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NONLAWYER LEGAL ASSISTANCE AND ACCESS TO JUSTICE

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INTRODUCTION

NONLAWYER legal assistance is a necessary ingredient of any plan for meaningful access to the courts. The American Bar Association Commission on Nonlawyer Practice found in 1995 "that as many as 70% to 80% or more of low-income persons are unable to obtain legal assistance even when they need and want it."¹ While low-income households have the greatest problems of access,² many moderate-income households, as well, do not have access to the justice system.³

The ABA Model Rules of Professional Conduct contain an overly broad ban on assisting the unauthorized practice of law⁴ that discourages judges and lawyers from working with nonlawyers to make courts accessible to the public. Nevertheless, courts, lawyers, and individuals committed to meaningful access to justice are finding new roles for nonlawyers in the legal system.

In Rutherford County, Tennessee, for example, the nonlawyer court advocate of the Domestic Violence Program, Inc., assists pro se petitioners in obtaining orders of protection. A Domestic Violence Court Advocacy Protocol, signed by the local judges, the local bar association, and the District Attorney General, enables the court advocate who is not a lawyer to accompany victims of domestic violence to court, to sit with them at counsel's table, and, at the discretion of the judge, to assist the court with other duties including answering docket calls and communicating relevant information to the judge.⁵

The role of the court advocate may be active. The court advocate helps pro se petitioners prepare petitions for orders of protection, prepares final orders and agreed orders under the supervision of the

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1. Commission on Nonlawyer Practice, American Bar Ass'n, *Nonlawyer Activity in Law-Related Situations* 77 (1995) [hereinafter ABA Comm'n on Nonlawyer Practice].

2. *See id.* at 75.

3. *See id.* at 73-78.

4. *See* Model Rules of Professional Conduct Rule 5.5 (1998) ("A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.").

5. *See* J.S. Daniel et al., *Domestic Violence Court Advocacy Protocol* (1996) (on file with the author).

ordering judge, prepares pro se petitions for contempt, and assists victims with the preparation and filing of subpoenas for witnesses and vital records when necessary.⁶

Similarly, in New York City, where most tenants in Housing Court are not represented by lawyers,⁷ the City-Wide Task Force on Housing Court, Inc., places nonlawyer volunteers in the Housing Court of each borough to assist defendants in housing cases.⁸ A staff person in each borough coordinates nonlawyer volunteers who maintain information tables in each courthouse.⁹ When asked for assistance, the volunteers explain the procedures of Housing Court, the warranty of habitability, and other aspects of landlord-tenant law.¹⁰

The program has received much support. The local bar association, recognizing the plight of unrepresented tenants in Housing Court, supports the program.¹¹ Moreover, judges and court clerks refer unrepresented tenants to the information table. Occasionally, judges even call on experienced nonlawyer volunteers from the City-Wide Task Force to summarize cases and suggest dispositions.¹²

The activities of the nonprofit community organizations in Tennessee and New York fill a need that is not being met by lawyers. Victims of domestic violence have their personal safety and security at stake in every hearing on a petition for an order of protection.¹³ Defendants in Housing Court face the loss of property, disruption of family, and possible deprivation of constitutional rights when they appear at a hearing without a lawyer.¹⁴ In a system that does not guarantee lawyers, the help of nonlawyer volunteers is invaluable.

Despite their value, vital programs like these might constitute unauthorized practice of law in many jurisdictions.¹⁵ Most states have statutes imposing civil and criminal penalties on the unauthorized practice of law.¹⁶ In particular, Rule 5.5 of the ABA Model Rules of Professional Conduct supports the sweeping prohibition in these statutes by making it unethical for a lawyer to "assist a person who is not a mem-

6. *Id.*

7. Telephone interview with Angelita M. Anderson, Executive Director of the City-Wide Task Force on Housing Court, Inc. (August 18, 1998). The City-Wide Task Force on Housing Court, Inc., is a not-for-profit coalition of community housing organizations.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. See Elizabeth McCulloch, *Let Me Show You How: Pro Se Divorce Courses and Client Power*, 48 Fla. L. Rev. 481, 500-01 (1996) (discussing the threats to a woman's personal safety and legal rights when she "acts to free herself from the battering relationship").

14. See Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 Hofstra L. Rev. 533 (1992).

15. See *infra* notes 205-12 and accompanying text.

16. See ABA Comm'n on Nonlawyer Practice, *supra* note 1, at 119.

ber of the bar in the performance of activity that constitutes the unauthorized practice of law."¹⁷

The comment to Rule 5.5 notes that the definition of the practice of law varies from jurisdiction to jurisdiction, but adds: "Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."¹⁸

The American Bar Association Commission on Nonlawyer Practice issued a comprehensive report with recommendations in 1995 after conducting nationwide hearings on nonlawyer practice.¹⁹ In its report, the ABA Commission indicates that the primary goal of unauthorized practice rules is to protect the public from harm.²⁰

To achieve this goal of protecting the public, the ABA Commission recommended regulation of law-related nonlawyer activities that pose a risk of harm to the public.²¹ Further, it recommended the prohibition of law-related activities by nonlawyers only if regulation cannot effectively protect the public.²² The Commission concluded:

A regulatory approach for nonlawyer activity may be needed if the activity presents a serious risk of harm, if consumers cannot protect themselves against that risk because they will find it difficult or impossible to evaluate the nonlawyer service provider's qualifications, or if the likely benefits of regulation outweigh the likely negative consequences of regulation. . . . The activity should be prohibited if no regulatory approach will effectively accomplish an appropriate level of public protection.²³

To determine the appropriate level of regulation, the ABA Commission suggested an analytical approach to the varied forms of nonlawyer activity.²⁴ Regulatory options advanced by the Commission included protective legislation, as well as registration, certification, and licensing by agencies other than courts.²⁵

Professor Deborah Rhode has also argued in a series of articles that unauthorized practice rules are an unnecessary and ineffective means of protecting the public.²⁶ In addition to their ineffectiveness, Profes-

17. Model Rules of Professional Conduct Rule 5.5 (1998).

18. *Id.* Rule 5.5 cmt. 1.

19. See ABA Comm'n on Nonlawyer Practice, *supra* note 1, at xiv-xv. The Commission held hearings in ten cities from 1992 through 1994 and conducted extensive research into the provision of legal assistance in the United States and Canada. *Id.*

20. See *id.* at 126-30, 136-40.

21. See *id.* at 137.

22. See *id.*

23. *Id.*

24. *Id.* at 136-42.

25. *Id.* at 142-50.

26. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1, 79 (1982) [hereinafter Rhode, *Policing the Professional Monopoly*] (pointing out that lay representatives have practiced successfully before many administrative agencies); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Non-*

sor Rhode argues that the rules infringe on First Amendment rights through their vague and overbroad prohibitions.²⁷

Professor Rhode suggests that nonlawyers should only be excluded from law-related activities if three considerations favor the restrictions. She writes:

If, as the ABA Commission and other bar leaders consistently maintain, our primary goal in regulating nonlawyer practice is to serve the public interest, then three considerations become critical. What are the risks and benefits of lay competition in the legal services market? What is the best way to minimize these risks? Who should make such decisions?²⁸

According to Professor Rhode, these three considerations weigh towards permitting nonlawyer involvement in the legal system. Yet, the first consideration, the risk of harm to the public, does not fully account for the state's interest in requiring that some tasks be performed exclusively by lawyers. The needs of the legal system itself must be examined before setting limits upon the ability of nonlawyers to perform law-related activities. These needs become clear when examining two related aspects of the legal system: the judiciary's need to control the exercise of judicial power and the need for judicial accessibility to individuals.

The judiciary is a government branch of limited powers. Through its decisions it resolves disputes and makes law. The power of the courts to make law is exercised both at the state and the federal level by deciding cases and controversies.²⁹ The cases and controversies are initiated by individuals, not by the courts.³⁰ Indeed, the integrity of the judiciary requires that courts decide only cases brought by individuals with standing to bring them.³¹ As a result, courts have a corre-

lawyer Practice, 22 N.Y.U. Rev. L. & Soc. Change 701, 710 (1996) [hereinafter Rhode, *Professionalism in Perspective*] (“[I]f consumer protection is our true objective, the current system is poorly designed to achieve it.”); Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 Geo. J. Legal Ethics 209, 230 (1990) [hereinafter Rhode, *Delivery of Legal Services by Non-Lawyers*] (arguing that the risk of nonlawyer practice to consumers has been overstated).

27. See Rhode, *Policing the Professional Monopoly*, *supra* note 26, at 74-96; see also Rhode, *Delivery of Legal Services by Non-Lawyers*, *supra* note 26, at 231 (“Concerns about incompetent or unethical assistance also can be addressed by measures short of prohibiting all lay practice.”).

28. Rhode, *Professionalism in Perspective*, *supra* note 26, at 707.

29. See K.N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 72-75 (1960) (describing how the common law doctrine of precedent works); Christopher J. Peters, *Adjudication as Representation*, 97 Colum. L. Rev. 312, 312 (1997) (“Courts making law are constrained by the process of participatory decision making—the production of judicial decisions through voluntary, self-directed debate among litigants.”).

30. See Peters, *supra* note 29, at 435.

31. See *id.*

[W]hen adjudication operates as that process often, perhaps even usually does, according to the common law method that it has known for centuries,

sponding need to ensure access for those individuals with standing to bring cases of all types.³²

This Article weighs the state's interest in the orderly operation of the legal system against the need for accessibility and concludes that some law-related activities would benefit from nonlawyer participation and do not require proscribing or regulating nonlawyer participation. Nevertheless, it finds there are strong arguments for regulating, and in some cases prohibiting, nonlawyer participation in other law-related activities.

This Article contends that the ethical obligations of confidentiality, candor, competence, and loyalty imposed on lawyers by the courts contribute to the orderly operation of the legal system.³³ It also suggests that courts have a duty to exercise heightened care when litigants without lawyers rely on assistance from nonlawyers who are not subject to the ethical obligations imposed by the courts.

Some writers have recommended transferring responsibility for regulating lawyers and nonlawyer legal assistance from the judiciary to legislative or executive agencies.³⁴ They have argued that regulation of lawyering through licensing and court-imposed ethical rules has been an inefficient means of achieving the objectives of regulation.³⁵ This Article contends that the responsibility of the judiciary to guarantee the orderly operation of the legal system within bounds set by the Constitution and common law tradition requires the courts to retain primary responsibility for regulating lawyers and nonlawyer legal assistance.³⁶ Because the First and Fourteenth Amendments protect some of the specific law-related activities engaged in by nonlawyers, regulation of nonlawyer activities devised by legislative and executive

it brings with it the ingredients of a truly democratic legitimacy. And it tells us that all we have to do in order to sustain that legitimacy in adjudication is to preserve the common law features that produce it: resolution only of actual controversies; fact-specific, case-by-case adjudication; initiation and control of lawsuits by affected parties; and narrow application of stare decisis.

Id.

32. See *infra* notes 173-92 and accompanying text.

33. See *infra* notes 228-38 and accompanying text.

34. See generally David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 801, 873 (1992) (recommending use of a combination of legislative, executive, and judicial agencies to regulate lawyer conduct); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 Tex. L. Rev. 335, 407 (1994) (suggesting that Congress might eventually have to promulgate ethical rules for lawyers).

35. See Wilkins, *supra* note 34, at 822-30 (doubting that the current disciplinary system for lawyers can be effective); Zacharias, *supra* note 34, at 345 ("Disparate state professional rules result in confusion and an inability of lawyers to follow each jurisdiction's mandates.").

36. David Wilkins has examined the impact of various regulatory schemes on the responsibility of the judiciary to remain independent. See Wilkins, *supra* note 34, at 853-58.

agencies is subject to judicial review to guarantee compliance with constitutional mandates.³⁷

Part I of this Article examines the First and Fourteenth Amendment protection afforded to law-related activities of organizations with primarily political and social goals. It reviews cases in which the Supreme Court has found that state unauthorized practice of law rules violated the First and Fourteenth Amendments. This part also discusses the two standards of review that have evolved for law-related speech and association with primarily political or social goals versus activities with primarily commercial goals. It draws on Supreme Court cases that established the right of civil rights organizations, civil liberties organizations and labor unions to encourage and sponsor lawyer-conducted litigation that advanced the groups' interests, and it argues that First and Fourteenth Amendment protections should also apply to other organizations with primarily political and social purposes that encourage and assist litigation by providing nonlawyer legal assistance to litigants without lawyers.

Part II reviews the types of governmental interests that have been advanced to justify restrictions on the law-related activities of lawyers as well as nonlawyers. It suggests that the Supreme Court has shifted the focus from the government's interest in protecting the public from harm to its interest in the operation of the legal system.³⁸

Part III explores two aspects of the governmental interest in the operation of the legal system. It examines the need of courts to limit the exercise of judicial power to the cases of litigants with standing and the corresponding need for courts to be accessible to individuals with cases of all types.

Part IV recommends that courts and the bar undertake an analysis of specific law-related activities to determine whether the regulation or prohibition of nonlawyer participation violates the First and Fourteenth Amendments. This part begins such an analysis by asking the three questions suggested by Professor Rhode as they relate to the operation of the legal system. It does not attempt a corresponding analysis of the government's interests in protecting the public from harm.³⁹ It first asks what are the risks and benefits to the operation of the legal system of allowing nonlawyer participation in specific law-related activities. It then discusses ways of minimizing threats to the operation of the legal system that are less restrictive than prohibiting unauthorized practice of law. Finally, it discusses who should decide whether regulation is needed and how to provide it.

37. See Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 *Hastings L.J.* 577, 652-55 (1989); Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 *Fordham L. Rev.* 559, 595-610 (1992).

38. See *infra* notes 142-50 and accompanying text.

39. See Rhode, *Professionalism in Perspective*, *supra* note 26, at 707.

I. FIRST AMENDMENT PROTECTION OF LAW-RELATED ACTIVITIES

The Supreme Court has long recognized the conflict between rules banning unauthorized practice of law and the First Amendment guarantees of freedom of speech, association, and petition of government for redress of grievances.⁴⁰ Early cases rejected the arguments of state bar associations that the governmental interest in protecting the public from harm justified broad bans on speech and collective activity aimed at gaining access to the courts.⁴¹

The Court has applied two different standards of scrutiny to First Amendment challenges to state regulation of lawyers and the law-related activities of nonlawyers. On the one hand, the Court has held that organizations with primarily political and social purposes have a fundamental right to engage in speech and cooperative activities aimed at facilitating access to the courts for individuals with legitimate claims.⁴² Therefore, the Court has ruled that rules prohibiting such activity must withstand strict scrutiny by reviewing courts.⁴³ On the other hand, the Court has applied intermediate scrutiny to rules curtailing law-related activities that have the primary purpose of advancing the commercial interest of the speaker—a standard more deferential to the state.⁴⁴ Here, when defending regulations governing commercial speech and association, state agencies must advance a substantial governmental interest and demonstrate that the regulations are narrowly tailored to achieve that interest.⁴⁵

Although both tests require an inquiry into the governmental interest at stake, courts have failed to develop a clear picture of those interests in their decisions under this test. But, significantly, in *Florida Bar v. Went for It, Inc.*,⁴⁶ the Court appears to have recently changed the focus of its governmental interest inquiry from interest in avoiding harm to the public to the government's own interest in the operation of the legal system.⁴⁷ The new shift in emphasis is significant for the analysis of unauthorized practice of law rules.

40. See *United Transp. Union v. State Bar*, 401 U.S. 576, 580-86 (1971); *United Mine Workers, Dist. 12 v. Illinois Bar Ass'n.*, 389 U.S. 217, 221-25 (1967); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 8 (1964); *NAACP v. Button*, 371 U.S. 415, 444-45 (1963).

41. See *United Mine Workers*, 389 U.S. at 221-25; *Trainmen*, 377 U.S. at 8.

42. See *infra* notes 48-95 and accompanying text.

43. See *In re Primus*, 436 U.S. 412, 432-33 (1978).

44. See *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623-24 (1995).

45. See *id.*

46. 515 U.S. 618 (1995).

47. See *id.* at 631 n.2.

A. *The Right of Organizations with Primarily Political and Social Purposes to Encourage and Sponsor Litigation*

In *NAACP v. Button*,⁴⁸ the Court held that the First Amendment, applied to states through the Fourteenth Amendment, protected the NAACP's campaign to end public school segregation by encouraging and sponsoring litigation.⁴⁹ In Virginia, lay members of the NAACP recruited parents and children to meetings at which NAACP staff lawyers explained the legal steps necessary to desegregate public schools and passed out printed forms authorizing the NAACP staff lawyers to represent the signers in desegregation cases.⁵⁰ The NAACP paid its staff attorneys a modest per diem fee for their work on cases and reimbursed their expenses.⁵¹ The staff lawyers were not permitted to receive any other compensation, and there was no cost to the client.⁵² NAACP policies limited the types of cases it would finance, but actual conduct of the sponsored litigation was under the control of the lawyers.⁵³ The Virginia courts held that the NAACP campaign violated the state statute forbidding the practice of law without a license,⁵⁴ the solicitation of business for a lawyer by a layperson or organization,⁵⁵ and "the improper solicitation of any legal or professional business" by a lawyer.⁵⁶

The Supreme Court disagreed. The Court found that the activities of the NAACP and its legal staff were "modes of expression and association protected by the First and Fourteenth Amendments"⁵⁷ The Court reasoned that to the NAACP, litigation was a form of political expression, and that, "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."⁵⁸

The Court also found the Virginia statute to be impermissibly vague and overbroad.⁵⁹ Observing that a statute curtailing First Amendment rights as little as possible could be valid if it served a compelling government interest,⁶⁰ the Court concluded that Virginia had not advanced an interest sufficient to justify the broad prohibitions of its statute.⁶¹

48. 371 U.S. 415 (1963).

49. *See id.* at 428-29.

50. *See id.* at 421.

51. *See id.* at 420.

52. *See id.* at 420-21.

53. *See id.* at 421.

54. *See id.* at 418.

55. *See id.* at 423-26.

56. *Id.* at 419.

57. *Id.* at 428-29.

58. *Id.* at 430.

59. *See id.* at 432-36.

60. *See id.* at 438.

61. *See id.* at 432, 438, 444.

The following year, the Court, in *Brotherhood of Railroad Trainmen v. Virginia*,⁶² upheld the First Amendment rights of a union that assisted its members with legal claims.⁶³ Here, the union's members and staff contacted members who were injured on the job, told them that they had the right to sue for compensation, and urged them to consult a lawyer recommended by the union.⁶⁴ The Virginia State Bar claimed that nonlawyer union members who gave injured members advice about their legal rights and urged them to initiate legal action were engaging in the unauthorized practice of law.⁶⁵ The bar also claimed that the local lawyers who accepted the cases and charged the clients fees were engaged in improper solicitation of legal business and aiding the unauthorized practice of law.⁶⁶

Although the cases of the injured workers did not appear to have the political significance of the desegregation litigation protected in *Button*⁶⁷ and the commercial interest of the lawyers who received the referrals was more pronounced, the court still recognized the union's rights. Indeed, the Court found that

the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other.⁶⁸

The court also extended the First Amendment protection to the lawyers who accepted employment under the plan.⁶⁹ The Court explained that “what Virginia has sought to halt is not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice.”⁷⁰

Similarly, three years later, in *United Mine Workers, District 12 v. Illinois State Bar Ass'n*,⁷¹ the Supreme Court held that the First and Fourteenth Amendments protected the union's right to hire lawyers on salary to assist members in asserting their legal rights.⁷² In this case, the union employed a licensed attorney on salary to represent its

62. 377 U.S. 1 (1964).

63. *See id.* at 8.

64. *See id.* at 5.

65. *See id.* at 2.

66. *See id.*

67. *See id.* at 10 (Clark, J., dissenting) (“Personal injury litigation is not a form of political expression, but rather a procedure for the settlement of damage claims.”). However, Justice Clark's description of personal injury litigation overlooks the power of courts to make law through the interpretation of statutes and the development of common law doctrines. *See* Peters, *supra* note 29, at 361-66.

68. *Trainmen*, 377 U.S. at 6.

69. *See id.* at 8.

70. *Id.* at 6.

71. 389 U.S. 217 (1967).

72. *See id.* at 221-22.

members in worker compensation claims.⁷³ In doing so, the union told the staff lawyer, "your obligations and relations will be to and with only the several persons you represent."⁷⁴ The Illinois courts enjoined the arrangement as an unauthorized practice of law,⁷⁵ but the Supreme Court overruled the Illinois courts. While the Court acknowledged the broad power of the states to regulate the practice of law, it refused to allow broad rules which impair the rights of individuals to assemble peacefully and to petition for a redress of grievances.⁷⁶

The Supreme Court reaffirmed the right of union members to advise each other on legal issues and to help each other secure effective legal representation in *United Transportation Union v. State Bar*.⁷⁷ Here, the union, a successor of the Trainmen's union, helped its members meet the cost of legal representation in personal injury claims by referring workers injured in Michigan to an Illinois law firm.⁷⁸ The union also made an initial investigation of the facts of the claim and turned the results over to the law firm.⁷⁹

The Supreme Court again extended the First Amendment to the union practices.⁸⁰ The Court concluded: "The common thread running through our decisions in *NAACP v. Button*, *Trainmen*, and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."⁸¹

Despite the Supreme Court's strong defense and continued support of collective activity to gain access to justice, the Court never clearly defined its contours. Nevertheless, the facts of *Button*, *Trainmen*, *United Mine Workers*, and *United Transportation Union* somewhat define the scope of the First Amendment rights.

The First and Fourteenth Amendment rights of the organizations, their members, and staff were at stake in the four cases, not the rights of the litigants. In *Button*, the entity with First Amendment interests was a nonprofit membership corporation⁸² that had some of the characteristics of a political party.⁸³ The Court held that the NAACP, its affiliates, and its staff lawyers were protected by the First and Four-

73. See *id.* at 218.

74. *Id.* at 220.

75. See *id.* at 218-19.

76. See *id.* at 222-23. The court added that "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political." *Id.* at 223.

77. 401 U.S. 576 (1971).

78. See *id.* at 577-78. The firm agreed with the union to limit its fees to 25% of the recovery. See *id.*

79. See *id.* at 579 n.4.

80. See *id.* at 580.

81. *Id.* at 585.

82. *NAACP v. Button*, 371 U.S. 415, 419 (1963).

83. See *id.* at 431 (recognizing that the "NAACP is not a conventional political party" but that it acts in some ways as such).

teenth Amendments.⁸⁴ In *Trainmen*, the petitioner was a labor union “founded as a fraternal and mutual benefit society to promote the welfare of trainmen.”⁸⁵ The Court extended First and Fourteenth Amendment protection to the individual members acting through their union.⁸⁶

Each of the organizations with First and Fourteenth Amendment rights at stake was seeking to advance its own political and social objectives by encouraging individuals with redressable injuries to bring lawsuits and by assisting litigants with their cases.⁸⁷

The specific law-related activities engaged in by the NAACP and the unions included: informing persons about their legal rights,⁸⁸ advising them to file a lawsuit,⁸⁹ recommending a particular lawyer,⁹⁰ hiring a lawyer to assist union members,⁹¹ and employing a nonlawyer to investigate accidents and to gather evidence for trials.⁹² The goals of the protected activities ranged from asserting freedoms guaranteed by the Constitution in *NAACP v. Button*,⁹³ to vindicating rights under federal protective legislation in *Trainmen*,⁹⁴ and to bringing claims arising under state law in *United Mine Workers*.⁹⁵

84. *See id.* at 428-29.

85. *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 2 (1964).

86. *See id.* at 8; *see also* *United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-22 (1967) (protecting the right of the union to hire a lawyer “to assist its members in the assertion of their legal rights”).

87. In each of the cases, barriers to obtaining lawyers made it difficult for potential litigants to vindicate their legal rights. *See United Mine Workers*, 389 U.S. at 219; *Trainmen*, 377 U.S. at 3-4; *Button*, 371 U.S. at 443. For example, in *Trainmen*, the Court observed:

It soon became apparent to the railroad workers, however, that simply having these federal statutes on the books was not enough to assure that the workers would receive the full benefit of the compensatory damages Congress intended they should have. Injured workers or their families often fell prey on the one hand to persuasive claims adjusters eager to gain a quick and cheap settlement for their railroad employers, or on the other to lawyers either not competent to try these lawsuits against the able and experienced railroad counsel or too willing to settle a case for a quick dollar.

377 U.S. at 3-4; *see also United Mine Workers*, 389 U.S. at 219 (reporting that before the union hired an attorney on salary, union members were paying 40%-50% of worker's compensation awards for attorney fees); *Button*, 371 U.S. at 443 (“Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation.” (footnote omitted)).

88. *See Button*, 371 U.S. at 434-37.

89. *See id.*

90. *See id.*

91. *See United Transp. Union v. State Bar*, 401 U.S. 576, 580-81 (1971); *United Mine Workers*, 389 U.S. at 221-22; *Trainmen*, 377 U.S. at 5.

92. *See United Transp. Union*, 401 U.S. at 581-82.

93. 371 U.S. at 430.

94. 377 U.S. at 5-8.

95. 389 U.S. at 224 & n.5.

B. *Commercial Speech and Law-Related Activities*

The rights to engage in commercial speech and association are not fundamental, even when the speech or association is law-related, but the First Amendment does afford them protection.⁹⁶ In *Florida Bar v. Went for It, Inc.*, the Court upheld a Florida bar rule that prohibited “personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for thirty days following an accident or disaster.”⁹⁷ In applying intermediate scrutiny, the Court used a three-pronged test for law-related commercial speech: “First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn.”⁹⁸

The substantial interest prong of the test requires the state to assert an interest in support of its rule.⁹⁹ Unlike rational basis review, the most deferential test, the intermediate standard does not permit the court itself to put forward conceivable state interests.¹⁰⁰ The second prong of the test requires the state to demonstrate that the anticipated harms are real possibilities and that the challenged regulation is likely to alleviate them.¹⁰¹

Finally, the third part of the intermediate scrutiny test demands that the state’s regulation be “reasonably well tailored to its stated objective”¹⁰² The regulation does not have to be the least restrictive means, but it must be a much closer fit than rational basis review requires.¹⁰³ A regulation prohibiting activities likely to produce the harms anticipated by the state can satisfy the third prong.¹⁰⁴

Florida Bar did not supplant the analysis of First and Fourteenth Amendment rights in *Button* and the union cases.¹⁰⁵ Instead, it concerned commercial speech entitled to a lesser degree of protection.¹⁰⁶

96. See *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623-24 (1995); see also *In re R.M.J.*, 455 U.S. 191, 203 (1982) (setting aside the disbarment of a lawyer and holding that to justify restrictions on commercial speech “the State must assert a substantial interest and the interference with speech must be in proportion to the interest served”); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564-66 (1980) (describing the intermediate scrutiny test to be used for commercial speech).

97. 515 U.S. at 620.

98. *Id.* at 624 (citation omitted).

99. See *id.* at 624.

100. See *id.*

101. See *id.* at 625-26.

102. *Id.* at 633.

103. See *id.* at 632.

104. See *id.* at 632-34.

105. See *id.* at 634 (“There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer.”).

106. See *id.* at 634-35.

The line between the two levels of protection afforded to the different types of law-related activity was explored in the companion cases of *In re Primus*¹⁰⁷ and *Ohralik v. Ohio State Bar Ass'n.*¹⁰⁸

Edna Smith Primus was a private attorney and an officer of the American Civil Liberties Union (ACLU) affiliate in South Carolina.¹⁰⁹ After speaking to a woman who had been sterilized as a condition of receiving government health insurance, Primus sent the woman a letter telling her that the ACLU would provide free legal assistance if she wanted to sue the state.¹¹⁰ The ACLU volunteer lawyers designated to take the case shared office space with Primus,¹¹¹ and they had agreed to turn over any court awarded attorney fees to the organization.¹¹² The South Carolina bar disciplined Primus for solicitation.¹¹³

The Supreme Court held that Primus's actions were protected by the First Amendment and the state regulations could not survive strict scrutiny.¹¹⁴ Acknowledging that the state had a compelling interest in preventing undue influence by its lawyers, the Court held that a regulation that impaired fundamental rights must be no broader than the activity it sought to prevent;¹¹⁵ the strict scrutiny standard would not tolerate a prophylactic regulation.¹¹⁶ The possibility that the ACLU might receive attorneys' fees was not sufficient incentive to make its advocacy of litigation a commercial activity, as the ACLU remained a not-for-profit organization and did not use the possibility of a fee award as a consideration in selecting cases.¹¹⁷

In *Ohralik v. Ohio State Bar Ass'n.*, decided on the same day as *Primus*, the Court applied intermediate scrutiny and upheld suspension of the license of a lawyer who followed an accident victim to the hospital and offered to represent her for a contingency fee in a personal injury suit.¹¹⁸ The Court found, "In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component."¹¹⁹ The Court held that states are permitted to make rules governing commercial activities of lawyers that are "prophylactic measures whose objective is the

107. 436 U.S. 412 (1978).

108. 436 U.S. 447 (1978).

109. See *In re Primus*, 436 U.S. at 414.

110. See *id.* at 415-16.

111. See *id.* at 414 n.1, 418 n.8, 428 n.21.

112. See *id.* at 429-30.

113. See *id.* at 414.

114. See *id.* at 432-38.

115. See *id.* at 432-33.

116. See *id.* at 432.

117. See *id.* at 431 n.25.

118. 436 U.S. 447, 467-68 (1978).

119. *Id.* at 457.

prevention of harm before it occurs."¹²⁰ Rules prohibiting solicitation of legal business for financial gain, although broader than necessary to avoid the targeted harms, are an acceptable regulation of commercial activity.¹²¹

Unlike *In re Primus*, *Ohralik* involved no cooperative activity between the lawyer and a layperson or organization with primarily political interests; it involved merely a private attorney soliciting clients.¹²² This distinction is significant for state rules prohibiting the unauthorized practice of law when those rules restrict the freedom of speech and association of organizations with primarily political and social purposes. Thus, state rules restricting law-related speech and associational activity intended to advance the beliefs of organizations with primarily political and social purposes are subject to strict judicial scrutiny,¹²³ and they must not prohibit more than the specific acts that the state has a compelling interest in preventing.¹²⁴

In short, organizations such as the NAACP, the ACLU, and the United Transportation Union enjoy the strongest First and Fourteenth Amendment protections when they use the legal system to advance their political and social objectives.¹²⁵ Freedom from unwarranted

120. *Id.* at 464. In *Bates v. State Bar*, 433 U.S. 350, 380-81 (1977), the Court held that the overbreadth doctrine does not apply to commercial speech because the economic incentives to speak can be counted on to overcome the possible chilling effect of a broad regulation on protected speech.

121. See *Ohralik*, 436 U.S. at 461 n.19 ("[W]e cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest.").

122. *Id.* at 458.

123. See *NAACP v. Button*, 371 U.S. 415, 431-33 (1963).

124. See *In re Primus*, 436 U.S. 412, 434 (1978).

125. See *id.* at 438 n.32.

Normally the purpose or motive of the speaker is not central to First Amendment protection, but it does bear on the distinction between conduct that is "an associational aspect of 'expression,' . . . and other activity subject to plenary regulation by government. *Button* recognized that certain forms of "cooperative, organizational activity," . . . including litigation, are part of the "freedom to engage in association for the advancement of beliefs and ideas," . . . and that this freedom is an implicit guarantee of the First Amendment. . . . [Primus's] speech—as part of associational activity—was expression intended to advance "beliefs and ideas." In [*Ohralik*] . . . the lawyer was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests. The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw . . . but that is not reason for avoiding the undertaking.

Id. (citations omitted).

Justice Rehnquist criticized the majority opinion for establishing a standard based on the purpose of the speaker, on the grounds that such a subjective standard would be hard to apply. See *id.* at 441-42 (Rehnquist J., dissenting). However, the task of ascertaining the motive of the speaker might be more practical when the speaker is acting on behalf of an organization with goals that have been agreed to by the members than when the speaker is acting alone. In *Button*, 371 U.S. at 419-20, the Court looked to NAACP policy, set by an annual national convention, to ascertain the "ba-

state interference also extends to the lawyers who cooperate with these organizations.¹²⁶

Nonprofit organizations such as the Domestic Violence Program in Tennessee and the City-Wide Task Force on Housing Court in New York present a different model, but one that is analogous to the NAACP, the unions, and the ALCU. Rather than encouraging prospective litigants to consult a lawyer and sponsoring litigation conducted by lawyers, the two examples represent organizations that encourage individuals to prosecute or to defend cases in court without lawyers, when lawyers are not available. They provide nonlawyer legal assistance to potential and actual litigants who do not have lawyers. The reasoning that led the Court to extend First and Fourteenth Amendment protection to the activities of the NAACP, the unions, and the ACLU applies with equal force to the activities engaged in by the Domestic Violence Program and the City-Wide Task Force on Housing Court. Organizations that seek to alleviate domestic violence by encouraging victims of battering to vindicate their legal rights and organizations that seek to keep families secure and safe in their homes by helping tenants assert their rights in court are similar in motive to the NAACP, the unions, and the ACLU. The primary purpose of such organizations would be ascertainable from their charters and official resolutions. State-imposed limits on their activities in support of litigation that advances their beliefs and ideas should be subject to strict scrutiny by reviewing courts. Limits on their law-related activities should be based on compelling governmental interests and should be the least restrictive means likely to achieve the government's interests.

II. IDENTIFYING THE GOVERNMENTAL INTERESTS

Because collective law-related activities for political or social goals are protected by the First and Fourteenth Amendments, only compelling governmental interests may justify the deprivation of these fundamental rights.¹²⁷ When evaluating the interests served by the regulation of the practice of law, courts and the bar have traditionally focused on protecting the public from harm.¹²⁸ Recently, however, the Supreme Court appears to have shifted that focus to the government's own interest in the operation of the legal system.¹²⁹ That inter-

sic aims and purposes" of the organization. In *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 3, n.3 (1964), the Court found the purpose of the organization stated in the union's constitution. In *In re Primus*, 436 U.S. at 431, the Court referred to rules of the Internal Revenue Service that were binding on "public interest law firms" to determine the purpose of the ACLU.

126. See *Trainmen*, 377 U.S. at 8.

127. See *supra* notes 48-95 and accompanying text.

128. See ABA Comm'n on Nonlawyer Practice, *supra* note 1, at 136-40; *supra* notes 21-25.

129. See *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 631 n.2.

est is an important justification for regulation of some law-related activities. Its recognition, therefore, calls for more careful assessment of the role of nonlawyer legal assistance in the administration of justice.

In early cases, states, in their defenses of unauthorized practice rules, relied on broad statements of governmental interest.¹³⁰ These broad statements included an interest in regulating the legal profession or maintaining high standards of legal ethics.¹³¹ The Court has rejected these broad statements.¹³²

For example, in *Trainmen*, the Court observed that the “[s]tate could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest.”¹³³ Similarly, in *United Mine Workers*, the Court found that a decree preventing the union from paying a lawyer to represent injured union members was not needed to “protect the State’s interest in high standards of legal ethics.”¹³⁴ In *Button*, the Court required more specific statements of governmental interest.¹³⁵

In *Button*, the Court decided that none of the interests advanced by the State of Virginia justified a law preventing the NAACP, its lay members, and its lawyers from soliciting plaintiffs for cases seeking desegregation of public schools.¹³⁶ The Court explained that such rules were “aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest.”¹³⁷ The Court recognized the state’s narrow interest in preventing conflicts of interest that create a situation where a lawyer might betray the interests of a client to enrich herself or a lay sponsor.¹³⁸ In this case, however, the Court found that these dangers were not implicated in the context of civil rights lawyers contesting state-mandated racial segregation.¹³⁹

The Supreme Court has recognized another more specific interest in protecting the public from harmful communication. The Court ex-

130. See, e.g., *Trainmen*, 377 U.S. at 6-8 (“[T]he State has failed to advance any substantial regulatory interest.”).

131. See, e.g., *United Mine Workers, Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 222-24 (1967) (holding that broad rules framed to protect the public cannot justify the substantial impairment of union members’ associational rights); *Trainmen*, 377 U.S. at 7 (stating that a State could not ignore an individual’s constitutional rights by invoking its power to regulate the professional conduct of attorneys); *NAACP v. Button*, 371 U.S. 415, 444 (1963) (concluding that “the State has failed to advance any substantial regulatory interest”).

132. See *United Mine Workers*, 389 U.S. at 222-24; *Trainmen*, 377 U.S. at 6-8.

133. 377 U.S. at 7.

134. 389 U.S. at 225.

135. 371 U.S. at 444.

136. See *id.*

137. *Id.* at 440.

138. See *id.* at 442-43.

139. See *id.* at 442-44.

plained in *In re Primus* that a state has a compelling interest in preventing lawyers from using misleading or overbearing communication, deception, or improper influence to solicit clients or to influence their decisions.¹⁴⁰ The Court explained: "The State's special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence."¹⁴¹

More recently, in *Florida Bar*, the Court recognized two interests—protecting the public from harm and supporting the administration of justice—which justify a rule prohibiting lawyers from mailing solicitations directly to accident victims and their relatives within thirty days of an accident.¹⁴² The Court recognized a substantial interest in protecting the public from harm—"protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers."¹⁴³ The Court also recognized a "paramount" interest in protecting the legal system by preventing actions that "negatively affect the administration of justice."¹⁴⁴ Indeed, the Court noted that the administration of justice was damaged by "the erosion of confidence in the profession that such [solicitations] have engendered."¹⁴⁵

The interests in protecting the public from harm and protecting the legal system itself are interconnected.¹⁴⁶ Indeed, the Court noted that the interest in protecting the privacy and tranquility of personal injury victims factored into the state's interest in the administration of justice.¹⁴⁷ "Because direct mail solicitations in the wake of accidents are perceived by the public as intrusive, . . . the reputation of the legal profession . . . has suffered commensurately."¹⁴⁸ Similarly, damage to the administration of justice can ultimately lead to public harm.

The Court distinguished *Florida Bar* from other First Amendment cases challenging regulations of the practice of law.¹⁴⁹ The Court reasoned that in *Florida Bar*, the substantial governmental interest advanced was its own interest in carrying out a function of government rather than merely a paternalistic interest in protecting the public

140. *See id.* at 438-39.

141. *Id.* at 438.

142. *See Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 624-25 (1995).

143. *Id.* at 624.

144. *Id.* (alteration in original) (quoting *Florida Bar: Petition to Amend the Rules Regulating the Fla. Bar—Adver. Issues*, 571 So. 2d 451, 455 (Fla. 1990)).

145. *Id.* at 635.

146. *See id.*

147. *See id.* at 624-25.

148. *Id.* at 625; *see* Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went for It, Inc.*, 49 Ark L. Rev. 703, 724-25 (1997) (questioning the Court's reliance on polling data to establish a governmental interest in action that curbs First Amendment rights).

149. *See Florida Bar*, 515 U.S. at 628-31.

from harm.¹⁵⁰ Perhaps this indicates that the Court has shifted the focus away from the governmental interest in *protecting the public*—which includes protecting the public from shoddy work, invasion of privacy, undue influence, deception, fraud, and overreaching to the governmental interest in the *operation of the legal system*—which has included measures the courts have cited to preserve confidence in the legal profession, protect the attorney-client relationship, license and supervise lawyers in their role as officers of the courts, assure the economic viability of the bar, and maintain the moral and ethical fabric of the administration of justice.¹⁵¹

150. See *id.* at 631 n.2 (“There is an obvious difference between situations in which the government acts in its own interests, or on behalf of entities it regulates, and situations in which the government is motivated primarily by paternalism.”).

151. The dual interests expressed in *Florida Bar* of protecting the public from harm and supporting the administration of justice recur consistently in cases testing the limits of state regulation of law-related activities. See *Shapiro v. Kentucky Bar Ass’n*, 486 U.S. 466, 474-75 (1988) (dealing with direct solicitations’ potential for unduly influencing a lay person); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 641 (1985) (finding the possibility of “overreaching, invasion of privacy, the exercise of undue influence, and outright fraud”); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 465 (1978) (noting that “the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person”); *In re Primus*, 436 U.S. 412, 426 (1978) (“Without denying the power of the State to take measures to correct . . . substantive evils . . . this Court has required that ‘broad rules framed to protect the public and to preserve respect for the administration of justice’ must not work a significant impairment of ‘the value of associational freedoms.’” (quoting *United Mine Workers, Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967))); *Bates v. State Bar*, 433 U.S. 350, 378 (1977) (“Restraints on advertising . . . are an ineffective way of deterring shoddy work.”). The Supreme Court has recognized

that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of the professions. . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been “officers of the courts.”

Goldfarb v. Virginia State Bar, 421 U.S. 772, 792 (1975) (citations omitted). The governmental interest in the administration of justice encompasses measures to preserve confidence in the legal profession. See *Florida Bar*, 515 U.S. at 635 (“The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered.”); see also *United Mine Workers*, 389 U.S. at 222 (“But it is equally apparent that broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms.”). The government might also take measures to protect the attorney-client relationship, see *Ohralik*, 436 U.S. at 454 (“The solicitation of business by a lawyer through direct, in-person communication with the prospective client has long been viewed as inconsistent with the profession’s ideal of the attorney-client relationship.”), to license and supervise lawyers in their role as officers of the courts, see *In re Primus*, 436 U.S. at 438, to assure the economic viability of the bar, see *Bates*, 433 U.S. at 377-78, and to maintain the moral and ethical fabric of the administration of justice, see *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 6 (1964) (“Here what Virginia has sought to halt is not a

According to Professor Rhode, while the feared harms to the public are serious concerns of state government, they are insufficient justifications for a comprehensive state regulation of law-related activities.¹⁵² Even when reviewed under the relaxed standard of scrutiny applied to commercial speech, rules imposing qualifications for the practice of law, restricting solicitation of legal business, and controlling the relationship between litigants and their representatives seem to be overreactions to the perceived evils.¹⁵³ Moreover, Professor Rhode questions whether unauthorized practice of law rules effectively protect the public against incompetent representation. She writes that

[t]he traditional rationale for unauthorized practice constraints—protection of the public from incompetent and unethical services—cannot support the scope of current prohibitions. Although the risk to consumers should not be overlooked, it has been too often overstated. As noted earlier, in many contexts where lay services are prevalent, certification as a lawyer is neither a necessary nor a sufficient guarantee of competence. Attorneys who lack experience in a certain subject area may be less able to provide cost-effective routine services than experienced legal technicians.¹⁵⁴

The fear of harm to the public, however, is not the sole justification for unauthorized practice of law rules. The government's interest in the administration of justice and its ultimate connection to the prevention of public harm, as noted in *Florida Bar*, helps to explain the legitimate need for regulation of some law-related activities. Consequently, Professor Rhode's framework is incomplete without a consideration of this important interest. The next part examines this interest in the administration of justice, focusing on the limited exercise of judicial power and the role of judicial accessibility within that interest.

III. THE GOVERNMENTAL INTEREST IN THE OPERATION OF THE LEGAL SYSTEM

Traditionally, courts have given insufficient attention to the government's interest in maintaining an orderly system of justice at both the state and federal levels. Yet, as noted above, it is an important justification for rules governing the practice of law.

The most imperative requirements of the operation of the judiciary are derived from the Constitution and the historical understanding of

commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice.”).

152. See Rhode, *Professionalism in Perspective*, *supra* note 26, at 707-09.

153. See *id.* at 710-11 (arguing that the public can be protected from incompetence more efficiently by licensing systems for nonlawyers).

154. Rhode, *Delivery of Legal Services by Non-Lawyers*, *supra* note 26, at 230.

the role of adjudication in our system of government.¹⁵⁵ Courts exercise judicial power by making judgments and issuing orders in cases before them. They also exercise judicial power by making law through the precedential effect of their decisions.¹⁵⁶ The doctrine of *stare decisis* in both federal and state courts ensures that these decisions will not only determine the conduct of the parties to a particular case, but will also influence the conduct of others in similar situations.¹⁵⁷

Although the Constitution and the traditional role of our judiciary limit the exercise of judicial power to cases and controversies, they also require that the judiciary be accessible to individuals with claims.¹⁵⁸ Within this system, lawyers are a necessary ingredient.¹⁵⁹ Indeed, courts could not function within the limits of the Constitution and make justice accessible to all without relying on lawyers for some tasks.¹⁶⁰ This part examines the operation of the legal system, specifically focusing on the limits of judicial power and the requirements of making justice available to all. Part III.A first examines limits on judicial power. Part III.B examines the requirements of making justice available to all. Both sections note the role of lawyers in this scheme.

A. *Limiting the Exercise of Judicial Power*

At all levels of government, access to the courts is limited. In both federal and state courts the judicial power is reserved for litigants who have a personal stake in a matter that can be brought before the court. Article III of the Constitution restricts the judicial power of federal courts to "cases" and "controversies."¹⁶¹ The case or controversy language creates two different kinds of limitations. First, it assures that the judicial branch does not act as a legislative body, but exercises power only in the context of adjudication.¹⁶² Further, the language also assures that individuals who invoke the power of the judiciary are

155. See Peters, *Adjudication as Representation*, *supra* note 29, at 435-36.

156. *Id.* at 347 (explaining that "[s]tare decisis binds only to the extent that parties to subsequent cases are situated similarly to the parties in precedential cases").

157. *Id.* at 361 (explaining that a rule made by a court in one case "is likely to persist not merely as a rule of decision—to be followed by courts in deciding subsequent cases—but as a rule of conduct as well, to be followed by individuals and entities rationally conducting their everyday affairs"); see also Llewellyn, *supra* note 29, at 72-75 (contrasting "orthodox" and "loose" views of precedent's function in courts).

158. See *infra* notes 173-92 and accompanying text.

159. The Sixth Amendment, for example, recognizes the critical role of lawyers in the administration of justice by guaranteeing the right to counsel in criminal cases. See U.S. Const. amend. VI.

160. See, e.g., *In re Gault*, 387 U.S. 1, 34-42 (1967) (discussing the role of lawyers in juvenile court delinquency proceedings). The Court held that the Fourteenth Amendment Due Process Clause requires states to appoint a lawyer for a child and his parents who are unable to afford counsel, if the proceeding may result in the commitment of the child to an institution. *Id.* at 41.

161. See *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

162. See *id.* at 94-95.

proper parties to participate in an adversarial proceeding under the doctrine of standing.¹⁶³ As the court explained in *Flast v. Cohen*,

Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.¹⁶⁴

In state courts, too, the common law doctrine of standing serves the purpose of assuring that courts adjudicate actual cases and controversies between litigants with adverse interests.¹⁶⁵ Although the power of state courts varies from state to state, all courts must set some boundary at which judicial power ends and legislative and executive powers begin. The doctrine of standing sets the boundaries for individual access to the courts by determining who is a proper party to invoke the power of the court.¹⁶⁶

Once the litigants meet the case and controversy requirements, they have access to remarkable powers within the legal system. Those powers include the ability to initiate cases,¹⁶⁷ to conduct discovery,¹⁶⁸ to frame issues for courts to decide,¹⁶⁹ to obtain decisions,¹⁷⁰ and to enlist public officials in enforcing judgments and orders.¹⁷¹ Clearly, the lawyer, as an agent for her client, exercises substantial power in these law-related activities. The possibility that a representative who is permitted to invoke judicial power on behalf of a qualified litigant might misuse this remarkable power to advance personal interests, whether financial or ideological, in ways that conflict with the interests of the actual litigant poses a significant risk to the integrity of the legal system. Ethical rules that prohibit conflicts of interest between law-

163. See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513, 1549 (1991).

164. *Flast*, 392 U.S. at 94-95.

165. See Peters, *supra* note 29, at 428 (arguing that adjudication should be limited to those cases where the plaintiff has a sufficient personal stake in the outcome so that the court can base its substantive decision on facts particular enough to allow later litigants to distinguish them); see also Llewellyn, *supra* note 29, at 72-73 (explaining that under an orthodox view of precedent, the power of a court to make law by establishing precedent is limited by the actual facts and procedural issues before the court).

166. See Brown, *supra* note 163, at 1549.

167. See, e.g., Fed. R. Civ. P. 3 (providing that a civil action is commenced upon the filing of a complaint with the court).

168. See, e.g., Fed. R. Civ. P. 26-37 (listing rules and procedures governing discovery).

169. See Peters, *supra* note 29, at 348, 353, 369-70.

170. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 387-391 (1978); Peters, *supra* note 29, at 348-49.

171. See, e.g., Fed. R. Civ. P. 64, 69-70 (specifying procedures for enforcing judgments).

yers and their clients and rules that proscribe misleading and overbearing solicitation serve to enforce the standing requirements of courts and to prevent misuse of judicial power by individuals who have no standing to initiate litigation themselves.¹⁷²

B. *Making Justice Accessible*

Although constitutional and judicial doctrines limit access to courts, at the same time, they seek to ensure access for litigants who meet the requirements.¹⁷³ Nonlawyer assistance often is crucial in facilitating this access.¹⁷⁴ Moreover, in recent decades, the expansion of these doctrines increased the necessity of nonlawyer assistance.

In the 1960s and 1970s, the Supreme Court expanded the federal court doctrine of standing to include many individuals who never before had access to the courts for redress of their grievances.¹⁷⁵ The new inclusiveness of the standing doctrine fueled the increased need for legal services for poor persons.¹⁷⁶ This expansion of the standing doctrine paralleled the expansion of the protections of the Due Process Clauses of the Fifth and Fourteenth Amendments.¹⁷⁷ Indeed, as the Supreme Court extended due process protection to the beneficiaries of protective legislation in cases such as *Goldberg v. Kelly*¹⁷⁸ and *Mathews v. Eldridge*,¹⁷⁹ it also made the doctrine of standing more inclusive, so that beneficiaries of protective legislation could invoke the power of federal courts when threatened with the loss or deprivation of entitlements.¹⁸⁰ In *Association of Data Processing Service Organizations, Inc. v. Camp*, the Supreme Court extended the

172. In *NAACP v. Button*, 371 U.S. 415 (1963), Justice Harlan wrote in dissent: The State has sought to prohibit the solicitation and sponsoring of litigation by those who have no standing to initiate that litigation themselves and who are not simply coming to the assistance of indigent litigants. Thus the state policy is not unrelated to the federal rules of standing—the insistence that federal court litigants be confined to those who can demonstrate a pressing personal need for relief.

Id. at 463-64 (Harlan, J., dissenting).

In *In re Primus*, the Court, acknowledging the concern expressed by Justice Harlan in *Button*, explained:

Nor does the record permit a finding of a serious likelihood of conflict of interest or injurious lay interference with the attorney-client relationship. Admittedly, there is some potential for such conflict or interference whenever a lay organization supports any litigation.

436 U.S. 412, 436 (1978).

173. See *Brown supra* note 150, at 1549-53.

174. See *Button*, 371 U.S. at 435-36, 41-42.

175. See *id.* at 1551-52.

176. See Alan W. Houseman, *A Short Review of Past Poverty Law Advocacy*, 23 *Clearinghouse Rev.* 1514, 1515-17 (1990).

177. See *Brown, supra* note 163, at 1549-53.

178. 397 U.S. 254 (1970).

179. 424 U.S. 319 (1976).

180. See *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-54 (1970).

doctrine of standing to include individuals whose claims were arguably within the "zone of interest" of a statute or regulation.¹⁸¹ By expanding access to federal courts, the Court not only enabled beneficiaries of protective legislation to seek judicial review of the fairness of procedures in government programs, but also ensured that the legislation would be interpreted by a branch of government not charged with its administration.¹⁸²

The 1960s and 1970s also saw increased legal advocacy on behalf of poor persons.¹⁸³ The victories in cases brought by minorities and disadvantaged persons opened the courts as a source of relief for injustices and, at the same time, created a greater need for lawyers to enforce legislation and constitutional rights.¹⁸⁴ The success of the NAACP litigation strategy that culminated in *Brown v. Board of Education*¹⁸⁵ led to lawsuits by racial minorities challenging racial segregation throughout the country.¹⁸⁶

President Lyndon Johnson's War on Poverty embraced legal advocacy as part of its strategy to combat poverty.¹⁸⁷ It laid the groundwork for the federal Legal Services Corporation that established law offices to provide free legal assistance for poor persons throughout the country.¹⁸⁸

Congress, however, has since retreated from its commitment to provide lawyers to represent poor persons with legal interests requiring the protection of the courts.¹⁸⁹ Funding for the national Legal Services Corporation was cut from a high of \$321 million in 1981 to \$241 million in 1982 and has never regained the 1981 level of funding.¹⁹⁰

181. *Id.*

182. *See* Brown, *supra* note 163, at 1549-53.

183. *See* Section of Legal Education and Admissions to the Bar, American Bar Ass'n, *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 50-54 (1992) [hereinafter *The MacCrate Report*] (describing the expansion of legal services for the poor during the 1960s and 1970s).

184. *See id.* at 50; Houseman, *supra* note 176, at 1516-17.

185. 347 U.S. 483 (1954).

186. *See* Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (1975) (describing the NAACP litigation strategy in the fight against racial segregation); *see also* NAACP v. Button, 371 U.S. 415, 435 n.16 (1963) (citing numerous cases challenging public school segregation in Virginia alone).

187. *See* The MacCrate Report, *supra* note 183, at 49-51.

188. *See id.* at 50-54; Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. Va. L. Rev. 367, 370-73 (1993-94); Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 Geo. L.J. 1669, 1672-85 (1995).

189. N. Lee Cooper & Stephen F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 Cumb. L. Rev. 923, 939 (1996).

190. *See* Eldred & Schoenherr, *supra* note 188, at 370-71. Congress appropriated \$300 million for the Legal Services Corporation for the 1999 fiscal year. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 411, 112 Stat. 2681 (1998).

This retreat risks harm to both the public and the legal system. Legal interests entitled to judicial protection from unlawful deprivation include rights to housing, health care, education, nutrition, and income maintenance for persons with disabilities and the unemployed.¹⁹¹ If the legislative and executive branches of government do not provide adequate support for programs that make meaningful access to the courts possible, the rights and legal interests of many will go unrecognized and unfulfilled. In turn, the proper operation of the legal system requires the vindication of the rights and legal interests of those with standing. Therefore, the operation of the legal system might falter if it will be unable to uphold the rights and legal interests of individuals who meet the standing requirements. Consequently, the judiciary should find ways to allow those who are unrepresented to gain meaningful access to the courts. In many areas, this must include the availability of nonlawyer assistance.

When courts scrutinize laws that prohibit nonlawyer legal assistance, they must consider whether licensed lawyers are actually available to persons with legal claims.¹⁹² Laws that restrict commercial enterprises that help with law-related matters must likewise be balanced by realistic efforts to make legal assistance available when and where it is needed.

The regulation of lawyers, of course, is necessary, as is regulation of the use of judicial power by nonlawyers. Nevertheless, those regulations must not be used to reverse the role of the federal and state courts as protectors of the rights of all persons. Where regulation is needed, the means used to achieve the government's interests must be carefully chosen so as not to infringe on the role of the courts as protector of the rights and liberty of every person.

IV. ASSESSING THE NEED FOR REGULATION

Rules prohibiting unauthorized practice of law have a particularly adverse impact on the First Amendment rights of organizations with primarily political and social goals. Rules curtailing First Amendment rights of organizations with primarily political and social goals must be the least restrictive means necessary to achieve a compelling governmental interest.¹⁹³ Such rules must identify the prohibited activity with precision,¹⁹⁴ and must not be so broad as to include protected

191. See Houseman, *supra* note 176, at 1517-18.

192. See, e.g., *Johnson v. Avery*, 393 U.S. 483, 487 (1969) (holding that prison writ writers have the right to assist prisoners in drafting petitions for writs of habeas corpus because, without nonlawyer assistance, "their possibly valid constitutional claims will never be heard in any court" (quoting *Johnson v. Avery*, 252 F. Supp. 783, 784 (M.D. Tenn. 1966))).

193. See *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 632 (1995).

194. See *Gentile v. State Bar*, 501 U.S. 1030, 1048-49 (1991) (holding that an ethical rule that fails to give fair notice of the contours of prohibited conduct, absent a clarifying interpretation by a state court, is void for vagueness).

speech within an otherwise valid prohibition.¹⁹⁵ In addition, they must not prohibit protected speech and association simply because they have the potential to cause harm.¹⁹⁶

The ABA Commission on Nonlawyer Practice detailed risks of harm to the public posed by some types of nonlawyer legal assistance.¹⁹⁷ The commission urged courts to examine specific nonlawyer activities and to adopt levels of regulation, ranging from prohibition to no regulation at all, when examining nonlawyer activities.¹⁹⁸ Professor Rhode has also concluded that the laws prohibiting unauthorized practice of law do a poor job of protecting the public from harm caused by ineffective legal assistance.¹⁹⁹

Many critics of state laws and ethical rules prohibiting unauthorized practice of law have focused solely on whether the regulations are well-tailored to the government's goal of preventing potential harms to the public.²⁰⁰ As stated above, a complete picture also requires an examination of how well-tailored such regulations are to the government's own interests in the operation of the legal system.²⁰¹ Therefore, this part does not make a new examination of the risks of harm and the benefits to the public of nonlawyer legal activities. Instead, it reviews only the risks and benefits to the operation of the legal system posed by nonlawyer legal activities.

This part analyzes the threats and benefits to the operation of the legal system of nonlawyer legal activities and the rules prohibiting them. It suggests the need for levels of regulation of specific nonlawyer activities that might not be justified, alone, by the governmental interest in protecting the public from harm.

The activities of nonprofit organizations such as the Domestic Violence Program and the City-Wide Task Force on Housing Court challenge the courts and the bar to determine whether restrictions on specific law-related activities can withstand the strict judicial scrutiny that is applied to state action that restricts fundamental rights. Courts and the bar should ask what is the compelling governmental interest that justifies the restriction and has the state agency chosen the least restrictive means of achieving it. The three questions posed by Profes-

195. See *In re Primus*, 436 U.S. 412, 434 (1978); *NAACP v. Button*, 371 U.S. 415, 432-33 (1963).

196. See *Primus*, 436 U.S. at 434-36 (holding that prophylactic restraints on non-commercial speech and association violate the First Amendment).

197. See ABA Comm'n on Nonlawyer Practice, *supra* note 1, at 126-30.

198. See *id.* at 136-57.

199. Rhode, *Professionalism in Perspective*, *supra* note 26, at 710-11.

200. See ABA Comm'n on Nonlawyer Practice, *supra* note 1, at 126-30, 136-42; Andrews, *supra* note 37, at 621; Rhode, *The Delivery of Legal Services by Non-Lawyers*, *supra* note 26, at 230; Rhode, *Policing the Professional Monopoly*, *supra* note 26, at 90-94. Professor David B. Wilkins evaluates the impact of competing approaches to regulating the practice of law on the professional independence of lawyers as well as on the protection of the public. Wilkins, *supra* note 34, at 804-19.

201. See *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 631 n.2 (1995).

sor Rhode provide a useful framework for examining whether regulations are likely to meet the test of strict scrutiny. However, limiting the analysis to the government's interest in protecting the public from harm does not go far enough. This section applies the three questions to the government's interest in the operation of the legal system.

The first question asks what are the risks and benefits to the operation of the legal system in allowing various types of nonlawyer legal assistance.²⁰² The second question asks whether there are ways to minimize the risks without prohibiting specific nonlawyer activities—in other words, it asks whether there is a less restrictive approach than prohibiting nonlawyer activity.²⁰³ The final question asks who should decide whether regulation is needed and how to provide it.²⁰⁴

A. *Risks and Benefits of Nonlawyer Legal Assistance*

This section answers Professor Rhode's first question in the context on nonlawyer legal activities. It first identifies the law-related activities which are subject to regulation. It then examines the risks of nonlawyer legal assistance. Finally, it examines its benefits. The examination in this section of risks and benefits of nonlawyer legal assistance to the operation of the legal system is followed in the next section by discussion of ways of minimizing the risks that are less restrictive than prohibiting nonlawyer activities outright.

1. Identifying Law-related Activity Subject to Regulation

Under First Amendment jurisprudence, state rules that regulate or prohibit nonlawyer law-related activities must specify the activity subject to regulation with sufficient precision.²⁰⁵ The term, "practice of law," is too broad to provide a meaningful description of the activity forbidden to nonlawyers.²⁰⁶ Nevertheless, the "practice of law" can be divided into distinct groups of law-related activity.

Courts have defined the practice of law to include representing parties in contested cases,²⁰⁷ negotiating the settlement of claims,²⁰⁸ drafting documents,²⁰⁹ giving legal advice,²¹⁰ and representing oneself to

202. *See id.*

203. *See id.*

204. *See id.*

205. *See In re Primus*, 436 U.S. 412, 434 (1978).

206. *See Rhode, Professionalism in Perspective*, *supra* note 26, at 710-11.

207. *See, e.g., Nicollet Restoration, Inc., v. Turnham*, 486 N.W.2d 753, 754-55 (Minn. 1992) (holding that it is unauthorized practice of law for a nonlawyer to appear for a corporation in a court proceeding).

208. *See, e.g., Dauphin County Bar Ass'n v. Mazzacaro*, 351 A.2d 229, 234 (Pa. 1976) (holding that negotiating settlements on behalf of injured claimants for a contingency fee constitutes unauthorized practice of law).

209. *See, e.g., Washington State Bar Ass'n v. Great W. Union Fed. Sav. and Loan Ass'n*, 586 P.2d 870, 875 (Wash. 1978) (en banc) (concluding "that the selection and completion of form legal documents, or the drafting of such documents, including

be licensed to practice law.²¹¹ In other contexts, nonlawyers routinely engage in similar activities such as drafting documents, entering negotiations, and giving professional advice.²¹² While nonlawyers face little regulation or prohibition regarding these activities in other fields, they face much regulation of law-related activity in a legal context due to the perceived risks.

2. Risks

In a legal context, giving legal advice, drafting legal documents, and negotiating the settlement of claims in situations not related to a case pending in court pose little threat to the operation of the legal system.²¹³ Advice about the law given by a nonlawyer to an individual who is not a party to a legal proceeding does not threaten misuse of judicial power. An individual who is not a party to a case does not have access to the power of the judiciary and therefore cannot misuse it. Contracts and deeds, whether drafted by a nonlawyer or a lawyer, do not create access to judicial power that might be subject to abuse. Negotiating the settlement of a claim that has not been filed in a court does not implicate the judiciary in the fairness of the result. Provided that the person giving assistance does not fraudulently claim to be licensed or regulated by a court, the rendition of bad advice, poor drafting, or ineffective negotiation should not result in misuse of judicial power nor damage to the reputation of the judiciary.

In pending cases, however, when pro se litigants receive such non-lawyer legal advice, there is some threat to the orderly operation of the legal system—the pro se litigant might fail to take action, to reveal facts, or to make arguments due to ineffective assistance by an individual without sufficient training. A pattern of court decision making based on inadequately developed facts and uninformed legal arguments could undermine the integrity of the legal system. If the non-lawyer falsely leads the litigant to believe that the court has

deeds, mortgages, deeds of trust, promissory notes and agreements modifying these documents constitutes the practice of law”).

210. See, e.g., *In re Jorissen*, 391 N.W.2d 822, 825 (Minn. 1986) (per curiam) (holding that a suspended lawyer violates the rule against unauthorized practice of law when “the non-lawyer acts in a representative capacity in protecting, enforcing, or defending the legal rights of another, and advises and counsels that person in connection with those rights”).

211. See, e.g., *Kansas v. Schumacher*, 519 P.2d 1116, 1127-28 (Kan. 1974) (per curiam) (holding that a suspended attorney who holds himself out to the public as capable of practicing law is in contempt of a court order suspending him from the practice of law).

212. See, e.g., *The MacCrate Report*, *supra* note 183, at 135-99 (describing skills required in the practice of law).

213. The possibility of injury to an individual by a nonlawyer's bad advice, poor drafting, or ineffective negotiation might justify regulation because of the potential for harm to the public, but not because they pose a significant threat to the operation of the legal system.

authorized or supervised the activity, the pro se litigant might wrongly attribute an unjust decision to the bias of the court.

Despite these risks, the threat to the legal system posed by inadequate nonlawyer legal advice, drafting assistance, or representation in negotiations seems minor when weighed against the risk posed to the legal system by denying unrepresented litigants meaningful participation in court proceedings. In light of this, less drastic means of protecting the governmental interest in the operation of the legal system than prohibiting the nonlawyer activities are possible. These possibilities will be explored in the next section.

Nevertheless, the governmental interest in the operation of the legal system may require some level of regulation of activities involved in representing litigants in contested cases.²¹⁴ Because litigants have significant power, and their representatives often exercise those powers for them,²¹⁵ unregulated representation of litigants in contested cases risks misuse of judicial power. Depending on the type of hearing or trial, the representative might have the power to conduct discovery,²¹⁶ to compel testimony and the production of documents,²¹⁷ to object to testimony,²¹⁸ to waive rights of a party,²¹⁹ to frame issues for courts to decide,²²⁰ and to obtain decisions that have binding effect on future cases.²²¹

Representatives not subject to appropriate regulation could undermine the legitimacy of the legal system by using the power for purposes that conflict with the interests of the actual litigant. For instance, misuse of the discovery powers by a representative whose interests conflict with those of litigant might result in invading the privacy of others for reasons not justified by the strategy of the case.

The judiciary's interest in limiting its power to resolve disputes and to make law to the cases of litigants with standing to invoke judicial power is threatened by the delegation of a court's power to representatives not subject to appropriate regulation. The representative whose interests conflict with those of the litigant might frame issues for the court unrelated to the interests of the litigant, so that the re-

214. See *supra* notes 144-51 and accompanying text.

215. See *supra* notes 161-71 and accompanying text.

216. See, e.g., Fed. R. Civ. P. 26-37 (depositions and discovery rules).

217. See, e.g., *Clinton v. Jones*, 117 S. Ct. 1636, 1651-52 (1997) (holding that a litigant can compel even the President of the United States to give testimony in a civil case).

218. See, e.g., Fed. R. Evid. 103(a)(1) (requiring a timely objection to evidence as a condition of claiming error on appeal).

219. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991) (holding that a federal court has the inherent power to dismiss a litigant's case on the court's own motion if the litigant's lawyer fails to prosecute the case).

220. See *Peters, supra* note 26, at 348; see also Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 Mich. L. Rev. 485, 487-881 (1994) (advocating a stronger client role in framing the theory of a case).

221. See *Fuller, supra* note 170, at 387-91; *Peters, supra* note 29, at 348-49.

sulting decision and legal precedent would not be grounded in a true adversary proceeding. Furthermore, ineffective representation by untrained representatives would undermine the courts' reliance on advocates to develop relevant facts and to present cases in an adversarial context.²²²

Once again, the threat to the operation of the legal system resulting from nonlawyer activities must be weighed against the threat posed by judicial proceedings in which parties appear but do not have meaningful access to justice due to lack of assistance. The means of protecting the legal system short of total prohibition of nonlawyer activities will be reviewed in the next section.

3. Benefits

In some circumstances, however, the operation of the legal system would benefit from the availability of nonlawyer representation in contested cases. In courts with a high proportion of pro se litigants, such as the New York City Housing Court, nonlawyers can contribute to the goal of providing meaningful access to the courts by offering to litigants basic information about the law and court procedures.²²³ Nonlawyers can also contribute to the orderly operation of the courts by assisting pro se litigants with the preparation of relevant testimony and evidence in court proceedings that occur on short notice, such as hearings on petitions for orders of protection.²²⁴

B. *Ways of Minimizing Risks to the Operation of the Legal System*

This section corresponds to Rhode's second consideration. It examines whether certain risks to the operation of the legal system may be minimized without prohibiting specific nonlawyer activities. This section first examines the most prevalent regulation that prevents the misuse of judicial power and resources—rules that allow only lawyers to represent litigants in contested cases. It then identifies some methods of regulating law-related activities that may be less restrictive, not-

222. See Peters, *supra* note 29, at 348.

Judges may finish cases, but they do not initiate them or move them toward conclusion; they do not decide what facts need to be proven; they do not determine what legal arguments will be presented. Judges rule on motions, but they do not bring them; they respond to objections during testimony, but only rarely do they elicit testimony themselves; they hear arguments of counsel and read legal briefs, but they do not make or write them. All of this—all of the activity that drives adjudication forward, that defines the legal issues and determines what facts will animate them—is done by the litigants themselves, through their counsel.

Id. (footnote omitted).

223. See *supra* notes 7-14 and accompanying text.

224. See *supra* note 5 and accompanying text. For a discussion of nonlawyer legal assistance in domestic violence cases, see ABA Comm'n on Nonlawyer Practice, *supra* note 1, at 155-57.

ing that the First Amendment requires the states to pursue possible less restrictive avenues to achieve their goal.²²⁵

There are strong arguments for allowing only licensed lawyers to represent litigants in contested cases. The adversary system places considerable reliance on litigants and their representatives to develop the facts of their cases, to research the law, and to frame issues for courts to decide.²²⁶ The legal training of lawyers prepares them for these tasks.²²⁷ Thus, the ethical rules imposed by courts on lawyers protect the courts as well as the public.

The ethical requirements of confidentiality,²²⁸ candor,²²⁹ competence,²³⁰ and loyalty²³¹ provide important protections for parties and for courts. The requirement of confidentiality permits clients to reveal secret interests and unfavorable facts to their lawyers without fear of exposure.²³² The requirement of candor toward a client insures that a lawyer will honestly inform a client about existing law and the implications of a client's actions.²³³ The duty of candor towards a tribunal

225. See *In re Primus*, 436 U.S. 412, 434 (1978).

226. See Peters, *supra* note 26, at 348.

227. See Roy T. Stuckey, *Education for the Practice of Law: The Times They Are A-Changin'*, 75 Neb. L. Rev. 648, 659-660 (1996) (describing how legal education prepares lawyers for practice).

228. See, e.g., Model Rules of Professional Conduct Rules 1.6, 3.3 (1998) (regarding confidentiality and candor toward the tribunal); see also *id.* Rule 1.6 cmt. 2 ("The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.").

229. See, e.g., *id.* Rule 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); *id.* Rule 3.3 (regarding the duty of candor toward a tribunal).

230. See, e.g., *id.* Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

231. See, e.g., *id.* Rules 1.7-1.13 (regarding conflicts of interest); *id.* Rule 1.7 cmt. 1 ("Loyalty is an essential element in the lawyer's relationship to a client.").

232. See, e.g., *id.* Rule 1.6 cmt. 4 (describing how the obligation of confidentiality encourages open and honest communication); see also *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2086 (1998) ("Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel.").

233. See, e.g., Model Rules of Professional Conduct Rule 2.1 cmt. 1 (discussing client's entitlement to straight forward advice). For a discussion of the duty of lawyers to use independent judgment in counseling clients, see generally Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 Brook. L. Rev. 629, 676 (1997) (arguing that the independence in corporate-securities lawyering is crucial in overcoming "cognitive and organizational pressures that bias managerial perception and decision-making"); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 Geo. J. Legal Ethics 31, 31 (1995) (discussing good judgment as the most important issue in teaching professional responsibility at a time when the legal profession seems to be experiencing a "crisis of professionalism"); Deborah L. Rhode, *Ethical Perspectives*

protects the operation of the legal system from dishonesty and allows courts to rely upon the statements of lawyers.²³⁴ The ethical obligation of loyalty to a client addresses the risk that representatives will use the power of the courts to advance personal interests at the expense of the interests of the individuals with standing to invoke judicial power.²³⁵

The requirement of competence not only protects the public but conserves the resources of courts by allowing courts to rely on the development of cases in an adversarial context.²³⁶ In recent years, the organized bar and legal educators have engaged in extensive debate about the skills and values necessary to provide competent representation.²³⁷ The debate has had a substantial impact on legal education.²³⁸

on Legal Practice, 37 Stan. L. Rev. 589, 594 (1985) (advocating that professional responsibility should emphasize individual morality rather than conformity to a code of conduct); Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, 45 Am. U. L. Rev. 859, 867 (1996) (arguing that students can explore their own judgments through an appellate advocacy clinic); William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083, 1083-84, 1090-91 (1988) (rejecting a categorical approach to legal ethics which utilizes formalized rules, and instead advocating reliance on lawyers' good judgment and discretion); Paul R. Tremblay, *Practiced Moral Activism*, 8 St. Thomas L. Rev. 9, 9-12 (1995) (describing the intersection of philosophy and lawyering in discussions of legal ethics).

234. See Model Rules of Professional Conduct Rule 3.3 (1998).

235. See, e.g., *id.* Rule 1.7 (representing clients with adverse interests); *id.* Rule 1.8 (addressing prohibited transactions between lawyers and clients); *id.* Rule 1.9 (discussing conflicts of interest with former clients); *id.* Rule 1.10 (addressing conflicts of interest imputed to all members of a firm); *id.* Rule 1.11 (representing a private client on a matter formerly handled by the lawyer as a government official); *id.* Rule 1.12 (representing a client on a matter in which the lawyer has participated as a judge); *id.* Rule 1.13 (discussing the lawyer's duty of loyalty to an organization as client when members of the organization have conflicting interests).

236. See, e.g., *id.* Rule 1.1 (describing competent representation).

237. See generally The MacCrate Report, *supra* note 183, at 83-88, 123-33 (defining the skills and values that are desirable for practicing attorneys); Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. Legal Educ. 612 *passim* (1984) (arguing that legal education should largely include clinical experiences rather than traditional instruction); Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. Legal Educ. 313, 317 (1995) (advocating a broader view and method for achieving expertise as a lawyer); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. Rev. L. & Soc. Change 109, 178 (1993-94) (analyzing a particular method of clinical supervision that "constantly identif[ies] those aspects of the law, lawyering, and the legal system that are critical to an understanding of what it means to be a lawyer"); Stuckey, *supra* note 227, at 669-71 (calling for law schools to educate their students to be problem solvers). For an overview of skills and values required for the practice of law as identified by leaders in clinical legal education, see generally *Clinical Anthology: Readings for Live-Client Clinics* (Alex J. Hurder et al. eds., 1997) (presenting recent scholarship to aid in classroom teaching and discussion in live client clinics).

238. See Stuckey, *supra* note 227, at 655-69.

Some law-related activities, no doubt, require regulation. Those areas that directly implicate judicial power warrant regulation because the potential abuses and distortion of the judicial power could greatly disrupt the operation of the legal system. Without a means of limiting access to judicial power to individuals with standing to litigate, the legal system would become an instrument of arbitrary power rather than a source of justice.²³⁹ Certain law-related activities, such as framing issues for courts to decide, give direction to the law-making power of the courts.²⁴⁰ Other activities, such as compelling witnesses to appear for questioning at depositions and trials, make direct use of the judicial power.²⁴¹ Courts must exercise appropriate control over representatives who exercise the powers that are available to litigants in court cases. Individuals with grievances have the power to initiate cases.²⁴² Individuals with standing have direct access to the power to conduct discovery, to frame issues for courts to decide, to compel the attendance of witnesses at hearings and trials, to compel witnesses to reveal secrets and to produce documents, and to enlist public officials to enforce court orders.²⁴³

Because individuals with standing must be allowed to enlist representatives to litigate their cases in order to make access to the courts meaningful,²⁴⁴ courts must have a means to ensure that representatives who assist litigants use the powers at their disposal to advance the interests of the litigant rather than the representative's conflicting personal interests. Courts must also have a means to insure that representatives, who through petitions, motions, briefs, and arguments frame issues for courts to decide, have sufficient training to recognize relevant facts, to identify existing law, and to make arguments to apply or change law.

Although there are strong arguments for allowing only licensed lawyers to represent litigants in contested cases, the First Amendment requires that states seek the least restrictive means of regulating political speech and association.²⁴⁵ Some courts have contemplated less

239. See *Peters*, *supra* note 29, at 360-61 (arguing that legitimacy of the legal system is based on the adequate representation of the interests affected).

240. See *id.* at 347-48.

241. See, e.g., Fed. R. Civ. P. 26-37 (listing rules governing discovery and depositions); *Clinton v. Jones*, 117 S. Ct. 1636 (1997) (holding that even the President of the United States is not temporarily immune from suit).

242. See, e.g., Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."); *NAACP v. Button*, 371 U.S. 415, 429-430 (1963) (explaining that litigation is a means for the "redress of grievances," an activity protected by the First Amendment).

243. See *supra* notes 167-71 and accompanying text.

244. See *United Transp. Union v. State Bar*, 401 U.S. 576, 585-86 (1971) (explaining that collective activity undertaken to obtain access to the courts is protected by the First Amendment).

245. See *In re Primus*, 436 U.S. 412, 432-34 (1978).

restrictive measures. Indeed, some courts have chosen to permit nonlawyer assistance to litigants in specific types of activities.

For instance, in *In re Buck*, a bankruptcy court held that a written request by a nonlawyer representative for service of notices filed in a bankruptcy case was not an unauthorized practice of law.²⁴⁶ The court explained, the "district's local bankruptcy rules should not be interpreted to place an unnecessary and expensive burden on non-local attorneys or creditors, who are wanting to receive copies of pleadings that may affect them."²⁴⁷

When the Texas State Unauthorized Practice of Law Committee claimed that nonlawyer legal assistance in bankruptcy proceedings violated the local bankruptcy court's rule against the unauthorized practice of law, the Fifth Circuit denied the claim.²⁴⁸ The activities performed by nonlawyer representatives included filing proofs of claim in bankruptcy proceedings, monitoring the status of cases, and negotiating reaffirmation agreements with debtors' counsel.²⁴⁹ The court found, "The average amount of each claim is small and effectively precludes economically efficient management by the creditor or an attorney."²⁵⁰ The court reasoned that prohibiting the nonlawyer activities "conflicts with the Bankruptcy Code's purpose to secure just, speedy, and inexpensive determinations without requiring the adjudication of undisputed matters."²⁵¹

Many federal agencies, including the U.S. Department of Health and Human Services,²⁵² the Immigration and Naturalization Service,²⁵³ the U.S. Department of Labor,²⁵⁴ and the Social Security Administration,²⁵⁵ permit nonlawyers to appear in cases before them. Patent agents assume the rights and obligations of lawyers in patent hearings.²⁵⁶ A 1992 survey by the New York County Lawyer's Association Committee on Legal Assistance showed that a majority of New York City and New York State agencies permit nonlawyer advocacy in some form.²⁵⁷

246. *In re Buck*, 219 B.R. 996 (Bankr. W.D. Tenn. 1998).

247. *Id.* at 1000-01.

248. *See State Unauthorized Practice of Law Comm. v. Paul Mason & Assoc., Inc.*, 46 F.3d 469, 470-72 (5th Cir. 1995).

249. *See id.* at 470.

250. *Id.*

251. *Id.* at 471; *see also In re Kincaid*, 146 B.R. 387, 390-91 (Bankr. W.D. Tenn. 1992) (holding that questioning a debtor at a meeting of creditors in a bankruptcy proceeding is not unauthorized practice of law).

252. *See* 45 C.F.R. § 205.10 (a)(3)(iii) (1997).

253. *See* 8 C.F.R. § 292.1 (1997).

254. *See* 29 C.F.R. § 18.34 (1997).

255. *See* 42 U.S.C. § 406(a)(1) (1994).

256. *See Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 384-85 (1963) (holding that the federal statute that permits nonlawyer patent agents to represent parties before the U.S. Patent Office preempts state rules prohibiting unauthorized practice of law.)

257. New York State Bar Ass'n, *Guidelines for the Utilization by Lawyers of the Services of Legal Assistants* 42 (1997).

Nevertheless, the broad sweep of unauthorized practice of law rules, supported by the ABA Model Rules of Professional Conduct, discourage innovative approaches—such as these—which address the need for greater access to the legal system.²⁵⁸ The ban on assisting the unauthorized practice of law in the ABA Model Rules of Professional Conduct, to the extent that such a ban is adopted by the states, may threaten the First Amendment rights of lawyers and the public as well.²⁵⁹ Indeed, a broad ban that is enforceable by punitive sanctions could have a chilling effect on activity that is constitutionally protected but may arguably fall within the scope of the rule. As the court explained in *NAACP v. Button*, “It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes.”²⁶⁰

Lawyers are not likely to participate in activities that rely on non-lawyer legal assistance to expand access to courts if their participation puts them in jeopardy of disbarment proceedings. Therefore, the governmental interests in the operation of the legal system are not served by overbroad restrictions on First Amendment liberties. Moreover, this increases the need to find ways of minimizing the risks that law-related activities of nonlawyers pose to the legal system without prohibiting or even regulating those activities.

One possibility is that courts can play a crucial role in minimizing the risks associated with nonlawyer legal assistance. Courts can protect the adjudicative process from the dangers of bad legal advice to litigants, poor drafting of documents used in court, and ineffective assistance in negotiations of settlements by providing in-court assistance to pro se litigants.²⁶¹ Similarly, before a case proceeds, judges can explain the basic legal principles that will be used to decide the case so that the pro se litigant will be less likely to present a case based on inaccurate advice.²⁶² Courts can also instruct pro se litigants in basic court procedures to insure that litigants do not rely on misleading information.²⁶³

In addition, judges can question pro se litigants to determine whether their goals are accurately represented in the documents they

258. Model Rules of Professional Conduct Rule 5.5 (1998).

259. See *NAACP v. Button*, 371 U.S. 415, 435 (1963).

260. *Id.*

261. See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks*, 67 *Fordham L. Rev.* 1987, 2011-21 (1999) (contending that courts may provide active assistance to unrepresented litigants without violating their duty of impartiality); McCulloch, *supra* note 13, at 504-08 (suggesting that advocates for court access for low-income persons direct their efforts at establishing monitoring systems for all pro se litigants, not just the poor).

262. See Engler, *supra* note 261, at 2028-31.

263. See *id.* at 2029.

file.²⁶⁴ They can give pro se litigants an opportunity to submit changes and amendments if the documents do not appear to reflect the litigants' goals. Courts can also ask pro se litigants if they have received nonlawyer legal assistance in drafting complaints, answers, motions, or other documents, and can warn them if the documents appear to be inadequate.²⁶⁵ In addition, courts can direct pro se litigants to legal aid and pro bono programs when it appears that representation by a lawyer is essential to the just determination of a case.

Courts can minimize the risks to the operation of the legal system posed by nonlawyer assistance with negotiating settlements of pending litigation. Courts can review the settlement, inquire into the facts of the case and the goals of the parties, and ask whether nonlawyers other than the litigants participated in negotiating the settlement. Moreover, a court can refuse to dismiss a case if the settlement appears to be unfair or oppressive.²⁶⁶

While court involvement in the cases of pro se litigants may place a burden on the time and resources of courts, the Constitution requires this burden. Indeed, choosing the least restrictive means necessary to protect the operation of the legal system makes it necessary for courts to assume this extra burden to avoid curtailing First Amendment rights. The next section considers Professor Rhode's third question—who or what should make these determinations.

C. *Who Should Decide Whether and How to Regulate?*

Fashioning an appropriate level of regulation depends on a balance of the different interests which affect the operation of the legal system. Courts are best suited to determine whether and how to regulate the legal system. Indeed, courts must make the ultimate decision because the proper operation of the legal system involves questions of constitutional law and requires determinations about the role of courts and the rights of individuals. Moreover, the extent of the judicial power and the standing of individuals to invoke judicial power are questions traditionally reserved for the courts.²⁶⁷ The rights of organizations and their members to vindicate legal interests through the courts are determined by the First and Fourteenth Amendments as interpreted by the courts.

This Article's analysis of the risks and benefits of nonlawyer legal activities to the operation of the legal system is not a sufficient foundation to determine whether a nonlawyer should have a constitutional right to engage in any particular law-related activity. That determination also requires an examination of the potential for harm to the pub-

264. *See id.*

265. *See id.*

266. *See id.*

267. *See supra* notes 155-66 and accompanying text.

lic posed by the activity. There might also be other governmental interests that justify restrictions. Nevertheless, the analysis in this Article suggests that regulation of some activities is necessary and regulation of other activities is suspect.

The courts appear to have a compelling interest in preventing the misuse of judicial power by representatives who have access to the power to conduct discovery, to compel witnesses to testify, and to frame issues for courts to decide. Restricting these powers to lawyers is likely to be the least restrictive means of providing meaningful access to justice for litigants while avoiding the misuse of judicial power.²⁶⁸

On the other hand, it is not likely that rules prohibiting nonlawyers from giving legal advice can survive constitutional scrutiny.²⁶⁹ Between these poles are activities such as drafting wills and deeds, negotiating the settlement of claims, and representing litigants at docket calls and pretrial hearings. Each activity should be analyzed to determine the least restrictive level of regulation that can survive judicial review. Courts should repeal ethical rules that curtail First Amendment rights. Courts should be willing to invalidate state legislation that is overbroad, vague, or not justified by the appropriate constitutional standard.

Courts are in the best position to regulate participation in the operation of the legal system by nonlawyers as well as lawyers. Courts have the authority and the responsibility to take measures necessary for the operation of the legal system.²⁷⁰ Courts have traditionally relied on the organized bar to propose changes in the regulation of the practice of law, and as Professor Rhode observed, the bar has often resisted changes that affected the interests of lawyers adversely.²⁷¹ If the bar fails to act, courts should take the initiative in reforming the regulation of nonlawyer activity to eliminate unconstitutional restrictions on speech and association. Courts and the bar should join efforts to involve nonlawyers in the administration of justice.

CONCLUSION

Ethical rules and legislation prohibiting unauthorized practice of law will soon have to yield to the growing demand for access to the

268. See *supra* notes 240-44 and accompanying text.

269. See *supra* notes 33-37 and accompanying text.

270. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991) (holding that a federal court has the inherent power "to fashion an appropriate sanction for conduct which abuses the judicial process."); *Sheppard v. Maxwell*, 384 U.S. 333, 357-363 (1966) (discussing a trial judge's responsibility to take measures necessary to conduct a fair trial); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-30 (1962) (noting the ancient origin of the power to dismiss a plaintiff's action with prejudice due to failure of the plaintiff to prosecute).

271. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, *supra* note 26, at 705-706.

legal system and to the constitutional rights of persons engaged in nonlawyer legal assistance. The courts and the bar should reform regulations governing the practice of law to accommodate these pressures.

Courts and the bar should begin an analysis of the governmental interests involved in the operation of the legal system and the least restrictive ways of meeting those governmental interests. They should undertake a similar analysis of the governmental interests involved in protecting the public from being harmed by persons engaged in law-related activities and the least restrictive means necessary to accomplish those interests. When the First and Fourteenth Amendment rights of nonlawyers are at stake, courts should not prohibit the protected activities of nonlawyers if it is possible to achieve appropriate governmental interests through less restrictive means. An analysis that results in expanding the role of nonlawyers in the legal system can contribute to the realization of the goal of equal access to justice.

Notes & Observations