2001

Lawyering for the Middle Class: Foreword

Nancy J. Moore

Recommended Citation

Available at: http://ir.lawnet.fordham.edu/flr/vol70/iss3/1

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
In 1994, Roger Cramton published a seminal article entitled *Delivery of Legal Services to Ordinary Americans.* In that article Cramton began with the premise that "[t]he [legal] profession is organized in two hemispheres: lawyers who serve individuals and those who serve corporate clients." Conceding that lawyers and clients in both hemispheres share common problems, he focused specifically on deficiencies in the provision of legal services to individuals. The article was wide-ranging, covering such diverse topics as incompetence and lack of diligence, cost and availability, and trust, loyalty, and integrity. Cramton examined existing reform proposals, including mandatory pro bono, improving publicly funded legal services for the poor, and relaxing present unauthorized practice and form-of-practice restrictions. Ultimately, his personal recommendations for reform similarly covered the gamut, from tightening regulations on client trust accounts to mandatory...
reporting of malpractice awards, and from compulsory arbitration of fee disputes to enhanced competition in legal services markets.

The articles in this symposium issue on “Lawyering for the Middle Class” build on the foundation established by Cramton, as well as by others, such as Deborah Rhode, who have written extensively about the problems ordinary Americans face in navigating the legal system. The symposium articles provide us with more detailed information concerning the nature and scope of the underlying problems, particularly addressing the question of whether there are indeed vast, unmet legal needs on the part of middle-class persons. In addition, the articles in this symposium help us to evaluate both existing and newly proposed solutions, through a combination of historical examination of current barriers to competition and comparative analysis of analogous developments in the medical profession. The articles are particularly helpful in assessing where we as a profession stand at the beginning of the twenty-first century given a variety of new influences on professional responsibility, including changes in the organization and structure of the legal profession and dramatic developments in the technologies available to both lawyers and clients.

11. Id. at 612-13.
12. Id. at 614.
13. Id. at 615-17.
16. Id. The work of the Ethics 2000 Commission responded to three recent developments: (1) the adoption of the ABA Model Rules of Professional Conduct by forty-four states but with significant variations; (2) the newly recognized legal
The articles can be categorized in two groups. The first (and largest) group addresses the difficulties middle-class Americans face in obtaining access to legal services. Providing a more detailed examination of Cramton’s premise that middle-class persons do not have adequate access to representation, these articles then discuss a variety of proposed solutions, including creating lawyer profiles to help prospective clients choose competent counsel, expanding prepaid legal services, creating an alternative hierarchy to encourage more and better qualified lawyers to serve the middle class, and relaxing restrictions on the roles played by non-lawyers in the provision of legal services, particularly in taking advantage of the possibilities inherent in the use of the Internet. The second group of articles takes an entirely different approach by examining ethical issues in practice areas that have a unique impact on middle-class Americans.

I. MIDDLE-CLASS ACCESS TO LEGAL SERVICES

A. Defining the Problem

Of the symposium authors who address the question, the conclusion is virtually unanimous that middle-class persons do not have adequate access to legal representation. Whereas Cramton relied almost

framework for law practice reflected in the ALI Restatement; and (3) the dramatic changes in the organization and structure of law practice, including significant developments in the technologies available to lawyers and clients.

17. See infra Part I.
18. See infra Part II.
19. See George C. Harris & Derek F. Foran, The Ethics of Middle-Class Access to Legal Services and What We Can Learn From the Medical Profession’s Shift to a Corporate Paradigm, 70 Fordham L. Rev. 775, 795 (2001) (“While difficult to compare because of their different methods and focus, the bar association legal needs studies confirm as a whole what has long been assumed. A significant number of Americans with legal needs are not getting professional assistance.”); see also Steven K. Berenson, Is It Time for Lawyer Profiles?, 70 Fordham L. Rev. 645 (2001) (discussing difficulties in identifying an appropriate legal services provider); Leslie C. Levin, Preliminary Reflections on the Professional Development of Solo and Small Firm Practitioners, 70 Fordham L. Rev. 847, 854, 848 (2001) (arguing that “solo and small firm lawyers often are the lawyer for the middle class” and stating that “the percentage of lawyers practicing in these settings has decreased over the last forty years”); Judith L. Maute, Pre-Paid and Group Legal Services: Thirty Years After the Storm, 70 Fordham L. Rev. 915, 916 (2001) (“For over thirty years, the organized bar has studied, squabbled and lamented over how to address the unmet legal needs of the middle class.”). Susan Carle is not entirely convinced that middle-class persons do
entirely on two studies commissioned by the American Bar Foundation and published in 1974 and 1989, the authors in this symposium issue have had access to a recent spate of additional empirical studies of the unmet needs of the middle-class, including more so-called "legal needs" surveys conducted by the American Bar Association ("ABA"), by a number of states, and by Martindale Hubbell, the publisher of a well-known and widely used directory of American lawyers. Acknowledging that these "legal needs" studies have been subject to criticism, the authors nevertheless agree that the current legal services delivery system does not meet the needs of lower- and moderate-income persons. These conclusions, and other observations concerning the legal services market, are buttressed by not have adequate access to legal representation, but she does agree that the evidence suggests at the very least that "middle income persons face significant and growing problems of access to the legal system." Susan D. Carle, Re-Valuing Lawyering for Middle-Income Clients, 70 Fordham L. Rev. 719, 724 (2001).

20. Cramton, supra note 1, at 541-44 (citing Barbara A. Curran & Francis O. Spalding, The Legal Needs of the Public (1974); Barbara A. Curran, Report on the 1989 Survey of the Public's Use of Legal Services, in ABA Consortium on Legal Services for the Public, Two Nationwide Surveys: 1989 Pilot Assessment of the Poor & Public Generally (1989)). The studies cited by Cramton were done in collaboration with the ABA. See Maute, supra note 19, at 927.

21. See Berenson, supra note 19, at 651 n.43 (citing ABA Consortium on Legal Services and the Public, Legal Needs and Civil Justice: A Survey of Americans—Major Findings from the Comprehensive Legal Needs Study 24 (1994)); Carle, supra note 19, at 723 & n.15; Harris & Foran, supra note 19, at 791 & n.91; Maute, supra note 19, at 936 & n.136; see also Carle, supra note 19, at 724 n.17 (citing ABA Consortium on Legal Services and the Public, Agenda for Access: The American People and Civil Justice: Final Report on the Implications of the Comprehensive Legal Needs Study (1996)).

22. See, e.g., Harris & Foran, supra note 19, at 792-94 & nn.102-18 (citing surveys conducted by the state bars of Oregon, California, and New York); see also Carle, supra note 19, at 723 n.13 (citing surveys conducted by the state bars of New York and Maryland).


24. See Carle, supra note 19, at 724 & n.20; Harris and Foran, supra note 19, at 790 & n.83. Both Harris and Foran and Carle cite Rhode, who argues that the legal needs studies are problematic on several levels. From an empirical perspective it is unclear precisely what is being measured. Any society generates a vast array of conflicts that could give rise to legal action. Whether they do is a function of the organization of the legal system and its broader cultural setting. See Harris & Foran, supra note 19, at 790 n.83 (quoting Deborah L. Rhode, The Rhetoric of Professional Reform, 45 Md. L. Rev. 274, 281 (1986)); Carle, supra note 19, at 724 n.20 (quoting Deborah L. Rhode, The Rhetoric of Professional Reform, 45 Md. L. Rev. 274, 281-82 (1986)).

25. See supra note 19 and accompanying text.

26. For example, Berenson addresses the difficulties consumers have in finding lawyers, See infra text accompanying notes 33-36. Levin addresses questions concerning the nature of solo and small firm practices. See infra text accompanying notes 39-40. Maute provides detailed observations on the current use of pre-paid and group legal services. See infra text accompanying notes 56-60.
extensive references to statistical reports and other recent studies of the demographics of the profession.

According to the authors, the primary barriers to effective participation in the legal system by the middle class are affordability and lack of information. For example, George Harris and Derek Foran, in their article entitled The Ethics of Middle-Class Access to Legal Services and What We Can Learn From the Medical Profession's Shift to a Corporate Paradigm, see a legal services market increasingly dominated by corporate legal services, in which business interests and wealthy individuals command an ever greater share of the market, thereby driving up the cost of legal services. Coupled with what they characterize as the "anticompetitive regulatory structure" of the legal profession, this rise in cost has effectively priced the middle class out of much of the legal services market.

Middle-class persons often find the legal services market not only unaffordable, but also inaccessible. Steven Berenson, in his article entitled Is It Time for Lawyer Profiles?, addresses the lack of reliable information consumers have about lawyers, concluding that the problem is worse in the legal services market than it is in the medical services market. This is because most Americans rely primarily on word of mouth. But whereas most Americans are in regular contact with at least one physician (from whom they can obtain referrals for specialty care), "most persons are not in regular contact with an attorney who plays a role analogous to that of the primary care physician." Neither attorney directories nor advertising provide much information about legal service providers, and lawyer referral


29. Harris & Foran, supra note 19, at 795-98.
30. Id. at 835.
31. Id. at 796 ("Ordinary consumers face an additional obstacle to securing a lawyer's services: a bidding process against the businesses and high-wealth individuals that command more and more attention from the legal services industry—a bidding process they cannot possibly hope to win."); see also Carle, supra note 19, at 726 ("Part of the problem, of course, [that a majority of Americans receive inadequate legal representation] lies in the stark fact of vast differentials in financial resources—it is always easier to buy high quality professional services if one can pay huge amounts for them.").

32. See Harris & Foran, supra note 19, at 802-07.
33. Berenson, supra note 19, at 648-56.
34. Id. at 648 (according to Martindale Hubbell study, most common source of lawyer referrals is "views of family members and friends").
35. Id. at 650.
services typically do little, if any, screening of their participating lawyers.\textsuperscript{36}

According to Susan Carle, in her article entitled \textit{Re-Valuing Lawyering for Middle-Income Clients}, yet another obstacle to the delivery of quality legal services to the middle class is "a dominant hierarchy that defines lawyering for corporate clients as the highest prestige career and lawyering for individuals as a low prestige track."\textsuperscript{37} This view is confirmed by the widespread acceptance of the conclusions of an earlier study by Jerome Carlin,\textsuperscript{38} which according to Leslie Levin, portrayed solo and small firm lawyers "as a marginal group of lawyers with less sophisticated practices and lower ethical standards than lawyers who worked in larger firms."\textsuperscript{39} Levin, in her article entitled \textit{Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners}, discusses negative assumptions about solo and small firm lawyers arising from not only the Carlin study, but also ABA reports suggesting that these lawyers, who are the primary source of legal services for the middle class, "are isolated, receive little mentoring and rely on independent study to learn practice skills."\textsuperscript{40}

\textbf{B. Some Good News}

According to the articles that address these various obstacles, the news is not all bad. Indeed, many of the authors conclude that progress has been made on a number of different fronts. For example, on the question of the quality of legal services offered by solo and small firm lawyers, Levin's article provides a reassessment of the traditional negative assumptions about these lawyers. Relying on several studies more recent than Carlin's,\textsuperscript{41} as well as her own study based on interviews with forty-one lawyers,\textsuperscript{42} Levin paints a far more positive picture of these lawyers. Unlike the lawyers in Carlin's study, less than half of the lawyers in Levin's study attended local law schools: Indeed, over twenty-percent graduated from "elite" schools.\textsuperscript{43} Less than half began as employees of solo or small firm

\begin{itemize}
\item \textsuperscript{36} Id. at 653-55.
\item \textsuperscript{37} Carle, \textit{supra} note 19, at 726.
\item \textsuperscript{38} Levin, \textit{supra} note 19, at 848 n.5 (citing Jerome E. Carlin, Lawyers on Their Own (1962)).
\item \textsuperscript{39} Id. at 850.
\item \textsuperscript{40} Id. at 852 (footnotes omitted).
\item \textsuperscript{41} Id. at 848 n.5 (citing a number of studies following Carlin's 1962 study, particularly those of Carroll Seron and Jerry Van Hoy, which focused directly on the work of solo and small firm practitioners).
\item \textsuperscript{42} Id. at 856-59. According to Levin, "[t]he study is small and the conclusions are necessarily quite tentative." Id. at 855. In addition, she concedes that "[t]his is not a rigorously scientific study and there may have been some hidden biases within the group of lawyers that agreed to be interviewed." Id. at 858. For additional limitations regarding the validity of the author's study, see \textit{id.} at 858 n.49.
\item \textsuperscript{43} Id. at 859.
\end{itemize}
practitioners;* as a result, many of them received mentoring and assistance in skills development at an earlier stage in their careers.** Moreover, office settings and training opportunities available to solo and small firm lawyers are not the same as they were at the time of Carlin’s study because technology has “fundamentally changed the economics and efficiencies of solo and small firm practices, enabling lawyers in these settings to compete with larger firms.”*** Levin concludes that the typical solo or small firm lawyer “is not the undereducated and disillusioned lawyer who Carlin described forty years ago, but rather someone who often has chosen that form of practice and is generally satisfied with it.”****

Technology has also had a more direct, beneficial impact on middle-class consumers. As noted by Berenson, it has made available tremendous amounts of legal information that has made it easier for these consumers to represent themselves.***** Self-representation may also be furthered by the availability on the Internet of interactive forms, pleadings, and other legal documents,****** although these services also raise questions concerning the unauthorized practice of law.******* In her article entitled Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution, Louise Teitz addresses the need to implement appropriate controls and standards but fully acknowledges the extent to which the provision of legal services on-line, including dispute resolution services, “has helped open the market to the ordinary middle-class citizen/consumer.”********

Of course, the availability of alternative dispute resolution (“ADR”), whether in cyberspace or in more traditional forms, is itself a positive development in reducing the cost of legal services for the middle class.********* In particular, according to Judith McMorrow, the

---

44. Id. at 860.
45. Id. at 878.
46. Id. at 853.
47. Id. at 896. Levin does sound a cautionary note concerning the possible adverse effect of technology on the professional development of solo and small firm lawyers. Id. at 875. While acknowledging that technology can greatly expand their “advice networks,” id., she is fearful that simultaneously “it may reduce the instances of more highly textured oral advice-giving.” Id.
48. Berenson, supra note 19, at 674 n.74.
49. Id.
50. See generally Catherine J. Lanctot, Attorney-Client Relationships in Cyberspace: The Peril and the Promise, 49 Duke L.J. 147 (1999); see also Louise E. Teitz, Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution, 70 Fordham L. Rev. 985, 987-88 (2001) (“Legal ethics regulators and experts have struggled in the last several years to define what is the ‘practice of law,’ when engaged in cyberspace.”).
51. Teitz, supra note 50, at 987.
52. The rapid rise in the use of ADR processes has been extraordinary. As late as 1994, Cramton discussed ADR primarily in future terms, as one of a series of “reform proposals [that] seek[] to reduce the cost of legal services and court proceedings by
arbitration of employment disputes represents a "significant institutional mechanism for accessing justice for a large number of middle-class individuals."\textsuperscript{53} In her article entitled \textit{The Advocate as Witness: Understanding Context, Culture and Client}, McMorrow concludes that "[l]abor arbitration and labor representation is one of the few areas where middle-income clients obtain meaningful access to representation on a subject critically important to their daily lives."\textsuperscript{54} Similarly, the recent growth of mediation is a phenomenon that has mostly benefited the middle class. Robert Burns, in his article entitled \textit{Some Ethical Issues Surrounding Mediation}, notes that while mediation has been embraced by corporations as well as individuals, "in the majority of mediations, at least one of the participants, if not both, is a person of modest means."\textsuperscript{55}

Perhaps the most significant development in recent years has been the growth in group-based delivery of legal services. Judith Maute, in her article entitled \textit{Pre-Paid and Group Legal Services: 30 Years After the Storm}, describes the progress that has been made not only in the rising number of Americans who have some coverage through a legal services plan,\textsuperscript{56} but also in the acceptance of such plans, including closed-panel plans, by the organized bar. According to Maute, after a long, "tortured history," the "ABA has embraced the concept, actively supporting the development of an industry and trade group committed to economical, quality delivery of legal services to middle-income persons through pre-paid group plans."\textsuperscript{57} Moreover, having reviewed several such plans, Maute concludes that, so far, the for-profit providers have successfully blended professionalism with a managerial and entrepreneurial spirit,\textsuperscript{58} adopting a "striking emphasis on preventive lawyering,"\textsuperscript{59} along with high priorities on quality control and customer satisfaction.\textsuperscript{60}

\textsuperscript{54} Id. at 981.
\textsuperscript{56} Maute, \textit{supra} note 19. According to Maute, "it appears that twenty-five percent to forty percent of Americans have some coverage through a legal services plan." \textit{Id.} at 916.
\textsuperscript{57} \textit{Id.} at 916.
\textsuperscript{58} \textit{Id.} at 937.
\textsuperscript{59} \textit{Id.} at 939.
\textsuperscript{60} \textit{Id.} at 940.
C. Remaining Obstacles and Proposed Solutions

Despite this acknowledged progress, significant barriers continue to impede the access of the middle class to the legal services market. As noted earlier, these barriers include affordability and lack of information, as well as a prestige hierarchy that accords low prestige to those who provide legal services to individual, middle-income persons. Most of the authors in this first group of articles devote the bulk of their papers to discussing a variety of means of eliminating these barriers.

Carle acknowledges that it is unrealistic to expect the dominant mentality to change its view that lawyers serving corporate clients represent the highest prestige career path but also notes the existence of an "alternative prestige hierarchy" that gives considerable honor to those who do "public interest" lawyering for the poor. She urges legal ethics teachers and theorists to help extend this "alternative prestige hierarchy" to include lawyering for the middle class, that is to include those who help "real people with real problems and making a real difference in their lives." She surveys various attempts to define public interest lawyering, including one that recognizes "previously unrepresented groups and interests" consisting not only of the poor, but also "environmentalists, consumers, racial and ethnic minorities, and others." Even then there appears to be some resistance to include among public interest lawyers those who receive modest fees for representing middle-income clients. Carle explains the historical basis for this resistance, ultimately hoping to encourage students to "conceive of their career options as falling on a spectrum, along which the moral honor in representing a particular client base will tend to be inversely related to the social, political, and economic power of those clients."

Berenson focuses on a prospective client's lack of information about lawyers and looks to a "recent wave of state physician profile legislation" to see if an analogous development in the legal

61. See supra text accompanying notes 29-40.
62. See, e.g., Carle, supra note 19, at 743.
63. Id. at 729-32.
64. Id. at 745.
65. Id. at 730 (quoting Council for Public Interest Law, Balancing the Scales of Justice: Financing Public Interest Law in America (1976)).
66. Id. at 731.
67. Id. at 732-40.
68. Id. at 742. Levin's article suggests that it might not be necessary to use public interest rhetoric to encourage more lawyers to take jobs representing middle-class clients, given that the lawyers in solo and small firm practices who represent primarily middle-class clients are generally more satisfied with their work lives than big firm lawyers. Levin, supra note 19, at 896. Indeed, most of them appear to have deliberately chosen this practice setting, often after a period of serving with a large- or medium-sized law firm. Id. at 860.
69. Berenson, supra note 19, at 647.
profession is likely. According to Berenson, twenty-four states have enacted legislation providing for some form of publicly accessible physician profiles, including mandatory reporting of such information as licenses and certifications, malpractice suits, disciplinary actions, and criminal convictions. This legislation was prompted by "the development of informed consent doctrine, the 'crises' in medical malpractice and peer review, and creation of the National Practitioner Data Bank." Berenson concludes that the underlying conditions in the legal profession are sufficiently different from conditions in the medical profession that it is unlikely that publicly accessible lawyer profiles will be required in the near future. Nevertheless, he believes that such profiles would be valuable to prospective clients and discusses what information should be included and excluded.

Berenson acknowledges that making information about physicians and lawyers publicly accessible in order to assist prospective patients and clients in choosing a professional service provider runs counter to the traditional "professional paradigm," whereby the delivery of professional services is said to involve "the application of 'esoteric knowledge,'" thus rendering the recipients of professional services without "the specialized knowledge necessary to evaluate the quality of services they have received." According to this paradigm, a prospective patient or client is not in a position to understand or evaluate the significance of such information as a malpractice award rendered against a professional; therefore, providing such information would only confuse the recipient. On the other hand, those who advocate professional profile legislation are proponents of a "consumer protection perspective" who "regard the purchase and sale

70. Id. at 657 & n.86.
71. Id. (discussing variety in information included in state physician profiles).
72. Id.
73. Id. at 671-79; see also id. at 678 ("[I]t does not appear that the time is ripe for a movement toward lawyer profiles.").
74. Id. at 679-83. Berenson does not discuss differences in the regulatory context of physicians and lawyers. Physicians are regulated primarily by federal and state statutes, See Harris & Foran, supra note 19, at 813-14, whereas lawyers are regulated primarily by courts, see generally Charles W. Wolfram, Modern Legal Ethics §§ 2.1-2.7.3 (1986). Indeed, under the "negative inherent powers" doctrine, courts have the exclusive power to regulate lawyers and thus can overturn state legislation as violative of the separation of powers in state constitutions, Id. § 2.2.3. As a result, consumers have less opportunity to influence regulators to impose a requirement that lawyers furnish practice profiles.
76. Id. at 648-49
77. Id. at 649
78. See, e.g., id. at 663-64 (discussing argument of opponents of physician profiles that physician profiles will not help consumers in selecting a physician but rather will have the opposite effect of confusing them).
of medical services in the same manner as any other consumer transaction."

This tension between "professionalism" and "consumerism" is a theme that runs through many of the articles. Looking at developments in this light helps some authors to explain how current barriers to affordable and accessible legal services were erected and why they must now be relaxed or perhaps even abolished. Several of the authors explore this theme in the context of the recent debate within the profession on the question of whether unauthorized practice and form-of-practice restrictions ought to be relaxed in order to permit multidisciplinary practices, better known as MDPs. For example, Nathan Crystal, in his article entitled Core Values: False and True, examines the ABA's stated reliance on certain "'core values'" of the profession in rejecting the recommendations of its own MDP Commission, which would have relaxed current restrictions to permit some form of MDPs. Crystal concludes that "reliance on core values of the legal profession in debates about legal ethics has rhetorical appeal but is fundamentally misleading" in that it masks "an antimarket, anticompetitive attitude of the bar that impedes change in the rules of professional conduct, including efforts to improve the delivery of legal services to people of moderate means." This conclusion is based on a detailed historical examination of four of the so-called "core values"—undivided loyalty, strict confidentiality, duty to promote access to legal services, and the exclusive authority of courts to regulate the practice of law—and an explanation of how these core values have not been treated as such throughout the history of the profession. Crystal makes no specific recommendations for reform but does clearly indicate his belief that market forces are highly relevant to the current debate over ethics and that "[t]he profession would be much better served by fostering realistic debates that take into account a full range of values, including market values, rather than by using the rhetoric of core values as a kind of veto over change in rules of professional conduct."

79. Id. at 663.
81. Id. at 748.
82. Id. at 750-56.
83. Id. at 756-62.
84. Id. at 762-65.
85. Id. at 765-73.
86. Id. at 774. Crystal also indicates that he favors relaxing restrictions on unauthorized practice. Id. at 764 ("The most direct way to improve delivery of legal services to moderate-income individuals is by relaxing the restrictions on the unauthorized practice of law."). He also indicates, at least indirectly, that he favors reducing bar control of unauthorized practice restrictions. Id. at 765 (quoting Deborah L. Rhode, Access to Justice, 69 Fordham L. Rev. 1785, 1785 & n.1 (2001), for conclusion that "meaningful progress in removing restrictions on the unauthorized
Harris and Foran join with Crystal in criticizing the anticompetitive regulatory structure of the legal market. Focusing their attention on Model Rule 5.4, which prohibits fee-sharing with nonlawyers and combining with nonlawyers to practice law,87 Harris and Foran call for a "serious reexamination of the prohibition and its justifications."88 After all, they ask, "What good are the profession's core values for those who do not make it through the lawyer's office door?"89

Like Crystal,90 Harris and Foran believe that the primary motivation for adopting the prohibitions in Rule 5.4 and its predecessor rules was economic protectionism, not protection of the public interest.91 They go further than Crystal, however, in forcefully advocating for deregulation of form-of-practice restrictions. For example, with respect to the corporate practice of law, they ask, "But why not Sears? If the traditional business structure of legal practice has not met the legal service needs of most Americans, why not give corporate America an opportunity to do so?"92 And at least part of what corporate America has to offer the public that the legal profession does not is a level of capital contribution and planning that might be necessary to make profitable the provision of legal services to middle-class consumers.93 Thus, Harris and Foran suggest that the reason those lawyers serving middle-class clients have not yet taken advantage of the potential of the Internet is precisely a lack of capital contribution: "The technology is available, the need is established, and the middle classes are on-line. What is missing are properly-capitalized service providers willing to make the necessary investment."94
Teitz approaches the problem of on-line legal services from a different point of view. According to her, the technology of the Internet has made it a practical impossibility to enforce many of the form-of-practice restrictions that currently exist. How, for example, can one determine what constitutes "the practice of law" when it is practiced in cyberspace, which is itself "borderless"? Which jurisdiction's rules apply, and how can you actually enforce the rules that do apply against persons (or entities) who can remain virtually anonymous? There is, in fact, little established law or enforcement in the Internet arena in the majority of states. Using the provision of on-line dispute resolution services as an illustration, Teitz suggests a mode of regulation that would apply regardless of whether providing the services is or is not the unauthorized practice of law. Accepting the consumer paradigm, she argues in favor of consumer regulation that would apply regardless of whether the particular service is characterized as providing legal or non-legal services. Moreover, she urges potential regulators to take a global perspective, given the increasing use of on-line dispute resolution with international transactions.

Once we accept the proposition that on-line legal services are in many respects simply another form of e-commerce for which regulation need not be delegated wholly to professional organizations or even courts (through their inherent power to regulate the practice of law), a much wider range of possible

---

95. Teitz, supra note 50, at 987-88.
96. Id. at 990.
97. Id. at 988.
98. Cf. id. at 1007 (referring to "the anonymous and borderless nature of cyberspace").
99. Id. at 1009.
100. See id. at 1010 (arguing that "since not all ODR [on-line dispute resolution] is provided by lawyers and not all ODR is categorized as 'practice of law,' ODR is a new frontier with pockets of overlapping and perhaps conflicting rules and large areas of unexplored or uncontrolled services," and concluding that "ODR like all of e-commerce needs to have mechanisms to build consumer trust in the goods or services" and that "[t]he regulation of legal services, including dispute resolution, need not be delegated wholly to the professional organizations that incorporate a degree of self-interest").
101. Id. at 1013 ("As the practice of law has moved more and more to the business of providing legal services, the services have become products for consumers, as clearly evident from the current web-based legal services available and even priced like consumer products.").
102. Id. at 1011 ("It is a global problem that ideally would utilize global standards . . . .").
103. Id. at 1010. As a formal matter, of course, bar associations do not directly regulate the practice of law, but rather do so indirectly, through their influence on courts, which do have the power to regulate both lawyers and the practice of law. See infra text accompanying note 104.
104. See generally Wolfram, supra note 74, § 2.2 (discussing the inherent power of courts to regulate lawyers).
solutions can be considered, including regulation by both governmental and non-governmental entities. For example, Teitz suggests licensing, as well as self-certification or certification through private entities. She is also willing to look to existing bodies like the Federal Trade Commission, which would investigate deceptive practices in connection with on-line services, including but not limited to legal services. Local enforcement of state deceptive trade practice statutes is also possible, and might well be a more productive means of regulating on-line legal services than relying entirely on existing mechanisms at the state level for professional discipline and for violations of unauthorized practice of law restrictions. Without attempting to choose one particular form of regulation over another, Teitz cogently argues for taking an entirely different approach to the various means by which on-line services should be regulated in the public interest.

D. Analogizing to the Provision of Medical Services

Berenson is not the only author to look to the medical profession for ideas for making legal services more accessible to the middle-class. Both Maute and Harris and Foran believe that there are lessons to be learned from how the medical profession has dealt with similar tensions between consumer needs and professionalism concerns. Maute closes her article on group pre-paid legal services plans with some brief observations on developments in the health care industry, and asks "[w]hat are the lessons of prepaid health care?" In her view, which is shared by Harris and Foran, the rise of managed care raises serious questions about intrusions on independent professional judgment. In particular, she is concerned that "if the pendulum swings too far in favor of closed panels, the [pre-paid legal services] plan promoters might flex their economic power, exacting too much from lawyer providers." Given that closed panels currently appear to be working well, however, she is clearly in favor of regulating, rather than prohibiting, the use of closed panels in providing legal services to middle-class consumers.

Harris and Foran provide a more extensive examination of developments in the medical profession, beginning with "[t]he historical parallels between the efforts of the legal and medical professions to ward off lay ownership of professional services

105. Teitz, supra note 50, at 1010.
106. Id. at 1013.
107. Id. at 1013-14.
108. Maute, supra note 19, at 943.
109. See Harris & Foran, supra note 19, at 817-21.
110. Maute, supra note 19, at 941.
111. Id. at 943.
112. Id.
providers [which] are . . . quite striking."¹¹³ Under pressure from both the federal government and private employers as a result of the rising costs of health care insurance, Congress passed the Health Maintenance Organization Act, which ultimately resulted in the elimination of both state prohibitions on corporate ownership and the American Medical Association's ("AMA") ethical restrictions on physicians participating in corporate practice.¹¹⁴

Like Maute,¹¹⁵ Harris and Foran concede that "the new corporate owners have exerted pressure on the traditional physician-patient relationship,"¹¹⁶ creating conflicting loyalties and "'undermin[ing] the physician's fundamental obligation to serve as patient advocate.'"¹¹⁷ Moreover, while noting that the AMA has created new ethical rules that extensively address a physician's professional obligation to preserve independent judgment, they concede that ethical rules cannot affect the corporate owners themselves.¹¹⁸ Nevertheless, they argue that legitimate concerns over the loss of professional autonomy can be addressed by a combination of these new ethical rules and the prospect of liability on the part of the corporate owners.¹¹⁹ They then discuss in some detail how the liability rules operate in the medical profession, including both vicarious and direct liability on the part of managed care providers.¹²⁰

Harris and Foran conclude by urging a similar regime for the legal profession, that is, one in which lawyer ethics rules affirm and protect the value of preserving independent judgment without banning lawyer practice in corporate formats.¹²¹ Like corporate medical providers, corporate legal providers could and should be liable for malpractice, under either the doctrine of respondeat superior or the theory of "ostensible agency" that is often applied to corporate medical providers.¹²² Finally, they argue that such a regime is in fact already in place in the legal profession, citing the example of lawyers employed by liability insurance companies to defend their insured against claims by third persons.¹²³ Indeed, they note that just like managed care

¹¹³ Harris & Foran, supra note 20, at 811.
¹¹⁴ Id. at 813.
¹¹⁵ See Maute, supra note 19, at 942 (noting that "[medical] providers have complained about managed care and unwarranted intrusions on their exercise of independent professional judgment about appropriate care, specialist referrals and medication").
¹¹⁶ Harris & Foran, supra note 19 at 817-18.
¹¹⁷ Id. at 818 (quoting Erica Worth Harris, Conquering Individualism and Cynicism in America, 6 Va. J. Soc. Pol'y & L. 315, 331 (1999)).
¹¹⁸ Id. at 821-25.
¹¹⁹ See id. at 821-34.
¹²⁰ Id. at 828-34.
¹²¹ Id. at 834-46.
¹²² Id. at 832-33.
¹²³ Id. at 840-41. For a discussion of the ethical issues raised when insurance companies use in-house counsel to defend their insureds, see Nancy J. Moore, The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required? 4 Conn.
companies, the insurance industry has adopted cost containment measures, and, just like the AMA, the organized bar has responded by affirming the lawyer's ethical duty to resist such measures when they unreasonably interfere with the lawyer's professional judgment on behalf of the insured-client. 124

II. ETHICAL ISSUES IN SPECIFIC PRACTICE SETTINGS

Unlike the first group of articles, the second group examines practice settings with a unique impact on middle-class clients to determine whether new or more nuanced ethical rules are necessary to meet the unique needs of these clients. These practice settings include elder law, labor arbitration, and mediation.

In an article entitled Middle-Class Lawyering in the Age of Alzheimer's: The Lawyer's Duties in Representing a Fiduciary, Patrick Longan begins by noting the special vulnerability of middle-class persons with Alzheimer's, a degenerative disease that slowly diminishes the mental capacities of its victims. 125 "More Americans are living longer," 126 and many of the middle-class Alzheimer victims needing guardians or caretakers have accumulated large sums of money over the course of their lifetimes. This accumulation makes them highly susceptible to financial abuse by their caretakers, who are often their adult children. 127

Model Rule 1.14 128 purports to give guidance to lawyers who represent clients with diminished mental capacity, 129 but as Longan

---

124. Harris & Foran, supra note 19, at 842-44; see also Moore, Ethical Duties, supra note 123, at 285-92 (discussing ethical propriety of practice of insurance companies of paying bundled flat fees to lawyers retained to represent their insureds).
126. Id. at 901.
127. Id. at 902. Longan does not state explicitly that middle-class persons are even more vulnerable than the elderly wealthy, but it makes sense to conclude that this is the case. The elderly wealthy are more likely to have consulted lawyers over the course of their lifetimes, often making advance arrangements for the disposition of their wealth, including the creation of trusts and the appointment of institutional fiduciaries.
128. Model Rule 1.14 reads as follows:
(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer
notes, its guidance is minimal at best. Moreover, coupled with sometimes confusing ABA interpretations, its advice is often ambiguous, particularly when the lawyer represents a fiduciary whom the lawyer knows to have defrauded the beneficiary. Longan takes us through a variety of scenarios involving elderly persons with differing levels of diminished capacity and lawyers with differing

reasonably believes that the client cannot adequately act in the client's own interest.


130. Longan is particularly concerned with the ability of a lawyer to disclose information in order to prevent or rectify breaches of a fiduciary's duties. He notes that lawyers are not permitted to breach confidentiality under Rule 1.6, the confidentiality rule, "to prevent or rectify financial harm to the older person." Longan, supra note 125, at 902. Yet, as Longan notes, Comment 4 to Rule 1.14 suggests that a lawyer representing a guardian acting adversely to a ward's interest may be obliged to prevent or rectify such misconduct under Rule 1.2(d), which does not contain any explicit duty to prevent or rectify a client's wrongful conduct. Id. The Comment to Rule 1.2 provides that "[w]here the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary." R. 1.2 cmt. 8. This Comment undoubtedly refers to special obligations created not by the ethics rules themselves, but by other law. See Restatement (Third) of the Law Governing Lawyers § 51(4) (2000) (discussing the civil liability of a lawyer for failing to prevent or rectify breach of fiduciary duty owed by the client to a non-client). Longan acknowledges and supports the existence of civil liability in many of these cases. See Longan, supra note 125, at 911.

The Ethics 2000 Commission recommends amending Rule 1.14 to clarify the relationship between that Rule and Rule 1.6, by providing that when taking protective action authorized under Rule 1.14, "the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests." R. 1.14(c) (Proposed Draft 2001), at http://www.abanet.org/cpr/e2k-rule114.html. In addition, the Ethics 2000 Commission recommends amendments that would provide additional guidance regarding the types of protective action a lawyer can take pursuant to the rule. See R. 1.14(b) (Proposed Draft 2001), at http://www.abanet.org/cpr/e2k-rule114.html; R. 1.14 (Reporter's Explanation of Changes 2001), at http://www.abanet.org/cpr/e2k-rule114rem.html. The Commission did not specifically address the ability of a lawyer representing a fiduciary to take steps to protect the beneficiary. It proposed broadening Rule 1.6 to permit the lawyer to disclose client information when necessary to prevent or rectify a client's crime or fraud in which the lawyer's services had been used, but those proposals were not adopted by the ABA House of Delegates. See generally Moore, supra note 14.

131. Here Longan discusses Formal Opinion 94-380 of the ABA Standing Committee on Ethics and Professional Responsibility, which concludes that "a lawyer representing a fiduciary is bound strictly by all the Rules of Professional Conduct, especially Rule 1.6's prohibitions on revealing confidential information." Longan, supra note 125, at 903 n.11 (quoting ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 94-380 (1994)). As Longan asks, "How can a lawyer prevent or rectify misconduct without telling someone about it?" Id. at 903.
relationships to both the elderly victim and the caretaker. Ultimately, he concludes that "[o]nly a rule of mandatory disclosure of planned malfeasance, backed up by the threat of civil liability for keeping quiet, will enable the legal profession to render an admittedly difficult but necessary service to our aging population."

McMorrow is interested in the "advocate-witness rule," which generally prohibits a lawyer from representing a client in a proceeding in which the lawyer is "likely to be a necessary witness." She is concerned that application of the rule might "have a disproportionate impact on lawyers and clients who have developed a long-standing relationship, often the lawyer for a family, a small business or union"—in other words, middle-income clients. In order to better understand how the rule functions in different settings, she examines its application in federal and state court proceedings and in labor arbitrations.

McMorrow concludes that the rule does indeed operate differently in different contexts, particularly with respect to the rule's exception for situations in which "disqualification of the lawyer would work substantial hardship on the client." Federal and state courts tend to emphasize institutional concerns, such as role differentiation and the integrity of the trial process, giving relatively little weight to the burden of clients separated from their chosen counsel. In

132. Id. at 909.
133. Id. at 913.
134. McMorrow, supra note 53.
135. Model Rule 3.7, the "advocate-witness rule," reads as follows:
   (a) A lawyer shall not act as advocate at a trial in which the lawyer
   is likely to be a necessary witness except where:
      (1) the testimony relates to an uncontested issue;
      (2) the testimony relates to the nature and value of legal
          services rendered in the case; or
      (3) disqualification of the lawyer would work substantial
          hardship on the client.
   (b) A lawyer may act as advocate in a trial in which another lawyer
   in the lawyer's firm is likely to be called as a witness unless
   precluded from doing so by Rule 1.7 or Rule 1.9.

R. 3.7.
136. McMorrow, supra note 53, at 947. Although not mentioned by McMorrow, another reason why the Rule might have a disproportionate impact on middle-class clients is that such clients are more likely than others to be represented by a solo practitioner. See supra text accompanying note 40. Wealthy individuals and corporations are more likely to be represented by firms, and firms can avoid the harshness of the advocate-witness rule by using another lawyer in the firm to litigate a case in which the lawyer who had previously represented the client will testify. See R. 3.7(b) (no imputation of conflict to another lawyer in firm unless there is a conflict of interest).
137. See McMorrow, supra note 53, at 948.
138. R. 3.7(a)(3).
139. McMorrow, supra note 53, at 963.
140. Id. at 968 (citing Bruce A. Green, Conflicts of Interest in Litigation: The Judicial Role, 65 Fordham L. Rev. 71 (1996)).
determining whether attorney disqualification "would work substantial hardship on the client." Federal courts in particular do "not consider the interpersonal relationship between lawyer and client—the trust built up due to a long relationship—as a distinctive value."141 Middle-class clients, however, are particularly dependent on "the human dimension of trust" because, unlike "repeat actors with significant economic clout," they do not have either access to a large pool of lawyers or the ability to evaluate their qualifications.142

Labor arbitrators, on the other hand, have generally deferred to a lawyer's judgment that a particular client will suffer "substantial hardship" if the lawyer is disqualified under the advocate-witness rule.143 McMorrow concludes that such deference exists primarily because "[l]abor arbitration works to protect relationships in a more thorough and systematic manner than court litigation."144 McMorrow sees some value in the different approaches taken by courts and arbitrators, but perhaps her article will persuade courts to place greater emphasis on the importance of ongoing relationships between lawyers and their middle-class clients.

Like McMorrow, Burns notes the benefits of alternative dispute resolution to middle-class clients.146 His focus is on mediation, however, as "the preferred method" of alternative dispute resolution.147 He raises two ethical issues that have confronted lawyers who negotiate on behalf of their clients—the duty of candor and the allocation of decision-making authority between lawyer and client—and asks whether the fact that the negotiation occurs during a mediation changes the analysis.148 In addition, he distinguishes between different types of mediation, including "facilitated share bargaining"149 and "transformative mediation."150

With respect to both ethical issues, Burns concludes that the "specific ethical issues that surround mediation as facilitated arms-

141. Under the predecessor to the Model Rules, the ABA Code of Professional Responsibility, the exception required a demonstration not only that there would be substantial hardship but also that the substantial hardship be attributable to "the distinctive value of the lawyer or his firm as counsel in the particular case." Model Code of Prof'l Responsibility DR 5-101(B)(4) (1980); see also McMorrow, supra note 53, at 970. Massachusetts state court opinions may provide somewhat greater protection for long-standing attorney-client relationships. Id. at 970-71.

142. McMorrow, supra note 53, at 970.
143. Id. at 978.
144. Id. at 980. Other reasons may include the following: arbitrations may not be "trials" within the meaning of Rule 3.7, labor arbitrations do not use juries (so that role confusion is not as serious a problem), and non-lawyers may also represent a party to an arbitration. See id. at 978-79.
145. Id. at 982-83.
146. See supra notes 52-55 and accompanying text.
147. Burns, supra note 55, at 691.
148. Id. at 692.
149. Id.
150. Id. at 708.
length negotiation are really no different than those that surround such negotiation engaged in without a mediator’s intervention.” In other words, the presence of a mediator does not increase the duty of candor owed by the lawyer to either the mediator or the other party, nor does it result in a different allocation of decision-making authority. If, however, the mediation is viewed as “transformative mediation,” in which the goals are “mutual recognition and empowerment,” the standard analysis of ethical issues is woefully deficient. This is because “such mediation is discontinuous with the ways in which American lawyers generally conceive of their roles and counsel their clients,” although it fits well with a style of lawyering described by Thomas Schaffer as “moral discourse.”

Burns is less concerned with the rules of professional conduct than with styles of lawyering. He is clearly sympathetic to lawyers who are “committed to the primacy of moral dialogue,” although he wisely acknowledges that this style of lawyering is neither available nor appropriate in all cases. Although not directly concerned with the content of ethical rules, his subtle analysis of the nuances of the different types of mediation suggests an ongoing need to evaluate rules that apply to both lawyer and nonlawyer mediators, in order to ensure that such rules facilitate rather than undermine the benefits that mediation confers on middle-class and other clients.

151. Id.
152. Id. at 707.
153. Id. (quoting Thomas L. Shaffer & Robert F. Cochran, Jr., Lawyers, Clients, and Moral Responsibility 126 (1994)).
154. Id. at 716.
155. Id. at 716-17.
156. The Ethics 2000 Commission struggled over whether and how to address the ethical issues confronting a lawyer serving as a mediator or other third-party neutral, including whether the lawyer may give legal advice or information to the parties and whether the lawyer may reduce a settlement agreement to writing. Ultimately, the Commission adopted a minimalist rule, requiring merely that a lawyer serving as a third-party neutral inform unrepresented parties that the lawyer does not represent them. Model Rules of Prof’l Conduct R. 2.4(b) (Proposed Draft 2001), at http://www.abanet.org/edpc/e2k-rule24.html; R. 2.4(b) (Reporter’s Explanation of Changes 2001), at, http://www.abanet.org/edpc/e2k-rule24rem.html. The Comment to Rule 2.4 notes that

[ ]awyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

I have recently begun teaching a seminar called "Lawyering in the 21st Century." The purpose of the seminar is to go beyond the basics of the regular Professional Responsibility survey course in order to focus on what I see as the cutting-edge issues confronting the legal profession today. In this seminar, we cover such topics as multidisciplinary practice, multijurisdictional practice, lawyering on the Internet, lawyers performing as third-party neutrals, and lawyers representing clients with diminished capacity—in other words, many of the same topics that are addressed in this symposium issue on lawyering for the middle class.

What this means, for me, is that the issues addressed in this symposium are among the most important confronting the legal profession today. Increasingly, lawyers are being challenged to justify our monopoly status and right to regulate ourselves, given our apparent inability to make affordable legal services available to all. Moreover, given changes in both the organization and structure of law practice and the technologies available to both lawyers and clients, there are emerging ethical issues that either have not been addressed at all or need to be readdressed in light of these new developments. The articles in this symposium do not purport to give definitive answers to all of the questions asked. Nevertheless, it is hoped that they sharpen our focus on the myriad of issues confronting not only the individual lawyers who represent ordinary citizens, but also the legal profession in its ongoing efforts to provide adequate legal services to all.
Notes & Observations