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Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective

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To be an eminent barrister, a man must be 'a scholar and a gentleman'. . . . The members of the bar form one of the most brilliant sections of society; and he who would be of it must be fit for it. He must have the best possible education at school and college; and, at both, the embryo barrister should train his powers of speech at debating societies connected therewith. He should by all means try to graduate from Oxford or Cambridge.

There is a single word to characterize the single dominant issue [for the legal profession] in the 1980's. . . . That word is competence.

It is difficult to dissent from the enthusiasm with which the legal profession recently has taken up the issue of lawyers' competence.1 No one with any practical experience would deny the superf-
ciality and shoddiness of much legal work, nor would anyone claim that the bar’s institutions of quality control have provided effective means of self-regulation in the past. Furthermore, from one perspective, a lawyer’s most fundamental ethical duty is “competence,” because the guarantee of competence is what justifies the professional monopoly. The adversary system is built on the assumption that each side’s position will be represented effectively by a trained legal advocate. Upgrading legal services appears to be in everybody’s interests.

This article, nevertheless, suggests a rethinking of the emerging consensus. It will argue that the bar’s current concern has little to commend itself as the issue of the 1980’s. We should pay attention to the quality of legal services, but the leaders of the bar thus far have approached this concern too narrowly. Their approach leads at best to a distraction from an understanding of important recent changes in the legal profession. At worst, successful “reforms” justified in the name of improving competence could undermine or negate recent trends that have bolstered the position of consumers of legal services. Too much “competence,” defined strictly as collective self-improvement, will undermine client choice and the accessibility of legal services.

Part I of this article explores briefly the problems of documenting incompetence and defining competence, showing the recent emergence of new attempts to find a single objective measure of professional performance. Accordingly, the collective upgrading programs now being discussed by the legal profession tend to favor the imposition of high performance standards across all sectors of clients and legal practices. All practitioners, it seems, are supposed to perform at the level of corporate lawyers with deep pocket clients. It takes little analysis to see that there are real costs connected with the pursuit of uniform high quality.

Part II explores how competence came to be the issue of the 1980’s, and shows the likely futility of any efforts to make competence the paramount value in professional regulation. Some reasons for these efforts relate to skepticism about the quality of the profes-


2. See, e.g., Marks & Cathcart, Discipline Within the Legal Profession, Is it Self Regulation?, 1974 U. ILL. L.F. 198; Martyn, supra note 1, at 769-11.
sion as well as the rise of consumerism. Historical professional trends, however, also appear to be crucial. The competence concern can be seen as a response to the emergence of an increasingly diverse, fragmented profession dominated by the market rather than by the profession's traditional institutions. It appears to be an attempt to reaffirm the traditional ideal of a homogeneous, highly respected and self-regulating legal profession. The current competence movement, therefore, cannot be separated from an agenda defined by particular professional interests. An examination of recent Supreme Court cases, the Code of Professional Responsibility, and the proposed Model Rules of Professional Conduct demonstrates, however, that the recent competence movement conflicts profoundly with other values that are not likely to be given up—notably client autonomy and consumer accessibility. We therefore need not even step outside of the reigning professional values—in part, of course, the product of pro-consumer changes forced on the legal profession in the last two decades—to see the limits of any approach that focuses single-mindedly on professional performance.

The recent concern with upgrading legal performance, in short, offers little of substance that can benefit consumers of legal services. It conflicts with other constitutionally protected values consumers would prefer to maintain, and it appears doomed to failure. Consumers increasingly will be free to make their own choices about the quality and price of legal services.

Part III then asks how a consumer perspective—one that recognizes competence as one value to be considered along with accessibility and client autonomy—might be developed on the problem of professional quality. It begins with the recognition that rights to choose accessible legal services do not guarantee that consumers actually will make good bargains. A consumer perspective can suggest some approaches to further the interest in facilitating quality legal services at reasonable prices. Trial practice rules, new educational


4. Such a perspective on the lawyer-client relationship owes much to recent work initiated by D. Rosenthal, Lawyer and Client, Who's in Charge? (1974). Rosenthal's research showed that clients cannot depend upon lawyer professionalism to maximize client interests, since lawyers and clients do not necessarily have the same interests. Rosenthal began the call for more client control over decisionmaking in the lawyer-client relationship.

5. See, e.g., suggestions in Advisory Committee on Proposed Rules for Admission to Practice, supra note 1.
requirements, peer review systems and the like must be evaluated not merely for what they might contribute to a collective upgrading effort, but also for their impact on the consumer of legal services.

I. COMPETENCE AND INCOMPETENCE: SEARCHING FOR A PROBLEM AND A SOLUTION ACHIEVABLE THROUGH PROFESSIONAL REGULATION

The recent professional movement has developed without a clear conception of what the lawyer competence problem is or how it might be solved. The immediate causes of concern were the statements made in the early 1970's by Chief Justice Burger and others, primarily appellate judges, criticizing the quality of trial and appellate court lawyers. The first professional response to these rather unsystematic appraisals of lawyer competence was skepticism or even disagreement. Several thoughtful commentators called for empirical research about professional quality, and Marvin Frankel emphasized a maxim of caution, primum non nocere.

6. Different continuing legal education programs are described in Gilbreath, Maintaining Competency Among Lawyers: How Far Have We Come?, 24 CATH. L. 162 (1979); Comment, Proposals for the Improvement of Lawyer Competency, 18 WILLAMETTE L. REV. 301 (1982). Although these programs may help to improve the quality of the profession, they could be quite burdensome to many lawyers and somehow would need to be paid for by consumers of legal services.

7. A MODEL PEER REVIEW SYSTEM (Discussion Draft, Apr. 15, 1980); ENHANCING THE COMPETENCE OF LAWYERS, supra note 1, at 271-97.

8. Consumers do have legitimate complaints about the quality of lawyers. See infra text accompanying notes 120-87.


10. See, e.g., Bazelon, supra note 1; Kaufman, supra note 1. For a survey of judicial views on competence, see Maddi, Trial Advocacy Competence: The Judicial Perspective, 1978 AM. B. FOUND. RESEARCH J. 105.

11. See, e.g., Carlson, supra note 1; Rosenthal, supra note 1.

12. "First, do no harm." Frankel, supra note 1.
ies have now been done, but very little evidence of measurable incompetence has been uncovered. There also is no evidence that lawyers are less competent now than in the past. The "problem" has been difficult to document.

The professional reaction more recently, however, has not been to discount the issue of competence. Professional leaders instead have treated the issue with increasing seriousness. As discussed in the next section, recent changes in the legal profession help to explain why influential leaders have embraced the competence issue with enthusiasm. That explanation requires, however, an understanding of how generalized concerns with professional quality have been translated into specific definitions of competence and a concrete agenda requiring increased professional regulation.

"Competence" appeared as a subject of explicit professional regulation for the first time in 1969 as a canon of professional ethics. The specific term, however, is not defined in the Canons, nor is it defined in the current Code of Professional Responsibility. In the Code, ethical considerations, which have only an "aspirational" quality, prescribe that the lawyer "act with competence and proper care," keep "abreast of current legal literature and developments," and "prepare adequately for and give appropriate attention to his legal work." Incompetence becomes a matter for discipline only if the lawyer handles a matter that "he knows or should know he is not competent to handle," fails to undertake "preparation adequate in the circumstances," or "neglect[s] a legal matter entrusted to him."

13. See, e.g., the criticisms by Blair, Trial Lawyer Incompetence: What the Studies Suggest About the Problem, the Causes and the Cure, 11 CAP. U.L. REV. 419 (1982); Cramton, supra note 1. Social scientists have also noted the difficulty of separating "performance" from "outcome." Saks & Benedict, Evaluation and Quality Assurance of Legal Services: Concepts and Research, 1 LAW & HUM. BEHAV. 373 (1977). See also Burns, Testing in Practice Skills, in Enhancing the Competence of Lawyers, supra note 1, at 136; infra notes 47-52 and accompanying text.

14. Cramton points out that the bar is probably better qualified and educated than in the past. Cramton, supra note 1, at 6.


16. Ethical Considerations technically are not binding, but they can be used to give content to the binding Disciplinary Rules.


18. CPR EC 6-2.

19. CPR EC 6-4.


22. CPR DR 6-101(A)(3).
While this standard sets forth a minimum level for acceptable performance, it does not provide an adequate means to upgrade professional quality. In practice, the vagueness of the standard makes it difficult to measure professional competence objectively, or to discipline individual lawyers for particular behavior. Content can be given to the Code by assuming a prevailing level of performance that is acceptable—competent. Incompetent performance then would mean a quality below the existing professional norm. Physicians still are evaluated by precisely such standards. Yet the recent concern has been with the competence of the profession generally, and the Code is not responsive to this concern.

The emerging attitude of professional reformers is that collective upgrading is desirable and that the profession must play a leadership role in the effort. As noted before, the President of the American Bar Association called competence the issue of the 1980's, and a recent article in the ABA Journal suggested that the idea of peer review was ready for implementation. Even the initial critics or skeptics of the competence movement appear to have climbed aboard the bandwagon. An array of articles and studies increasingly assumes the existence of a serious competence problem that the profession must address. The organizers of the Houston Conference on "Enhancing the Competence of Lawyers," held in 1981, appear to have captured the emerging consensus:

[T]he conference was planned on the assumption that debate and discussion over the extent of incompetence would lead nowhere and be distracting to the conference's fundamental concern with analyzing different remedies. On the other hand, the conference planners believe that incompetence within the profession—whatever its extent—does exist and is a significant issue for the profession.

The A.B.A.'s proposed Model Rules of Professional Conduct, proffered in revised form in 1981 by the Kutak Commission as potential successors to the Code, respond to the concern with upgrading. Competence is placed first among all ethical requirements.

26. See, e.g., Frankel, in ENHANCING THE COMPETENCE OF LAWYERS, supra note 1, at 220.
27. ENHANCING THE COMPETENCE OF LAWYERS, supra note 1, at xii.
29. The drafters attempted to elevate the importance of competence: "This emphasis
Further, according to Model Rule 1.1, "[c]ompetence consists of the legal knowledge, skill, thoroughness, preparation and efficiency reasonably necessary for the representation." It does not appear, however, that this proposal can provide a basis for upgrading either.

While the 1981 Kutak draft creates some potential for upgrading depending on how the "reasonably necessary" standard is interpreted, it sacrifices the workability of an earlier draft circulated in 1980. Instead of the "reasonably necessary" wording, the 1980 draft referred to "acceptable practice by lawyers undertaking similar matters." The loss of precision in the 1981 version stems from the drafting dilemma just mentioned. If there is a general competence problem, which the critics assume, the lowest common denominator approach of the 1980 draft is inadequate, and a more rigorous standard must be applied. The drafters need a definition of competence that is both objective and capable of upgrading the unacceptably low level of performance presumably found in the profession today.

The important 1980 ALI-ABA discussion draft of A Model Peer Review System further suggests the direction in which professional reformers are moving. The purpose of the peer review system is not just to impose discipline, but also to provide objective standards that can be used to improve the practice of law generally. Indeed, the interim report of the ABA Task Force on Professional Competence, circulated in late 1982 and already cited with approval by the current ABA President, specifically endorsed as "minimal standards" the definition of competence found in the ALI-ABA discussion draft.

In Section 1, the discussion draft first distinguishes competence, defined as a "general condition of performance" from negligence, de-

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30. MODEL RULES Rule 1.1.
33. A Model Peer Review System suggests both voluntary and referral methods of obtaining candidates for review. Refusal to comply with referrals or recommendations for improvement could lead to discipline. See A MODEL PEER REVIEW SYSTEM, supra note 7, at §§ 12-22.
34. AMERICAN BAR ASSOCIATION, INTERIM REPORT OF THE TASK FORCE ON PROFESSIONAL COMPETENCE 4 (1982).
fined as a "want of due care in performing a specific task." This
distinction clarifies the aim of peer review—to upgrade professional
performance. Peer review could also reduce individual acts of negligence, but negligence is a problem the draft assumes can be treated separately.

The draft then goes on to break new ground with a careful and
thoughtful analysis of the specifics of high-quality lawyering. Sections 2 to 6 set forth the rather strong burdens envisioned for practicing lawyers. Section 2, for example, reads:

An attorney should gather appropriate facts about a client's problem. A thorough, accurate, and clear set of relevant facts should be obtained—from the client, from documents, and from other knowledgeable persons and relevant sources. An attorney who voluntarily assumes more work than he or she can adequately gather facts for is not excused for failing to meet this standard.

The lawyer must uncover the facts thoroughly, even exhaustively. The problem of too much work or overcommitment can provide no excuse. Section 3 imposes the same burden for legal research:

An attorney should formulate the material issues raised by the client's problem. Once factual and legal issues are identified, the attorney is responsible for an accurate determination of applicable law and for identifying alternative legal responses to the problem.

Sections 4, 5 and 6 then require the development of "a strategy of legal problem solving," "strategy execution," and "following through."

36. A MODEL PEER REVIEW SYSTEM, supra note 7, at 12 (emphasis supplied).
37. Id. at 15.
38. Id. at 16.
39. Id. at 17.
40. Id. at 19:
What the attorney does for the client should be thorough yet economical and responsive, accurate, consistent, and clear. This is true of oral and written presentations of legal and factual positions in consultations, negotiations, adjudications—in everything an attorney does. In presenting his or her work, the attorney should achieve rapport with those who participate in the client's matter and be firm with adversaries when appropriate.
41. Id. at 20:
An attorney who undertakes to represent a client should see the client's problem through. Actions and alternative strategies agreed upon by the client should be undertaken in a timely manner. The client should be informed of the completion of actions, of delays, or of circumstances requiring reassessment or reformulation of the
Having moved beyond vagueness and the lowest common denominator approach, the criteria suggest the practice of a first class corporate law firm.\textsuperscript{42} The expense of performing at this level can be staggering. While the commentary to Section 5 acknowledges the need to consider limitations of time and resources,\textsuperscript{43} it is referring to \textit{execution} of the strategies, not research to uncover all the facts and possible legal approaches. The commentary to Section 2 emphasizes, for example, that the "market mechanism" cannot be blamed for less than competent action: "The need to earn a living is no justification for performance below an adequate level of competence."\textsuperscript{44} "Adequate" appears to require at least that the lawyer gather \textit{whatever} relevant facts can be found and research \textit{whatever} law bears on the problem, and it may require more.

The draft's approach provides an attractive ideal: the competent lawyer has the responsibility to learn all the facts and legal options before advising the client and picking a strategy. If there is a general, remediable deficiency in professional performance, it is likely to be inadequate preparation and research.\textsuperscript{45} Rigorous, well-enforced requirements on lawyers could overcome these problems and upgrade the profession as a whole, with quality insulated from problems caused by the market for legal services. It is understandable that the draft has appealed to the ABA leadership.\textsuperscript{46}

The first stumbling point, however, is that lawyers do operate in a market, and the inadequacies of performance should be related to what ordinary clients can and will pay for legal services.\textsuperscript{47} Thus, a

original strategy. A protracted problem should be subjected to periodic review. A client for whom an attorney provides continuing services should be advised of relevant changes in the law.

\textsuperscript{42} The standard is not unrelated to that being applied increasingly to criminal defense. \textit{See American Bar Association, Standards for Counsel for Private Parties} (1979); \textit{American Bar Association, Standards for the Defense Function} (1971). Similar factors may be at work in the effort to upgrade criminal defense, but criminal defense differs from civil representation enough to confine discussion here to noncriminal matters.

\textsuperscript{43} \textit{A Model Peer Review System, supra} note 7, at 19 (comment to § 5).

\textsuperscript{44} Id. at 15 (comment 2 to § 5).

\textsuperscript{45} Almost all the empirical research reveals that lack of preparation is the most important cause of performances deemed to be inadequate. \textit{See, e.g.,} the summary of the research in Note, supra note 32, at 1024-26.

\textsuperscript{46} \textit{See, e.g.,} Harrell, supra note 35; Smith, supra note 25.

\textsuperscript{47} In a thoughtful review of recent literature about legal education and the legal profession, Stewart Macaulay observes:

Indeed, what appears to be incompetence at trial in some cases may be no more than lawyers doing the best they can in light of what their clients can pay. Perhaps lawyers should turn away clients who cannot pay for complete first class legal service rather than trying to wing it on their behalf, but this seems to be something other than a question of competence.
recent American Bar Foundation study by Dorothy Linder Maddi of trial attorneys' views of trial advocacy found, *inter alia*, that more than one-third of a sample of attorneys believed that economic considerations affected the amount of time spent on a case, and that excessive workloads contributed to problems in preparing a case adequately for trial.

Economic considerations and excessive workloads are closely related. Most lawyers do not serve large corporations willing to pay for however many hours are necessary for first-rate work, but rather individuals or businesses who lack the ability simply to pass on costs to consumers. Such a clientele leads to an "excessive" workload, since lawyers' incomes depend on servicing large numbers of matters that will support only limited bills. Professor Hazard makes this point dramatically:

> [I]t is not far wrong to say that lawyers for big corporations are the only practitioners regularly afforded latitude to give their technical best to the problems they work on. The rest of the bar ordinarily has to slop through with quickie work or, as one lawyer put it, make good guesses as to the level of malpractice at which they should operate in any given situation.

If these lawyers were required to prepare more than they judge to be feasible economically, they would avoid cases where economic considerations appeared to dictate a less than thorough performance. The result could be as the ALI-ABA draft hopes, a higher standard of performance, but the cost would be fewer cases (or less legal advice) and a higher cost per case. In the words of Stewart Macaulay, "qualifications, skill and the opportunity to do a competent job must be paid for by someone."

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49. *Id.* at 1071.


> [T]he discovery of a unique issue is likely to be a function of the amount of time that lawyers devote to a case, and thus of the amount of money that the client spends on lawyers. If the stakes are high, the problems can become very complex; if the client lacks money, his problems are likely to be routine.

*Id.* at 1117.


52. *See Macaulay, supra note 47*, at 513. Conceivably lawyers could work more, charge less per hour, and earn less, but that prospect appears unlikely.

An economic analysis suggests that high quality may sometimes reflect overcompetence. As Earl Johnson notes, "one must be alert to the danger of labeling representation as
The limited resources of the client population, moreover, are not the only problem. The amount at stake in a particular dispute also places limits on diligence in legal and factual investigations. Recent research reveals that the mean amount in controversy in state courts, excluding the vast number of small claims involving less than $1000, is still only about $4500, and it is not much more in federal courts.53 We cannot expect even rich clients to pay for premium legal performances when relatively small sums are in dispute. Strict standards of performance thus appear to be inconsistent with lawyer involvement in today’s typical litigation.

We shall return to the trade-off between accessibility and quality performance.54 The point now is that a demanding, relatively inflexible, definition of competence can be developed, offering some promise as a means of upgrading professional performance through professional regulation, and professional reformers are taking up that challenge. Given the bar’s laissez-faire past in regulating individual lawyers and the economic difficulties a workable definition such as that of the ALI-ABA draft may produce, however, it is appropriate to ask why the organized bar is now so concerned with competence and why reforms are taking this particular direction.

II. COMPETENCE AND OTHER COMPETING VALUES:
UNDERSTANDING THE CURRENT REFORM EFFORT AND ITS LIMITATIONS

The bar has tended to address the competence issue from a special professional viewpoint that, as we shall see, exaggerates the importance of a uniform standard of quality and neglects values a consumer or public interest would assert. Before exploring those other values—accessibility and consumer autonomy—it is appropriate to ask how the issue of competence relates to long-term historical trends in the legal profession. Obviously one cannot say that such trends have created the competence movement, but any effort to understand the current professional perspective and its limitations must situate the competence issue within the evolving professional setting.

The limitations on the recent competence effort derive from

54. See infra text accompanying notes 120-87.
both the current market for legal services and the Code of Professional Responsibility, which reflects that market. Recent Supreme Court cases have emphasized a right of consumer access to legal services; at the same time, the legal profession has experienced growth in size and diversity. Although these factors may have encouraged a new concern with lawyer competence, they also militate against the success of reforms directed towards uniform upgrading of the profession. Moreover, the Code of Professional Responsibility and the proposed Model Rules illustrate a concern not only with accessibility, but also with the related value of client autonomy. Any effort to make competence the paramount professional value will conflict with these values already accepted and implemented by professional regulations.

A. The Legal Profession's Historical Perspective on Lawyer Competence

In 1938, participating in a symposium condemning “the unauthorized practice of law,” Karl Llewellyn asked a somewhat embarrassing question: “Who is worrying about unauthorized practice, and why? Is it the public, complaining of quacks? Is it the profession concerned about the public welfare? Or who and why?” As Llewellyn and other commentators have recognized, the lack of paying work in the depression to a large extent explained the bar's sensitivity to the problem of unauthorized practice, or competition by nonlawyers. Neither public demand nor concern about public welfare adequately justified the sudden emphasis on eliminating the unauthorized practice of law. It was primarily the profession's issue—not that of the general public.

To be sure, there are complaints today by the public about the legal profession and the services that lawyers perform. Thoughtful members of the profession no doubt also believe that the profession must be upgraded in the public interest. But those public-minded concerns must be considered along with any professional bias that can be detected. As in the 1930's, the response to a perceived public

56. This argument has been made effectively and in great detail in Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 STAN. L. REV. 1 (1981).
57. See, e.g., B. CURRAN & E. SPALDING, THE LEGAL NEEDS OF THE PUBLIC 210-14, 229-31, 234 (1977). See also Abel, supra note 3. According to Abel, “client evaluation of professional performance is based on the form in which those services are rendered, the equivalent of the doctor’s bedside manner, not their substance.” Id. at 37 (emphasis supplied).
problem—this time the quality of licensed lawyers, not the alleged abuses of unlicensed legal practitioners—has been consistent with a relatively narrow professional view of the problem and how it can be solved. The current quest for a uniform, high standard of competence should be understood in relation to the traditional ideal of an elite, homogenous, self-regulated profession.

First, a uniform standard of competence traditionally underpins the legal profession’s claims to monopoly and to self-regulation. As the current President of the American Bar Association observed: “The legal profession can take pride that it has acknowledged the need for greater emphasis on competence on its own initiative. However, the self-regulation that has been exercised by the legal profession requires no less.”58 The unwritten contract between the profession and the public provides that lawyers will be left alone and given a monopoly in exchange for the promise that a high-quality service can be obtained from anyone with the professional license. If the public begins to have a different perception, the professional claim to independence may be threatened.

Second, competence is a way to protect the prestige of the profession and respect for the legal system. Lawyers collectively are more respected if “incompetent” practitioners are denied licenses or rooted out. A repeated theme in the professional elite’s efforts at self-regulation is that a small number of unprofessional or incompetent lawyers can undermine respect for lawyers as a group. Furthermore, the system of justice generally and the adversary system in particular will be more respected if each individual represented by a lawyer can be confident of having his or her rights protected competently. As stated succinctly in 1979 by the English Royal Commission on Legal Services: “All who get legal services should get the same standard of service.”59

Finally, a high, uniform standard of competence may protect the incomes of some sectors of the profession from the ravages of unrestrained competition.60 Clearly this is no concern of the bar elite—the leaders of the competence movement—but it can help to produce a coalition in favor of the renewed emphasis on competence.

These traditional professional concerns can be seen, for example, in the history of restrictions on bar admission and requirements

58. Harrell, supra note 35, at 1532.
59. ROYAL COMMISSION ON LEGAL SERVICES, FINAL REPORT, Cmd. 7648, § 5.5 (1979).
60. According to one commentator: “In the classic personal professions, association and colleague control emerged in relation with market organization; they now appear to be warrants against the temptations of the market.” M. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 226 (1977).
of a particular type of legal education. In the 1920's, in particular, the bar elite's overriding concern about competence led to important professional reforms. The reforms were primarily a response to the perceived danger of an influx of lawyers lacking the gentlemanly background of the established elite. Many observers believed that large numbers of new lawyers, especially immigrants trained in night law school, were "unfit." Exhibiting "racial tendencies toward study by memorization," they were ill-suited to a profession reserved for only the most brilliant sections of society. Inferior lawyering also was claimed to be a cause of unequal justice for the poor, an ironic suggestion when the remedy is to make lawyers less accessible.

In Jerold Auerbach's critical words:

> The overriding urge was to make the bar safe for Americans, not to provide equal justice or equal access. The inferior quality of the bar was blamed upon easy access; the denial of justice to the poor, in turn, was blamed upon an inferior bar. To elitists, in practice or in the professoriat, the remedy was obvious: the quality of the bar and the quality of legal services would improve only if professional access were restricted.

Furthermore, while bar leaders feared that the profession was filling up with incompetent practitioners, many in the bar's rank and file feared that increased competition would cut into their clientele and

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61. J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 120-29 (1976). Roscoe Pound's celebration of the virtues of bar associations in The Lawyer from Antiquity to Modern Times (1953) makes the point from the bar's point of view. "What is a bar association?," he asks, and then responds as follows:

> The bar association as an organization of those practicing the profession is an essential element of professional life. It is only through organization that the spirit of public service can be developed and maintained and crucial types of public service can be rendered effectively. It is the bar association, not the individual lawyer that can maintain high educational standards insuring a learned profession, that can maintain high standards of character as a prerequisite of admission to practice, that can formulate and maintain high standards of ethical conduct in relations both with clients and with courts.

Id. at 10-11.

Interestingly, Herbert Harley's arguments prior to World War I for an integrated bar included the need for lawyers to develop "class-consciousness." See D. McKean, The Integrated Bar 35 (1963). Harley's arguments in another setting carefully linked competition and quality. He praised restrictions on entry in Ontario as follows:

> The aspirant to legal honors must indeed make sacrifices in Ontario. . . . But when admission is won finally there is compensation. The candidate finds himself in a profession which is looked up to. He is free from the demoralizing competition which dulls the conscience of the young practitioner in the States. He is not impelled by starvation to cruise along the ragged coast of impropriety.


63. Id. at 116.
incomes. This coalition prompted reforms to restrict entry into the profession. The most notable reforms were higher educational standards, the creation of integrated state bars, and new requirements that potential lawyers obtain experienced sponsors who would vouch for their fitness and qualifications.  

While the new reforms did not remake the bar completely in the image of the bar's elite, they did limit somewhat the possibilities of entering the profession. The law school, rather than alternative means of study and apprenticeship, became "the center for the production of lawyers." Training, education, and testing became the accepted guarantees of competence, and the methods for restricting entry into the profession. State bar associations, in addition, gained more power to judge the suitability of potential lawyers and to regulate those admitted to the bar.

In retrospect, the reforms of the 1920's appear relatively moderate, even if they contributed to reducing consumer access to the profession and indirectly raised the costs of legal services. What is important to see, however, is that elite concerns with the public's perception of the quality of the legal profession and the legal system joined forces with the concerns of rank-and-file practitioners regarding competition to place "competence" on the agenda for reform. Furthermore, the professional response can be seen as an attempt to bolster the ideal of a uniform, high-quality profession. At least one notable reformer, Alfred Z. Reed, called for a frank acceptance of professional heterogeneity and stratification, but the idea of professional homogeneity continued to prevail. The bar, of course, could not in fact be made completely homogeneous or of a consistently high quality, but the reforms at least helped to sustain the appearance of uniformity and quality.

The leaders of the legal profession today also believe that the public perception of uniform lawyer competence needs to be strengthened through new professional reforms. In part, of course, the leaders have acted to reassure the public after such well-publicized criticisms as those of the Chief Justice. But the current competence movement has a deeper logic as well. It responds to a series of

64. See id. at 102-29; supra note 61.
65. See M. Larson, supra note 60, at 178.
66. See id. at 231.
67. Reed, a staff member of the Carnegie Foundation, was commissioned by the American Bar Association in 1913 to report on the system of legal education. His 1920 report, entitled Training for the Public Profession of Law, surprised ABA leaders and called for an explicit division of the profession into a well-educated elite and a second group educated at more accessible and practical night law schools. His proposals were condemned by most of the bar leadership. See generally J. Auerbach, supra note 61, at 109-13.
recent changes that have made it increasingly difficult to sustain the traditional ideal. Recent Supreme Court decisions regarding consumer access to the profession combined with the influx of new attorneys have created a situation that appears to demand new professional initiatives to regulate and upgrade lawyer quality. An overriding professional concern with uniform competence, however, conflicts with these decisions, economic reality, and the values of consumer accessibility and client autonomy now reflected in the Code of Professional Responsibility. The movement thus offers little to the consumer, because it neglects important consumer values. It also can promise no real change in the profession, since it is unlikely to succeed in overcoming those values and the new market for legal services discussed next.

B. Competence and the New Market for Legal Services

Since 1963, the Supreme Court consistently has emphasized a right of access to legal services, and the inevitable result, whether or not confronted explicitly, has been to eliminate traditional rules that promoted the ideal of professional homogeneity. Traditional practices that favored a relatively uniform, stable, and high-priced standard of performance, have fallen one by one. The cumulative result, combined with another influx of new lawyers, is a potential challenge akin to that of the 1920's, and it is understandable that the bar has reacted.

The Supreme Court first decided that state bar associations and other state agencies no longer can prevent individuals from joining together to purchase lower cost legal services from attorneys. Such prohibitions, the Court held in United Mine Workers v. Illinois State Bar Association, violate the first amendment. The issue before the Court was only the right of access, but the record showed plausible evidence that access came at some cost in the quality of professional performance. Cheaper services were less likely to result in diligent research and representation. As Justice Harlan complained in his dissent, there was evidence in the record which "Illinois may reasonably consider to present the danger of lowering the quality of representation furnished by the attorney to union members in the han-

70. Id. at 224.
dling of their claims." The Mine Workers' attorney had a huge caseload and rarely appealed any cases. While no particular example of poor representation could be cited, the lawyer could not have provided consistently high-quality legal services. The Mine Workers' contract with the lawyer was a bargain for cutrate legal services; that bargain can no longer be prohibited in the interest of a professional ideal.

In 1975, in Goldfarb v. Virginia State Bar, the Court then prohibited local minimum fee schedules as violations of federal antitrust laws. Learned professions, the Court held, are "trade or commerce," and cannot justify this particular "anticompetitive conduct." In labeling legal practice trade or commerce, the Court helped push lawyers more deeply into the marketplace. Cost-cutting, as the profession has long recognized, threatens the goal of uniform high quality: "The view that inadequate fees will lead to inferior legal services goes back to the old Canons..." The Supreme Court's decision in Goldfarb thus pushed the profession further from the ideal of uniformity in professional quality and performance.

In Bates v. State Bar of Arizona, two years later, the Court went the next step toward legitimating explicit price competition. The first amendment and the public interest in the accessibility of legal services prohibit an absolute ban on advertising. The Court refused to take seriously the argument that advertising and price

71. Id. at 226 (Harlan, J., dissenting).
72. See id. at 231-32. For example, the attorney handled more than 400 claims per year, negotiated settlements on behalf of a number of clients simultaneously and had very little personal contact with clients. He was paid relatively little ($12,400 per annum) and devoted little time to each case.
74. Id. at 787. The medical profession's turn came in Arizona v. Maricopa County Medical Soc'y, ___ U.S. ___, 102 S.Ct. 2466 (1982).
75. See Annotated Code of Professional Responsibility 105 (1979). See also id. at 184.

The prohibitions on advertising and price competition were developed largely in the profession's interest. See Fennell, Advertising: Professional Ethics and the Public Interest, in Law in the Balance: Legal Services in the Eighties, supra note 3, at 144, for a useful discussion of the prohibition in England.
competition could adversely affect the quality of service. Here, too, the Court would not deny consumer access in the interest of bolstering a professional ideal.

Individual lawyers have been freed from a number of traditional professional restrictions. Price competition has been sanctioned; and the policy of accessibility, found to have constitutional significance by the Supreme Court, has been implemented through forced marketing changes in legal services. The American Bar Association's Task Force on the Role of the Lawyer in the 1980's thus acknowledged a dramatic change in the character of the profession:

> In the 1980s, the marketplace is a laboratory for new, organizational structures struggling to meet the needs of the public. The catalysts for change are in place: new requirements in the type of legal services clients need, increased competition among various types of purveyors of legal services, and a greater range of tools available to the practitioner.

Although not yet demonstrated empirically, this series of events may in fact have led to some reduction in quality of legal services as consumers obtain cutrate legal services. The problem of quality, however, must be seen in relation to the set of characteristics that have supported the profession. The challenge is to sustain traditional professional values generally in a new era of price competition and bargain legal services. Marketing changes challenge the ideal of a homogeneous, well-respected, self-regulating profession that guarantees competent professional service from all its members, even if at a premium cost.

What Reed proposed in the 1920's and the ABA reformers refused then to accept has come closer to reality. Existing divisions within the profession have been magnified, and new divisions have been created. Furthermore between 1970 and 1980, the number of

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77. 433 U.S. at 378-79.

78. The same line of reasoning could lead to attacks on the laws precluding the "unauthorized practice of the law." Schwartz, The Reorganization of the Legal Profession, 58 TEX. L. REV. 1269, 1273 (1980). The arguments are made in Rhode, supra note 56. See also Christensen, The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?, 1980 AM. B. FOUND. RESEARCH J. 159. Paradoxically, however, the improvements in accessibility that come with deregulation within the profession may reduce external pressures for complete deregulation. If lawyers will be available at lower fees, there will be less public concern about the high cost of obtaining legal advice and assistance, which would in turn reduce pressures to allow lay individuals to provide legal services.

A recent criticism of the unauthorized practice doctrine as it applies specifically to ownership of legal clinics is Note, Legalizing Nonlawyer Proprietorship in the Legal Clinic Industry: Reform in the Public Interest, 9 HOFSTRA L. REV. 625 (1981). The author argues that private, nonlawyer ownership must be permitted.

lawyers per 100,000 in the population increased by forty-six percent.\textsuperscript{80} The challenge today is not an influx of immigrants lacking the traditional graces of the gentleman lawyer (although there may be a reaction to affirmative action in the recent concern with competence). Rather, it is the influx of "unprofessional" lawyers who, taking advantage of Supreme Court liberality, may cut costs and quality in order to attract clients.\textsuperscript{81} The important ideal of high-quality, professional legal services is becoming ever more difficult to sustain. Indeed, more than status is at stake; if unrestrained competition is the norm and the professional image suffers too much in the public's perception, there is always the possibility of the \textit{bête noire} of the profession, governmental regulation.\textsuperscript{82}

The collapse of even the appearance of professional homogeneity and uniform quality—which the absence of closed panel group legal services,\textsuperscript{83} price competition, and advertising helped to support—poses a real dilemma for those oriented toward traditional professional values. Moreover, at least some sectors of the profession fear the economic consequences of cost-cutters and increased competition. If the profession is kept relatively small in relation to demand, the monopoly of suppliers can be expected to keep lawyers' prices high. The new influx of lawyers, however, makes the rules of competition quite significant. New and aggressive marketing can take business away and lower the prices of those who were content


Two of the larger discount legal services chains are discussed in the following sources: Jenkins, \textit{Chain Gang: Is the World Ready for Discount Legal-Services Chains?} Joel Hyatt Thinks So, TWA AMBASSADOR, Oct. 1982, at 14 (discussing Hyatt Legal Services); and Swee-ney, \textit{When is a Lawyer Like a Bar of Soap?}, Christian Sci. Monitor, Oct. 29, 1981, at B8 (Dart Legal Centers).

\textsuperscript{82} This possibility is discussed in Martyn, \textit{supra} note 1, at 734-36. See also \textit{supra} note 58 and accompanying text.

\textsuperscript{83} Closed panel plans are those where the members of the group must select a lawyer from a particular list of lawyers or from among lawyers paid a salary by the plan. An open panel plan is where any lawyer chosen is paid by the plan or the client is reimbursed. The bar has tended to favor open panels, analogous to the medical profession and Medicare. Open panel plans can avoid the problem of lawyers agreeing to charge less for legal services in exchange for assured business from the group, and they also pose no threat that plan sponsors will pressure lawyers to cut costs to make a plan profitable. See W. PFENNIGSTORF \& S. KIMBALL, \textit{LEGAL SERVICE PLANS: APPROACHES TO REGULATION} 5 (1977).
with the earlier situation.\textsuperscript{84} While the elite members of the bar obviously do not fear the proliferation of lawyers and the emerging price competition, the effort to redefine competence can be crucial economically for the less secure members of the profession or for those who are trying to break in. Given what appear to be justifiable elite worries about professional quality, independence, and prestige in the new era of the 1980’s, one finds the same constituencies behind upgrading competence now as the ones behind restricting entry into the profession earlier in this century.\textsuperscript{85}

The legitimate concern with professional quality, we shall see, can be addressed in a number of ways. Indeed, several useful ideas are already receiving considerable attention. But an important, even dominant theme of the current campaign to make competence the issue of the 1980’s has been the effort to upgrade the bar collectively through new regulations imposing a uniformly high professional standard.\textsuperscript{86} This campaign is understandable from a traditional professional perspective. In the view of the bar elite, it may help to prevent competition from undermining professional standards too much,\textsuperscript{87} reducing respect for lawyers as a group, and perhaps raising the specter of regulation by the government. It also may help limit competition that is deemed destructive by the rank and file.

Yet this particular professional approach appears to reflect a reluctance to embrace what Murray Schwartz has called “the shift, compelled by court decision and the push for a mass legal services delivery system, from a bar-regulated delivery system to a market-

\textsuperscript{84} Cf. Bellow, Which Lawyers Win?, Working Papers, Fall 1976, at 4 (discussing advertising restrictions and who they benefit).

\textsuperscript{85} Depending on the local situation, competence standards could be a weapon against legal clinics, which as a matter of policy may not ask some kinds of questions and undertake investigations of facts. Such standards also could be used against small practitioners who practice an inefficient law; they could be found to be too unsystematic and haphazard in their approaches. In the latter case, the competence criteria would accelerate the movement toward more efficient, mass delivery services that maximize the use of economies of scale through standard forms and involvement of paralegals.

\textsuperscript{86} Interestingly, in the same speech in which David Brink termed competence the issue of the 1980’s, he noted that “access” was the issue of the 1970’s. See Enhancing the Competence of Lawyers, supra note 1, at 301.

\textsuperscript{87} Another phenomenon related to concerns with competition is the effort to stimulate the demand for legal services that clients traditionally have not sought (like medical services with Medicare). See Abel, supra note 3. There is some truth to the statement of two English commentators that, “[f]rom this view . . . the lawyer has need of the poor, but what we have yet to establish is whether the poor need lawyers.” A. Bankowski & G. Mungham, Images of Law 79 (1976).
Moreover, a closer look at reigning professional ethics suggests some real obstacles to making competence the paramount value. As the present and draft codes of professional responsibility make clear, the profession has already moved too far in the direction of values other than the desire for a homogeneous and high-quality professional product. This time, we shall see, the revival of an ideal of homogeneity will be more difficult than ever.

C. Competence and The Code of Professional Responsibility

The Code of Professional Responsibility can best be understood as an uneasy truce among a number of competing and even inconsistent values—including loyalty to the client, zealousness on behalf of the client, loyalty to the legal system, accessibility, and competence.\textsuperscript{89} The Code cannot provide clear answers to difficult questions precisely because it always points in multiple directions. Nevertheless, the Code still provides a useful map of the contours of legal professionalism. It is a map that may be more reliable than other statements of the professional self-image. As will be seen, however, an effort to push competence to the forefront through a uniform measure of performance would radically transform the balance of professional and consumer values currently enshrined in the Code. Other key values, notably those of client accessibility and client autonomy (a value derived from concerns with loyalty and zealousness to the client’s wishes), are not likely to be given up in favor of competence.

The value of accessibility should be considered first. The accessibility trend, as discussed before, has been the impetus for change in the market for legal services. Despite the opposition of much of the organized bar,\textsuperscript{90} the trend has been built on a constitutional foundation, in turn based on certain assumptions about the virtues of price

\textsuperscript{88.} See Schwartz, The Death and Regeneration of Ethics, 1980 Am. B. Found. Research J. 953, 962. Economists, it should be noted, have often advocated this change for both lawyers and doctors. See, e.g., Reder, Medical Malpractice: An Economist’s View, 1976 Am. B. Found. Research J. 511. As noted in infra text accompanying notes 120-87, I am not satisfied that a strict market/contract approach is necessarily in the interests of consumers of legal services.


\textsuperscript{90.} See, e.g., Elson, Canon 2 - The Bright and Dark Face of the Legal Profession, 12 San Diego L. Rev. 306 (1975); Note, Group Legal Services and the Organized Bar, 10 Colum. J.L. & Soc. Probs. 228 (1975). The experience of one state is discussed in Delk, The Advent of Prepaid Legal Services in North Carolina, 13 Wake Forest L. Rev. 271 (1977).
competition and advertising as means to promote access and enable the profession to satisfy the "unmet need" for legal services.91 The Code of Professional Responsibility therefore must allow price competition, advertising, and group and prepaid legal services; as a result, the Code changed substantially in the 1960's and 1970's.92 Competence concerns can no longer prevent these professional marketing innovations. Individual examples of incompetence can be disciplined, but the profession cannot use the risk of substandard legal services to proscribe marketing innovations that promote accessibility. In the foreseeable future, the Code will have to reflect Court-permitted reforms in the means of supplying legal services.

If innovative institutions and marketing techniques were required to exemplify a single standard of competent legal performance, however, accessibility could still be reduced as a practical matter. Clients might be able to purchase only the Cadillac model of legal services, even if from a plurality of dealers. There would be very little price competition because the services could not vary significantly, and consumers would gain little by new forms of practice or widespread advertising of the same professional product. Another newly embedded professional concern, that of client autonomy, prevents such a one-dimensional standard.93

This conflicting value of client autonomy, which gives the consumer a right to bargain for a more accessible professional product, finds support in the current Code of Professional Responsibility and appears even more strongly in the proposed Model Rules of Professional Conduct. The examination of the Code can be facilitated by referring first to a hypothetical client who wishes to pay, or can pay, no more than a given amount, say $500, for particular legal ser-

91. See, e.g., B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS (1970). The emphasis on these reforms as means to fill the unmet need for legal services is especially apparent in the majority opinion in Bates v. State Bar of Ariz., 433 U.S. 350 (1977):

The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney.

433 U.S. at 370. For criticisms of this kind of reasoning, see, e.g., Marks, Some Research Perspectives for Looking at Legal Need and Legal Services Delivery Systems: Old Forms or New?, 11 Law & Soc'y Rev. 191 (1977). The role of "legal needs" in the legal services movement is described in B. GARTH, NEIGHBORHOOD LAW FIRMS FOR THE POOR (1980).

92. Changes are especially apparent in CPR DR 2-101 (publicity) and DR 2-103 (recommendation of professional employment).

93. The pro-access cases can also be seen as cases potentially providing power to the consumer. According to the Supreme Court in United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585-86 (1971), "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the first amendment." See infra text accompanying notes 177-86.
Varying the facts slightly, we shall also consider the situation where the client wishes to pay only $500 and the value of the client's claim is $1000. The maximum amount that can be gained from the representation or advice thus will be assumed to be $1000. In each case, the lawyer could do legal and factual research at a number of levels. We will stipulate that $500 worth of research or services at the lawyer's normal billing rate would not exhaust the subject in law or fact, but it probably would provide some insight to the client that otherwise would not be available. The question to guide our analysis of the Code is whether the lawyer can agree to provide this level of service without subjecting himself or herself to liability for failing to do exhaustive research. Liability could be imposed through a malpractice action brought by a client or a disciplinary action enforced by the bar.

The two disciplinary rules under Canon 6 of the current Code are directly on point. A lawyer shall prepare adequately in the circumstances and shall not attempt to limit liability for personal malpractice. The malpractice prohibition seems clear, but it could be avoided by defining quality with reference to the $500 limitation. There would be malpractice only if the $500 worth of work were done negligently. Such a definition is not as implausible as it at first seems to be. Even if an absolute standard aside from the $500 is sought, issues will arise where $1000, or $2000, or $10,000, worth of research would have turned a losing case into a winner. Presumably any standard for deciding such malpractice cases still will have to refer to some "appropriate" level of research. That level might just as well be the level sought by the client, in which case we arguably would not have a true example of contracting away malpractice. The contract would only provide the setting for evaluating the quality of work.

94. Of course, the lawyer may be able to change the client's view of how much ought to be spent by stating the likely result of investing more in a given matter. Nevertheless, the client may not trust the lawyer's assessment or may decide that he or she does not want to risk more than $500.

95. It is probably not too farfetched to suggest that practitioners proceed by consulting sources in some fashion such as the following: practitioner's manuals (not always up to date), legal encyclopedias, treatises, case headnotes, cases within the jurisdiction, cases outside the jurisdiction, etc. One practical threshold is whether the research requires the lawyer to go beyond the confines of the office library. Another is whether the research results in an exhaustive memorandum or simply in a couple of cases somewhat on point.

Compare my approach, which assumes some client control, with the suggested theoretical framework in Johnson, supra note 52. Johnson emphasizes lawyer control over choices regarding how much to invest in legal services.

96. CPR DR 6-101(A).

97. CPR DR 6-102(A). See also EC 6-6.
Ambiguity in the words "adequate under the circumstances" also merits attention. Can the client dictate the circumstances? The American Bar Foundation's annotation to the Code provides some help. It states that the lawyer "should weigh the cost to the client against the potential benefit of added preparation." According to this view, the competence standard should not require the lawyer to generate a fee "disproportionate to its value to the client." Similarly, it has long been established that the fee charged by an attorney should be set in relation, *inter alia*, to the "amount involved." Thus, even when minimum fee schedules were allowed, the Code suggested that a small claim might require lower fees and thus, implicitly, less time.

When referring to collection of a small claim, therefore, it appears that the lawyer—*sua sponte* or in compliance with the client's wishes—can decide to be somewhat less thorough. This is of course economically reasonable in typical litigation, and the rationale has been carried over into substantive areas of law, such as the law of collateral estoppel. A lawyer is expected to devote less time and resources to an issue that involves a relatively small amount in controversy, even, it seems, to the point of losing on a particular legal issue that might have been won if more preparation had been done.

A second question is whether the client can *elect in any event* to purchase the lower level of service that the lawyer could provide if there were a small amount in controversy. Canon 7 of the current Code requires the lawyer's "zealousness" in responding to the client's decisions on matters of substance. This interpretation follows indirectly from the disciplinary rules and explicitly from

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99. *Id.*
100. *See CPR DR 2-106.*
101. *See, e.g., Restatement (Second) of Judgments § 68.1 (Tent. Draft No. 4, 1977).* The doctrine is recognized under the idea of foreseeability. If it was not foreseeable that an issue in one case would be important in a subsequent action, the issue may be relitigated in the second action. Presumably there was insufficient incentive to litigate the issue thoroughly in the first action.
102. It is now generally accepted that small claims are not necessarily simple claims. *See Yngvesson & Hennessey, Small Claims, Complex Disputes: A Review of the Small Claims Literature, 9 Law & Soc'y Rev. 219 (1975).* *See also supra* note 95.
103. Canon 7 provides as follows: "A Lawyer Should Represent a Client Zealously Within the Bounds of Law." CPR Canon 7.
104. CPR DR 7-101 states that a "lawyer shall not intentionally . . . fail to seek the lawful objectives of his client through reasonably available means. . . ." *See also DR 7-102* (representing a client within the bounds of the law).
ethical considerations 7-7 and 7-8.\textsuperscript{105} The client is to make basic
decisions, and one can suggest that the decision about the extent of
service to be provided is a fundamental one. Further, since the law-
ner unquestionably can consider the “value to the client” in decid-
ing the appropriate level of preparation, there must be a point where
the client’s view defines the value of winning, or more accurately of
maximizing the chances of winning.\textsuperscript{106} The professional norm of
competence should not override choice here, given that the reduced
level of services would be acceptable if the value to the client were
low as an objective matter. Finally, the recent trend has been to ex-
tend the sphere of client autonomy.\textsuperscript{107} At the very least, therefore,
the Code is ambivalent as to the resolution of the hypothetical de-
scribed above. Too strong a commitment to competence would run
counter to other, consumer-oriented values which, the analysis sug-
gests, already have a very strong claim on the profession. It would
raise prices and prevent the consumer from seeking other than the
premium professional product.

The same problem, perhaps even exacerbated, can be found in
the Model Rules. The Rules begin by stating the requirement of
competence in Rule 1.1, which provides for “the legal knowledge,
skill, thoroughness, preparation and efficiency reasonably necessary
for the representation.”\textsuperscript{108} Rule 1.3 also requires “reasonable
promptness and diligence.”\textsuperscript{109} Rule 1.2, however, states that the
“objectives of representation” are set by the client, and the lawyer
“shall consult with the client as to the means by which they are to be

\textsuperscript{105} EC 7-7 states:
In certain areas of legal representation not affecting the merits of the cause or sub-
stantially prejudicing the rights of a client, a lawyer is entitled to make decisions on
his own. But otherwise the authority to make decisions is exclusively that of the
client and, if made within the framework of the law, such decisions are binding on his
lawyer.

EC 7-8 requires that the client be “informed of relevant considerations” and states that “the
lawyer should always remember that the decision whether to forego legally available objec-
tives or methods because of non-legal factors is ultimately for the client and not for himself.”

\textsuperscript{106} This is not to say, however, that other considerations such as the duty not to file a
frivolous lawsuit might be relevant at some point. See CPR DR 7-102(A)(1) and (2); Fed. R.
Civ. Proc. 11. These rules seek to protect the legal system and other parties from the time and
expense of groundless claims.

\textsuperscript{107} Important recent discussions of client autonomy and “informed consent” as a
means to protect that autonomy include: Luban, Paternalism and the Legal Profession, 1981
Wis. L. Rev. 454; Martyn, Informed Consent in the Practice of Law, 48 Geo. WASH. L. REV.
307 (1980); D. Rosenthal, supra note 4; Spiegel, Lawyering and Client Decisionmaking: In-
formed Consent and the Legal Profession, 128 U. PA. L. REV. 41 (1979); Spiegel, The New Model
Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structur-

\textsuperscript{108} Model Rules Rule 1.1.

\textsuperscript{109} Model Rules Rule 1.3.
Rule 1.4 concerns "communication" and also moves in the direction of more client decisionmaking. The official comment to Rule 1.4 appears even to favor intelligent participation by clients on questions of means as well as ends—"to the extent the client is willing and able to do so."

The problem of balancing competence and client autonomy again emerges. Rule 1.8(i), on malpractice, particularly illustrates the problem; it appears to modify the traditional rule discussed above that lawyers "shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice." Such an agreement would be permitted, but only if "the client is independently represented in making the agreement." This resolution may respect client autonomy to elect cheaper representation by waiving malpractice, but the requirement of the additional costs of a second lawyer may negate any savings. The client theoretically can make a contract that takes away one safeguard of competence, but the practical result appears to be the same as that dictated by the current Code.

The same tension or even inconsistency appears in the comments to some of the other rules. For example, one comment to Rule 1.2 states: In questions of means the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred. . . . Another comment, however, says that "the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1." This comment suggests that there is some irreducible minimum level of competency below which lawyers cannot sink. Yet Rule 1.1 refers to "reasonably" necessary services, and presumably that suggests flexibility.

The key issue of who decides thus remains open. The suggestion is that the client has a right to decide, but the practical result can again be the opposite. If the lawyer's major concern is ensuring that he or she satisfies a given definition of competence, the incentive will be to play it safe, to keep fees high, and not to allow the client to

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110. MODEL RULES Rule 1.2(a). Rule 1.2(c) states that the "lawyer may limit the objectives of the representation if the client consents after disclosure."
111. MODEL RULES Rule 1.4.
112. MODEL RULES Rule 1.4 comment.
113. MODEL RULES Rule 1.8(i). The only guidance in interpretation is the "Legal Background," suggesting the rule applies most clearly to express releases from malpractice liability.
114. Id.
115. MODEL RULES Rule 1.2 comment.
116. Id.
bargain for a relatively frugal legal effort. Again, what appears to be conceded to client autonomy—a value ostensibly given more concern in the Model Rules—may be taken away by the enhanced concern in the Model Rules with competence; or, alternatively, it could be that the pro-competence statements will fall to the new prominence of client autonomy.

The Model Rules, in addition, explicitly recognize a sliding scale of time and effort, which further complicates matters. One comment to the Model Rules suggests that the "required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence." The competence requirement again may vary depending on the size of the claim, but whether, or how much, it can vary according to the amount the client is willing to pay is still not at all clear.

Both the Code and the proposed Model Rules, we have seen, attempt to effect a truce among competing values, including those of competence and client autonomy, and of course the emphasis on accessibility through marketing changes remains. Different sections of the Code or the Model Rules send contradictory messages, and it is very difficult to ascertain which value is paramount in a hypothetical that forces a choice. The contradictions have been overstated, however, by focusing on a particularly tough case and by asking for a clear-cut answer. It may be possible to find a line that can accommodate the competing concerns of accessibility, client autonomy, and competence. What we shall see, however, is that such a line can be drawn only if competence is defined in a very flexible or even minimalist manner.

The simplest workable definition of competence relies on what most lawyers in fact do in practice. This approach has a long history behind it and also can be adapted to fit the modern profession. The diverse modern profession, with different client demands and delivery mechanisms, could even have different reference points for each situation. We might then ask, for example, whether there are some cases where it would be so outrageous to spend only $500 worth of time on a particular legal job that no lawyer would accept the job, regardless of the client's wishes. The money simply would be wasted if the lawyer acted on that basis. In another case, we might ask if the lawyer did a $500 job comparable to what the bulk of the practicing bar would do. There is both flexibility and objectiveness in such a standard, and it can accommodate the values of client autonomy

117. MODEL RULES Rule 1.1 comment.
and accessibility. The recurring problem is that this approach makes competence a nonissue for the profession as a whole. It does not force improvement in the performance of the bar generally since it follows the status quo, and it loses the strength in application of a single, uniform standard.

In light of the current professional ethical constraints, a more serious effort to pursue the competence issue would be to vary the profession's objective definition according to what the lawyer charged, what the client wished to pay, or what the amount in controversy was. Different contexts would require a different standard. The "reasonableness" factor in the Code and in the Model Rules\(^\text{118}\) could be interpreted to allow adjustment in accordance with individual client decisions and the diversity of service-providing institutions. Again, however, the practical result would be to lose the precision and power of the profession's current campaign. Developing this plurality of standards alone would be very difficult. Applying them effectively in the great variety of circumstances that can occur in professional representation would be even more difficult. Moreover, such an approach, if serious about client autonomy, focuses not on what the professionally defined standard in the circumstances should be, but rather on whether the client got what he or she bargained for. Thus, this kind of approach, which finds support in the next section, has a very different focus than the professional model we have seen.\(^\text{119}\)

If instead we prefer a uniform standard of competence, to be consistent with the Code we must pick a standard sufficiently low to be an irreducible minimum beyond bargaining. Given that the profession already recognizes and permits a plurality of lawyer efforts depending on the values in controversy, a standard that is low enough to accommodate the acceptable differences between first class treatment and economy treatment of small claims probably would be useless to the profession's campaign for collective self-improvement. It would leave no possibility for upgrading the profession as a whole along the lines of the ABA-ALI Model Peer Review System. There would be no requirement of comprehensiveness in developing the facts and researching the law.

The profession's quest to enhance the level of competence through professional regulation, therefore, cannot be harmonized with the current balance of concerns in the Code or in the proposed

\(^{118}\) See CPR DR 6-101(A)(2) (requiring "preparation adequate in the circumstances") and MODEL RULES Rule 1.1 (requiring "reasonably necessary" preparation).

\(^{119}\) See infra text accompanying notes 120-87.
Model Rules. The profession's current ideal seems to be a uniformly high standard of competence ensured by professional supervision, but that effort simply is inconsistent with the current standards for regulating professional ethics. The Code and the Model Rules now more than ever embody a number of competing values, and it is too late to make competence a paramount concern.

The profession has changed, and the issue of lawyers' quality makes no sense unless it is evaluated in light of those changes. The traditional ideal of a homogeneous, high-quality profession may have to be abandoned. The assault on traditional professional values is being led by the new consumer values of accessible legal services and client autonomy, and it now appears impossible to upgrade quality through the imposition of a uniform standard high enough to make any difference. If we are concerned with quality, we will have to develop an approach consistent with accepted consumer values.

III. Competence: Toward a Consumer Perspective

The key point about competence may be simply that the current professional perspective on the issue is anachronistic and inconsistent with major and even constitutionally inspired themes in the Code of Professional Responsibility. The competing themes in the Code—accessibility and client autonomy—have evolved in the past twenty years along with what can be seen as the consumer movement in legal services. Competence issues now should be addressed from a consumer perspective within the framework of those themes. The problem is addressing lawyer quality without abandoning accessibility and client autonomy.

This is not to say that consumers automatically benefit from recent changes in the legal profession. Lawyers and clients are now in the marketplace, but clients have no guarantee of a better value from deregulation than regulation. Although the consumer has new opportunities to select from a variety of legal investment strategies, the opportunity to make favorable contracts may not be realized.

Before discussing ways that consumers might be helped to take advantage of new opportunities, it first may be useful to set out explicitly the traditional professional perspective on competence and to compare it with the contract model that is emerging. A consumer model then can begin to address some of the problems faced by clients confronting a new marketplace for legal services.
A. Evaluating Competence: From the Professional to the Consumer Model

Two general approaches to evaluating competence can be outlined. One has already been suggested, the profession’s model, which is based largely on a uniform, professionally enforced ideal, applicable to all lawyers. The other, implicit in the critique of traditional professionalism, is based on contract and the competition of the marketplace. Strengths and weaknesses of each model can be examined before turning to the specific problem of how to approach the question of lawyer quality in a way that benefits consumers.

The professional ideal tends to favor a single, high-quality standard as a means to regulate all lawyers.\(^\text{120}\) If successful, or perhaps even if it only appears to be taken seriously by the profession, this model may help keep the prestige of the profession high, justify the professional monopoly, and prevent further regulation from outside the profession. Furthermore, if criticized as too expensive from the client or consumer perspective, the professional response could be that redistribution is irrelevant to quality concerns. If the public wants a more equitable distribution of the service, the government can take action, perhaps through subsidies, that is consistent with the widespread provision of high-quality legal services. Similarly, if the bar provides pro bono services for no fee or a low fee, those services still should satisfy the high professional standard.\(^\text{121}\)

Such an ideal would harmonize concerns with competence and accessibility and would preserve the profession’s ability to define standards of quality. The argument for equal justice makes this approach attractive. Unfortunately the ideal has little in common with legal services today in the United States\(^\text{122}\) and has never been reached anywhere in the world except perhaps in Sweden.\(^\text{123}\) It is

\(^{120}\) See supra notes 58-61 and accompanying text.

\(^{121}\) The Code of Professional Responsibility makes no distinction between the treatment of paying and nonpaying clients, but data collected by the University of Wisconsin Civil Litigation Research Project suggest that practical differences do emerge in time allocation. See D. Trubek, supra note 53. Similarly, interviews with lawyers in Shreveport found that for clients “unable to pay the ordinary fee, the lawyer was forced to treat them as special cases, to be helped only as time was available. The relationship was one of the charitable lawyer helping the supplicant client.” F. Marks, R. Hallauer & R. Clifton, The Shreveport Plan: An Experiment in the Delivery of Legal Services 30 (1974). Cf. Lochner, The No Fee and Low Fee Legal Practice of Private Attorneys, 9 Law & Soc’y Rev. 431 (1975).


\(^{123}\) Of course, lawyers play a generally different role in Swedish society than in American society. The Swedish system is described in M. Cappelletti, J. Gordley, & E. Johnson,
very expensive there and generally deemed prohibitively expensive elsewhere.\textsuperscript{124}

In the United States, even in prosperous years, Legal Services Corporation lawyers have had much higher caseloads than most lawyers, especially most corporate lawyers.\textsuperscript{125} Much concern has been expressed about the quality of legal services that poor people have obtained.\textsuperscript{126} It is also often stated that legal services lawyers, like wartime surgeons perhaps, quickly learn "bad habits" that make them unsuited to teach or to practice high-quality law.\textsuperscript{127}

The full potential of redistribution of lawyers has not been explored in the United States, and it is unlikely to be explored in the future.\textsuperscript{128} Poverty lawyers must practice a kind of law that emphasizes "mass delivery" and maximum impact of legal services\textsuperscript{129} instead of uniform, high-quality "mega-lawyering"\textsuperscript{130} along corporate lines. This kind of practice admittedly belies the ideal of the adversary system and equal justice for all.\textsuperscript{131} Some clients get high-quality work and others get only a few minutes of a lawyer's time. If results depend in part on the performances of advocates, then it is obvious that the distribution of legal services exacerbates inequalities. Nevertheless, acquiescence in unequal standards of perform-

\textsuperscript{525-84}{M. CAPPETTI.}


\textsuperscript{126} See Bellow, \textit{Turning Solutions into Problems: The Legal Aid Experience}, 34 NLADA BRIEF CASE 106 (1977); Carrington, \textit{The Right to Zealous Counsel}, 1979 DUKE L.J. 1291. Of course, the analysis depends on what one thinks legal aid attorneys ought to be doing on behalf of the huge number of individual clients they serve. See infra notes 169-76 and accompanying text.

\textsuperscript{127} On the bad habits of legal aid lawyers, see, e.g., Bellow, supra note 126.


\textsuperscript{129} Marc Galanter, for example, has demonstrated the fallacy in the formula that "the poor should receive the same quality and range of service as the rich." Galanter, \textit{Delivering Legality: Some Proposals for the Direction of Research}, 11 LAW \& SOC'Y REV. 225, 231 (1976). See generally B. GARTH, supra note 91, at 143-225.

\textsuperscript{130} See Galanter, \textit{Mega-law and Mega-lawyering in the Contemporary United States}, in \textit{The Sociology of the Professions: Lawyers, Doctors and Others} 152 (R. Dingwall & P. Lewis eds. 1983).

\textsuperscript{131} See the criticisms by Abel, supra note 122 and Simon, supra note 122.
ance is inevitable in the real world. It cannot be separated from the constraints of the market for legal services. This is not to say that redistribution should not be pursued as far as possible, but a uniform competence standard will not solve problems that ultimately must be traced to the unequal distribution of societal resources.

The professional ideal, therefore, ignores the reasons why the great number of practitioners, in Hazard's words, "slop through with quickie work." It is completely unrealistic as an ideal for solving problems of unequal access to legal services. Moreover, it is inconsistent with values given constitutional status by the Supreme Court and enshrined in the Codes of Professional Responsibility. A new model is emerging, despite the elegance of the traditional professional ideal.

The model for professional services that appears to be taking shape is simply that of contract—the client or client group bargains with the lawyer for the price and the level of services. The profession no longer dictates the standard of service to be provided. In the interests of accessibility and client autonomy, clients now have the power to bargain for something other than the standard service, which might be available only at a premium price. Competition, the new model assumes, promotes accessibility, and the client population is protected by traditional contract remedies. The consumer has more "rights" and more freedom of choice. The new model, however, raises its own problems. We cannot stop the analysis by a ritual incantation of the virtues of the market.

The serious problem, correctly perceived by professional leaders in the competence movement, is that the ordinary client—the

132. See infra text accompanying notes 140-87.
133. While Marvin Frankel has now become a supporter of the competence movement, he still points out its problems:
What if anything do we do, when we consider the need for competent lawyers, about the millions of people with the millions of problems who are unable for one reason or another to have any lawyer at all—competent or incompetent? Is that outside our subject? To what extent is incompetence really a social and economic phenomenon that resides primarily if not exclusively in the class of less affluent lawyers serving the classes of less affluent people?

ENHANCING THE COMPETENCE OF LAWYERS, supra note 1, at 230.
134. See supra note 51 and accompanying text.
135. See supra notes 121-31 and accompanying text.
136. See supra text accompanying notes 89-119.
137. A succinct statement of the free market case for a contract model of professional services appears in M. FRIEDMAN, CAPITALISM AND FREEDOM 137-60 (1962). As suggested infra text accompanying notes 120-87, Professor Friedman's faith that deregulation will solve the consumers' problems is not accepted in this article, but there is no doubt that consumers will have more opportunities to obtain legal services at lower prices.
one supposed to benefit from accessibility and client autonomy—may end up worse off, perhaps paying less for legal services but getting no value for the purchase. The typical individual or small business client has no basis for intelligently choosing what legal product to purchase on what terms, nor for evaluating the lawyer’s performance of the contract. Lawyers can use their technical expertise to take advantage of clients’ new-found freedom and turn the contract model into a means of increasing profits with the sale of inferior and sometimes even useless legal services.

The professional model potentially avoids these problems by ensuring that the services will be uniform and of high quality. In theory, the client can trust the lawyer and the profession’s regulation of the lawyer’s performance. The profession, however, has never policed itself to that extent. State bar associations to date have done very little to require conformance with even the lowest common denominator approach of the current Code. It is hard to imagine a complete turnaround on the issue of competence. Moreover, as we have seen, it probably is futile at this point to insist dogmatically that all lawyers do premium work even if costs are increased, more clients are denied services, and clients or client groups elect other than the premium standard.

A consumer perspective on the issue of the quality of the lawyer product would have to preserve the pro-access, pro-client autonomy direction of recent professional reforms while providing the means for clients: (1) to make intelligent choices regarding legal services investment; (2) to evaluate the results of professional services; and (3) to obtain redress if lawyers have provided less than was promised. We also must ask more generally how the quality of professional services can be improved consistently with values of accessibility and autonomy. These themes will underlie the following discussion.

B. Informed Consent in the Legal Profession: Improving the Consumer’s Choice

The problem of what clients ought to decide requires considera-

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138. That is not to say that larger corporate clients lack the ability and power to bargain effectively with law firms. A recent article suggests a trend toward divisions within corporate services among options such as the following: “first class treatment,” “business class,” “semi-business class,” and “tourist class.” Brill, The Age of the Endless Docket is Over, Am. Lw., Apr. 1982, at 8.

139. See, e.g., Marks & Cathcart, supra note 2, at 214-19; Martyn, supra note 1, at 707-13.
tion of the doctrine of informed consent.\textsuperscript{140} Client decisions, especially about the amount of resources to commit to a legal problem, depend upon information that often is possessed only by the lawyer. A doctrine of informed consent purports to ensure that the client has the ultimate power of choice and can obtain enough information about the various options to make the choice intelligently. The lawyer would have a duty to make the client aware of competing options.

Unfortunately, the professional experience to date with the doctrine of informed consent—mostly limited to the physician-patient relationship\textsuperscript{141}—has not been very successful.\textsuperscript{142} Some of the problems in the medical setting merit attention before the legal profession embraces informed consent as a useful reform. The problems stem in part from the fact that the contract model has not developed as far in medicine as in law,\textsuperscript{143} but they also run deeper because of the nature of medical services.\textsuperscript{144}

First, even to the extent patient autonomy generally is accepted as a vital goal, when a physician presumably is acting to save a life it is difficult to see a violation of any important value of individual autonomy. Second, patients may not be permitted to purchase (or physicians to sell) services so inadequate that, for example, an avoidable death will result. Such a consent will in any event be so closely scrutinized that the physician runs a high risk

\textsuperscript{140} See \textit{supra} note 107. Professor Rhode, arguing for deregulation beyond the professional monopoly, proposes that clients be able to purchase lay advice or representation within a doctrine of informed consent. Rhode, \textit{supra} note 56, at 95.

\textsuperscript{141} See, e.g., B. BARBER, INFORMED CONSENT IN MEDICAL THERAPY AND RESEARCH (1980); J. LUDLAM, INFORMED CONSENT (1978).


\textsuperscript{143} Professor Schuck, for example, points explicitly to the contrast between medical malpractice law, medical professionalism and market principles. Schuck, \textit{Malpractice Liability and the Rationing of Care}, 59 TEX. L. REV. 1421 (1981).


that the consent will not be accepted as informed and voluntary. Finally, health and life are very difficult values to balance against such factors as the cost, intrusiveness, and pain of a given medical procedure. It is difficult even under the best of circumstances for a patient to make a reasoned judgment, and as a result there typically is more deference to a physician’s decision than to a patient’s effort to assert the right of deciding how much treatment to accept.

These problems may be less serious for the lawyer-client relationship.\footnote{One could argue that the market system is less appropriate for lawyers than for physicians because of the adversary nature of our system of justice. Physicians deal only with individuals, whereas the adversary system requires roughly equal competence among several parties, at least in litigation. This argument, however, is unconvincing. Litigation is the unusual situation, and trial is even more unusual. Moreover, the adversary ideal does not correspond with the reality of the system today, nor with the emerging market context. See supra notes 121-31 and accompanying text.} First, except perhaps for the criminal defense situation, which is outside the scope of this article, lawyer-client decisions can be grounded essentially on economic calculations about the value of additional investment in legal services.\footnote{An investment model of legal services is described in Johnson, supra note 52; and D. TRUBEK, supra note 53.} Rather than matters of life and death, the questions concern the economic benefits and risks of alternative levels of legal performance. Clients can more easily understand and evaluate this type of information, and their decisions can be made on a more intelligent, well-informed basis. There is a greater possibility, in short, to promote an informed consumer of legal services than of medical services. The medical analogy should not be persuasive.

Other problems remain. The client may be misled if the lawyer does not provide accurate information. Further, the client’s lack of bargaining power, while perhaps not as obvious as in the medical situation, may make choice an illusion. Given the ascendancy of contract in the legal services setting, however, a consumer perspective demands some doctrine capable of bolstering the client’s capacity for intelligent choice. It provides the only way to reconcile client autonomy with the typical client’s lack of legal knowledge.

For an easy example, take the client who wants to bring a complex antitrust action for $500. The client should be told that there is virtually no chance of filing a lawsuit or even of persuading the potential defendant to pay anything if only $500 is invested. The extreme view of client autonomy would suggest that the lawyer not be held responsible to the client or the profession if the client says, “O.K., but I would like you to make a phone call anyway without any serious documentation or research to tell them of my assertion
that they have violated antitrust laws” and the lawyer does so. Although a conscientious lawyer might decide not to take such a client, the lawyer could decide to provide the service. The need from a consumer perspective is for the client to understand to the extent possible his or her choices.

This standard of informed consent differs from that found in the ALI-ABA Model Peer Review System, which requires the lawyer to find out all the facts and law and then tell the client what alternatives are available, and at what cost. Informed consent comes only after all the research is completed. What is suggested here is that the client should decide beforehand whether he or she wants that potentially expensive legal diagnosis. The fully informed client might decide to ask for limited lawyer research if the lawyer explains that the advice will be based on a less than comprehensive investigation and that there are specific risks in such an approach.

A more problematic case is where the client asks the lawyer for help but claims an inability to pay more than a small sum. A lawyer technically is not permitted to say that he or she will help but will spend very little time or energy on the case. Such a bargain is not very attractive, even if it means that clients obtain at least some legal help from a professional. There is evidence, however, that such bargains are made already, and, worse yet, that pro bono clients often are surprised to find that they end up with little or no lawyer commitment. Informed consent would at least let the client decide whether to entrust the problem to a lawyer who will expend minimal effort or to take the problem elsewhere. Although informed consent will not necessarily make the bargain fair, clients may be prevented from wasting their time and limited money when the chances of success are too slight, or from expecting a quality performance when the lawyer never intended to provide it.

Informed consent, in short, offers considerable promise; lawyers will have to learn the art of explaining their capabilities and limits. Still, of course, a client may have trouble evaluating whether the lawyer held up his or her end of the bargain. This problem already exists, but the professional model at least holds out the possibility that the quality of the professional product can be assessed and regulated by a uniform standard. The contract model complicates the

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147. The right to refuse a client is set out in CPR DR 2-110. See also EC 7-8 (referring to withdrawal).
148. It can be suggested, however, that if the services are of such a level as to be useless, the lawyer will have a very difficult time showing that the consent really was informed.
149. See supra note 121.
150. See supra note 121.
problem because of the varying levels of service that could be permitted. Contract remedies are available, but the question is how a client can invoke them realistically given a lack of ability to evaluate the lawyer's work.

The following two sections thus return more specifically to the problem of policing the quality of the professional performance. Even if informed consent leads to an intelligent bargain as to the level to be purchased, the consumer may gain little without effective means to evaluate the quality of both the information provided as a basis for the decision and the lawyer's performance of the agreed upon services.

C. Monitoring Quality From a Consumer Perspective: Remedies for Neglect

Most client complaints today are for neglect,\[151\] which commentators distinguish from problems of competence. A client who is the victim of lawyer negligence should of course have a remedy, such as an action for malpractice. The lawyer's mistake could be one of giving wrong information that leads the client to purchase or decline a certain level of legal services.

Even though the current systems for redressing legal malpractice have not been considered adequate for consumers of legal services,\[152\] the client, in fact, will have greater difficulties under the model of contract that has recently emerged. If the client can bargain for a particular level of services, negligence can no longer be determined simply by referring to what a typical practitioner would have done. Negligence may not then be provable simply by expert lawyer testimony or textbooks about the prevailing community norms of practice. Increasingly the question will be whether the lawyer was negligent under the circumstances established in the bargain with the client, a more complex and difficult question to resolve.

A consumer perspective, therefore, will require a reevaluation of the system of remedies for malpractice. Part of the task will be to consider both the problem of consumer accessibility to legal forums


\[152\] This problem of neglect, it should be emphasized, is not the focus of the bar's criticisms of lawyer competence. A consumer perspective, however, should pay attention to consumer complaints. See, e.g., Steele & Nimmer, Lawyers, Clients, and Professional Regulation, 1976 Am. B. Found. Research J. 917, 967-71; Pfennigstorf, Types and Causes of Lawyers' Professional Liability Claims: The Search for Facts, 1980 Am. B. Found. Research J. 253, 272.
and the problem of establishing a forum that from the consumer's view can decide satisfactorily this potential new generation of complicated malpractice claims. These problems can best be approached in conjunction with the next section, also concerned with enforceable remedies for individual consumers of legal services.

D. Monitoring Quality From a Consumer Perspective: Value for Price

As with remedies for malpractice, the legal profession's approach to the numerous disputes about lawyers' fees has been inadequate.\textsuperscript{153} Within the emerging contract model, the question will not be whether a lawyer ought to be disciplined for the quality of the performance as measured by a high-quality professional standard, but rather whether the client got what he or she bargained for.

For example, a client might ask if he or she really did get $1000 worth of advice for a fee of $1000; perhaps the lawyer was lazy, inefficient, or made mistakes that could have been avoided by better use of the time that was bargained for. The situation could be termed malpractice if the advice leads to damages, but other contractual remedies also should be available. It might be that the client simply ought to pay less for a particular legal service. Similarly, a client may object, as many now do, to the number of hours billed for a particular task that the client requested the lawyer to accomplish. Again, there should be an efficient contractual remedy for such overbilling.

As the consumer contract model gains ascendancy, consumers will have more frequent need for some means to evaluate the professional product and obtain redress when necessary. Deciding whether the contractual obligations have been met would be a "deregulated" way to police the profession. But here too the contract model potentially could make matters worse for the consumer. Although the traditional professional model in practice may not have worked well in handling fee disputes, at least the emphasis on uniform standards of performance may have provided the potential for a coherent system of regulation of fee disputes. Under the contract model, the problem is more difficult because the legal fees cannot simply be compared to professional norms. They must be considered in relation to the varying contractual expectations of the parties.

The law could evolve and be applied through adjudication of fee disputes, just as it now may develop through adjudication of mal-

\textsuperscript{153} See, e.g., Marks & Cathcart, supra note 2, at 216-19.
practice claims. To the extent that fee disputes involve a relatively small amount of money, however, the economic benefits of a judicial resolution may not outweigh the costs. The problem is compounded if the client has to prove the claim through expert legal testimony, which also can be expensive and no doubt can be difficult to obtain. Furthermore, the factual complexity of these questions of quality for value make litigation risky at best. In general, the new "rights" of individual clients realistically cannot be considered enforceable via the ordinary courts.

Many fee disputes could wind up in more accessible, less formal, and less expensive small claims courts. Unfortunately, the experience of small claims courts thus far is not promising. The informality simply may mean that an individual client who knows little about the law and legal practice will confront a sophisticated, knowledgeable lawyer. Conscientious and sympathetic judges may help even the balance, but the likelihood is that lawyers on the whole will fare much better than their clients in the small claims court setting.

There is no question that the new contract regime poses problems for the consumer seeking quality for value. There also is no easy solution to the problem of providing remedies at the individual level. Nevertheless, another possibility, which appropriately has been gaining more attention, is to look outside the courts to mandatory arbitration systems.

Mandatory arbitration of fee disputes, already available in several states including California, offers the virtues of informality, speed and inexpensiveness. Arbitration panels can develop considerable expertise and help overcome the consumer's lack of legal sophistication. There clearly is the potential to overcome the most serious drawbacks of both the ordinary courts and small claims courts.

Indeed, the California Special Committee on Resolution of Fee Disputes specifically recommended arbitration to overcome the problems of a disparity in bargaining power in attorney fee matters.

154. See generally Yngvesson & Hennessey, supra note 102. Small claims courts typically have had particular difficulty with highly technical claims or defenses, such as those available under new consumer protection laws. See J. RUHNA & S. WELLER, SMALL CLAIMS COURTS: A NATIONAL EXAMINATION 195-96 (1978).


156. See, e.g., Martyn, supra note 1, at 729-36; Rhode, supra note 89, at 718.
and the lack of any effective civil remedy for the client.\textsuperscript{157} For similar reasons, the American Bar Association Committee on Resolution of Fee Disputes has offered a set of model bylaws to encourage mandatory arbitration.\textsuperscript{158}

Consumers still must be wary, however. All of those arbitration schemes are under the auspices of the bar associations, and they may not be as aggressive as they should be in furthering consumer rights. The schemes will depend, after all, on the good will of the members of the local bars. Lay participants on panels, of course, can help keep the consumer perspective alive, but the undeniable fact is that consumers have fared poorly to date in virtually all industry-sponsored schemes for the arbitration of consumer complaints.\textsuperscript{159} Perhaps experience could prove attorney fee arbitration somewhat different, but one can doubt whether any of these reforms, desirable as they may be, will overcome the fundamental inequality between most lawyers and most clients. Without denying the potential, even if limited, of reforms enhancing clients' individual remedies, more global approaches to the overall consumer problem of quality for value also should be considered.

\textit{E. Diversification in Legal Services and Quality Control}

Consumers can benefit, with respect to making informed choices and obtaining value at a given price, from the increasing diversification in legal service supply that is emerging from the deregulation of the profession. Diversification, however, must be distinguished from what usually is referred to as specialization of the legal profession.\textsuperscript{160} Specialization refers primarily to the availability of legal services at a quality (and price) higher than that prevailing among general practice lawyers. It is perfectly consistent with a high, professionally defined standard of competence generally applicable to lawyers. Indeed, one aspect of such a standard of competence, however ambiguous it may be in practice, is a duty of the

\textsuperscript{157} State Bar of California, Report of the Special Committee on Resolution of Fee Disputes (1976).

\textsuperscript{158} Special Committee on Resolution of Fee Disputes, American Bar Association Section of Bar Activities, The Resolution of Fee Disputes: A Report and Model Bylaws (1974).


\textsuperscript{160} See, e.g., Enhancing the Competence of Lawyers, supra note 1, at 301-416; R. Zehnle, Specialization in the Legal Profession (1975); Laumann & Heinz, Specialization and Prestige in the Legal Profession: The Structure of Deference, 1977 Am. B. Found. Research J. 155.
general practitioner to refer clients to legal specialists in complicated legal matters.  

Diversification involves product differentiation and consumer choice. The availability of group and prepaid legal services, price competition, and advertising, despite some obstacles erected by professional organizations, has led inevitably to a diversification in the professional product. This diversification offers interesting possibilities for the consumer seeking a good buy in legal services. Indeed, if the bar is willing now to recognize diversification and even embrace it, despite the long tradition favoring at least the ideal of uniformity in professional services, the consumer can reap some very clear benefits.

First, diversification in legal services improves the possibilities for intelligent consumer choice. The consumer can avoid the dangerous trap of thinking that all lawyers provide basically the same services, which probably was never true. Instead, consumers increasingly will become aware that legal clinics, for example, provide "no frills" legal services on a relatively impersonalized, high-volume, low-cost basis, while large firms generally provide specialized high-cost, meticulous, individualized legal services. Small law firms, in turn, might be known for personal contact but not necessarily premium research. A consumer who is aware of such differences will be better able to make a choice as to the general quality of legal services desired and the price he or she is willing to pay.

Second, diversification offers the possibility of standards for performance, and even limited regulation, within each type of practice. Attempts to hold all practitioners to the corporate ideal would be abandoned. For example, the estimated 600 legal clinics in the United States could be held to a standard appropriate for mass legal services. It is not enough to insist that they handle only

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161. CPR DR 6-101(A)(1) already provides that "a lawyer shall not ... handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it."
162. See, e.g., AMERICAN BAR ASSOCIATION, supra note 79.
163. These differences would refer to types of claims as well as to types of practices.
164. See supra note 81.
165. Murray Schwartz has emphasized the idea of "holistic" lawyering. Schwartz, supra note 78, at 1283.
166. In a sense, this could imply the breakup of the legal profession into subprofessionals identified by type of client and practice. Just as licensed psychological counseling is divided, inter alia, into such categories as social workers, psychologists, and psychiatrists, the provision of legal advice and representation could be classified by specific categories. Obviously this could undermine the notion of a single legal profession with the same training and same status license, but that ideal is difficult to sustain today in any event.
167. See Jenkins, supra note 81.
"simple" or "routine" matters such as a will or an uncontested divorce. Even in a relatively simple matter, the premium quality lawyer will uncover the complexities in law and fact applicable to a particular individual. The paralegal filling out a form at a legal clinic cannot be held to that standard. One agenda for researchers and the bar should be to help develop a realistic approach for evaluating the quality of innovative mass legal services provided at relatively low prices. Indeed, there could even be some form of peer review within the diversified segments of the emerging legal profession.

A prime example of the need for a special set of standards is the Legal Services Corporation. Despite some official pronouncements to the contrary, the Legal Services Corporation can best be understood as an institution that is charged with both "mass delivery" along the lines of legal clinics and complex "impact" litigation akin to the work of the large corporate bar. Thus, if the premium, corporate-level performance standards were imposed on all legal services work, in practice many fewer cases could be handled and impact work would be slighted.

The quality question with respect to legal services for the poor in fact involves two problems. First, what should the standard of performance be for the services provided? Second, who should decide? On the one hand, it can be argued that, consistent with the informed consent notion described above, only the individual clients should decide. Marshall Breger's recent thoughtful study of legal aid points essentially in that direction. Another perspective, however, would suggest that "client" must be defined more broadly to include poor persons generally and their legal interests. If that is true, we should try to allocate decisions about the resources committed to particular legal services in a way that responds to a broader constituency. Moreover, it is difficult to use individual informed consent when the client is not paying. Presumably the informed client will want high level services for his or her legal problem.

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168. See supra note 50.
169. See, e.g., Cramton, The Task Ahead in Legal Services, 61 A.B.A. J. 1389 (1975). The Reagan administration, it should be noted, is trying to eliminate the Legal Services Corporation, especially its "impact" work. See, e.g., Drew, A Reporter at Large (Legal Services Corporation), NEW YORKER, Mar. 1982, at 97.
172. The English judicare legal aid system, which provides legal aid through private lawyers who are reimbursed by the state, confronts this problem by limiting the client to
The Legal Services Corporation has dealt with this general problem in part by requiring that each local program go through a priority-setting process that educates the client population as to the problem of limited resources and involves it in the key decisions about lawyers' priorities. In addition, the Corporation recently has developed a draft, entitled, "Standards for Providers of Civil Legal Services to the Poor." The draft provides, in part, that local decisions about which issues to pursue should be based on the client community's judgment regarding which needs are most critical. The client community may call for a kind of service that emphasizes quantity rather than individualized high quality for certain kinds of cases, and individual programs should be permitted to conform.

It might be useful to let the client community elect a standard which the legal profession explicitly could recognize as applicable only to mass legal services. Lawyers could then attempt to attain the highest quality possible within the constraints of high volume

"reasonable" services, meaning "that an applicant should receive aid if a normal private solicitor would advise a private client with a similar case and moderate financial means to proceed with litigation." M. Cappelletti, supra note 123, at 94. In other words, for cost reasons, the poor client cannot ask for more than what a hypothetical paying client would obtain. See also the discussion in Breger, supra note 171.

173. Priority setting is mandated by federal regulation, 45 C.F.R. § 1620. For discussion of how it is conducted, see SYSTEMS FOR LEGAL SERVICES: A STEP-BY-STEP GUIDE TO PLANNING AND DEVELOPMENT FOR LEGAL SERVICES PROGRAMS 4-1 to 4-28 (G. Krech ed. 1980).


175. The draft standards cannot be examined in detail here, but a few comments can be made. First, the draft seems to insist both on uniform high quality and informed consent, which is an admirable if unrealistic goal. See STANDARDS OF PROVIDERS OF CIVIL LEGAL SERVICES TO THE POOR, supra note 174, Standard 2.3-5. According to the commentary, "[t]he most serious danger of overloading lawyers or lay advocates is that they will respond by diluting the quality of services they provide to a point below acceptable standards." Id. at 2-67. With respect to informed consent, Standard 2.4-2 states that "the client should control the conduct of each legal matter, determining the objectives sought and strategies adopted, to the fullest extent permitted by the ethical responsibility of the advocate."

Nevertheless, the draft recognizes that a legal service provider: cannot reasonably hope to meet all of the needs which exist. Consequently, deliberate planning becomes critically important. . . . Planning should be responsive to the competing demands which confront providers. First, the sheer number of clients with a need for assistance with individual legal problems requires that a provider adopt a delivery structure which will maximize its ability to serve as many clients as possible, consistent with its overall objective. Second, there are a multitude of issues with community-wide impact which might be addressed. The choice of issues to be undertaken should be based upon the judgment of the client community regarding which needs are most critical.

Id. at 1-55.
and relatively little lawyer time involvement. The question of how to develop quality consistent with the mass provision of services obviously merits considerable attention.

The new pluralism in legal services, in sum, ought to inform a new agenda for research and evaluation by professional and consumer groups. Methods for studying and improving legal clinics, solo practitioners, legal aid lawyers, and other providers of legal services, should be devised free of the effort to find—or at least enforce—a one-dimensional professional standard. Consumer choice will be aided considerably by the explicit recognition that here, as elsewhere, one should expect more in price and quality from a gourmet store than a "no frills" market.

F. Competence, Organization, and the Bargaining Power of Consumers

Professionalization, in the words of Christopher Lasch, represents "the consensus of the competent," and he argues that it "came into being by reducing the layman to incompetence." Put another way, the emergence of specialized knowledge and training under the auspices of professional organizations made the layman unable to function in the professional's domain without becoming dependent on the professional. The consumer perspective, through a requirement such as informed consent, tries to make clients more competent to understand legal problems and how they can be handled. The idea is to give clients the tools to reach their own intelligent decisions about what to invest in legal services. Similarly, a pluralism in identifiable legal service "packages," from corporate specialist to legal clinic, helps the consumer understand the available choices.

Even with informed consent and diversification in legal services, however, the individual client will be at some disadvantage in trying to obtain quality at a reasonable price. The individual client will have problems caused by a lack of bargaining power and a lack of information when dealing with a particular lawyer or law firm. The client may be misled, may not be able to evaluate the alternatives, or may even be too much in need of legal services to make the most favorable contractual bargain.

It is therefore appropriate to consider other ways to improve

176. See, e.g., D. Rosenthal, supra note 4 (emphasizing the need for research).
the legal competence of the public—in Galanter's terms, to "upgrade parties." 178 One obvious possibility is for individuals to join together to increase their expertise and bargaining power for legal services. The group can determine what services its members want and how to monitor those services. It also can bargain collectively with lawyers who want that business. Indeed, individuals proceeding in this manner began the trend toward accessibility and diversification in the early 1960's. 179 Since then, there has been an enormous proliferation of group and prepaid legal services plans. 180

At least with respect to salaried lawyers in closed panel plans, who must provide services to all qualified members of the plan, quality control is a basic, if still largely neglected, issue. Pfennigstorf and Kimball make the point clearly:

Our point, in short, is that closed-panel plans using salaried lawyers can function only if those attorneys subject themselves and their professional judgments to restraint in the amount of time and effort to be devoted to individual clients and cases. In order to avoid both backlog and idle time, the natural way is to adjust the time spent on each client according to the total number of clients to be served. . . . This is not different from the practice in any law office, except that closed-panel attorneys must try to serve all the clients who come to the office. . . . 181

The sponsors of the plan, whether they admit it or not, elect a given standard of performance when they determine how many lawyers to hire and what to pay them.

The possible advantages to consumer members of these plans, however, go beyond simply the availability of some advice or representation at a low price. Here members can monitor the results on behalf of individuals and the group generally, decide whether more or less lawyer time needs to be purchased in the interests of their members, and find out just what realistically can be expected from lawyers with a particular salary and workload. They will not have to rely solely on staff lawyers who have an interest in claiming more pay and in reducing workloads. They also will be able to develop internal methods for handling complaints by consumers about the quality of services.

178. See Galanter, supra note 129, at 231.
180. See, e.g., L. Deitch & D. Weinstein, Prepaid Legal Services: Socioeconomic Impacts (1976); National Resource Center for Consumers of Legal Services, Group Legal Services Plans: Organization, Operation, and Management (1981); W. Pfennigstorf & S. Kimball, supra note 83.
There are promising hints that some plan sponsors have moved toward such efforts on behalf of their memberships. The United Auto Worker Legal Plan has had a peer review system for several years. Furthermore, while the National Resource Center for Consumers of Legal Services reports that quality control has not developed very far, it emphasizes the issue's importance.

The same principle of upgrading the consumer's knowledge and bargaining power also emerges with respect to the Legal Services Corporation and the delivery of legal services to the poor. The effort, mentioned before, to involve clients in setting priorities for the use of scarce resources constitutes the first step toward empowering them to choose and monitor the kind and quality of services provided by a local office. Evidence so far suggests that, despite the efforts to date, staff lawyers still make most basic decisions. Yet the idea of monitoring and choice by the client community can help to promote a consumer perspective in legal services for the poor.

Obviously not all potential clients will participate in self-help organizations that bargain and monitor on their members' behalf. Nevertheless, the potential benefits to consumers should not be overlooked. The consumer's new freedom to take advantage of price competition and different levels of services may not always lead to a situation where a good bargain is entered into and carried out effectively in the consumer's interests. It is important, therefore, that the consumer gain power to bargain successfully through organization. To the extent there are remaining professional barriers to such organizations, consumers will benefit from their elimination.

G. Education, Training and Professional Competence

This article cannot discuss reforms and issues in legal education, although they undeniably relate to professional diversity and quality. It bears reiterating, however, that reforms to improve knowledge and ability can have a number of different effects. Re-

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182. See Enhancing the Competence of Lawyers, supra note 1, at 293.
183. The National Resource Center suggests that discussion about levels of performance and the monitoring of quality and results has only begun. A reason given is the lack of objective professional measures of quality. It is questionable, however, whether the plans can be aided much by externally developed standards calling for uniform, and costly, high quality. See National Resource Center for Consumers of Legal Services, supra note 180, at 92-93, 153-54.
184. See supra notes 169-76 and accompanying text.
185. See, e.g., B. Garth, supra note 91, at 206-08.
186. For example, the profession could adopt the liberal view of group legal services proposed by the Kutak Committee in Model Rules Rule 5.4.
stricting entry to law schools, lengthening legal education, and mandating apprenticeship programs, for example, could all improve the quality of lawyers, but the result would not necessarily help consumers. Among other objections, it is clear that greater restrictions on the supply of lawyers will have an impact on lawyers' fees and accordingly on the accessibility of legal services.

Even if educational reforms do not directly raise the cost of legal services, they may fail to address problems in a way likely to benefit clients. One can imagine, for example, a first class trial advocacy program that teaches all the steps a perfect lawyer would perform, but neglects to consider the problem of how a typical lawyer undertakes those steps in the real world. Lawyers should know how to do premium work, but professional quality might improve and consumers might benefit if lawyers also know how best to standardize procedures, utilize assistants and manage a large caseload. As has been emphasized repeatedly, the profession is not homogeneous; various levels of services already are being provided and will surely be provided in the future.

IV. THE LEGAL PROFESSION AND COMPETENCE IN THE 1980's

In one important sense, leaders of the legal profession are right. Competence ought to be a vital issue for the legal profession in the 1980's. Consumers are increasingly thrust into the marketplace, and they cannot count on getting quality for value.

The organized bar, however, has tended to approach the competence issue from the wrong perspective. The movement to upgrade competence has not focused on means to help the consumer in a new era characterized by price competition, and diversity in lawyers and the kinds of services they provide. Instead, the tendency today, as it has been in the past, is to favor a collective upgrading effort, consistent with traditional professional values of homogeneity, standard high-quality services, and professional self-regulation. Lawyers are supposed to disregard the marketplace and insist on the maintenance of high-quality standards of performance.

Three general criticisms of that effort have been made in this article. First, it represents a distraction from profound recent changes in the legal profession, the implications of which are not yet well understood. Pressures to improve both access\(^{188}\) to lawyers and

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the rights of consumers to determine their investment in legal services have been translated increasingly into the practical deregulation of the profession with respect to price and level of service provided. This raises many difficult issues beyond the scope of this article, such as the possible impact on the assumptions of the adversary system, on the ideal of equal justice, and on the independence of the legal profession. These issues cannot be avoided simply by insisting that all lawyers really should be regulated by the same high standard of performance.

Second, an overemphasis on competence runs counter to the important values of access and consumer autonomy, which have emerged especially in the past two decades. A collective upgrading effort built on a uniform, high standard of performance will raise the cost of legal services, thus preventing access, and also will reduce the consumer’s right to determine the appropriate level of investment in legal services. Individuals gain little when the exaltation of quality prevents the purchase of varying levels of services.

Third, perhaps somewhat paradoxically, a collective upgrading effort built on a uniform high standard of performance appears doomed to failure. The changes in the profession are here to stay, and even a large scale effort to restore the traditional ideal can do little to turn the clock back. Indeed, an analysis of the profession’s current and proposed codes of professional responsibility clearly shows that too much emphasis on the requirement of uniform performance is inconsistent with other values contained in the codes. The values of access and client autonomy are accepted now in codes of professional responsibility, and they prevent any effort to focus single-mindedly on upgrading professional performances.

Finally, once we recognize the misdirection of the collective upgrading effort that purports to make competence the issue of the 1980’s, we can begin to ask how to address the problem of lawyer quality from a perspective consistent with consumer interests and indeed with the codes of professional responsibility. The traditional

189. While there is no Supreme Court in Great Britain to force the profession to move more toward price competition and advertising, it is notable that strong pressures are being placed on the profession. See, e.g., Fennell, supra note 76.

190. There is a sense in which “failure” could be successful. Without imputing motives, from the perspective of professional leaders the perfect “solution” arguably may be an emphasis on upgrading sufficient to reassure the public about legal professionalism. If there is too much emphasis on competence, costs may be raised which would anger the public. The result then could be the breakdown of the professional monopoly over the delivery of legal services. Cf. Rhode, supra note 56. This article has chosen to take the bar leaders seriously, asking what the implications are of a real effort to upgrade the bar generally through professional regulation.
professional model is inadequate. A contract model has emerged, along with diversity in available legal services, and we must ask how to protect the consumer in this new setting.

Addressing lawyer competence from a consumer perspective is a serious challenge. Individual, unorganized consumers lack the knowledge and bargaining power to make intelligent decisions about legal services investment. They also are bound to have trouble evaluating the results and obtaining effective remedies when lawyers err or take advantage of them. Nevertheless, several reforms already being discussed in the profession, such as the further development of the informed consent doctrine, the improvement of remedies for clients unhappy with their lawyers, and the encouragement of group and prepaid plans, do offer some potential. Finally, the debate about quality can be improved if consumers and the profession recognize that the nostalgic search for uniform, enforceable standards of high-quality performance will not provide consumers much assistance in their efforts to find reasonable quality legal services at a reasonable price.