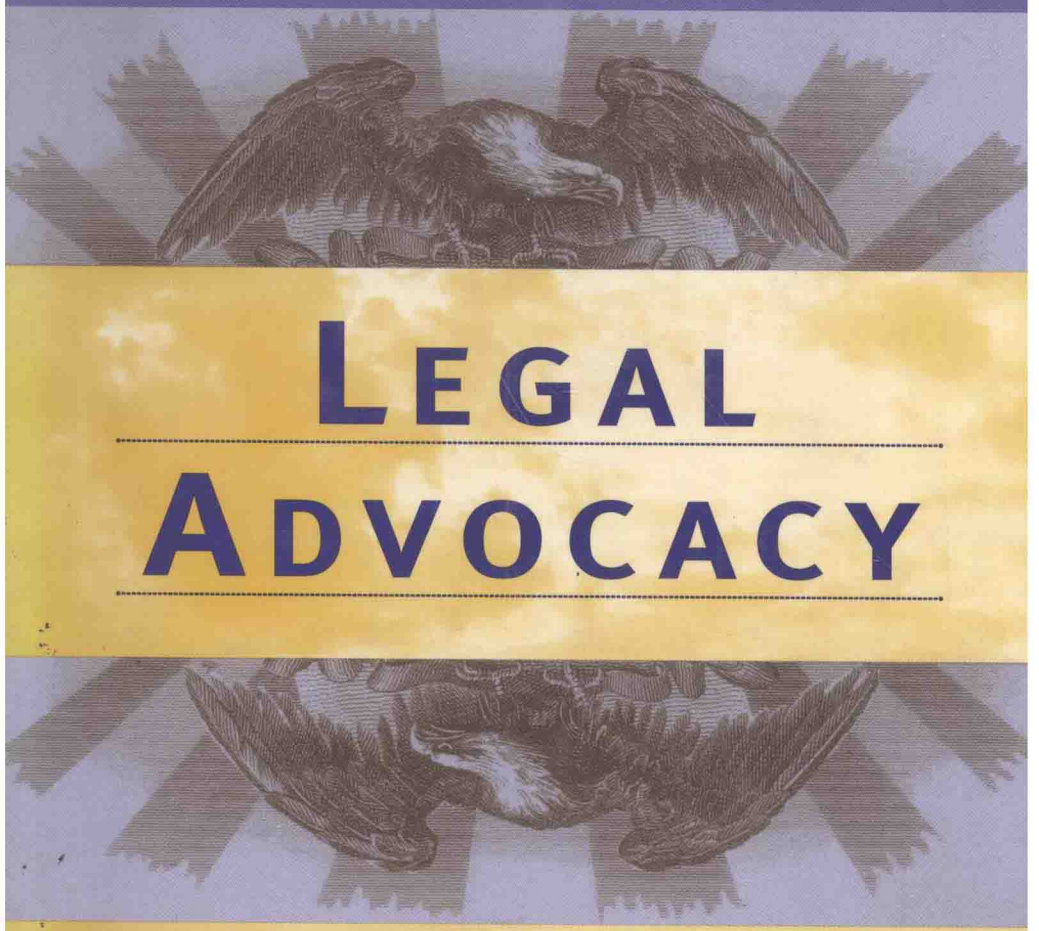

LEGAL ADVOCACY

LAWYERS AND NONLAWYERS AT WORK

HERBERT M. KRITZER

MICHIGAN

Legal Advocacy

Lawyers and Nonlawyers at Work

Herbert M. Kritzer

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To my teachers at
Colonel White High School
Dayton, Ohio

and most particularly
Stanley L. Blum, social studies
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Contents

CHAPTER 1

Does It Really Take a Lawyer?

What difference does a lawyer make? That is the central question of this book. Usually, this question is posed as the choice between turning some matter or dispute over to a lawyer and handling it on your own. This need not be the case. Consider the following scenarios.

> *It is a beautiful spring Sunday, and you take a drive out into the country. Some idiot makes a left turn across your path. You suffer a broken leg. The idiot is insured by State Farm. You have the following options.*
>
> Doing nothing ("lumping it")[1]
> Negotiating a settlement directly with State Farm
> Hiring a lawyer, who will most likely request a fee of one-third of the recovery plus his or her expenses[2]

What if you had the option of hiring a "public insurance adjuster" to estimate your damages and negotiate on your behalf with State Farm, paying a commission of only 15 to 20 percent rather than what amounts to a commission of 33 percent? After all, insurance companies use nonlawyer adjusters; why can't you? Perhaps the public adjuster has spent twenty years working for State Farm before going into independent operation.

Or, what about the following situation?

> *It's Friday afternoon. You've been out for a few drinks with your friends after work. You're stopped by a police officer and arrested for driving while intoxicated (DWI). In this case you have two options.*
>
> Pleading guilty and facing the music
> Hiring a lawyer and fighting (or negotiating), paying a fee of $100 or more per hour

What if you had the alternative of hiring an experienced "paralegal" who specializes in defending DWI cases, and who charges $50 per hour? Per-

haps this person is a retired highway patrol officer who has appeared as a witness in hundreds of traffic cases including many involving DWI.

If you want help with a drunk driving case or a personal injury case or another matter that might lead to having to appear in court, your only choice in the United States is, with some very specific exceptions, to hire a lawyer.[3]

Over much of American history there has been a cyclical debate over the question of whether, or to what degree, nonlawyers should be prevented from providing services in competition with lawyers.[4] The debate has again become loud and contentious at the end of the century. A number of states have conducted, or are in the process of conducting, inquiries into the question of allowing nonlawyers to provide routine legal assistance in specific limited circumstances. In 1992 the American Bar Association created a Commission on Nonlawyer Practice to examine these issues from a nationwide perspective. The commission's final report,[5] issued in 1995, never came before the ABA's House of Delegates for discussion or endorsement. For all purposes, the report was buried, presumably with the hope in the ABA that it would quickly be forgotten.

All of this is happening as the legal profession finds itself under public attack. While criticism of lawyers has a long history, the profession has seldom been used as a major political target, as it was in the Republican Party's 1995 "Contract with America." As part of the contract, the U.S. House of Representatives passed "The Attorney Accountability Act of 1995" (H.R. 988). This proposal, as with most of the contract's provisions, died in the U.S. Senate. The love/hate relationship between the public and lawyers has long been reflected in jokes about lawyers, but other factors suggest that lawyers' public image in the late twentieth century may really have fallen to a low point, with law graduates even being booed at university commencement ceremonies.[6]

The American legal profession is clearly worried about both its image and its prerogatives. It is probably right, particularly about the latter. The profession has generally been extremely successful in securing and protecting limitations on potential competitors. The two previous scenarios represent situations for which alternatives to representation by lawyers are available in one or more common law countries. In England, nonlawyers are free to represent injured persons up to the stage of filing an action in court, although there have been efforts to allow assistance in the lower courts that approaches representation.[7] In Ontario, nonlawyers routinely provide representation in traffic court (as well as in other lower court proceedings), and in settings such as workers' compensation boards.[8]

In fact, lawyers in England possess a monopoly only on representa-

tion and advocacy in the courts of law.[9] Nonlawyers may provide legal advice and legal advocacy for matters outside the court context, including personal injury claims which might eventually develop into court cases.[10] Many of the types of tasks routinely handled by lawyers in the United States are handled by nonlawyers in England.

While the solicitors' branch of the English legal profession dominates in the handling of personal injury claims, "loss assessors" are available to individuals who would prefer to pay a representative on a percentage basis to negotiate a settlement with an insurer.[11] The clear attraction of loss assessors is their fee structure—solicitors are not permitted to charge individuals in this way.[12] Little is known about the background or qualifications of loss assessors, although at least some of them worked as "claims inspectors" representing insurance companies before switching to representing claimants.[13] The Law Society, the professional organization of solicitors, regularly warns against the loss assessors,[14] arguing that assessors lack the potential leverage of threatening court action. The Law Society also points out that disgruntled clients of solicitors have means of recourse that are not available to clients of loss assessors. Interestingly, I know of no evidence that shows widespread (if any) dissatisfaction with the services provided by loss assessors. Furthermore, British insurance officials have told me that assessors typically have solicitors to whom they can turn for backup should the need arise.

England uses an extensive set of "administrative tribunals" to deal with issues such as social security (broadly defined) benefits, workplace disputes, housing issues, immigration, and the like. Because these tribunals are not courts, the legal profession must compete with other potential providers of advocacy. In the late 1980s, an empirical study compared the effectiveness of representation before tribunals by lawyers to that by various types of lay advocates of various types. The researchers found no evidence that one type of advocate was consistently more effective than another. In some of the tribunals examined, lay specialists had more impact than either barristers or solicitors; in other tribunals law-trained advocates had more impact, and in others certain lay specialists had impacts more or less equal to that of law-trained advocates.[15] When the researchers asked members of the tribunals (i.e., those who decided the cases) what seemed to be associated with effective representation, the members generally reported that it was not legal training but specialized backgrounds and experience that led to effective representation.[16]

Ontario permits "paralegals" (i.e., nonlawyers) to appear as advocates in the same types of administrative tribunals as does England. In addition, paralegals can represent parties in the lower-level courts—those hearing traffic offenses, minor criminal matters, and small claims.[17] The

best information available shows little difference between the lawyers and nonlawyers within specific venues. Clients of paralegals found paralegals more responsive and attentive to their problems, and they believed that the fees charged by paralegals were lower than those they would have had to pay a lawyer for the same work.[18] Adjudicators before whom the paralegals appeared reported occasional problems with such advocates, but tempered these concerns with statements such as the following.

> "It should be noted that the Board also sees poor quality representation by lawyers and not just paralegals."
>
> "It has been our experience that for the most part, an experienced non-legal representative does a better job than the lawyer who may not have a background or experience in Workers' Compensation."
>
> "The level of competence tends to vary for all groups. There is good and bad in both. [I have] often seen a lawyer who is completely out of his/her field do a very poor job and the same goes for a paralegal. On the other hand, [I have] seen a paralegal who is used to dealing in court do an outstanding job."[19]

A small survey of clients of one of the best-known companies providing nonlawyer representation in traffic cases found that 96 percent rated the person who represented them as excellent (81 percent) or good (15 percent), and 93 percent would use the company's services again.[20] In contrast, a 1993 U.S. survey of persons who had hired a lawyer in the preceding five years found that only 75 percent would use the same lawyer again.[21] Another 1993 survey found that only 67 percent were satisfied or very satisfied with a lawyer they had used during the preceding ten years.[22] A third survey found that 79 percent of respondents who had used a lawyer in the last five years were satisfied or somewhat satisfied with the lawyer's performance.[23] This limited comparison suggests that nonlawyers are capable of providing services to the satisfaction of their clients.

As it turns out, the United States may not be as different as the last few pages imply. In its 1995 final report, the ABA Commission on Nonlawyer Practice noted that "commission members were genuinely surprised to learn of the extent of nonlawyer practice, both in terms of that which is already lawful and also with regard to new and expanding forms of activity by nonlawyers."[24] Nonlawyers regularly appear as advocates before a variety of administrative and private dispute processing venues, sometimes directly competing with lawyers for clients, and sometimes directly confronting lawyers representing an opposing party. Nonlawyers

are generally barred from appearing in court, and the organized legal profession has worked hard, often successfully, but sometimes not, to exclude nonlawyers from even the venues where they currently appear.[25]

The American legal profession makes a number of arguments in justifying why you should not have the option of hiring a nonlawyer.

> The legal professional will put the client's interest first.
> The legal professional is trained in advocacy and legal thinking.
> The legal professional has the knowledge, training, and experience to recognize subtle and important issues and linkages.
> The legal professional can pursue a case "all the way" through the legal system if needed.
> The client has recourse to the legal profession's disciplinary bodies if dissatisfied with the services provided by a lawyer.

These arguments are closely identified with the literature on professionalism and the defining features of professions: formal expertise, other-regardingness, and disciplinary options.[26]

In recent years both interest groups and scholars have challenged the legal profession's ongoing success in excluding nonlawyers from providing representation. The most vocal critic is an organization now called HALT (originally an acronym for Help Abolish Legal Tyranny). HALT presents itself as an organization of consumers of legal services; it argues that Americans should be free to choose the type of representative they need and want, and that the current restrictions on legal practice serve largely to "protect [lawyers'] pocket books at the expense of consumer access."[27]

Richard L. Abel, in the conclusion of his detailed examination of the development and structure of the American legal profession, argues that the profession must "eliminat[e] every restrictive practice unsupported by convincing evidence that it is necessary to protect against incompetence, fraud, or other abuse. . . . The profession should encourage other occupations to advise, negotiate, draft, and represent, offering the supervision of lawyers but not requiring it."[28]

In my own study of the work of lawyers in perhaps the most jealously guarded of venues, civil litigation, I come to the conclusion that paraprofessionals, whom I refer to as "legal brokers," might be as effective and less expensive than legal professionals in handling routine cases of personal and property injury or routine contract disputes. I argue that the nature of the lawyer's work in routine litigation provides little basis to argue that such work should be the exclusive realm of lawyers. I note that, particularly from the side of businesses, it is common for nonlawyers to handle

work that, when performed for an individual, is restricted to lawyers (e.g., negotiating the settlement of injury claims).[29] In moments of candor, American lawyers will admit that paralegals can do many, if not most, of the tasks that a lawyer does in certain types of practices. In her study of solo and small-firm lawyers in the New York City area, Carroll Seron quotes a practitioner she calls Robert Rothman: "A good paralegal can do just about everything I can, everything except go to court and meet the client on the initial—you know, selling of the client."[30]

We commonly decry the American "I'll be suing you" culture—our reputed tendency to turn every complaint or problem into a court case. While much of the rhetoric about the litigious American and our disease of "hyperlexis" is overdrawn,[31] there may be a connection between our inclination to use the courts for a wide range of issues and problems,[32] and our granting to the legal profession purview over a variety of activities that in other countries involve a range of service providers. One can look outside the United States for evidence that there may be some connection between the use of courts and the legal profession's control over access to legal advice and advocacy.

For example, the Netherlands and the neighboring German state of Northrhine-Westphalia share most of the social and economic characteristics often said to be associated with litigiousness. Nonetheless, these two areas differ sharply on a variety of indicators of court use. At least part of the reason is probably the larger role assigned to the legal profession in Germany than in the Netherlands. As do American lawyers, German lawyers possess a monopoly on giving legal advice; in contrast, in the Netherlands (as in England) anyone can give legal advice, and many alternative sources of such advice are available.[33]

Asserting Control: How the Legal Monopoly Came to Be

The practice of excluding nonlawyers from providing law-related services is actually a twentieth-century phenomenon, largely a product of the efforts of the bar associations during the 1920s and 1930s. How did the exclusion of nonlawyers from many types of activities come to be? A number of authors have related the general story of the development of the American legal profession and its efforts to secure a monopoly.[34] The success of the "unauthorized practice of law" movement is important for the analysis I present in the chapters that follow. Because state law has governed the practice of law, the specific history of efforts to impose restrictions varies from state to state. However, the general pattern of the organized bar taking the lead is common across states. To illustrate the

historical process that brought us to the restrictive situation that dominates in the 1990s, I draw upon (and supplement) a detailed, unpublished history of the California bar's efforts to eliminate nonlawyers from a variety of areas of practice.[35]

In 1872, California enacted a Code of Civil Procedure that explicitly permitted nonlawyers to perform all legal functions other than appearing in court on behalf of fee-paying clients: "Any person may engage in the profession of law. The *profession* is open to all, and it is simply the right to *practice* in Court which is not permitted except to those duly qualified."[36] The result was a plethora of legal service providers. Banks advertised free legal services such as drafting wills and trust agreements to attract customers; these same banks provided legal advice and employed lay agents to handle tasks in probate court on behalf of customers. Various groups involved in the sale of real estate routinely handled legal tasks associated with such sales (and even drafted legal documents unrelated to these tasks). Nonlawyers routinely handled injury and damage claims, with the insurance company's own adjuster dealing with independent claims adjusters representing accident victims. Automobile clubs provided legal services to members on a variety of minor matters. Collection agencies advertised legal services and handled their own cases, without lawyers, in the courts. Accountants provided legal advice on a range of financial issues (tax, receiverships, estates, trusts, etc.), and both the U.S. Treasury Department and the federal Tax Court explicitly permitted accountants to appear as advocates in various proceedings. Under the Code of Civil Procedure of 1872, anyone could practice law in the Justice of the Peace Court and the Police Court. The result was that only in the higher courts of California did the legal profession possess a monopoly—actually a near monopoly because lay employees of collection agencies could appear on behalf of their employers in the higher courts.

Starting early in the twentieth century, the California Bar Association—then a small group with little political influence—unsuccessfully sought to get bills passed by the legislature excluding competitors from engaging in what the CBA viewed as the practice of law. When the CBA did succeed in getting a bill passed in 1921 restricting the activities of powerful competitors such as the banks, those competitors got a referendum on the ballot the following year that overwhelmingly repealed the 1921 law. After the humiliating defeat on the referendum, it was the California Supreme Court that came to the bar's rescue by handing down a decision which adopted a broad definition of the practice of law.

> The practice of law is the doing and performing services in a court of justice in any matter depending therein throughout its various stages

> and in conformity with the adopted rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in court.[37]

The Supreme Court thus opened the door to the CBA to move against a range of competitors. The State Bar Act of 1927 made it a misdemeanor for an unlicensed person to advertise a readiness to "practice law"; the act left undefined what it was to "practice law," simply relying on the Supreme Court's broad definition. By the late 1930s, case law clearly established that giving legal advice for a fee constituted the practice of law.

The bar did not limit its efforts to remove competitors to the development of case law. It pursued two other tactics: using disciplinary procedures against lawyers who worked with the politically weaker competitors and negotiating boundary agreements with the politically more powerful competitors. For some competitors subject to regulation, the bar also sought to work through the competitors' regulatory bodies to limit the competitors' activities.

Because lawyers had always retained exclusive rights to represent injured parties in the higher courts, the successful independent claims adjusters—operating under names like the General Claims Bureau of Southern California, Golden State Adjustment Organization, Royal Adjustment Company, or the West Coast Claims Bureau—relied upon lawyers to handle the cases the adjusters were unable to resolve. Starting in 1930, the bar sought to discipline these attorneys, getting one after another suspended from practice. The end result was to put the independent adjusters out of business.[38]

With the most powerful groups—automobile clubs, banks, title companies, and insurance companies—the bar tried to negotiate agreements limiting what these groups could do in the way of legal work.[39] The auto clubs agreed to restrict their handling of members' legal work to matters "involving sums of money so small that the Club member cannot afford to employ counsel."[40] The bar persuaded the land title companies to limit their legal work to filling in blanks or retyping standard forms.[41] Real estate brokers similarly limited their legal work, and the real estate commissioner of the state agreed to eliminate some of the less standard legal forms that had been included in the real estate handbook.

The banks were very resistant to having limits placed on their legal service activities, which had become an important method of attracting large depositors. In 1933, the state bar filed suit against two of the state's most powerful banks. While the suit was pending, committees from the bar and the California Bankers Association met to try, unsuccessfully, to