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Bruce A. Green

Fordham University School of Law

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FOREWORD:
**RATIONING LAWYERS: ETHICAL AND
PROFESSIONAL ISSUES IN THE
DELIVERY OF LEGAL SERVICES
TO LOW-INCOME CLIENTS**

Bruce A. Green

BY now, it is a commonplace observation that many people in this country cannot afford a lawyer to assist them in addressing their legal problems, either because they have very little money or because the cost of legal assistance is too high given the funds available to them.¹ It is also commonly understood that the present level of government and private funding for legal services for low-income persons is woefully inadequate to meet the pressing legal need.² Within the organized bar, where these problems are best understood, there is strong support for increased government funding.³ One question, however, may occasion disagreement among knowledgeable individuals who are committed to the principle that legal assistance should be provided to all who need it: Given the present inadequate level of support, how should existing resources be deployed? For example, should an effort be made to ensure that every potential client has some access to a lawyer, even if the amount of time that the lawyer addresses each individual's problem is severely constricted, or is it preferable for lawyers to devote longer amounts of time to assisting a smaller number of clients?

The writings in this book examine how legal assistance is delivered to low-income individuals in this country, and consider how this delivery might better be accomplished, given the limited availability of private and government funding to subsidize its costs. This examination could have been undertaken from any number of perspectives. Here, however, the delivery of legal assistance is viewed principally through the prism of professional and societal norms and values, as expressed in ethical rules, statutes and other sources of legal obligation (e.g., those establishing lawyers' professional obligations to clients and po-

1. See, e.g., James C. Moore, *Considering Lawyers' Obligations to Both Clients and Communities*, N.Y. L.J., Jan. 27, 1999, at S3 (observing that only part of the need for legal services is being met).

2. See, e.g., Gary Spencer, *New Bar President to Seek Funding for Legal Services*, N.Y. L.J., June 28, 1996, at 1 ("[C]ongressional plans to eliminate the limited funding now available for civil legal assistance to the poor will turn frustration into hopelessness for most of the needy.").

3. See, e.g., *id.* (reporting that New York State Bar Association President M. Catherine Richardson intended to find alternative sources of funding for the shortfall created by Legal Services Funding cuts).

tential clients and those regulating nonlawyers in providing legal assistance), as well as in aspirational principles (e.g., that all individuals should receive assistance in resolving legal problems, that lawyers should render pro bono legal assistance, and that lawyers should work to improve the law).

These writings were developed in connection with a conference entitled "The Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues," which was conducted at Fordham University School of Law on December 4-6, 1998. The conference reflected several years of planning, the support of ten co-sponsoring entities, and the involvement of close to 100 individual participants, many of whom assisted in organizing the conference or in producing thoughtful articles relating to the conference's theme, and each of whom contributed to discussions leading to the development and adoption of the recommendations that follow. This foreword sets out to describe why and how the conference was conducted in order to place the recommendations and other writings in context.

I. WHY THE CONFERENCE WAS CONDUCTED

A. *Delivery of Legal Services to Low-Income Clients: Why It Is Distinctive*

This conference followed on the heels of two prior national "ethics" conferences conducted at Fordham, the first on representing older clients,⁴ and the second on representing children.⁵ Although it was organized along similar lines, this conference's scope was far more ambitious, if not daunting. The aim was to bring together thoughtful professionals with varied experiences relevant to the legal representation of low-income clients. The participants would engage in discussions and, insofar as possible, develop recommendations designed to advance the understanding of lawyers, courts, ethics rulemakers, non-lawyer professionals, and others about how best to assist individuals with limited financial means with respect to legal problems that arise in all civil contexts. The Conference would examine not only traditional structures and practice settings, but also new and alternative structures and processes for delivering legal services.

Thus, the aim of the Conference was not primarily to educate the invited participants, but to draw on their expertise and intellectual energy to develop writings and recommendations that would guide the legal profession and others who assist low-income persons and that would encourage further dialogue concerning the relevant ethical and professional issues. Toward these ends, participants would look

4. See Special Issue, *Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 961 (1994).

5. See Special Issue, *Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1281 (1996).

broadly at issues of professional conduct faced by: (1) lawyers serving in not-for-profit legal services offices that receive government and/or private funding; (2) lawyers serving in social agencies or community-based organizations; (3) individual lawyers and law firms who represent indigent clients on a pro bono basis or for a reduced fee; (4) law school clinical, externship, and volunteer programs; and (5) legal personnel providing information or assistance to individuals in the courthouse setting. Further, the Conference would examine the "ethical" issues in the broadest sense. Thus, participants would be invited to consider how existing professional norms apply to lawyers in various practice settings and the extent to which those norms are appropriately adapted to the issues facing lawyers who represent low-income and indigent clients. They would also consider how lawyers should respond to questions that are not addressed fully or at all by the existing standards of professional conduct.

The initial idea for the conference grew out of the work of Fordham's ethics center⁶ and public interest law program.⁷ Most especially, it grew out of the work of an advanced seminar on "Ethics and Public Interest Law."⁸ Each spring, students in the seminar read and discuss secondary literature on public interest law practice while collaborating with different New York City not-for-profit law offices on projects relating to this area of practice. Although public interest law has been construed broadly,⁹ many of the projects have focused on the work of legal services offices and other offices serving low-income persons. For example, small groups of students have been paired with lawyers at Brooklyn Legal Services Corporation "A", the IOLA Fund of New York, Lawyers Alliance, Legal Services of New York, the Legal Aid Society, MFY Legal Services, New York Lawyers for the

6. The Stein Center for Ethics and Public Interest Law at Fordham Law School was established through the generosity of Louis Stein, Fordham class of 1926. Despite his death in 1996, Mr. Stein's vision continues to animate Fordham Law School's deep commitment to the use of law in the service of others. For more information on Louis Stein and the Stein Center, see Fordham Univ. Sch. of Law, Bulletin: 1998-1999, at 107-09 (1998).

7. Fordham established the Stein Scholars Program in 1992. Each year, approximately twenty members of the entering class are selected for the program on the basis of their demonstrated commitment to public service. See *id.* at 105. In addition, Fordham's Public Interest Resource Center, headed by Assistant Dean Thomas J. Schoenherr, strives to educate all of Fordham's law students about pro bono and volunteer opportunities through actual experiences working with people in need. See generally Thomas J. Schoenherr et al., *The Fordham Model: Student Initiated Projects for the Public Interest* (n.d.) (unpublished manuscript, on file with the *Fordham Law Review*).

8. For a description of this seminar in its earliest years, see Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, Law & Contemp. Probs., Summer/Autumn 1995, at 193, 204-05.

9. See, e.g., Daniel Wise, *Spitzer Aims at Official Corruption*, N.Y. L.J., Jan. 28, 1999, at 1 (describing the New York State Attorney General's Office as a "public interest law firm" (quoting New York State Attorney General Eliot Spitzer)).

Public Interest ("NYLPI"), the Open Society Institute ("OSI"), and Volunteers of Legal Service. Three of these organizations—the Legal Aid Society, OSI, and NYLPI—were among the conference's ten cosponsors, and two of them—OSI and the IOLA Fund—were generous financial contributors to the conference, as was the ABA Section of Litigation, another cosponsor.

Student projects undertaken in the context of Fordham's seminar have led to various publications¹⁰ and programs, such as training sessions on tenant representation or on the representation of incapacitated clients. With the exception of the November 1998 symposium on "Lawyering for Poor Communities in the Twenty-First Century,"¹¹ however, these projects have tended to be comparatively narrow in scope. In viewing these projects together and over time, though, questions emerged that were cross-cutting and that seemed to us worthy of fuller exploration. Our goal in organizing the Conference was to encourage participants to explore these cross-cutting issues in order to promote better understandings of how to address the legal needs of low-income persons.

The issues all were connected, one way or another, to several obvious considerations that generally make serving low-income persons distinctive, although not necessarily unique. These are that: (1) low-income persons generally cannot afford a lawyer; (2) consequently, to the extent that legal assistance is available to them, it is likely to be funded by a third party (e.g., a government entity, a private foundation or other private contributors, or a private lawyer or law firm);¹² (3) because of the limited availability of outside funding, the demand for legal assistance will far exceed the supply of lawyers available to serve individuals who cannot afford to pay; and (4) in the absence of adequate legal resources, some low-income persons may seek assistance from: (a) other institutions and agencies, including personnel of the courts or administrative agencies in which they appear; or (b) representatives of the social service agencies from which they may seek assistance with respect to nonlegal problems that are related to their legal problems.

What this means is that lawyers will have difficult choices about whom to assist and how much assistance to provide that, ideally, will

10. See, e.g., Janine Sisak, *If the Shoe Doesn't Fit . . . Reformulating Rebellious Lawyering to Encompass Community Group Representation*, 25 Fordham Urb. L.J. 874 (1998) (written by a Stein Scholar); Symposium, *The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions*, 25 Fordham Urb. L.J. 279 (1998) (a symposium created out of work done in the seminar).

11. Symposium, *Lawyering for Poor Communities in the Twenty-First Century*, 25 Fordham Urb. L.J. 673 (1998).

12. For a discussion of issues arising from the influence of third-party funders, see Samuel J. Levine, *Legal Services Lawyers and the Influence of Third Parties on the Lawyer-Client Relationship: Some Thoughts from Scholars, Practitioners, and Courts*, 67 Fordham L. Rev. 2319 (1999).

be made with an awareness of other institutions that may be available to give assistance. In making these decisions, lawyers may be influenced in conscious or unconscious ways by the expectations (if not legal constraints) of public and private funders.¹³ They may also be affected by competing philosophical or ideological understandings of the ideal role of lawyers and law offices serving low-income clients.¹⁴

Moreover, difficult issues may arise concerning the role of the client community in the process through which these decisions are made. Unlike paying clients, who can afford to shop for a lawyer, low-income individuals with legal problems lack the economic clout to ensure that their individual preferences are respected.¹⁵ Collectively, they are equally likely to lack the political clout to ensure that their voices are heard.¹⁶ Class differences (not to mention, in many cases, racial and ethnic differences) may further distance lawyers from the low-income population.¹⁷ Nonetheless, there are means of making the client community part of the decision-making process.¹⁸ Over the years, careful attention has been paid to questions concerning how lawyers can discern the interests and preferences of the client community and how these concerns should inform decisions about the struc-

13. *But cf.*, Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 *Fordham L. Rev.* 2187 (1999) [hereinafter Houseman, *Restrictions*] (discussing whether a lawyer can accept LSC funds bearing restrictions and still practice ethically).

14. *See, e.g.*, Martha F. Davis, *Brutal Need: Lawyers & the Welfare Rights Movement, 1960-1973*, at 33-34 (1993) (noting tension in the 1960s between advocates of law reform and defenders of traditional legal aid); Gerald P. López, *Rebellious Lawyering* 24-28 (1992) (distinguishing between "regnant" lawyers—who "consider themselves the preeminent problem solvers" and "rebellious lawyers"—who work with disempowered people and groups to assist them in improving their own lives); *cf., e.g.*, Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 *Mich. L. Rev.* 1401, 1404-17 (reviewing Davis, *supra*) (describing the "test-case strategy" for law reform).

15. *See* Geoffrey C. Hazard, *Firm's Muddy Mission*, *Nat'l L.J.*, Feb 26, 1996, at A21.

16. *See* Martha Minow, *Political Lawyering: An Introduction*, 31 *Harv. C.R.-C.L. L. Rev.* 287, 292-93 (1996); *see also* Marie A. Failinger, *Face-ing the Other: An Ethics of Encounter and Solidarity in Legal Services Practice*, 67 *Fordham L. Rev.* 2071, 2071-72 (1999) ("The debate about what poverty lawyers must do poignantly contrasts a visionary hope for a 'Beloved Community' in which the poor are heard in their own voice and seen in their own humanity with the reality of daily defeat—clients silenced and bent, sometimes even by their own lawyers." (footnote omitted)).

17. *See* Christopher P. Gilkerson, *Poverty Law Narrative: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 *Hastings L.J.* 861, 873 (1992) ("The effect of universalized narratives is the exclusion of norms, values, and experiences deemed to be different. For the poverty lawyer, the result is a 'legal blindness' to the perspective of those who come to the legal services office in search of assistance.").

18. *See* Minow, *supra* note 16, at 287-88. Professor Minow describes a community of blacks and chicanos who received compensation from a public utilities company that for years provided the residents with dirty water. *See id.* The community, with the assistance of a lawyer, had gathered evidence, met with company representatives, and demanded appropriate relief. *See id.*

ture and priorities of offices that provide legal representation to low-income clients.¹⁹

Considerations such as these may lead lawyers serving low-income persons to encounter distinctive ethical concerns,²⁰ and the common ethical concerns that these lawyers encounter may play out differently in this distinctive context. This is not to say, however, that lawyers necessarily should serve low-income clients differently, or to suggest that lawyers should provide services of a lesser quality to low-income persons. On the contrary, any such suggestion would be inconsistent with the legal profession's aspiration to assist all individuals who have legal needs regardless of whether they can afford to retain a lawyer,²¹ implicit in which is the ideal that low-income clients should receive the same level and quality of legal assistance as clients with financial means.²² Thus, the organized bar could be expected to share the view of legal aid lawyers that low-income clients should have access to the full range of legal services²³ (and, hence, legal restrictions on class actions or legislative or administrative advocacy should not be imposed on government-funded legal services lawyers).

The point is simply that the recurring ethical and professional issues facing lawyers (and others) serving low-income persons are likely to be different from those facing privately retained lawyers because of the considerations noted above, and that the appropriate responses may differ accordingly. This observation might appear to be at odds with the traditional concept that lawyers serving low-income clients should play by the same rules as lawyers serving paying clients.²⁴

19. See, e.g., Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. Rev. 1101 (1990) [hereinafter Tremblay, *Community-Based Ethic*] (arguing that community norms should inform legal services lawyers' case selection). For a discussion of accountability to individuals and groups of clients in collective representation settings, see Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 Fordham L. Rev. 2449 (1999).

20. See, e.g., Barbara Glesner Fines, *From Representing "Clients" to Serving "Recipients": Transforming the Role of the IV-D Child Support Enforcement Attorney*, 67 Fordham L. Rev. 2155, *passim* (1999) (discussing ethical issues arising from the role of attorneys hired by the government to recover child support payments owed to families receiving public assistance).

21. See, e.g., Model Rules of Professional Conduct Rule 6.1 cmt. [1] (1998) ("Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay . . .").

22. But see Lucie White, *Specially Tailored Legal Services for Low-Income Persons in the Age of Wealth Inequality: Pragmatism or Capitulation?*, 67 Fordham L. Rev. 2571, 2576 (1999) (suggesting that the aspirational principle of equivalent legal services for people of all income levels should be reexamined).

23. See, e.g., William J. Dean, *The Role of the Private Bar*, 25 Fordham Urb. L.J. 865, 868 (1998) (noting that pro bono representation is not just a job for litigators, but corporate lawyers as well).

24. Cf. Bruce A. Green, *Lawyers as Nonlawyers in Child-Custody and Visitation Cases: Questions from the "Legal Ethics" Perspective*, 73 Ind. L.J. 665, 668 & n.18 (noting that ethical rules do not distinguish between different practice settings). This

Nonetheless, lawyering for low-income clients is different because, as academics and practitioners increasingly acknowledge, when it comes to questions of professional conduct, "context counts."²⁵ Questions of ethics and professionalism vary depending on the setting in which lawyers practice,²⁶ the nature of the clients,²⁷ and the nature of their clients' legal concerns,²⁸ among other considerations. The ethical and professional dilemmas encountered by lawyers serving low-income clients are therefore different from those encountered by lawyers serving as criminal prosecutors, civil government lawyers, in-house corporate lawyers, and personal injury defense lawyers.²⁹

concept has traditionally been important to the organized bar because of its commitment to the principle that the legal profession is a unified profession with a universally applicable set of professional norms. *See, e.g., id.* at 669 ("The organized bar eschews distinct rules for particular areas of practice."). At least at one time, the organized bar would have been especially committed to the idea that professional norms apply no differently to the delivery of legal services to low-income persons. This was a premise of the bar's support for legal aid lawyers earlier in this century, before the advent of federal funding for legal services. *See generally* Earl Johnson, Jr., Justice and Reform 5-14 (1974) (discussing the history of the legal aid movement). Legal aid societies depended on the financial and political support of the organized bar, which was achieved in part by limiting the types of cases that would be accepted (so as to avoid competition with private practitioners), in part by appealing to the professional ideal of equal justice, but also in part by declining to challenge prevailing professional norms. *Cf.* Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 Geo L.J. 1669, 1671 (1995) [hereinafter Houseman, *Political Lessons*] ("Although many legal aid societies were inspired by a reform mentality that saw legal services as contributing to specific changes in the situation of the poor, the reform orientation was attenuated or eliminated in order to maintain funding and support from the established parts of the bar.").

25. *See, e.g.,* Bruce A. Green, *Less Is More: Teaching Legal Ethics in Context*, 39 Wm. & Mary L. Rev. 357, 379-85 (1998) (describing why context matters in understanding legal ethics); Mary C. Daly & Bruce A. Green, *Teaching Legal Ethics in Context*, N.Y. St. B.J., May/June 1998, at 6, 8 (describing four ways in which context matters); *cf.* John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 Fordham L. Rev. 1927, 1927 ("Seldom will a client's legal problem be just a legal problem. By issuing a call to context, I am directing attention to the inner-city poor's lived experiences . . ."). These differences are particularly pronounced if one takes as the point of reference the work of private lawyers for corporations and other paying clients—the point of reference from which the legal profession's ethical codes emerged. *See* Bruce A. Green & Nancy Coleman, *Foreword* to Special Issue, *Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 961, 967 (1994).

26. For example, prosecutors have unique ethical duties. *See, e.g.,* Model Rules of Professional Conduct Rule 3.8 & cmt. [1] (1998) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

27. For example, special rules apply to lawyers representing organizations rather than individuals. *See, e.g., id.* Rule 1.13 ("Organization as Client").

28. *Cf., e.g.,* Lewis Becker, *Ethical Concerns in Negotiating Family Law Agreements*, 30 Fam. L.Q. 587 (1996) (discussing questions of ethics and professionalism likely to arise in representing clients with divorce or custody problems).

29. The extent to which lawyers for low-income clients are or should be different has been a matter of academic and professional debate. *See, e.g.,* Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 Hastings L.J. 947, 947-48 & nn.1-11 (1992) (describing several perspectives on progressive lawyers and their professional obligations).

Moreover, lawyering for low-income people has always been different. Thirty years ago, for example, a foundation study criticized legal aid societies on the grounds that their lawyers: (1) provided minimal amounts of assistance (sometimes “only a single consultation”); (2) had “little time or incentive to enter into a contest over legal principle [or] to make or alter a law”; and (3) were “captive of [their] principal financial supporters.”³⁰

Although the availability of funds to support the provision of legal services to low-income clients has expanded over the past thirty years, the funding of legal assistance for those who cannot afford it remains grossly inadequate to meet the need.³¹ Consequently, lawyers and law offices are still limited in the extent and nature of assistance provided to low-income clients. Moreover, they continue to be influenced and even restricted by, if not captive of, their funders.³² This consideration that has led to thoughtful, yet highly controversial, analyses of how ethically to respond to such restrictions, on one hand,³³ and to thoughtful, yet highly controversial, legal challenges to certain restrictions, on the other.³⁴ Thus, when it comes to responding to the legal needs of low-income persons, lawyers and others are compelled to think about and respond to problems of resource allocation in ways that many privately retained lawyers need not.

Indeed, not only do lawyers and others think hard about these problems, they have been doing so for some time. Recognizing that “context counts,” entities of the ABA have developed standards designed to provide guidance specifically to lawyers serving low-income clients.³⁵ Other national organizations, such as the National Legal Aid and Defenders Association (“NLADA”), also work to develop guidance for legal service providers, as do state and local orga-

30. Johnson, Jr., *supra* note 24, at 10 (quoting James E. Carlin et al., *Civil Justice and the Poor* 50 (1966)).

31. Francis J. Larkin, *The Legal Services Corporation Must Be Saved*, *Judges' J.*, Winter 1995, at 1, 1.

32. See, e.g., Steven Epstein et al., *Foreword to Symposium, The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions*, 25 *Fordham Urb. L.J.* 279, 280 (1998) (outlining the restrictions placed on organizations funded by the Legal Services Corporation (“LSC”).

33. See, e.g., ABA Comm. on Ethics and Professional Responsibility, *Formal Op.* 96-399 (1996) (“Ethical Obligations of Lawyers Whose Employers Receive Funds from the Legal Services Corporation to Their Existing and Future Clients When Funding Is Reduced and When Remaining Funding Is Subject to Restrictive Conditions”).

34. See, e.g., *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757 (2d Cir. 1999) (upholding some LSC restrictions against a First Amendment challenge but striking down the “suits-for-benefits” restriction); *Legal Aid Soc’y v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir.) (upholding LSC restrictions against a First Amendment challenge), *cert. denied*, 119 S. Ct. 539 (1998).

35. See *Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means* (1996); *Standards for Providers of Civil Legal Services to the Poor* (1986).

nizations for the benefit of their own legal personnel. This has also been a fertile area of professional and academic writing, as a bibliography prepared by the Fordham law library reflects.³⁶

In some respects, the amount of consideration given to these problems has been remarkable. Even after the advent of "continuing legal education" requirements in the area of legal ethics, lawyers have sometimes been reluctant to engage in serious public discussion of ethical issues relating to their particular area of practice out of concern either that common practices may be difficult to justify or that a public discussion of "ethics" might somehow lead outsiders to infer that lawyers practicing in the area are acting unethically. Legal services practitioners, in particular, might be reluctant to discuss ethical and professional issues out of concern that those who are generally unsupportive of their work would seize upon supposed "ethical" problems as a further reason to oppose Legal Services Corporation funding or other government or private funding.³⁷

Notwithstanding these concerns, discussions of legal and professional issues in serving low-income persons have been not only ongoing, but also robust. Precisely for this reason, it is difficult to tie all the threads of the conversation together. One obvious and overarching concern for those who think about the delivery of legal services to low-income persons, however, is how the legal profession, together with potential nonlawyer providers, can collaborate most effectively to provide meaningful assistance to as many low-income individuals as possible.

To address this concern, efforts have been made to expand available resources, even as federal funding for legal services remains fixed or decreases. These efforts have included: the provision of assistance to groups of individuals via programs of education, the joint representation of multiple clients, and the representation of not-for-profit organizations and informal organizations;³⁸ the provision of assistance by nonlawyers, including lay advocates, community representatives, so-

36. See *Bibliography to the Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues*, 67 *Fordham L. Rev.* 2731 (1999).

37. Indeed, opponents of legal services have not hesitated to label aggressive tactics by legal services lawyers "unethical" in debates over LSC funding and restrictions in Congress. See, e.g., 138 *Cong. Rec.* H2280 (daily ed. April 2, 1992) (statement of Rep. Goodling) (referring to "the unethical and predatory practices of some [LSC] grantees").

38. See generally Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 *Clinical L. Rev.* 433 (1998) (discussing the use of community education by legal services programs); Brian Glick & Matthew J. Rossman, *Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience*, 23 *N.Y.U. Rev. L. & Soc. Change* 105 (1997) (discussing the representation of community organizations by Brooklyn Legal Services Corporation A).

cial workers and other non-legal professionals, and paralegals;³⁹ lawyers' provision of advice, representation with respect to limited aspects of individuals' legal problems, and other forms of limited legal assistance, some involving hotlines, computers, or other modes of developing technologies;⁴⁰ the thoughtful allocation of limited resources by legal services offices, given recognition that, for some individuals, limited legal assistance will not be effective to address their legal problems;⁴¹ and the involvement of other institutions of the legal profession, including the organized bar, lawyers in private practice who provide low-cost or pro bono assistance, and law schools.⁴²

B. *The Significance of "Ethics" and "Professionalism"*

One might ask, what do "ethics" and "professionalism" have to do with all this? As discussed below, there are at least three answers. Those who are concerned about serving the legal needs of low-income persons ought to give thought to: (1) how applicable laws and ethical rules governing the practice of law restrict their options; (2) how best to practice within the context of ethical and legal restrictions; and (3) whether efforts should be made to improve the applicable legal and

39. See generally Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship*, 67 *Fordham L. Rev.* 2123 (1999) (discussing collaborations between lawyers and social workers); Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 *Harv. C.R.-C.L. L. Rev.* 415, 434-36 (discussing nonlawyer participation and practice within the legal system).

40. See generally George Bushnell, *State Wins ABA Access-to-Justice Award*, 77 *Mich. B.J.* 774, 776 (1998) (discussing the State Bar of Michigan's use of hotlines and computer terminals to improve access to legal services); Wayne Moore & Monica Kolasa, *AARP's Legal Services Network: Expanding Legal Services to the Middle Class*, 32 *Wake Forest L. Rev.* 503, 525-34 (1997) (discussing the AARP's use of hotlines to provide legal services); Richard Zorza, *Re-Conceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice: From Threat to Opportunity*, 67 *Fordham L. Rev.* 2659 (1999) (discussing the ethical implications of the use of new technologies to deliver legal services).

41. See generally Gary Bellow & Jeanne Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 *B.U. L. Rev.* 337 (1978) (discussing the allocation of resources in the legal services setting); Paul R. Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 *Fordham L. Rev.* 2475 (1999) [hereinafter Tremblay, *Triage*] (proposing a system of legal services triage that seeks to fulfill the goals of legal services practice).

42. See generally Tigran E. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More than Charity?*, 96 *W. Va. L. Rev.* 367, 399-403 (1993) (calling for an imposition of an affirmative duty of public service upon lawyers, and for law schools to begin teaching students about this duty as part of the professional responsibility curriculum); Steven Lubet & Cathryn Stewart, *A "Public Assets" Theory of Lawyers' Pro Bono Obligations*, 145 *U. Pa. L. Rev.* 1245 (1997) (arguing that lawyers' obligation to provide pro bono services stems from their use of "public assets" in the practice of law); *probono.net*, *probono.net* (visited Mar. 28, 1999) <<http://www.probono.net>> (offering attorneys information about pro bono opportunities and resources to enable them to deliver pro bono services).

ethical restrictions to promote better and more effective work on behalf of low-income clients.

1. Conforming to Legal and Ethical Standards

As is true for legal practitioners working in other distinctive settings, those who provide legal assistance to low-income clients must consider how the “law and ethics of lawyering” applies to their work. For example, ethical and legal limitations apply to lawyers who charge individuals by the minute for brief advice given over the telephone⁴³ or to lawyers who give advice to prospective clients whom they decline to represent.⁴⁴ Do these restrictions apply in precisely the same way to legal services offices giving advice over a “hotline” or giving a few minutes of advice in person to a prospective client who must be turned away because of the office’s caseload? Similarly, ethical rules concerning the compensation of lawyers by third parties⁴⁵ have been applied to lawyers retained by insurance companies to represent policyholders.⁴⁶ Do the rules apply in precisely the same way to a lawyer who is employed by a social service agency to represent its clients, or to a legal services office that is subject to audits and restrictions imposed by government or private funders?

2. Best Practices Within the Existing Legal and Ethical Framework

Once it is understood how the “law of lawyering” currently applies, lawyers and law offices must consider how best to practice within the context of applicable legal and ethical understandings: Given the various approaches that lawyers or law offices may take, what is the best way to comply with applicable legal and ethical obligations while serving low-income individuals respectfully, honestly, loyally, and competently? This raises questions of “ethics” in both a narrow and a broad sense.

In the narrow sense, rules of professional conduct, statutes, and court rules may limit the range of options available to those assisting low-income persons and, in particular, may require service providers, while promoting innovation, to develop structures and procedures in

43. See Committee on Prof'l Ethics, New York State Bar Ass'n, Opinion 664 (1994).

44. See *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).

45. See, e.g., Model Rules of Professional Conduct Rule 1.8(f)(2) (1998) (“A lawyer shall not accept compensation for representing a client from one other than the client unless there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.”).

46. See, e.g., Ethics Advisory Opinion Comm., Utah State Bar, Opinion 98-03 (1998) (requiring a lawyer hired by an insurance company to defend an insured to obtain the insured’s consent before submitting billing statements to an outside auditing company); Ethics Comm., North Carolina State Bar, Proposed 98 Formal Ethics Op. 10 (1998) (same).

certain ways to respect ethical and legal restrictions.⁴⁷ Consider the following examples.

First, court rules and other provisions may limit lawyers' ability to provide limited legal assistance concerning litigation to individuals who cannot afford full-service representation. For example, recent judicial decisions have criticized lawyers who assisted pro se litigants with their legal filings, finding that the lawyers' undisclosed participation violated ethical rules on candor, Rule 11 of the Federal Rules of Civil Procedure, and court rules requiring lawyers who appear in a proceeding to obtain the court's permission before withdrawing.⁴⁸ There is a question whether these decisions are rightly decided or too restrictive,⁴⁹ but, regardless of how one views them, lawyers must take account of them in deciding how to assist pro se litigants. What is the best way to assist a pro se litigant while complying with existing judicial restrictions?⁵⁰

Second, lawyers serving low-income clients must take into account rules of professional conduct governing conflicts of interest.⁵¹ These may influence how lawyers represent multiple tenants of an apartment who have similar legal problems and other groups of similarly situated individuals, by requiring lawyers to reach understandings about what to do when the different clients seek to direct the representation differently. These rules may also affect the willingness or ability of law firms to render pro bono services in certain kinds of cases, because of perceived problems relating to "issues" or "positional" conflicts where the legal position of the pro bono client might be inconsistent with the legal position of a paying client in an unrelated case.⁵² What are the ways in which a lawyer may serve low-income persons most effectively within the confines of existing conflict rules?⁵³

47. For a call for the re-examination of ethical rules and structures that safeguard professional autonomy at the expense of service to low-income families, see Louise G. Trubek, *Context and Collaboration: Family Law Innovation and Professional Autonomy*, 67 Fordham L. Rev. 2533 (1999) [hereinafter Trubek, *Context and Collaboration*].

48. See *Riccota v. California*, 4 F. Supp. 2d 961, 985-88 (N.D. Cal. 1998); *Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1077-79 (E.D. Va. 1997); *Johnson v. Board of County Comm'rs*, 868 F. Supp. 1226, 1231-32 (D. Colo. 1994); *aff'd on other grounds*, 85 F.3d 489 (10th Cir. 1996).

49. For further discussion of these decisions and the ethics of "ghostwriting," see John C. Rothermich, Note, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 Fordham L. Rev. 2687 (1999).

50. For a call for a more proactive role in assisting pro se litigants by court personnel, 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 (1999).

51. See, e.g., Model Rules of Professional Conduct Rule 1.8 (1998).

52. See John S. Dzienowski, *Positional Conflicts of Interest*, 71 Tex. L. Rev. 457, 531-36 (1993); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 Stan. L. Rev. 1395, 1409-19 (1998).

53. For discussions of conflict issues in the delivery of legal services to low-income persons, see Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical*

Third, rules of professional conduct governing client confidentiality,⁵⁴ competence,⁵⁵ and conflicts of interest⁵⁶ may influence the work of bar associations and other volunteer agencies that act as intermediaries between low-income individuals and lawyers offering pro bono services. If these agencies establish a lawyer-client relationship with the prospective clients, they may be obligated to preserve confidences, to oversee the work of pro bono counsel, or to undertake "conflict checks." If not, they may have to make certain disclosures to avoid inadvertently creating a lawyer-client relationship and may have to limit the extent to which confidences are revealed.⁵⁷ These same rules may influence how court personnel and nonlawyer professionals provide assistance to unrepresented individuals, limiting them to the provision of legal "information" (e.g., concerning which papers to file and where to file them) as distinguished from "advice," and obligating them to provide certain disclosures or disclaimers to avoid giving the impression that they are providing legal representation.⁵⁸

Efforts to use limited resources as efficiently and fairly as possible for the benefit of low-income individuals with legal problems may also implicate concerns about ethics and professionalism in a broader, non-legal sense. For example, what principles should guide lawyers and law offices in choosing among potential clients, cases, and client matters?⁵⁹ If a lawyer seeks to represent a group within the community, what steps, if any, should the lawyer take to ensure that the group speaks for the community or that the group's leadership speaks for the group, and to assist in resolving differences that may exist within the

Considerations and Market Forces, 67 Fordham L. Rev 2279 (1999); Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 Fordham L. Rev 2339 (1999).

54. See, e.g., Model Rules of Professional Conduct Rule 1.6 ("Confidentiality of Information").

55. See, e.g., Model Rules of Professional Conduct Rule 1.1 ("Competence").

56. See, e.g., Model Rules of Professional Conduct Rule 1.8 ("Conflicts of Interest: Prohibited Transactions").

57. See, e.g., Committee on Prof'l Ethics, New York State Bar Ass'n, Opinion 664 (1994) (detailing disclosures required when giving legal advice by a 900 telephone number).

58. See, e.g., John M. Greacen, *No Legal Advice From Court Personnel—What Does That Mean?*, Judges' J., Winter 1995, at 10 (discussing the difference between "information" and "legal advice").

59. For some attempts to answer these questions, see Bellow & Kettleon, *supra* note 41, at 359 (stating that while a program may limit the categories of clients' needs that it will address, it should not limit the services provided within those categories); Barbara A. Glesner, *The Ethics of Emergency Lawyering*, 5 Geo. J. Legal Ethics 317 (1991) (positing standards of practice for emergency legal services); and Tremblay, *Community-Based Ethic*, *supra* note 19, at 1103-04 (expressing the opinion that it is permissible for legal services offices to engage in "triage," the practice of allocating scarce legal resources). Professor Tremblay expands on his work on triage in this issue. See Tremblay, *Triage*, *supra* note 41. For comments on and criticisms of Professor Tremblay's triage proposals, see Justine A. Dunlap, *I Don't Want to Play God—A Response to Professor Tremblay*, 67 Fordham L. Rev. 2601 (1999).

community or the group concerning the direction of the representation?⁶⁰ What principles should guide the decision of whether to use resources to provide limited assistance to a large number of individuals via hotlines, educational activities, or brief in-person consultations, or whether to provide full representation to a small number of individuals?⁶¹ What is a law school's moral (if not legal) responsibility to ensure the quality of work undertaken by law students in law school volunteer organizations or clinics?⁶² Should legal services providers assess programs for delivering legal services and, if so, what qualities should be assessed and how should assessments be made?⁶³

60. Articles dealing with these issues include Stephen Ellman, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 Va. L. Rev. 1103, 1141 (1992); and William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 Ohio N.U. L. Rev. 455 (1995). See also Tremblay, *Community-Based Ethic*, *supra* note 19, at 1141-46 (discussing the ethical obligations of lawyers representing groups within a community).

61. See generally sources cited *supra* note 59 (discussing methods of allocating scarce legal resources). For a discussion of approaches to the delivery of limited legal assistance, see Mary Helen McNeal, *Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance*, 67 Fordham L. Rev. 2617 (1999).

62. This is not to suggest that law school clinics do not provide competent, and in many cases excellent, representation. Issues related to students' inexperience, however, do arise. As Professor Tarr put it:

One controversial issue is the practice of using poor people as "guinea pigs" for law students. The "underprivileged" are expected to be appreciative of free legal services that they probably could not receive elsewhere. Most clinics rightfully pride themselves on the quality of service they deliver to their clients, which is frequently equal to or superior to private practitioners' service to their clients. Nevertheless, the underlying liberal assumptions that serve as the rationale for clinical work need to be reexamined. Whose interests do they really serve: the clients, the students, the supervisors, or the law schools?

Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 How. L.J. 31, 35 (1993); see also David F. Chavkin, *Am I My Client's Lawyer? Role Definition and the Clinical Supervisor*, 51 SMU L. Rev. 1507, 1513-28 (1998) (discussing a clinical supervisor's obligations to the clinic's clients). See generally Lisa G. Lerman, *Professional and Ethical Issues in Legal Externships: Fostering Commitment to Public Service*, 67 Fordham L. Rev. 2295 (1999) (discussing ethical issues that arise during law students' legal externships); James E. Moliterno, *In-House Live-Client Clinical Programs: Some Ethical Issues*, 67 Fordham L. Rev. 2377 (1999) (discussing ethical issues that arise in law school clinics).

63. These issues arise in response to criticisms of legal service programs' efficacy, such as those of Professor Feldman. See Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 Geo L.J. 1529 (1995). For responses to Professor Feldman, see Gary Bellow & Jeanne Charn, *Paths Not Yet Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 Geo. L.J. 1633 (1995); and Houseman, *Political Lessons*, *supra* note 24. For an attempt to begin to answer these questions, see Gregg G. Van Ryzin & Marianne Engelman Lado, *Evaluating Systems for Delivering Legal Services for the Poor: Conceptual and Methodological Considerations*, 67 Fordham L. Rev. 2553 (1999). See also Clark D. Cunningham, *Evaluating Effective Lawyer-Client Communications: An International Project Moving from Research to Reform*, 67 Fordham L. Rev. 1959 (1999) (discussing an effort to assess and improve attorney-client communications).

3. Working to Improve the Law and Ethics of Lawyering

Finally, the law and ethics rules governing the legal profession may not be keeping pace with the delivery of legal services to low-income clients. As Nancy Coleman and I have observed elsewhere,

Even though the legal profession is aware of the increasing diversity of the law, of modes of practice, and of legal needs, its professional standards remain deeply rooted in the nineteenth-century mode of practice out of which they emerged: the representation of sophisticated individuals and businesses, on a retained basis⁶⁴

These provisions may not be explicitly designed to deal with the issues faced by lawyers and others who render assistance to low-income persons in legal services settings, law schools, social service agencies, courthouses, and other settings outside the traditional "lawyer for hire" context. Moreover, these provisions are especially unlikely to contemplate current innovations, including those made possible by new technologies, that have been implemented or contemplated by legal services providers, bar associations, not-for-profit agencies, law schools, and others.⁶⁵

Obviously, if standards of professional conduct are to be "universal," they must make sense in the context of serving low-income clients no less than in the context of serving corporations and individuals who are financially well-off. Thus, as the ABA and state and local bar associations engage in the ongoing process of reconsidering and proposing amendments to disciplinary rules and other relevant laws, they must widen their frame of reference to take into account an array of individuals with legal needs. This includes low-income persons and the work of lawyers and nonlawyers who assist them. Doing so may reveal a need to change, refine, supplement or clarify existing provisions. Two illustrations should suffice.

First, it has become increasingly plain that, with training, individuals who are not licensed to practice law may competently assist low-income persons in dealing with legal problems that are not being addressed by lawyers. Indeed, U.S. Attorney General Janet Reno has recently promoted the development of "community advocate programs," in which individuals who are not lawyers would be trained to assist individuals in low-income communities to address common legal

64. Bruce A. Green & Nancy Coleman, *Foreword to Special Issue, Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 961, 967 (1994) (footnotes omitted).

65. See generally *Recommendations to the Legal Services Corporation: A Blueprint for Enhancing the Delivery of Legal Services to Persons in Poverty Through the Effective Use of Technology* (1994) (unpublished paper distributed by the National Clearinghouse for Legal Services, on file with the *Fordham Law Review*). For a list of LSC-funded organizations with web sites, see Legal Servs. Corp., *LSC Funded Programs with Web Sites* (visited March 6, 1999) <<http://www.lsc.gov/lswbsites.html>>.

problems.⁶⁶ Potential legal impediments to worthwhile programs, such as this one, include state "unauthorized practice of law" ("UPL") statutes,⁶⁷ developed in earlier times to deal with far different issues. On one hand, the impact of these provisions has been eroded by state and federal laws authorizing nonlawyers, with or without training, to assist low-income persons with respect to discrete legal matters, including in administrative settings, where the disputed issues may be legally and factually complex.⁶⁸ On the other hand, where they have not been preempted by other laws, UPL provisions may be enforced vigorously and aggressively to block the provision of services or products (e.g., the distribution of law books or computer programs) that may well provide high quality assistance to those who cannot afford to retain a lawyer.⁶⁹ Unquestionably, there is a need to reconsider and refine existing UPL provisions to encourage social workers, paralegals, and others to provide quality legal assistance more broadly to low-income persons. Legal services offices and bar associations must also be encouraged to develop educational programs and publications and to provide support designed to assure the quality of such assistance.

Second, recognizing that it remains true today, as it was thirty or more years ago, that legal services providers often lack the resources to provide more than "minimal amounts of assistance" to those with legal problems, lawyers and law offices have become increasingly thoughtful about which individuals will receive "brief advice" or similarly limited assistance, who will provide this service, and how it will be provided. For years, nonlawyer personnel in many offices have offered some help, in the course of answering the telephone or in the earliest stages of intake, to those who were ineligible to be represented in a comprehensive way, and lawyers have provided limited assistance that has been variously described as "information and re-

66. See Scot Lehigh, *Harvard Law Women Must Lead, Reno Says; AG Faces Challenges Facing Alumnae*, Boston Globe, Nov. 15, 1998, at B5 (reporting Reno's proposal for "the creation of a community-advocate program in which the advocates would address such common problems as tenant-landlord disputes and vacant municipal lots").

67. See, e.g., Cal. Bus. & Prof. Code § 6126 (West 1990) (prohibiting the unauthorized practice of law); N.J. Stat. Ann. § 2C:21-22 (West 1995) (same); N.Y. Jud. Law § 476-a (McKinney 1983) (same).

68. See, e.g., 5 U.S.C. § 555 (1994) (permitting nonlawyer representatives, when authorized by the agency involved, to participate in administrative hearings); N.Y. Jud. Law § 478 (McKinney Supp. 1999) (permitting supervised students in clinical settings to represent clients); N.Y. Comp. Codes R. & Regs. tit. 18, § 358-3.4(e) (1998) (permitting nonlawyer representatives in administrative law hearings).

69. See, e.g., *Unauthorized Practice of Law Comm. v. Parsons Tech. Inc.*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999) (holding that the distribution of a computer program, "Quicken Family Lawyer," violated the Texas UPL statute).

ferral,' 'advice only,' and 'brief services.'"⁷⁰ Today, developing technologies provide the possibility of offering assistance by hotline or via computer as well as in the traditional ways. The existing disciplinary rules, however, do not seem to address these efforts, or at least not clearly and explicitly.

Thus, it is unclear whether individuals who receive only "brief advice" are to be regarded as "clients" for purposes of the existing ethical rules. If so, the lawyer must give competent advice, keep information he or she receives confidential, and avoid conflicting representations. The lawyer might also be foreclosed from limiting the "scope of the representation" so as to deprive the client of "competent" representation, and might be obligated to undertake the record keeping required by conflict of interest provisions. Alternatively, individuals who receive "brief advice" might be regarded as non-clients, like complete strangers to whom no ethical duties are owed, based on the (possibly fictitious) premise that these individuals are receiving "information" but not meaningful legal assistance tailored to their specific legal problems. Recently, ABA drafters have set to work to develop a rule to define the ethical obligations owed to one class of individuals whose limited contact with lawyers makes them less than clients but more than strangers: namely, "prospective clients."⁷¹ It would not be surprising if the drafters have proceeded based on the paradigm of an individual or corporation who seeks to engage a lawyer for a fee. Would the proposed rule apply equally well when legal services law offices give brief advice to low-income persons, who may or may not be fairly characterized as "prospective clients?" The obligations of lawyers giving brief advice to individuals should be addressed by a rule, whether these individuals are characterized as "clients," "prospective clients," or "non-clients," and the obligations identified in the rule should make sense for legal services lawyers no less than corporate lawyers.

II. HOW THE CONFERENCE WAS CONDUCTED

A. *Organization of the Conference*

Believing these kinds of issues to be important ones for lawyers and the communities they serve, Fordham law faculty set to work in 1996 to lay the groundwork for a conference that would examine ethical and professional issues relating to the delivery of legal services to low-income clients. Others shared our belief in the importance of this inquiry and, consequently, the law school's Stein Center for Ethics and

70. Raymond H. Brescia et al., *Who's in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 *Fordham Urb. L.J.* 831, 836 (1998).

71. See Model Rules of Professional Conduct Rule 1.18 (Draft No. 1, January 22, 1999) (a proposed new rule on "Duties to a Prospective Client"); see also Restatement (Third) of the Law Governing Lawyers § 27 (Proposed Final Draft No. 1, 1996) (setting forth a lawyer's duties to a prospective client).

Public Interest Law was joined along the way by nine institutional co-sponsors. These included the four noted previously: the ABA Section of Litigation, the Legal Aid Society, NYLPI, and OSI. The others included the Legal Services Corporation, which is of course the federal government agency principally concerned with the issues that were to be addressed at the conference; the National Legal Aid and Defender Association; two additional American Bar Association entities (the ABA Center for Professional Responsibility and the ABA Standing Committee on Legal Services); and the Keck Center on Legal Ethics and the Legal Profession, which Professor Deborah Rhode directs at Stanford Law School.

Together with other interested individuals,⁷² representatives of the institutional co-sponsors collaborated on several tasks. The first was to identify a range of authors, both academics and practitioners, to prepare articles for the benefit of the Conference's participants (and, ultimately, the readers of this law review) that would build upon and augment the existing legal literature on the delivery of legal services to low-income persons. Some of the articles would squarely address the questions later to be discussed at the Conference, others would provide important background to the discussions, and all would stimulate the participants' thinking before they arrived at Fordham in December 1998. This book contains twenty-one articles produced by the authors who, to the gratitude of the Conference's co-sponsors, responded to this call.⁷³

The second task was to identify the questions for consideration by participants at the conference. This required taking the broad subject matter of the conference and dividing it into topics that were slightly less broad and (relatively) distinct from each other. After many months of discussion, the following eight sets of questions were identified:

1. *Rendering legal assistance to similarly situated individuals.* Because limited resources are available to serve clients of limited means, lawyers seek efficient means of addressing the needs of a

72. In particular, thanks are owed to Alan Houseman of the Center for Law and Social Policy for his many contributions to the development of the conference.

73. See Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 Fordham L. Rev. 1879 (1999); Calmore, *supra* note 25; Cunningham, *supra* note 63; Engler, *supra* note 50; Failinger, *supra* note 16; Galowitz, *supra* note 39; Glesner Fines, *supra* note 20; Houseman, *Restrictions*, *supra* note 13; Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 Fordham L. Rev. 2241 (1999); Lardent, *supra* note 53; Lerman, *supra* note 62; Levine, *supra* note 12; Margulies, *supra* note 53; Moliterno, *supra* note 62; Wayne Moore, *Are Organizations that Provide Free Legal Services Engaged in the Unauthorized Practice of Law?*, 67 Fordham L. Rev. 2397 (1999); Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 Fordham L. Rev. 2415 (1999); Southworth, *supra* note 19; Tremblay, *Triage*, *supra* note 41; Trubek, *Context and Collaboration*, *supra* note 47; Van Ryzin & Engelman Lado, *supra* note 63; White, *supra* note 22.

large number of individuals with legal problems in common. Among the approaches have been: (a) the representation of groups of individuals; (b) the representation of community organizations, non-profit organizations and community economic development corporations; and (c) impact litigation. These approaches present issues of decision-making, conflicts of interest, and confidentiality, among others. For example, in representing a group (e.g., a group of tenants), from whom does the lawyer take direction? What role should the lawyer play in establishing a decision-making structure? What is the lawyer's duty to communicate with group members individually, to what extent should disclosures received from individual group members be kept confidential from others, and to what extent must these "ground rules" be made clear at the outset? What is the lawyer's role when group members disagree about the direction to be taken?

2. *Use of non-lawyers.* Increasingly, in light of the limited availability of legal resources, lawyers render legal assistance by, through, or with non-lawyers. As the ABA's recent study describes, non-lawyers provide services ranging from interviews and intake, to rendering advice, to providing direct representation in administrative proceedings and other fora. The lawyers' relation with non-lawyers may vary. Lawyers may provide direct supervision or training or may simply be available to provide legal advice. The settings in which non-lawyers render assistance may also vary. Non-lawyer professionals may serve in legal services offices or other not-for-profit agencies, may act through community groups, or may assist clients independently. Some of the work of lawyers in conjunction with non-lawyers raises such questions as whether lawyers are aiding the unauthorized practice of law, whether certain uses of non-lawyers lead to the rendition of inadequate legal representation for which lawyers are accountable, and whether lawyers are providing adequate supervision to ensure that ethical standards are maintained. Thus, questions for consideration include: How do existing professional standards and unauthorized-practice laws apply to the various work of non-lawyers? Are these standards and laws appropriate or should they be revised? And, how can lawyers working together with non-lawyers most effectively assist clients of limited means within the context of appropriate standards?

3. *Limited legal assistance.* Faced with limited resources, legal services and pro bono programs have explored various possibilities for providing "limited" (as distinguished from "full-fledged") legal assistance to those who, with some assistance, may be able to advocate on behalf of themselves. These possibilities include assistance to pro se litigants, client education and outreach, and the use of kiosks in various settings, as well as limited legal advice provided through telephone hotlines, over the internet, or in person. Questions are raised about whether providing limited assistance constitutes legal representation (rather than merely the dispensation of legal "information") and, if so, whether it satisfies standards of competence, as well as whether these short-term relationships between

clients and lawyers present problems of conflicts-of-interest and client confidentiality.

4. *Client/matter/case selection.* Decisions about which clients to represent and how to define the scope of the representation are critical in serving the population of prospective clients with limited means who may have limited options for legal assistance. Individual lawyers and law offices make these decisions in the context of a variety of considerations, including the resources available to them, the legal needs of the particular low-income client population, and the priorities set by, and resources available to, the range of other providers of legal assistance in the area. What standards should be applied to these decisions and by what process should the standards be applied? Is it appropriate to make categorical decisions about whom to represent or which types of cases to take on, and, if so, how should such decisions be made? To what extent is it appropriate to limit the scope of representation (e.g., “advice only,” or “negotiations only,” or “administrative hearing but not appeal”), to condition the representation on the client’s willingness to accept the lawyer’s advice or to delegate to the lawyer decisions that are traditionally made by clients (e.g., whether to accept a particular settlement)? Although these questions relating to the allocation of scarce legal resources are largely unaddressed by the legal profession’s disciplinary rules, legal services lawyers have discussed them for many years and have resolved them in many different ways, sometimes with the assistance of standards developed by the ABA. Among the possible questions raised are whether some approaches to dealing with client, matter, and case selection are more appropriate than others, whether some should be deemed unacceptable, and whether new approaches should be considered in light of recent social and political changes. In particular, the standard and process by which priorities are set might be considered in view of the expanding technological options (e.g., use of the internet) as well as the expanding range and nature of potential providers—including nonprofit programs, community-based organizations, entities operating with funding restrictions, other entities operating without restrictions, private attorneys, etc.

5. *Influence of third parties on the lawyer-client relationship.* Most lawyers who render legal services to the clients with limited means receive financial support from someone other than the client—e.g., the government, private benefactors, or the private law firm or agency in which they work. Consequently, these lawyers (like their counterparts in other practice settings) may be subject to various limits, obligations, pressures or influences from third parties with respect to which clients may be represented, the matters that may be undertaken, and how clients may be represented as a general matter, as well as occasional attempts to influence how they handle individual cases. For example, lawyers serving in legal services offices are subject to restrictions and reporting obligations as a condition of receiving government funding. Social services agencies may seek to require their lawyers to comply with reporting obliga-

tions that the law imposes on social services professionals. Both in the context of future cases and, occasionally, in the context of pending cases, questions are raised about how lawyers should respond to outside influences in light of their ethical obligations of competence, loyalty, confidentiality and zealous advocacy.

6. *Representation by private practitioners.* The ABA Model Rules recognize the “critical need for legal services that exists among persons of limited means” and the corresponding responsibility on the part of every lawyer “to provide legal services to those unable to pay.” Consistent with this responsibility, many individual lawyers and private law firms—although far from all—serve indigent clients on a pro bono basis or for a reduced fee. Some decline to do so in particular types of cases out of concern that indigent clients’ legal positions would appear to be at odds with positions taken on behalf of the firm’s private clients. The extent to which this concern is legitimate, and how it may be addressed consistently with the law firm’s pro bono obligation, are important, yet not fully resolved, questions. Other issues are presented by the pro bono work of lawyers and law firms working in conjunction with bar associations and other not-for-profit organizations. What obligations are undertaken by the organizations that assist lawyers in identifying indigent clients who are in need of assistance? Do these organizations have an obligation to ensure that volunteer lawyers are qualified to perform the work they are undertaking or an obligation to supervise or review the pro bono work? Do they assume attorney-client obligations (e.g., duties of confidentiality or loyalty)? Further, it is important to explore questions confronted by private lawyers who represent clients of limited means for compensation, since, as a recent ABA Legal Needs Study indicates, private practitioners appear to be the primary providers of legal services to low-income persons. For example, when private lawyers and law offices represent clients of limited means on a contractual basis or on a reduced fee basis, to what extent does the nature of the compensation affect the nature of the services provided?

7. *Representation within law school settings.* Increasingly, legal assistance is provided to indigent clients by law students in the law school setting. The structures within which students work vary considerably. Some serve in faculty-supervised legal clinics and lawyer-supervised externships in which a licensed attorney is counsel of record but the students assume substantial responsibilities. Others serve in volunteer organizations created and operated by law students themselves. Recent law-school initiatives include projects in which law students assist pro se litigants, and there is a range of other possibilities. This work raises questions about unauthorized law practice, lawyer competence, confidentiality and conflicts of interest. For example, to what extent are client confidences appropriately shared among students, and what safeguards must be taken to protect against improper disclosures? What types of disclosures must students make to prospective clients? What level of lawyer-supervision is required? What is the appropriate response when a

law school program is staffed by law students who are seeking employment in organizations representing interests in conflict with those of the program's clients? To what extent do pedagogic goals conflict with the obligation to represent clients ethically and competently? In general, how can and should law schools encourage public service activities and pro bono activity for the benefit of underserved communities?

8. *Assessment of systems for delivering legal services.* As new mechanisms for delivering legal services to low-income clients are developed, the need arises for methods of assessing them. This raises various questions, including questions concerning when assessments should be made, the standard by which delivery mechanisms should be assessed, the process that should be employed, and how information thereby acquired should be used. One possible standard would be qualitative. For example, when the program involves individual case representation, the standard might be whether the delivery mechanism effectively meets the legal needs of low-income clients (or, in the case of some delivery systems, non-clients) by sufficiently increasing the likelihood of favorable outcomes. Or a program serving individuals may have different or additional goals, as may a program providing assistance to groups or communities, and, thus, a program may be assessed in light of different or additional criteria for measuring success. Programs might also be assessed from perspectives other than the effectiveness or quality of the services provided, including from the perspective of client satisfaction or even lawyer satisfaction. Further, from the perspective of the ethical and professional concerns apart from the adequacy of legal assistance, one might assess whether an individual program and/or delivery system includes institutionalized mechanisms to ensure that accurate advice is given, that the nature and scope of the representation, if any, is adequately conveyed, and that client confidential information is preserved. Whether, as a practical matter, individual programs or models can and should be assessed from any of these perspectives is another legitimate question, given limitations of resources and client-confidentiality considerations, as is the question of whether, in a time of scarce legal resources, there is any absolute standard to which providers should be held.⁷⁴

The organizers' final task was to identify individuals who, together with the authors, would participate in the Conference. Obviously, the participants would generally be individuals who, in some aspect of their professional work, addressed issues relating to the delivery of low-income clients and believed that this was important work. As the list of participants reflects,⁷⁵ the participants were a varied and distinguished group. They included lawyers with considerable experience

74. Memorandum describing the Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues (n.d.) (on file with the *Fordham Law Review*).

75. See Symposium, *The Delivery of Legal Services to Low Income Persons: Professional and Ethical Issues*, 67 *Fordham L. Rev.* 1713 app. at 2787 (1999).

representing low-income persons in different legal contexts or in administering and designing programs to assist low-income persons with their legal problems, social scientists and others with expertise and experience from outside the legal profession, practitioners and academics with expertise in professional responsibility and clinical law practice, and others.

B. *What Took Place at the Conference*

The Conference began on the morning of Friday, December 4, with a short plenary session at which the participants were welcomed and John McKay, President of the Legal Services Corporation, delivered opening remarks. But this was a working conference, and so, soon after, participants were set to work. Through the rest of the day and the following day, over the course of more than twelve hours, participants worked in small groups to develop different sets of recommendations. There were eight working groups, each corresponding to one of the eight broad issues summarized above. Each group had approximately twelve participants, a discussion leader, and a student who assisted in recording the discussions. Each working group was asked to develop recommendations relating to its broad issue, but was told that it was not bound by the general summaries of these issues that had been provided, and was invited to discuss different or additional questions that it considered to be more important.

Participants at the Conference engaged in discussions and deliberations⁷⁶ in their individual capacities, and not on behalf of the particular office in which they worked or entity of which they were a member. This was not an attempt by the co-sponsors to develop recommendations that reflected their (or any other entity's) viewpoint. Rather, once the Conference began, the co-sponsoring entities had largely completed their task, which was principally organizational. The Conference now belonged to the individual participants. Participants were told that it was essential to the success of the working groups that: (1) everyone participate fully in discussions, drawing on his or her background and experience; (2) participants open themselves to each others' insights and experience; and (3) participants work together in a disinterested manner to achieve common ground, keeping in mind that the process is focused on how best to serve real individuals with real needs. The discussion leader's role was simply to

76. For a description of the operation of similar working groups, see Bruce A. Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 *Fordham L. Rev.* 1281, 1293 (1996). See also Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 *Notre Dame L. Rev.* 1369, 1382 (1998) ("In its broadest sense, deliberation is understood as a process of careful calculation and reasoned dialogue. It is a method of discourse in which individuals debate the merits of particular activities. Deliberation is reflective activity, requiring active participant engagement." (footnotes omitted)).

facilitate the discussion, to keep it on track, and to direct it toward the goals of achieving consensus on appropriate and thoughtful recommendations.

Over the course of the two days, although nothing required them to do so, the working groups generally sought consensus on a set of recommendations. This book includes summaries of the discussions that took place within the working groups.⁷⁷ The summaries serve various purposes, including to explain and justify particular recommendations, to preserve arguments made in opposition to proposed recommendations, and to identify issues on which agreement could not be reached. As they reflect, with very few exceptions, there was nearly total agreement within each working group on the recommendations it proposed. As the process went on, if a proposed recommendation drew opposition, it was ordinarily revised to accommodate the opposing viewpoint, or it was withdrawn and, in some cases, replaced by a recommendation that the issue be given "further study." Thus, at least as the participants viewed them on Saturday evening, the recommendations were neither particularly bold nor controversial.

On Sunday, participants came together in a plenary session to consider, discuss, and vote on the recommendations. The session was ably chaired by Danny Greenberg, who is Executive Director and Attorney-in-Chief of the Legal Aid Society in New York City. Of course, there was only a limited time for discussion and deliberation. Participants had time to address substantive issues only, and were expected to make their arguments concisely. There was no time to raise additional issues and to propose recommendations beyond those developed by the working groups. It was recognized that the recommendations would be incomplete as a consequence. It was understood, however, that the recommendations and other materials developed at the Conference were not meant to be the last word, but were intended simply to advance discussion within the legal profession on a set of important issues. Thus, participants were asked simply to do the best they can within the limited time they had together.

For the most part, the proposed recommendations were adopted as drafted. Some were refined or clarified in light of discussion at the plenary session that highlighted ambiguities or unintended implica-

77. See *Report of the Working Group on Assessment of Systems of Delivering Legal Services*, 67 Fordham L. Rev. 1869 (1999); *Report of the Working Group on Client/Matter/Case Selection*, 67 Fordham L. Rev. 1833 (1999); *Report of the Working Group on Limited Legal Assistance*, 67 Fordham L. Rev. 1819 (1999); *Report of the Working Group on Rendering Legal Assistance to Similarly Situated Individuals*, 67 Fordham L. Rev. 1801 (1999); *Report of the Working Group on Representation by Private Lawyers*, 67 Fordham L. Rev. 1853 (1999); *Report of the Working Group on Representation Within Law School Settings*, 67 Fordham L. Rev. 1861 (1999); *Report of the Working Group on the Influence of Third Parties on the Lawyer-Client Relationship*, 67 Fordham L. Rev. 1841 (1999); *Report of the Working Group on the Use of Nonlawyers*, 67 Fordham L. Rev. 1813 (1999).

tions.⁷⁸ Only one discrete proposal engendered substantial controversy and was not adopted in some form.⁷⁹ Additionally, several other proposals, although approved by a substantial majority of the participants, elicited negative reactions from several participants either at the plenary session or thereafter, in large part because of concern that the recommendations might be interpreted in a manner that was not intended. As this description should make plain, the recommendations are not the product of the co-sponsors or entities that contributed to the organization of the Conference, but of a group of thoughtful, experienced, concerned individuals who took part. Although the recommendations adopted at the Conference were endorsed by a substantial majority of those present at the plenary session, individual participants disagreed with a small number of specific recommendations, as have at least two entities upon reviewing them, and those areas of disagreement are noted below.⁸⁰

Finally, to compensate in part for the limited opportunity for reflection and debate during the plenary session, we invited participants to prepare short essays immediately after the Conference in response to the recommendations or the working group discussions. While all reflections were welcome, we particularly invited contributions expressing disagreement with particular recommendations, so that the views on both sides of disputed issues would be included in this volume. Thus, together with the recommendations, the summaries of the working group discussions, and the articles prepared in advance of the Conference, this book includes responses from participants with additional contributions to offer.⁸¹

78. Groups were given the opportunity to refine and clarify the recommendations in light of the discussion at the plenary session, although not to make additions or substantive changes that had not been considered at the plenary session.

79. This was the Working Group on the Use of Nonlawyer's proposed recommendation that criminal statutes prohibiting unauthorized practice of law should be repealed. Although the working group explained that it was not intending to foreclose all legal restrictions on unauthorized law practice, but simply to take this area of regulation outside the criminal law, participants in the plenary session were concerned that the criminal law may have an appropriate role to play, even if the current laws were themselves too broad, and that more opportunity for reflection was needed before endorsing such a broad-reaching proposal. Thus, the initial proposal was rejected in favor of a recommendation that "further study" be given to the issue.

80. See *infra* note 146.

81. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *Fordham L. Rev.* 2581 (1999); Dunlap, *supra* note 59; McNeal, *supra* note 61; Don Saunders, *Comments Regarding the Recommendations of the Fordham Conference on Ethical Issues in the Delivery of Legal Services*, 67 *Fordham L. Rev.* 2651 (1999); Zorza, *supra* note 40.

III. THE RECOMMENDATIONS: AN AGENDA FOR FUTURE WORK

This book contains the recommendations that were approved at the plenary session, as later refined in light of the discussions that took place on that day.⁸² They cover all eight of the broad sets of issues identified by the organizers of the Conference. Although the recommendations were developed from the perspective of ethical and professional considerations, they are concerned with far more than just the content of ethical rules and how they should be interpreted. Collectively, the recommendations speak to virtually all of the individuals and entities whose work affects the delivery of legal services to low-income persons. In essence, they propose an agenda for future work by these individuals and entities to expand and enhance the delivery of legal services to low-income persons.

A. *Recommendations to Lawyers who Represent Low-Income Clients*

The recommendations developed by the Working Group on Rendering Legal Assistance to Similarly Situated Persons provide guidance on how lawyers may assist low-income persons whose “common legal problems, interests, or objectives . . . can be served most effectively and efficiently through some form of collective action.”⁸³ In particular, they offer guidance concerning class-action representation and the representation of entities and associations serving or comprised of low-income persons, including guidance regarding conflicts of interest that may arise in the course of this work.⁸⁴ They also identify general steps that lawyers should take to better enable them to provide competent, high-quality representation involving the common legal problems, interests, or objectives of low-income persons, including, especially, “build[ing] collaborative relations across professions and between client groups and other entities that address issues relevant to the [low-income] client population.”⁸⁵ To like effect, the recommendations on the role of nonlawyers encourage lawyers to collaborate with other providers of services and advocacy and other professionals and to share their knowledge “to enable the other professionals to identify legal needs, to provide assistance that addresses those needs where possible, and to make referral for further legal assistance where needed.”⁸⁶

82. See *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 *Fordham L. Rev.* 1751 (1999) [hereinafter *Recommendations*].

83. *Id.* at 1751.

84. See *id.* *Recommendations* 7–24, at 1755–59.

85. *Id.* at 1757.

86. *Id.* *Recommendation* 36, at 1767.

B. *Recommendations to Legal Services Providers and Program Boards*

The Conference adopted the extensive set of recommendations fashioned by the Working group on Client/Matter/Case selection.⁸⁷ These include recommendations on delivery systems stressing that legal services programs for low-income persons in the community should collaborate to ensure the availability of a full range of services, including "class, group, and individual representation; legislative and administrative advocacy at the state and local level; and counseling, advice, and community education,"⁸⁸ and that programs "should encourage experimentation with different delivery techniques."⁸⁹ These also include recommendations on program priorities that address "the affirmative obligation to reach out to under-served groups";⁹⁰ the need to identify publicly, and periodically assess, clear goals and priorities that are set through a process of consultation with the client community; and the importance of working to make public institutions more responsive to the client community.⁹¹ Finally, these include the identification of factors to consider in selecting among cases when the program lacks sufficient resources to serve all eligible clients.⁹²

Likewise, the recommendations developed by the Working Group on Assessment of Systems for Delivering Legal Services are largely directed at legal services providers.⁹³ In light of the importance of "[a]ssessment and evaluation [as] necessary components of efforts to improve the ability of legal services delivery systems to fulfill the mission of achieving equal and full access to justice,"⁹⁴ the recommendations identify the general questions that should be addressed by an assessment or evaluation, the types of useful data that could be collected, the wide range of stakeholders who should participate in the assessment, the appropriate methodology, sources of funding and resources for data collection, sharing of information, and the challenges of assessment.⁹⁵

Finally, certain recommendations developed by the Working Group on Representation by Private Lawyers are directed specifically at those legal services programs (as well as bar associations) that seek to involve private practitioners in the representation of low-income persons.⁹⁶ These programs are urged to ensure the availability of support

87. *See id.* Recommendations 65-77, at 1778-80.

88. *Id.* Recommendation 65, at 1778.

89. *Id.* Recommendation 67, at 1778.

90. *Id.* Recommendation 68, at 1778-79.

91. *See id.* Recommendations 69-70, at 1779.

92. *See id.* Recommendations 76-77, at 1780.

93. *See id.* Recommendations 119-40, at 1796-1800.

94. *Id.* at 1796.

95. *See id.* Recommendations 119-40, at 1796-1800.

96. *See id.* at 1784.

and training resources such as formal training programs, practice manuals, access to mentors, and the use of technology.⁹⁷ They are also encouraged to develop internally consistent policies on how to address recurring ethical and professional issues such as whether the referring agency has an attorney-client relationship with the person seeking legal help; if so, whether the relationship ends or continues after the referral is made; whether the referring agency must provide support and follow-up; and the circumstances under which a volunteer lawyer may “give back” a case encountered by referrals to private practitioners.⁹⁸

C. *Recommendation to Private Practitioners*

The Conference adopted recommendations crafted by Working Group on Representation by Private Lawyers.⁹⁹ These address, among other things, the need for private practitioners both to increase the amount of pro bono work they contribute and to increase their financial support for the legal services community; the need for private practitioners to build bridges to legal services organizations and other public interest groups; and the need for private practitioners who provide legal assistance to low-income clients to develop the requisite knowledge and expertise.¹⁰⁰

D. *Recommendations to Law Schools*

Recommendations developed by the Working Group on Representation within Law School Settings are addressed to law school faculty, law school clinics, and law schools generally.¹⁰¹ They grow out of a recognition “that law schools should be, and should be viewed as, part of the solution to the current crisis in providing legal representation to low income persons,” both in their role as significant providers of legal services through their clinics, pro bono programs, and other initiatives, and in their role as educators of future lawyers who must be made aware of their professional responsibility to serve low-income persons.¹⁰² Among other things, the recommendations address law schools’ programmatic responsibilities, their role in increasing pro bono activities, and the importance of encouraging faculty involvement with organizations representing low-income persons.¹⁰³ The recommendations also identify ways in which law school clinics, “as a part of a broader legal provider network,” can work with other entities in deciding what services to provide, as well as issues that law

97. *See id.* Recommendation 92, at 1787.

98. *See id.* Recommendations 94–97, at 1788.

99. *See id.* Recommendations 85–107, at 1785–90.

100. *See id.* Recommendations 88–93, at 1786–87.

101. *See id.* Recommendations 108–18, at 1791–96.

102. *Id.*, at 1790–91.

103. *See id.* Recommendations 108–11, at 1791–93.

school clinical faculty can address in their teaching to better prepare students to represent low-income communities and clients.¹⁰⁴

Additionally, recommendations on the role of nonlawyers encourage law schools to educate law students to work collaboratively with other professionals, nonlawyer advocates, community-based organizations, and client groups.¹⁰⁵ They also urge law schools to collaborate with other university departments to develop courses and programs and conduct research on how law firms and organizations can best use nonlawyers to serve low-income clients and communities.¹⁰⁶

E. *Recommendations to Drafters and Interpreters of Ethics Rules*

Several recommendations focus on the need to augment or modify existing rules of professional conduct or the accompanying commentary. This is the principal target of the recommendations of the Working Group on the Limited Legal Assistance (as distinguished from "full service" representation).¹⁰⁷ These recommendations address ethical concerns raised when legal assistance is limited to the brief provision of legal information or advice, the review of documents, or the drafting of legal pleadings, or where assistance is provided by way of hotlines, websites, pro se clinics, form pleadings, or community education.¹⁰⁸ The recommendations recognize that prospects for significantly increasing access to legal services might be impeded by inappropriately restrictive interpretations of ethical rules, and identify general principles for interpreting existing rules, or developing new rules "to encourage use and expansion of responsible modes of representation that increase such access."¹⁰⁹

The recommendations developed by the Working Group on the Influence of Third Parties on the Lawyer-Client Relationship are also aimed at ethics rulemakers and regulatory authorities.¹¹⁰ These respond to the concern that while third-party funders "can have a positive influence on the attorney-client relationship when they seek to expand client access to justice or to enrich the lawyer's representation of individual clients," they can also influence the lawyer-client relationship in negative ways by imposing "unreasonable restrictions on the independent professional judgment of the lawyer, or on the attorney-client relationship."¹¹¹ The question of whether restrictions are unreasonable is important not only to legislators, but also to individ-

104. *See id.* Recommendations 115-16, at 1794-95.

105. *See id.* Recommendation 42, at 1770.

106. *See id.* Recommendation 43, at 1771.

107. *See id.* Recommendations 47-64, at 1774-78.

108. *See id.*

109. *See id.* Recommendations 47-51, at 1774-75.

110. *See id.* Recommendations 78-84, at 1781-84.

111. *See id.* at 1780-81.

ual lawyers who provide legal representation subject to the restrictions, because these lawyers must be sensitive to the possibility that, in individual cases or groups of cases, a particular restriction may create a serious ethical dilemma by restricting the lawyer's ability to provide competent representation, by interfering with the lawyer's professional judgment, or by interfering with the lawyer's ability to freely counsel the client on lawful goals.¹¹² Further, such a dilemma may be heightened by the client's limited access to a lawyer who would not serve under the same restriction.¹¹³ These considerations bear on the question of whether a legal services lawyer should undertake a particular representation subject to a relevant funding restriction, whether the particular client may agree to be represented subject to the restriction on the lawyer's services, or whether the lawyer should withdraw from the representation. Accordingly, the recommendations propose that lawyers be alerted to these considerations through additions to the Comments of the Model Rules of Professional Conduct, which serve as guidance, explanation, or illustration, but not as disciplinary rules themselves.¹¹⁴

Other recommendations regarding the ethics rules relate to private practitioners' representation of low-income clients. These include a recognition of the need for better guidance to address, first, the complex ethical issues that arise out of the relationship between private practitioners who take on pro bono representations and referring organizations (e.g., volunteer lawyer programs run by legal services offices or bar associations)¹¹⁵ and, second, "positional conflicts," which may occur when work on behalf of a pro bono client may have an impact on work performed by the lawyer or law office for another client.¹¹⁶ These also include a recommendation urging states to adopt the existing Model Rule 6.1,¹¹⁷ which identifies the need for private practitioners to provide legal services to low-income individuals and communities, and another encouraging the ABA drafters to add aspirational provisions to the Model Rules, like those contained in the earlier Model Code of Professional Responsibility, to the effect that lawyers should engage personally in efforts to improve the law independently of the interests or desires of particular clients.¹¹⁸

112. Cf. Model Rules of Professional Conduct Rule 2.1 (1998) ("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 situations.").

113. See *Recommendations*, *supra* note 82, at 1782.

114. See *id.* Recommendations 78, 80-81, at 1781, 1782-83.

115. See *id.* Recommendations 91-97, at 1787-88.

116. See *id.* Recommendations 98-102, at 1788-89.

117. Model Rules of Professional Conduct Rule 6.1.

118. See *Recommendations*, *supra* note 82, Recommendations 85, 98-102, at 1785, 1788-89.

Another recommendation directed at legal ethics authorities addresses lawyers' collaborations with nonlawyer professionals. It urges that confidentiality provisions should protect information gathered in the course of a collaboration between a lawyer and another professional.¹¹⁹

Still others address the work of law schools and law students. One identifies the need to examine the rules of professional conduct to determine whether they appropriately address the work of law students who provide pro bono legal assistance to low-income persons.¹²⁰ Another suggests the need for practice guidelines to address ethical issues frequently encountered by law school clinics, including "conflicts of interest, unique challenges to protecting client confidentiality, and student activities which may raise concerns about the unauthorized practice of law."¹²¹

Finally, the recommendations on assisting similarly situated persons urge the need for further study of "whether traditional conflicts of interest principles should control the representation of multiple community groups," in light of such considerations as "the availability of alternative representation . . . and questions about the adequacy of clients' consent to waive conflicts."¹²²

F. *Recommendations to Legislators*

One set of recommendations explains at length why it is contrary to sound public policy for legislators (or private funders) to restrict legal services lawyers from engaging in legislative advocacy or from undertaking class actions on behalf of low-income clients.¹²³ Another identifies criteria that should be considered when reevaluating statutory restrictions on nonlawyer activity, and urges in particular the elimination of per se prohibitions on nonlawyer representation before administrative agencies.¹²⁴

G. *Recommendations to Judges and Judicial Administrators*

A set of recommendations urges the judiciary to encourage the expanded use of nonlawyers to assist in satisfying unmet legal needs and furthering access to justice, and identifies specific ways of doing so.¹²⁵ These include the provision of court-approved forms that are in plain, understandable language and that are translated into the languages of the populations served by the court; the provision of legal advice by court employees and people working in court-annexed programs; the

119. *See id.* Recommendation 37, at 1767-68.

120. *See id.* Recommendation 114, at 1794.

121. *See id.* Recommendation 113, at 1794.

122. *See id.* Recommendation 18, at 1757.

123. *See id.* 1751-52.

124. *See id.* Recommendation 32, at 1763-64.

125. *See id.* Recommendations 25-33, at 1759-65.

elimination of court rules that prohibit lawyers from assisting nonlawyers who provide competent legal assistance to the public; and the provision by judges themselves of extensive assistance and advice to unrepresented litigants.¹²⁶ Recognizing the need “to assure that law schools can provide the full range of educational benefits to students, and can properly model the broad provision of legal services,” a separate recommendation opposes restrictions contained in student practice rules on the nature of the legal services that may be provided or the clients who may be served.¹²⁷

H. *General Recommendations*¹²⁸

Perhaps most significantly, the recommendations set forth an agenda for future work to be undertaken by the various entities that are concerned with expanding and enhancing the delivery of legal services to low-income persons. To some extent, this agenda is implicit in recommendations described above. For example:

- The recommendations on “unauthorized practice of law” show that substantial work must be done to develop and promote model legislation on the delivery of legal assistance by nonlawyers as an alternative to existing UPL provisions.¹²⁹
- The recommendations on ethical provisions show that work must be done to develop and promote (1) an ethical rule or set of rules to address the provision of “limited legal assistance” together with guidelines on the application of the relevant rules and law to particular methodologies; (2) specific guidelines to address the work of referral agencies; (3) specific guidelines to address positional conflicts arising out of pro bono representations; and (4) guidance on ethical issues that arise in law school settings.¹³⁰
- Additionally, many other recommendations explicitly identify further work that must be done.

To some extent, the future work involves advocacy. For example, the recommendations generally oppose legislative, administrative, and private third-party funding restrictions that undermine a legal services attorney’s ability to provide competent representation, and they specifically object to those current restrictions that limit the ability of legal services providers to represent low-income clients in class actions or to engage on their behalf in legislative or administrative advocacy. The recommendations explain:

126. *See id.* Recommendations 26, 29, 31, 33, at 1760, 1762, 1763, 1765.

127. *See id.* Recommendation 114, at 1794.

128. These Recommendations speak generally to the organized bar, not-for-profit organizations, private foundations, government agencies, and all other entities concerned with the legal needs of low-income persons.

129. *See Recommendations, supra* note 82, Recommendations 25–46, at 1759–74.

130. *See id.* Recommendations 47–64, 85–118, at 1774–78, 1784–96.

Lawyers serving low-income persons and communities should not be subjected to restrictions on professional practice that preclude them from assisting clients through class actions, administrative or legislative lobbying, or other forms of collective action that may, in a given situation, be the most effective and efficient means to achieve a common objective.¹³¹

Thus, the recommendations suggest that individuals and organizations concerned about the legal needs of low-income persons should work to achieve the repeal of these restrictions.

This future work also involves providing institutional support for, and encouragement of, the work of lawyers serving low-income persons. For example:

- With respect to the role of private practitioners, the bar “should take steps to create incentives and minimize disincentives to performing pro bono work,”¹³² and entities should “[e]ncourage the use of technology . . . to build bridges between private practitioners and legal services organizations and other public interest law groups.”¹³³
- With respect to the role of nonlawyers, entities should: produce educational and other material to assist nonlawyer advocates and their low-income clients; develop community-based general advice, referral and assistance centers/hotlines; create programs and organizations for the training and advancement of client and community advocates; and develop “a network and website to support competent nonlawyer advocacy, including assisting people involved in punitive actions related to the unauthorized practice of law.”¹³⁴
- With respect to assessments, organizations should, among other things, “formulate model data collection instruments and methods and should collect what has already been done in related fields,”¹³⁵ “conduct research on legal needs and delivery of legal services,”¹³⁶ and establish a clearinghouse for information about evaluation methods and findings.¹³⁷ Additionally, in consultation with stakeholders, major funders collectively should support the development of model assessment methodologies and “a research grant program to assess the effectiveness of different approaches to the delivery of legal services.”¹³⁸

131. *See id.* at 1751.

132. *Id.* Recommendation 86, at 1785.

133. *Id.* Recommendations 89, at 1786.

134. *Id.* Recommendations 25–46, at 1759–74.

135. *Id.* Recommendation 124, at 1798.

136. *Id.* Recommendation 127, at 1798.

137. *See id.* Recommendation 130, at 1799.

138. *See id.* Recommendations 129, at 1799.

- Lawyers should be funded to offer the services that may otherwise be unavailable because of existing restrictions on recipients of government funding.¹³⁹

Finally, the agenda developed by the participants at the Conference calls for further study in a variety of areas, including:

- “A study should be undertaken regarding contributions to and support of legal services,” with the ultimate goal of “develop[ing] strategies for increasing financial support from private practitioners for the legal service community.”¹⁴⁰
- Study should be undertaken of the work rendered to low-income persons by private practitioners outside the context of organized pro bono or Judicare programs, to determine whether providing training and support to these attorneys would produce more effective services.¹⁴¹
- Study should be undertaken of the use of older (late career) attorneys to provide legal services to low-income persons, including the problems and benefits of their involvement and the motivations and financial needs of these attorneys, and a planning group should be convened to devise appropriate strategies for utilizing the dramatically increasing number of older attorneys.¹⁴²
- Study should be done “to identify barriers to collaboration among lawyers, other professionals, nonlawyer advocates, and clients.”¹⁴³
- Study is needed of the role and composition of legal services program boards, to assess whether they adequately reflect the needs and resources of the community.¹⁴⁴
- Study should be undertaken with respect to a host of issues relating to third parties’ influence on the work of legal services lawyers, including the extent to which traditional ethical understandings concerning the lawyer-client relationship should be refined to accommodate legislative provisions, how audits and assessments by third parties impact on the provision of legal services, and how collaborations between lawyers and other professionals influence client representation.¹⁴⁵

As this description suggests, the recommendations by no means serve as the “last word” on ethical and professional issues raised by the delivery of legal services to low-income persons.¹⁴⁶ Rather, they

139. *See id.* Recommendation 82(g), at 1783-84.

140. *Id.* Recommendation 88, at 1786.

141. *See id.* Recommendation 103, at 1789-90.

142. *See id.* Recommendations 104-07, at 1790.

143. *See id.* Recommendation 38, at 1768.

144. *See id.* Recommendation 78, at 1781.

145. *See id.* Recommendation 82, at 1783-84.

146. Don Saunders’s response on behalf of the National Legal Aid and Defender Association expresses a concern with several recommendations. *See Saunders, supra* note 81. His concern about these particular recommendations was shared by several

are intended to identify a broad array of areas where additional work must be done. They place responsibility for this work in the hands of

participants at the Conference, and, following the Conference, similar concerns regarding these and other recommendations were expressed on behalf of two other entities, the Legal Services Corporation and the ABA Standing Committee on Legal Aid and Defenders, *see* Letter from Doreen D. Dodson, Chair, and Terry Brooks, Committee Counsel, ABA Standing Committee on Legal Aid and Indigent Defendants, to author (March 3, 1999) (on file with the *Fordham Law Review*) [hereinafter SCLAID Letter]; Letter from John McKay, President, Legal Services Corporation, to author (January 27, 1999) (on file with the *Fordham Law Review*) [hereinafter LSC Letter], and on behalf of Alan Houseman, *see* Memorandum from Alan W. Houseman, Executive Director, Center for Law and Social Policy, to Conference Participants (December 15, 1998) (on file with the *Fordham Law Review*) [hereinafter Houseman Memo].

As discussed in Mr. Saunders's response, there was a concern regarding certain recommendations addressing restrictions such as those imposed on law offices funded by the Legal Services Corporation. He points out that the recommendations might be read to imply that lawyers serving pursuant to such restrictions are generally rendering incompetent legal assistance or are otherwise failing to comply with their obligations under the ethical rules. *See* Saunders, *supra* note 81, at 2654. It seems fair to say that this was not what these recommendations were meant to imply, and that Mr. Saunders's response therefore provides a useful caution against reading too much into the recommendations generally—and into these recommendations particularly.

Additionally, Mr. Saunders's response takes issue with a recommended addition to the commentary to the Model Rules of Professional Conduct. This commentary would alert lawyers to the possibility that "[a] client's limited access to a lawyer is a coercive influence that compromises the client's ability to consent to" restrictions on the lawyer's representation. *Recommendations, supra* note 82, Recommendation 81, at 1782-83. The proposal appears to be consistent with the orthodox view of lawyers' professional obligations, as reflected, for example, in bar association ethics. *See, e.g.,* Committee on Prof'l and Judicial Ethics, Association of the Bar of the City of New York, Formal Op. 1997-2 (lawyer seeking minor client's consent to disclose information to social service agency "must consider whether the minor perceives, accurately or not, that in the absence of consent, he will not be able to secure legal assistance"); Committee on Prof'l Ethics, New York State Bar Ass'n, Opinion 490 (1978) (legal services lawyers seeking consent to disclose client confidences to the organization's board of directors "should be particularly sensitive to any element of submissiveness on the part of their indigent clients; and, such requests should be made only under circumstances where the staff is satisfied that their clients could refuse to consent without any sense of guilt or embarrassment") Nevertheless, Mr. Saunders raises the challenging point that it may be difficult to reconcile the Conference's support for various forms of "limited legal assistance" with the principle that clients should not be coerced by the absence of alternatives to accept restricted representation. *See Saunders, supra* note 81, at 2656.

Mr. Saunders's concerns regarding the possible implications of recommendations addressing the effect of restrictions by third party funders on lawyers' ability to represent legal services clients ethically and the ability of those clients to consent to the restricted representation were shared by Alan Houseman, Executive Director of the Center for Law and Social Policy, and Doreen Dodson and Terry Brooks, of the ABA Standing Committee on Legal Aid and Indigent Defendants. *See* SCLAID Letter, *supra*; Houseman Memo, *supra*. Although all three expressed their support for recommending that third parties not impose restrictions upon the legal services offices that they fund, they felt that to go further would diminish, rather than improve, low-income persons' access to justice. The Legal Services Corporation expressed opposition to "any recommendations that take a position contrary to the [Legal Services Corporation] Act and Regulations." LSC Letter, *supra*, at 1.

all the individuals (legal services lawyers, private practitioners, academics, judges, court personnel, and nonlawyer professionals, among others) and all the entities (legal services offices, law firms, courts, public agencies, private funders, not-for-profit entities, and bar associations, among others) that influence whether and how low-income persons receive assistance with respect to their legal needs.

**PROCEEDINGS OF THE CONFERENCE ON
THE DELIVERY OF LEGAL SERVICES
TO LOW-INCOME PERSONS:
PROFESSIONAL AND ETHICAL ISSUES**

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