especially advisable on contentious social issues that have little direct bearing on the legal profession and the usual work of lawyers. It seems particularly foolish for a bar association to risk its viability over issues regarding which it cannot realistically expect to exert much influence. For example, there have been very disruptive consequences for the ABA when it has taken up the issue of abortion.²³³

Each association should carefully determine for itself what it will do about the contentious issue problem. One sensible procedure, followed by some associations, is to require approval by the association's governing board before an association position or advocacy action may be undertaken.²³⁴ Under such restrictions, sections, committees, or other groups within the association may examine any issue and articulate their own position, but no further action is allowed without board approval. This does not solve the disruptive issue problem entirely, but it does place responsibility for association-wide action on a governing board. Such an arrangement is desirable because governing boards are normally very sensitive to the association's overall well-being and their decisions are likely to find broad member support.²³⁵

7. Improve research efforts. The major comprehensive bar associations could benefit from closer ties to the legal academic community generally. Most full-time law teachers have little or no contact with bar associations, and the bar associations make little effort to draw law teachers into their programs. This is unfortunate given the possible benefits for both associations and academics in the encouraging of academic research on important legal problems. In many such instances law teachers would be willing and able to [*241] conduct necessary background research, prepare more useful reports, and draft better legislation than if the associations relied on others for this work. Almost all full-time law teachers do considerable research and writing for legal publications, often producing articles that turn out to be of little consequence and that attract little interest. An important bar association

²³² See supra note 155 and accompanying text.

²³³ In 1990 and 1991, for example, more than 1500 lawyers resigned from the ABA over the abortion issue. See Podgers, supra note 200, at 62.

²³⁴ See, for example, the guidelines of the Bar Association of Metropolitan St. Louis, discussed supra, note 201.

²³⁵ In taking on this responsibility, the boards of unified bar associations would, of course, be limited by the restrictions in Keller. See supra notes 72-74 and accompanying text.

research project would be attractive to many legal academics, if properly approached, given that the product would be considered seriously by experts in the field and could lead to important reform.

Additionally, the bar associations' research base would be strengthened if the American Bar Foundation were to focus more attention on issues of high priority to those associations, especially through empirical studies on the profession and the administration of justice. The American Bar Foundation is an important research center with a cadre of able scholars, but it has become principally a research medium for social scientists' interests in law, especially those of sociologists; a high percentage of its studies are irrelevant or highly tangential to concerns of bar associations and lawyers generally.²³⁶ Yet the American Bar Foundation is largely funded by bar associations and other lawyer sources,²³⁷ and the ABA is generally well represented on the Foundation's Board of Directors.²³⁸ If the Foundation does not reorient its research efforts, lawyers and their organizations would be justified in withdrawing or sharply curtailing their support. Potential benefits to the legal profession from this quality research center are so substantial that the organized bar should not encourage its research funding to be so extensively diverted from matters of its concern.

8. Increase law school involvement in continuing legal education. The law schools should institutionally be drawn more heavily into furthering bar association post-admission educational objectives. Much CLE instruction is substantively superficial and pedagogically ineffective, and mandatory CLE programs are worthless to many participating lawyers. If the major comprehensive bar associations and other sponsors of post-admission legal education are serious about improving continuing legal education, the most promising approach may be to induce the law schools to participate, adapting CLE to fill the real needs of the lawyers who could benefit. In order to improve CLE programs, difficult questions will have to be addressed regarding course design, teacher staffing, testing, the effect on lawyer licensing or certification, and funding. Greater law school involvement may be the way to assure the best answers.

Of course, not all law schools would be interested in offering CLE [*242] programs.²³⁹ There would be sufficient law school cooperation, however, to test important new experimental approaches to CLE and to improve existing programs, if those schools could be assured of adequate funding and convinced of the bar associations' commitment to more effective continuing education.

VI. Conclusion

However much the need, over the next few years the major comprehensive bar associations are unlikely to change appreciably. They are too firmly established, and their organization and procedures are generally accepted both within the bar itself and by courts and legislatures, to the extent these latter bodies exert authority over the associations. But in the longer term, the associations inevitably will encounter new or more acute problems, and these will force the associations to consider seriously recommendations such as those outlined above, if not even more drastic proposals.

Trends are now emerging that suggest the kind of changes to come. For instance, there is growing dissatisfaction with the unified bar concept, which may ultimately persuade a number of unified state bars to abandon the form altogether. In addition, membership numbers of many major comprehensive bar associations are stable or in decline. This is due to several factors, including relatively high association dues, the competitive pull of specialty and smaller county bar associations, and the feeling of many lawyers that the major comprehensive bar associations have little to offer them. Without regular membership growth, and the financing this brings, associations are likely to come under increasing pressure to cut programs and services that they should be providing.

²³⁶ See supra note 59.

²³⁷ See supra note 56.

²³⁸ See ABA Handbook, supra note 31, at 74-75 (discussing Foundation's governance ties to ABA).

²³⁹ But see supra note 77.

Furthermore, there appears to be growing support for allowing lay legal technicians to practice law on their own.²⁴⁰ Because this threatens so many members of the bar, the major comprehensive bar associations may be moved to oppose the licensing of lay persons to practice law independently. Occupational self-protection is, after all, a fundamental objective of most professional and trade associations, including bar associations.

As funding of traditional legal aid agencies declines, there will be significant consequences for the major comprehensive bar associations. Underrepresentation of the poor has long been a problem, and it will become much more serious as traditional legal aid funding and staffing are further reduced or eliminated. As a result, the major comprehensive bar associations will come under increased pressure to develop new solutions to legal representation for those in poverty through, for example, expansion of existing pro bono and pro se assistance programs. [*243]

Despite some organizational weaknesses and a number of limitations on their operational effectiveness, the major comprehensive bar associations currently are important organizations that make many valuable contributions to the legal profession and the justice system. They are the principal organizations representing the interests of a powerful and diverse profession that is increasingly subject to market forces. Yet the associations are concerned with more than just the legal profession's interests, and they are frequently a positive force in furthering the public interest, at least as they perceive the public interest. How well the associations perform in the future will depend in part on their willingness to make changes that will increase their effectiveness. To be most effective, however, the associations must also be alert to trends indicative of future opportunities, and they must shape their programs in whatever ways will best take advantage of those upcoming opportunities, consistent with their policy goals. Whatever the implications of current trends, it is certain that in important respects the major comprehensive bar associations will be very different kinds of organizations in fifty years. Substantial change is certain to occur.

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²⁴⁰ See supra notes 152-155 and accompanying text.