Bar Associations: Policies and Performances

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Bar associations are an integral part of the legal profession and, along with law firms, courts, legislatures, and law schools, essential features of the modern American legal system. Despite their prominent place in the legal field, however, bar associations have received surprisingly meager scholarly attention. This Article seeks to help remedy this oversight by examining the contribution of bar associations to the legal system at large. In particular, it identifies the principal policies pursued by the associations and evaluates how effectively they further these policies. In addition, the Article addresses some of the bar associations' major limitations and makes recommendations for their improvement.

There are substantial variations among bar associations, but two principal types stand out: comprehensive associations and specialty associations. This Article concentrates on the major comprehensive organizations, which include the American Bar Association (ABA), each of the state bar associations, and the largest of the local bar associations. Both the specialty associations and

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2. In its statistical classifications, the ABA includes as state bar associations the two bar associations in the District of Columbia (one of which is mandatory), the Puerto Rico Bar Association, and the Virgin Islands Bar Association. See ABA Div. for Bar Servs., 1995 Bar Activities Inventory § 2 (Joanne O'Reilly ed., 1995) [hereinafter ABA Inventory]. North Carolina, Virginia, and West Virginia each have two state bar associations, membership in one being mandatory to practice in the state. See id.

3. According to the ABA, there are 24 of these associations with 3500 or more members. They are (with the size of their memberships as of 1995 in parentheses) as follows: the Los Angeles County Bar Association (22,786); the Chicago Bar Association (21,665); the Association of the Bar of the City of New York (20,100); the Philadelphia Bar Association (12,500); the New York County Lawyers Association (10,200); the Houston Bar Association (9,537); the Bar Association of San Francisco (9,000); the Dallas Bar Association (7,400); the Denver Bar Association (7,257); the Allegheny County Bar Association (Pennsylvania) (7,175); the Boston Bar Association (7,086); the San Diego Bar Association (7,004); the Bar Association of Metropolitan St. Louis (6,100); the Orange County Bar Association (California) (6,000); the Atlanta Bar Association (5,500); the Cleveland Bar Association (5,196); the King County Bar Association (Washington) (4,385); the Columbus Bar Association (Ohio) (4,300); the Maricopa County Bar Association (Arizona) (4,100); the Dade County Bar Association (Florida) (3,951); the Cincinnati Bar Association (3,593); the Santa Clara County Bar Association (California) (3,704); the Multnomah Bar Association (Oregon) (3,503); and the Kansas City Metropolitan Bar Association (3,500). See id.
the comprehensive associations are structured geographically, with membership
drawn from a national pool or from a particular state or local area.4 But in
terms of membership, financial resources, and range of activities, the
comprehensive organizations are significantly more influential than the
specialty organizations. Whereas specialty associations focus on a particular
type of practice5 or a particular group of lawyers,6 the comprehensive bar
associations contain a broad cross-section of lawyers and are concerned with
these lawyers' varied interests.7

Many of the existing major comprehensive bar associations were organized
over a hundred years ago. The Association of the Bar of the City of New
York, for example, was founded in 1870, the Chicago Bar Association in 1874,
and the ABA in 1878.8 Among the first state bar associations were the Iowa
State Bar Association, organized in 1874, and the New York State Bar
Association, organized in 1876.9 The memberships of the earliest comprehe-
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Sive bar associations were largely restricted to the more respected members of the bar. In addition to providing social opportunities for lawyers with common interests, the early associations were concerned with such matters as eliminating unprofessional behavior by lawyers, cleaning up corruption in local government, imposing higher pre-admission educational standards on lawyers, and occasionally pushing legal reform.10

As the memberships of the major comprehensive bar associations have grown and become more diverse,11 the range of association programs has expanded. In addition, organizational structures of the associations have become more complex, budgets have become larger, and more administrative work has been turned over to full-time employees. These forms of expansion have increased the opportunities as well as the problems of the associations.

Although there are sharp differences among them in policy priorities and implementation, the major comprehensive bar associations today are remarkably similar in the policies they seek to advance. As their activities and declarations of purpose reveal,12 the associations aim to benefit three principal target groups: individual lawyers, the legal profession generally, and the public at large. In general, the associations aim to benefit individual lawyers by providing them with opportunities to improve their professional skill and knowledge, to develop useful professional contacts, to expand their client base, and to increase their income. They aim to benefit the legal profession generally by helping to maintain a competent, respected, and ethically responsible body of lawyers and by protecting the profession from unqualified legal service competition. They aim to benefit the general public by protecting and strengthening the administration of justice, by enhancing public understanding of and respect for law and legal institutions, and by identifying and advocating


12. The ABA’s statement of purposes, for example, reads:
The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the profession and of the public.

ABA CONST. § 1.2.
needed changes in the law and opposing those they consider undesirable.

The major comprehensive bar associations play a significant role in representing an influential profession. This Article is an attempt to assess that role and to identify the major limitations preventing associations from being even more effective. Part I considers the resources available to bar associations and stresses that the associations' members are their most important resource. Part II focuses on the organizational structures of bar associations and notes their weaknesses. Part III examines the various programs that bar associations conduct, and their mixed record of effectiveness. Part IV discusses more generally the limitations to greater bar association effectiveness. And finally, Parts V and VI present some recommendations for improving the organizations and some conclusions about their future.

I. RESOURCES

Like organizations of all kinds, bar associations depend on, and are limited by, the resources available to them. The principal resource of bar associations is their members. In addition to providing most of the funding and leadership of the organizations, members do most of the work. In contrast to many trade associations, bar associations are composed of individual members, not firms. The ABA is by far the largest bar association in the United States, with a lawyer membership of 339,000 from throughout the nation,13 or about forty percent of the nation's lawyers. The largest of the state bar associations is the California Bar Association, with almost 115,000 members.14 Of the hundreds of comprehensive local bar associations in the United States,15 the twenty-four largest have over 3500 members each; the three largest—the Los Angeles County Bar Association, the Chicago Bar Association, and the Association of

13. See Robert A. Stein, Executive Director's Report, Mission: Membership, A.B.A. J., Aug. 1996, at 116 [hereinafter Stein, Mission: Membership]. This figure is down from 362,000 in 1993, though the ABA is apparently still the largest professional association in the world. See Robert A. Stein, Executive Director's Report, Plenty to Be Proud About, A.B.A. J., Jan. 1996, at 92 [hereinafter Stein, Plenty to Be Proud About]. The ABA considers its membership decline the number one issue with which it is faced. See Stein, Mission: Membership, supra; cf. Darryl Van Ouch, Associations Face Declining Member Rolls, NAT'L L.J., Jan. 15, 1996, at A1 (discussing risks of membership decline facing other comprehensive bar associations). In addition to its regular membership, the ABA has 42,000 student and associate members. See Stein, Mission: Membership, supra.

14. See ABA INVENTORY, supra note 2, § 2. The next largest state bar associations in terms of membership are the District of Columbia Bar Association (64,000 members); the State Bar of Texas (62,500); and the New York State Bar Association (55,500). See id. The smallest state bar associations are the Virgin Islands Bar Association (570 members); the West Virginia Bar Association (1271); and the Bar Association of North Dakota (1700). See id. About one third of the state bar associations have associate or affiliate paralegal members. See Steven Cohn, Welcome to the Club, LEGAL ASSISTANT TODAY, Sept.-Oct. 1995, at 54.

15. There are at least 150 local bar associations with over 300 members each, see ABA INVENTORY, supra note 2, § 1, though there are presumably more since this figure excludes associations that failed to respond to the ABA questionnaire. See id. at 1. In addition, there are many county and city bar associations with fewer than 300 members.
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the Bar of the City of New York—have over 20,000 members each.\textsuperscript{16}

Thirty-five of the fifty-seven state bar associations\textsuperscript{17} are unified, meaning that a statute or court rule requires membership in the association for a lawyer to practice in the state.\textsuperscript{18} Since they are mandatory, unified associations are generally more regulated than other associations. In non-unified bar associations, membership is voluntary, although a number of these associations limit membership to those in a particular jurisdiction or type of practice.

Bar association members in leadership positions are unpaid,\textsuperscript{19} and almost all maintain full-time jobs in law offices or other legal service agencies while attending to their association responsibilities. Leaders not only donate their time and effort to association affairs, but their firms commonly donate staff time to assist with association administrative duties. Beyond their leadership, all major comprehensive bar associations have paid staff members. The ABA and the California State Bar each have a total of around eight hundred employees,\textsuperscript{20} while the largest local association—the Los Angeles County Bar Association—has ninety-five employees.\textsuperscript{21} Some of the smaller state bar associations have as few as ten paid staff members each.\textsuperscript{22}

The associations’ staffs have become increasingly essential resources as association activities have increased. They now perform much of the routine administrative work of the associations, while top staff employees frequently exert some policy influence on association affairs (for instance by giving guidance to newly elected or appointed leaders). Although subordinate to the member leadership, the executive director is a full-time association employee with substantial influence on association affairs. Other employees common to larger associations, such as lobbyists, staff attorneys, and the director of continuing legal education (CLE), also exert substantial influence.

Most bar association income comes from annual member dues, so the

\begin{itemize}
\item \textsuperscript{16} See supra note 3.
\item \textsuperscript{17} See supra, note 2.
\item \textsuperscript{18} Bar associations in the following jurisdictions are unified: Alabama, Alaska, Arizona, California, District of Columbia, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Puerto Rico, Rhode Island, South Carolina, South Dakota, Texas, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and Utah. See ABA INVENTORY, supra note 2, § 2; see also Larry J. Rector, \textit{Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis}, 66 N.E.B. L. REV. 762, 763, nn.5-7 (1987) (listing when bar associations became unified and whether requirement was imposed by statute, court rule, or combination of two). For illustrative examples of the legal requirements for unified bar associations, see ARIZ. SUP. CT. R. 31 (1996), CAL. BUS. & PROF. CODE §§ 6000-6052 (West 1996), and WIS. SUP. CT. R. chs. 10, 11 (1996).
\item \textsuperscript{19} The ABA is an exception to this rule, paying annual stipends to its President ($100,000) and President-Elect ($50,000). There is an assumption that these are essentially full-time jobs. See James Podgers, \textit{Presidential Aid}, A.B.A. J., Oct. 1994, at 101.
\item \textsuperscript{20} See ABA INVENTORY, supra note 2, § 2; Van Duch, \textit{supra} note 13.
\item \textsuperscript{21} See ABA INVENTORY, supra note 2, § 2.
\item \textsuperscript{22} The State Bar of South Dakota, for example, has only four paid staff members while the Vermont Bar Association has six. See id.
\end{itemize}

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number of members and the rate of dues are crucial resource considerations. Additional sources of income include publication sales and advertising, CLE fees, section membership fees, gifts, foundation grants, and insurance programs that an association may provide or sponsor. The ABA, with its large membership and considerable ingenuity in attracting funds from other sources, has by far the highest annual income of any bar association, currently totaling 137 million dollars. Among state bar organizations, the California Bar Association leads in annual income, with ninety-five million dollars, while the Los Angeles County Bar Association has the highest income of local bar associations, at 9.5 million dollars. Meanwhile, some of the smaller state bar associations have annual incomes of under one million dollars each.

Annual dues for members vary considerably among associations. For example, annual dues are $190 for most active members of the Florida Bar, $275 for ABA members who have been members of the bar for ten or more years, and $478 for most California State Bar members.

In addition to membership resources, another valuable asset of major comprehensive bar associations is their reputation in important circles, both public and private. Well-known and highly regarded members help further association policies through their contacts, and they often support their proposals with carefully prepared position papers or draft legislation. Their

23. Aside from the benefits of exposure and continuing legal education, bar associations offer their members a number of benefits in exchange for their dues. In addition to the programs mentioned infra in Part III, the associations sometimes offer reduced rates on items like insurance coverage, office supplies, and auto rentals. See ABA INVENTORY, supra note 2, §§ 3-VI, 4-VI; TEN SMART WAYS TO MAXIMIZE YOUR ABA MEMBERSHIP (1996) (pamphlet) (publicizing advantages of ABA membership); THE PROFESSIONAL ADVANTAGE (pamphlet) (publicizing advantages of New York State Bar membership), included in N.Y. ST. B.I., Sept.-Oct. 1995, at 32.

24. See ABA INVENTORY, supra note 2, §§ 3-XVIII, 4-XVIII (providing statistical data on sources of bar association income other than dues).


26. Dues constitute 77% of the California Bar Association’s income. See Budget: Courage or Folly, CAL. ST. B.J., Jan. 1996, at 8.

27. See ABA INVENTORY, supra note 2, § 2.

28. See id.

29. Associations charge lower dues to some members, such as inactive members of the bar, lawyers recently admitted to practice, and student and associate members. See id. §§ 3-V, 4-V.

30. See FLA. STAT. ANN. ch. 1.7.3(a) (Harrison 1993).


32. See Towery Works Toward Dues Decrease, CAL. ST. B.J., Dec. 1995, at 5 (reporting bar president’s goal to reduce 1997 dues and noting higher cost of medical society fees in California). One reason for the fact that the California State Bar’s dues are relatively high is that the association pays a majority of the cost associated with the state’s unique and expensive disciplinary system. For more on this system, see infra note 104.

33. See James Towery, Bar’s Chief Welcomes Member Vote, CAL. ST. B.J., Nov. 1995, at 5 (discussing leadership sensitivity to bar association dues).
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reputations have helped the associations develop cooperative ties with other legal organizations and have facilitated relations with courts and government agencies. The associations' reputations usually assure a serious hearing when association representatives make statutory or other law-reform proposals.\(^{34}\) It helps, of course, that many of those whom the associations seek to influence are lawyers and association members.

In comparison to large business corporations and many government agencies, the major comprehensive bar associations' financial resources are limited. As with many other nonprofit organizations, therefore, bar associations must rely heavily on nonfinancial resources, especially volunteer services, to achieve their goals. Fortunately for the bar associations, their members are from a skilled profession, so those who volunteer their services are generally highly skilled.

II. ORGANIZATION

In addition to sufficient resources, bar associations need proper organization to carry on their activities most effectively. Poor organization results not only in waste and inefficiency but also increases the possibility of disruptive internal dissension. This Part examines the organizational structure common to most comprehensive bar associations. This structure, it is argued, significantly limits organizational effectiveness as it is conducive to weak leadership at the top and undue risk of inept performance below.

The major comprehensive bar associations typically follow a common organizational pattern, including membership-controlled governance, part-time unpaid members in leadership positions, and decentralized control over operations.\(^ {35}\) The full membership elects officers and a legislative body to head the association, and occasionally elects an executive board as well.\(^ {36}\) Significant control over association affairs, however, lies in semiautonomous subgroups of association members called sections and committees.\(^ {37}\) These subgroups have their own officers, and usually operate free from interference by the top leadership of the associations. The leadership usually does, however,

\(^{34}\) A bar association’s lack of influence with important figures and groups may hamper some of its reform efforts. For example, in the past, the lack of influence with local political figures and nolite bar groups by the Association of the Bar of the City of New York obstructed the adoption of some important reforms. See POWELL, supra note 1, at 193-211.

\(^{35}\) In its basic outline, the governance structure of the ABA resembles the usual bar association format: officers, a house of delegates, a board of governors, and sections, committees, and other member subunits. See generally ABA HANDBOOK, supra note 31, at 1-52. For a typical state bar association’s governance structure, see CONN. B. ASS’N CONST. arts. V-VIII.

\(^{36}\) The executive board has authority to act for the legislative body on many matters when the latter is not in session.

\(^{37}\) Some associations do not have member subgroups called sections but have committees that take over section functions. In addition to sections and committees, many associations have additional member subunits, such as task forces, boards, divisions, and commissions.
have the power to appoint section officers. Sections have their own meetings, frequently have their own publications, and often initiate their own law reform proposals.

Most sections concentrate on one specialty field of law practice, such as criminal law, taxation, or litigation, and members of these sections are often specialists in their field. Other sections, however, focus on different issues, for instance the concerns of young lawyers, senior lawyers, minority lawyers, or women lawyers; or the special concerns of solo and small firm practitioners, government lawyers, or lawyers employed by corporate law departments. In addition, there are sections on different aspects of professional practice such as law office management, alternative dispute resolution, and legal education and admission to the bar.

The principal purpose of most sections is to provide a forum in which association members with a special interest in a particular field of law may further their knowledge, develop contacts, and influence changes in the law. Sections are usually open to any association member upon payment of a separate section membership fee. Some of the larger associations have sections with more than one thousand members, and many bar associations have

38. Most bar associations make a special effort to attract young members. For example, the Chicago Bar Association's Young Members Section offers a variety of programs for its 11,000 members, including educational and career service seminars, athletic programs, social events, and a series of programs providing legal and nonlegal assistance to disadvantaged children in the Chicago area. See Elizabeth E. Lewis, Thoughts From the Chair, CBA Rec. (Chicago Bar Association), Jun.-Jul. 1995, at 46; Linda M. Rio, Thoughts From the Chair, CBA Rec. (Chicago Bar Association), May 1995, at 40; cf. Jeffrey M. Paskert, As Always Public Service is Primary Mission of Division, Nat'L L.J., Aug. 5, 1996, at C21 (discussing activities of ABA's Young Lawyers Division).

39. For example, the Connecticut Bar Association's Senior Lawyers Section; the ABA's Senior Lawyers Division.

40. For example, the Texas Bar Association's Committee on Opportunities for Minorities in the Profession.

41. For example, the California State Bar's Women in the Law Committee. On the activities of this committee, see Karen L. Bizzini, The State Bar Committee on Women in the Law, L.A. Law., Apr. 1995, at 13.

42. For example, the ABA's General Practice, Solo and Small Firm Section; the ABA's Standing Committee on the Solo and Small Firm Practitioner. On the efforts of these bodies, see Robert A. Stein, A Solo and Small Firm Majority, A.B.A. J., May 1996, at 105. For similar efforts by a local bar association, see Douglas M. Case, The Solo and Small Firm Practitioners Committee, CBA Rep. (Cincinnati Bar Association), June 1995, at 8.


44. For example, the Connecticut Bar Association's Corporate Counsel Section.

45. For example, the ABA's Section on Law Practice Management; the Wisconsin State Bar's Section on Law Office Management.

46. For example, the State Bar of Michigan's Section on Alternative Dispute Resolution.

47. For example, the ABA's Legal Education and Admission to the Bar Section. This section, established in 1893, was the ABA's first. See generally Susan K. Boyd, The ABA's First Section, Assuring a Qualified Bar (1993).

48. Each of the ABA's sections has more than 3000 members. See Stein, Mission: Membership, supra note 13. The largest section, Litigation, has more than 56,000 members, although the Young Lawyers Division, which is analogous to a section, has more than 107,000 members. See id. For reports on ABA section and division activities, see Paskert, supra note 38, at C3-C21. One of the larger state
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twenty or more sections. In general, a majority of association members belong to at least one section. Large sections carry out many of their activities through their own subcommittees.

Unlike sections, committees are typically composed of members appointed by the bar association leadership. The primary goal of these committees is rarely to benefit their members, but rather to provide services to the general membership or to some outside public group, to maintain cooperative relations with other professions or organizations, or to develop and encourage needed law reforms in a particular area. Typical committees include those on Professional Ethics, Continuing Legal Education, General Practice, Judicial Selection, Lawyer Referral Services, and Legal Aid.

Major bar associations generally have as many or more committees as they do sections. The range of committees is usually wide and differs from association to association. Committees are normally much smaller than sections, generally having fifty or fewer members. Many committees issue reports, have their own publications, and lobby or litigate to further their objectives. Many committees, especially those overseeing programs with considerable administrative work, have staff employees assigned to help them.

In addition to sections and permanent standing committees, major comprehensive bar associations have a miscellany of other organizational subunits. Occasionally, ad hoc task forces may be created to investigate a particular problem and report back to the leadership or take other action. Units of staff employees reporting to the executive director or other full-time
staff officials may be assigned to execute the more mundane administrative operations of an association, like making arrangements for association meetings and conferences, distributing association publications, maintaining current membership records, and billing members for annual dues and section fees. The largest associations, especially the ABA, have complex administrative staff structures for association operations. This complexity is due to both the large size of memberships and the broad range of programs that these associations administer.

Many of the comprehensive bar associations have close ties with local, state, or national foundations. These foundations, which are funded largely by donations and bequests, often contribute substantially to bar association projects. The American Bar Endowment, for example, an organization established by the ABA to advance research and education on the administration of justice, is the principal funding source of the American Bar Foundation, the largest empirical research center on law and legal institutions in the United States. Similar foundations have been established by other bar associations.

The American Bar Foundation is not as useful as it could be, either to the ABA or to bar associations generally. Bar associations need more accurate and complete data on the effectiveness of American legal institutions and the problems facing both American lawyers and the agencies and organizations with which American lawyers regularly interact. While some American Bar Foundation studies are of value to bar associations, many are useless to the associations, whatever merit they may have as contributions to social science.

55. The ABA, for example, has a Service Center to answer member inquiries, a Legal Technology Resource Center to aid members in effective use of office computers and other equipment, and a Member Advantage Program to give member discounts on many goods and services, from rental cars to fax machines. See TEN SMART WAYS TO MAXIMIZE YOUR ABA MEMBERSHIP, supra note 23. The ABA also administers a Fund for Justice and Education, which raises over $20 million a year to aid ABA public service programs. See ABA HANDBOOK, supra note 31, at 70-73.
58. Studies made under the auspices of the American Bar Foundation by Barbara Curran, Terence Halliday, John Heinz, and Robert Nelson have been particularly relevant to bar association concerns.
59. See, for example, the recent listing of working papers, publications, and presentations by Foundation personnel in ABF REPORT, supra note 56, at 23-30. One measure of the foundation’s social scientific bias is the disproportionate number of its research staff with Ph.D.s in history or the social sciences rather than law degrees. Of the 24 members of this staff in 1995, 15 were lacking in law degrees. See id. at 35. In addition, most of the foundation’s visiting research fellows were social scientists. See id.
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While a significant organizational feature of the comprehensive bar associations is their independence, many of them maintain connections with other organized bar groups. The ABA, for instance, maintains cooperative ties with state and local bar associations—and even with some specialty bar associations. The association distributes useful information and commentary to state and local bar groups and has both a division and a committee to promote and coordinate contact with state and local bar associations. In addition, the ABA's legislative body, the House of Delegates, has representatives from state, larger local, and some specialty bar associations. State bar associations also make outreach efforts, including meetings between state and local bar leaders, and newsletters and other publications directed to local bar association members.

Despite these efforts by the ABA and other associations, bar association activities remain poorly integrated and unduly duplicative. In addition, the exchange among associations of information pertaining to many matters of common concern is inadequate. Data on the legal profession and information on the successes and failures of organizational and programmatic innovations have often been insufficiently circulated. As a result of these problems, the associations are less efficient and influential than they might be, particularly in education programs directed at lawyers and the public, and in law reform efforts at the federal level.

One form of bar association organization, the unified state bar, has become a contentious issue in some states where it has been instituted. Many lawyers in unified bar states are opposed to mandatory membership due to positions taken by the associations on public and professional issues, the regulatory restrictions and obligations imposed on members, and the amount of annual dues that the associations charge. Opposition to the unified bar format has

60. Such materials include The Bar Leader, a bimonthly periodical published by the ABA, and the Bar Activities Inventory, a compilation of detailed statistical data about state and local bar associations. The most recent version of the latter was issued in 1995. See ABA INVENTORY, supra note 2.

61. The division is the Division for Bar Services. The committee is the Bar Activities and Services Committee. On the division, see ABA HANDBOOK, supra note 31, at 9; and on the committee, see id. at 40.

62. Each state bar association and each local bar association with more than 2000 members is entitled to a minimum of one delegate. The largest state associations, however, can have up to six delegates. See ABA CONST. § 6.4. The specialty bar associations and other organizations entitled to delegates are listed in id. § 6.8. The representation of other organizations in the House of Delegates was authorized in 1936 in response to calls for a federation of bar associations similar to that in the medical profession. See HURST, supra note 8, at 291-92.

63. A number of states have a separate bar presidents' committee or council composed of local bar presidents and chaired by the state bar president or president-elect. See, e.g., Report of the Connecticut Council of Bar Presidents, in CONNECTICUT REPORTS, supra note 53, at 42.

64. ABA meetings and ABA publications like The Bar Leader fill some of this need for the exchange of information, but much more is needed.

65. For an excellent analysis of the unified bar concept, see Theodore J. Schneyer, The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case, 1983 AM. B. FOUND. RES. J. 1. Schneyer concludes that the unified bar should be abolished. Wisconsin's experience with the unified
been particularly strong in California and Wisconsin. In the spring of 1996, pursuant to a legislative directive, a plebiscite of all California lawyers was held to determine if the unified form should be retained. Sixty-five percent of those voting supported the unified bar. In 1988, the Wisconsin Supreme Court suspended mandatory lawyer membership in its state bar after a federal district court ruled that such membership violated the First Amendment. Despite considerable resistance among lawyers, the Wisconsin court reinstated the unified bar in 1992 after the United States Supreme Court upheld the constitutionality of this form in Keller v. State Bar of California. Opposition to the unified bar concept has surfaced recently in other states as well.

The problems of unified bars have been aggravated by judicial decisions. Principal among these is the Court's 1990 decision in Keller, which, while upholding the constitutionality of the form, held that the First Amendment prohibits a unified bar from using a member's dues to fund political or ideological activities with which the member disagrees. The Court held that
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a unified association may only use member dues to fund activities germane to
regulating the legal profession and to improving the quality of legal services,
as these activities are consistent with the purposes of the unified form.73

Efforts to comply with Keller by many of the unified bar associations have
caused confusion, expense, and increased dissatisfaction with the unified
format.74

In sum, the major comprehensive bar associations, whether unified or not,
are not organized in a way that maximizes their efficiency or efficacy. The
structure and nature of the highest positions in the organization mean that the
top leadership is often weak, while the lack of coordination between different
associations results in duplication and inefficiency. It remains to be seen how
these issues affect the particular programs of each association, if at all. Part III,
therefore, examines and evaluates the kinds of programs usually pursued by
major comprehensive bar associations.

III. PROGRAMS

The major comprehensive bar associations seek to fulfill their policy
objectives through an extraordinary number and variety of programs relating
to the justice system generally, and to the legal profession in particular. While
the bar associations have the potential for great influence, their programs have
mixed records of success.

The large number and variety of programs conducted by the major
comprehensive bar associations reflect the associations’ perception of
themselves as representatives and guardians of the entire legal profession. In
addition, the associations’ objective of building and sustaining large and

Please Check Your First Amendment Rights at the Bar: The Problem of State-Mandated Bar Dues and
Compelled Speech, 50 WASH. & LEE L. REV. 1833 (1993). For a review of other case law on unified
bar associations, see John S. Skilton, Litigation Against the Unified Bar, B. LEADER, Sept.-Oct. 1994,
at 12.

73. See Keller, 496 U.S. at 14.

74. Some unified bar associations have sought to comply with Keller by raising non-dues funds or
by introducing dues reduction options. In Crosetto v. State Bar, 12 F.3d 1396 (7th Cir. 1993), the
Seventh Circuit upheld a Wisconsin rule enabling any state bar member to withhold the percentage of
dues that the state bar asserts are for political or ideological activities. On post-Keller developments
in Wisconsin, see John S. Skilton, President’s Perspective, To Speak or Not to Speak, WIS. LAW., Oct.
1995, at 5. In Florida and Michigan, the state bar associations adapted to Keller by prohibiting a range
of bar lobbying and other activities. See Smith, supra note 65, at 50-58.

Proponents of the unified bar continue to maintain that unified bars can provide more and better
service to the legal profession and the public than voluntary bars can provide because they possess more
funds and greater authority. See, e.g., Carson, supra note 65, at 12; Harriet L. Turney, A Unified Bar,
Financial Support of a Bar Association and the Attorney’s First Amendment Rights: A Theoretical
Analysis, 66 NEB. L. REV. 762, 768-69 (1987); Schneyer, supra note 65, at 96-106; James Towery,
A ‘Yes’ Vote Means a Loss of Power, CAL. ST. B.J., May 1996, at 7; James Towery, Scare Tactics,
inclusive memberships contributes to the range of programs offered.\textsuperscript{75} Indeed, even the comprehensive associations that formerly were elitist and restrictive in their memberships are now seeking to become more inclusive by attracting members from all professional specialties and kinds of law offices and by increasing the portion of their memberships composed of women and ethnic and racial minorities.\textsuperscript{76}

The number and range of bar association programs is best revealed by a brief review of the kinds of programs most commonly offered. The next few Sections, therefore, highlight the kinds of programs offered and examine how effectively bar associations achieve their policy goals. In particular, these Sections examine legal education, professional conduct, the unauthorized practice of law, legal services for the poor and persons of moderate means, litigation, and substantive law reform.

A. Legal Education

All major comprehensive bar associations are heavily involved in the post-admission legal education of lawyers. Some of these educational programs are open to lawyers generally while others are available only to the offering association’s members. Continuing legal education programs are widely offered and available to any lawyer who wishes to attend.\textsuperscript{77} A course fee is usually charged for these programs.\textsuperscript{78} CLE credit is given in those jurisdictions with

\textsuperscript{75} In addition to the programs they offer, all the major comprehensive bar associations offer some goods and services—such as office equipment, telephone service, automobile rentals, and equipment leasing—at reduced cost. Some state bar associations have helped form insurance companies to provide malpractice insurance to lawyers on favorable terms. See, e.g., Thomas V. Flaherty, President’s Page, \textit{Sources of Parental Pride}, W. VA. LAW., Sept. 1995, at 4 (describing formation in late 1980s of Attorneys Liability Protection Society by consortium of state bar associations); see also 1995 \textit{Report of the Professional Liability Fund}, ORE. ST. B. BULL., Nov. 1995, at 33 (commenting on mandatory malpractice insurance provided to all active Oregon lawyers). A few bar associations, mostly large local associations, also provide substantial law library facilities and restaurant facilities to their members.

\textsuperscript{76} On the evolution of one major local bar association, the Association of the Bar of the City of New York, toward a larger and more inclusive membership, see generally \textit{Powell, supra} note 1. As the number of female lawyers has rapidly increased, major comprehensive bar associations have made special efforts to fill leadership posts and other positions of responsibility with women. Roberta Cooper Ramo, for example, became the first female president of the ABA when she was elected in 1995, and women led the Connecticut Bar Association for three successive years, from 1992 to 1995.

Many associations have also sought to publicize and discourage gender discrimination within the legal profession generally. See, e.g., \textit{ABA Comm’n on Women, Elusive Equality: The Experiences of Women in Legal Education} (1996); \textit{ABA Comm’n on Women in the Prof’n, Unfinished Business: Overcoming the Sisyphus Factor} (1995). Similar efforts have been made with respect to racial discrimination in the profession. See, e.g., \textit{The Arizona Minority Counsel Program: Melting the Plexiglass Ceiling}, ARIZ. ATT’Y, Feb. 1996, at 46.

\textsuperscript{77} See \textit{ABA Inventory, supra} note 2, §§ 3-VII, 4-VII (compiling statistical data on bar association CLE programs). Bar associations do not have a monopoly on CLE; other organizations, like the American Law Institute, and some law schools offer their own CLE courses as well. See Lawrence Osborne, \textit{CLE Business: Academic Centers and the Sun-Blessed Cashing In}, NAT’l L.J., Feb. 19, 1996, at 15.

\textsuperscript{78} See Susan O. Scheutzow, \textit{Quality CLE: A Tradition of Our Bar Association}, CLEVELAND B.J., June-July 1995, at 16 (stressing that CLE fees are major source of bar association income). The Los
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CLE requirements, and credit toward certification granted in jurisdictions with lawyer certification programs. The subjects of instruction vary greatly, but they often cover developments in an important field of law or useful techniques in a particular area of practice. The traditional CLE approach offers practical, hands-on information and advice likely to help in representing clients. Supplementary instructional materials are distributed in many CLE courses; some courses also make available instructional audiotapes or videotapes.

While many of these materials can be used for self-study, CLE offerings commonly have one or more class instruction sessions. Most instructors are experienced practitioners, though occasionally a law professor or judge will act as a teacher. Classes are generally given in lecture form and only rarely are examinations administered. Occasionally, bar associations have offered special CLE programs for those willing to take on pro bono cases but lacking a background in poverty law matters.

In the thirty-eight states with CLE requirements, all but a few exempted lawyers must regularly take CLE courses. In most of these states, the requirement calls for fifteen hours of instruction each year in a wide range of approved courses. Much of the mandatory CLE instruction is given by or

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79. In 1995 and 1996, for example, the New York State Bar Association held over 225 CLE seminars on 42 subjects at various locations in the state. These seminars covered such subjects as estate planning and will drafting; the commencement of civil litigation; basic criminal practice; the litigation of automobile accident cases; New York gains, transfer and mortgage taxation; federal and state commercial litigation; and legal aspects of trade in the Americas. See NYSBA: Resources for Professional Development, in NYSBA REPORT TO THE MEMBERSHIP 10 (pamphlet), included in N.Y. ST. B.J., July-Aug. 1996, at 32.

80. The State Bar of Wisconsin publishes books on Wisconsin practice and is also the nation's largest producer of video training tapes for law practice management, law office training, and client education. In a recent ten-year period, the association distributed 25,000 videotapes, many to law firms outside Wisconsin. See Wis. LAW., Nov. 1994, at 40 (advertisement). More typical of state bar association self-study programs is that of the Connecticut Bar Association, which offers nearly fifty packages of videotapes and supplemental written materials on such topics as drafting contracts, estate administration, title searching, elder law practice, and accounting for lawyers. A complete list of offerings appears in CONNECTICUT B. ASS'N, CONTINUING LEGAL EDUCATION SELF STUDY PACKAGES (1995).


82. The Idaho Bar Association, for example, approves programs for which mandatory CLE credit will be given. A total of 932 CLE programs throughout the United States has been approved for credit in Idaho. See ADVOCATE (Idaho Bar Association), Sept. 1995, at 22 (listing CLE programs). In some states, lawyers are required to take instruction in professional responsibility as part of their CLE programs. See CLE J. & REG., Mar. 1995, at 17. All law schools accredited by the ABA are required to teach professional responsibility as well. See STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 302 (1991). In California, lawyers who have been disciplined are required to attend an eight-hour ethics course and to take an examination, unless otherwise ordered by the state supreme court. See Discipline Now Requires Ethics School, CAL. ST. B.J., Nov. 1995, at 29.
under the auspices of bar associations. In recent years many CLE programs have been offered by the ABA, in conjunction with state and local bar associations, through closed-circuit television at numerous sites around the country. Some associations also administer specialist lawyer certification programs with instructional and examination components. In addition, some bar associations have established mentoring programs so that young lawyers can seek the help of experienced practitioners in establishing their practices.

While additional lectures, workshops and educational publications are not formally included as CLE offerings, bar associations do provide them for members. Advanced specialist education and annual membership meetings with educational sessions are testimony to the importance of education to bar associations. Indeed, expanding member knowledge of the law and legal institutions is a major objective of bar associations whether through formal CLE programs or otherwise.

This objective extends to future lawyers as well, through association involvement with law school education. A bar association will occasionally provide moot court or other instructional assistance to law schools, and some offer financial assistance to these educational institutions. The most significant aspects of bar associations' involvement with law schools, however, are the ABA's long-standing program of setting law school accreditation standards, approving schools that are in accord with these standards, and making periodic accreditation inspections of most schools. In most states,

83. See generally Standards for Accreditation of Specialty Certification Programs for Lawyers (1992). Specialist certification of lawyers resembles board certification of physicians: While certification does not usually provide for exclusive practice rights, it can aid in attracting clients. In California, where certification is available in eight fields, there are 3000 certified lawyer specialists. See 449 Attorneys Pass Exam to Be Certified as Specialists, CAL. ST. B.J., Feb. 1996, at 3. In Florida, where the state bar allocates certification responsibility to specialist committees, there are 11 specialist fields. See Standing Policies of the Board of Legal Specialization and Education, Board Certified Lawyers, FLA. B.J., Sept. 1995, at 47.

84. See, e.g., Freddie Baird, A Step in the Right Direction: Mentor Program for Lawyers, 58 TEX. B.J. 144, 144-46 (1995) (discussing mentoring program of State Bar of Texas); Ken Howard, Mentoring Program Will Aid Transition from Law Student to Lawyer, ADVOCATE (Idaho Bar Association), Apr. 1995, at 6 (discussing similar program in Idaho).

85. In Georgia, for example, a state bar committee holds orientation sessions on professionalism for first-year students in four Georgia law schools. See President's Report, GA. ST. B.J., Fall 1994, at 48.


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statute or court rules mandate that only graduates of ABA approved law schools may take the bar examination and become qualified to practice law.87

Recently, the ABA has become involved in another significant effort to influence law school education. The impetus for this endeavor came from proposals made in a 1992 book-long report by an ABA task force.88 The report, often referred to as the MacCrate Report after its chairman, distinguished New York City lawyer and former ABA president, Robert MacCrate, has generated extensive discussion among practicing lawyers and law teachers. Among other things, the report strongly urges that law schools give more attention and care to developing lawyering skills and values in the training of their students. It also suggests that more consideration be given to skills and values instruction in the law school accreditation process. While the report is consistent with a growing movement toward increased emphasis on skills training by law schools, it has elicited a negative reaction from many in the law school community.89 There is an often unstated opinion among many law teachers that the practicing bar should not dictate to law schools what or how to teach.

Bar associations do not restrict their legal educational efforts to lawyers and law students. Many associations, for example, have instituted informational programs directed to elementary, high school or college students,90 designed to increase respect for the law and legal institutions.91 And there are programs directed to community groups or the public at large intended to provide free


In 1996, another ABA body, following a survey of law school ethics and professionalism courses and programs, made detailed recommendations for enhanced professionalism training at the undergraduate, law school, and post-admission levels. See ABA SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM (1996) [hereinafter TEACHING AND LEARNING PROFESSIONALISM]. The Committee viewed its report as an extension of THE MACCRATE REPORT. See id. at 1.


90. See ABA INVENTORY, supra note 2, §§ 3-XII, 4-XII.

advice and assistance over the telephone.92 One of the main objectives of these education programs is to respond to media attacks on the legal profession that the associations consider baseless.93

Bar association educational efforts directed at licensed lawyers are of mixed educational value. They clearly help to fill a major need, as legal education should not end with law school. But the programs typically offered by bar associations are most helpful to lawyers recently admitted to practice or to those in the process of shifting specialties. Except as a means of keeping up with new developments, there is little that the experienced practitioner can learn from the usual how-to-do-it kind of educational presentation. Other weaknesses in bar association education are that many presentations lack thorough preparation, and little time is accorded to meaningful audience participation. Despite the advantages of continuing education as a bar association funding device or as a public relations ploy intended to show that lawyers are keeping current with new developments in the law, making CLE mandatory has not expanded the learning process effectively. Where it exists, the benefits of required attendance are often undermined by the limited number of required credit hours and the limited nature of learning demands.

In the other highly important sphere of legal education, education by the law schools, bar association influence is quite limited. Although historically the ABA was a powerful force in establishing higher admission, staffing, library, and teaching standards for American law schools,94 as the law schools became more powerful and the Association of American Law Schools became their primary representative body, the influence of the ABA in legal education declined. In sustaining law school accreditation standards generally favored by the Association of American Law Schools and most of its members, however, the ABA continues to be a valuable ally. But the significance of the ABA’s accreditation criteria may be weakened by a recent antitrust consent decree, resulting in a possible cutback in standards by a number of law schools.95

Overall, the effectiveness of the comprehensive bar associations in furthering legal education varies. The associations provide a significant number of helpful educational opportunities of which many practicing lawyers take advantage to improve their knowledge and ability. But the educational quality

92. See ABA COMM’N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS 101-03 (1995); ABA INVENTORY, supra note 2, §§ 3- XII, 4-XII. Some associations also publish brochures for lawyers to give to clients to help answer common legal questions. See, e.g., LA. B.J., Aug. 1995, at 132 (listing Louisiana State Bar Association brochures); MAINE B.J., Mar. 1995, at 83 (listing Maine State Bar Association brochures).
95. See supra note 86.
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of offerings differs considerably. The published and taped materials generally are excellent; many of the in-person lecture presentations are mediocre. As they now stand, mandatory CLE programs are a waste of time for many of those required to attend.

B. Professional Conduct

Comprehensive bar associations have also given extensive attention to encouraging and enforcing ethical and professionally responsible behavior by members of the bar. Different programs exist for dealing with different aspects of this concern. The Model Rules of Professional Conduct, drafted by an ABA commission, the Kutak Commission, and adopted in 1983 by the ABA House of Delegates, set forth in considerable detail how lawyers should behave in a broad range of professional situations. With some variation from state to state, the Model Rules have been adopted as rules of court in most states.

A minority of states still follow an earlier set of model standards, the Model Code of Professional Responsibility, which was adopted by the ABA in 1969.

Questions have arisen in a host of situations as to what the Rules and the Code mean and how they should be applied. A considerable body of case law has developed construing the Rules and the Code, and a few provisions have been held unconstitutional. To clarify ambiguous sections of the Rules or Code, it is a common practice for the professional ethics committees of bar


97. Many of the changes made to the Model Rules in the course of adoption were proposed by state or local bar associations.

98. California is an exception, having adopted neither the Model Rules nor the Model Code. In many ways, however, the California Rules of Professional Conduct resemble the Model Rules and Model Code.

associations to give written interpretive opinions. These opinions, though not binding, are frequently cited favorably by the courts. Moreover, if the opinions are adhered to, those who requested them are unlikely to be charged with unprofessional conduct. The usual sanctions available for Rule or Code violations are disbarment, suspension from practice for a period of time, or reprimand. These sanctions are often publicized in bar journals and official court reports.

As the Model Rules stress what lawyers must do rather than what might be more ethically desirable, the ABA and some of the other comprehensive bar associations have prepared creeds of professionalism to guide further lawyers in their conduct with clients and others. The creeds are much shorter than the Model Rules or Model Code and, unlike the latter, are generally considered aspirational rather than obligatory. They have had much less impact on lawyers’ behavior than the Model Rules or Model Code. The creeds raise problems due to the lack of unanimity about ideal lawyer behavior. In addition, it is not clear whether the creeds will remain fully voluntary or whether the courts will consider them relevant authority in disciplinary cases, thereby giving them a mandatory aura.

The major comprehensive bar associations have not only been heavily involved in developing and interpreting standards of professional conduct for lawyers, but many of the associations also play significant roles in enforcing the standards. In some states, including some of the largest, the disciplinary process is principally a state bar association responsibility, although the state’s high court may and commonly does determine the final sanction on appeal.


101. For statistics on lawyer disciplinary sanctions, see infra note 137.

102. About half the state bar associations, many local associations, and even some courts have promulgated creeds of this sort, often referred to as pledges or oaths. See Rob Atkinson, A Dissenter’s Commentary on the Professionalism Crusade, 74 TEX. L. REV. 259, 278 n.74 (1995). For the ABA Pledge of Professionalism, approved in 1988, see THOMAS D. MORGAN & RONALD D. ROTUNDA, 1996 STANDARDS OF PROFESSIONAL RESPONSIBILITY 623-33 (1996).

103. See Atkinson, supra note 102, at 303-17.

104. In California, although ultimate authority over lawyer discipline is in the state supreme court, much of the responsibility for the lawyer disciplinary process is in the State Bar of California, a unified state bar association. See CAL. SUP. CT. R. 951 to 954 (1996); William T. Gallagher, Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar, 22 PEPP. L. REV. 485, 593-96 (1995). California is unique in having a separate state bar court. The court has seven full-time judges and its own review panel. See CAL. BUS. & PROF. CODE §§ 6085.5, 6086.65 (West 1990). Alaska and Florida are among the other states with substantial bar association responsibility for lawyer disciplinary enforcement. See ALASKA B.R. 10 (1986); FLA. SUP. CT. R. 3 to 3.2 (1993). In a few states, the state bar’s board of governors retains adjudicative functions. See LAWYER REGULATION FOR A NEW CENTURY 93 (Report of the ABA Comm’n on Evaluation of Disciplinary Enforcement 1992) [hereinafter MCKAY COMM’N REPORT]. In Mississippi, the state bar association has developed an innovative consumer assistance program to deal with minor complaints against lawyers, the more serious complaints proceeding to traditional disciplinary institutions. See Glen Waddle, The Mississippi Bar Consumer Assistance Program—How It Works, MISS. LAW., Mar.-Apr. 1995, at 12.
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In these states, complaint processing, investigation, prosecution, and initial determination of sanctions are state bar association responsibilities.¹⁰⁵ These tasks constitute one of the associations' most expensive operations.¹⁰⁶ The current trend, however, is for lawyer disciplinary enforcement functions to be performed by government bodies rather than by the bar. These government bodies screen and investigate complaints, and in cases with sufficient evidence of a serious infraction, seek disbarment or other sanctions from the courts. Whether or not bar associations are deeply involved in lawyer disciplinary enforcement, however, most states fund their lawyer disciplinary systems almost entirely from assessments on lawyers.¹⁰⁷

Over the past twenty-five years or so, the ABA has had considerable influence on the expansion and restructuring of the lawyer disciplinary process. This influence has come largely through the reports and recommendations of two highly respected ABA bodies, the Clark Committee¹⁰⁸ and the McKay Commission¹⁰⁹ and from the ABA's Model Rules for Lawyer Disciplinary Enforcement.¹¹⁰ The ABA's proposals have helped persuade government authorities in some states to provide lawyer disciplinary systems ultimately controlled by the judiciary, not by legislatures or bar associations,¹¹¹ and enforced by full-time disciplinary counsel.¹¹² In many states, however, the existing systems still fall short of what the ABA considers desirable.

¹⁰⁵. This, of course, does not extend to some kinds of lawyer misconduct, like criminal prosecutions, contempt matters, and malpractice cases, in which bar associations generally have no involvement. Many state bar associations are involved with malpractice insurance, however. See infra notes 123-124 and accompanying text.

¹⁰⁶. The State Bar of California spends more money on disciplinary matters than any other state bar association. In 1996, for example, 70% of its $46 million budget was earmarked for lawyer discipline. See Budget: Courage or Folly, supra note 26. By comparison, in Oregon, an adjoining unified bar state, only 32.4% of bar members' dues is allocated to lawyer discipline. See Celene Green, A Glance at Your OSB, OR. ST. B. BULL., Nov. 1995, at 5 (insert).

¹⁰⁷. See McKay Comm'n Report, supra note 104, at 90.

¹⁰⁸. The Clark Committee, which made its report in 1970, gained its name from its chairman, former United States Supreme Court Justice Tom C. Clark. The committee's formal name was the Special Committee on Evaluation of Disciplinary Enforcement.

¹⁰⁹. The commission was called the McKay Commission after its initial chairman, Robert McKay. The commission's formal name was the Commission on Evaluation of Disciplinary Enforcement. In its appendix, the commission's report reviewed the considerable progress made in implementing the Clark Committee's recommendations. See McKay Comm'n Report, supra note 104, at 89-129.

¹¹⁰. These rules were adopted by the ABA House of Delegates in 1989, replacing Standards for Lawyer Disciplinary and Disability Proceedings (1979) and Model Rules for Lawyer Disciplinary Enforcement (1985). Also, an ABA commission has developed written Standards for Imposing Lawyer Sanctions (1986).

¹¹¹. There is resistance in some states, however, to reducing substantially bar association responsibility for the lawyer disciplinary system. In Washington, for example, a joint task force of the bench and bar recently rejected a proposal, made by an ABA audit team, to shift responsibility for lawyer discipline from the bar association to the state supreme court. See Lindsay T. Thompson, Refining Lawyer Discipline in Washington: A Multifaceted Approach, WASH. ST. B. NEWS, Aug. 1995, at 15.

¹¹². In California, there are more than 60 such counsel; in New York, there are more than 30; and Florida and Pennsylvania each have more than 20. See McKay Comm'n Report, supra note 104, at 90.
There are other programs commonly carried on by comprehensive bar associations that also concern the professional behavior of lawyers. These programs aim either at reducing possibilities of professional misconduct or at reducing its adverse consequences. The programs include character and fitness screening of applicants to the bar, aiding lawyers with substance abuse problems, providing client security funds, and sponsoring lawyer malpractice insurance. Bar associations have a long history of investigating the moral fitness of those seeking admission to the bar. The purpose of these screening procedures is to exclude from admission those who are perceived as professional conduct risks. In some states, these character and fitness investigations are conducted by state bar association representatives. The question of the requisite moral fitness to practice law has occasionally raised difficult questions. Courts have had to consider, for example, whether admission should be denied based on past affiliation with the Communist Party, on evidence of sexual misconduct with minors, or on suspension from law school because of plagiarism.

Many bar associations also make efforts to identify and provide peer support and counseling referrals to lawyers with substance abuse problems. These programs not only help save the careers of many impaired lawyers, but they reduce the risks of professional misconduct. Client protection funds, available to reimburse clients for lawyer misconduct, like misappropriation of client property, also exist in nearly all states. In many instances, state bar associations administer these funds, financing them with bar dues or lawyer assessments. Most of these funds have caps on total payment per claim, ranging from $5000 to $200,000. Many also have caps on how much will

113. See WOLFRAM, supra note 98, at 858-64; Deborah L. Rhode, Moral Character as a Professional Credential, 94 YALE L.J. 491 (1985).
115. See, e.g., Konigsberg v. State Bar of California, 353 U.S. 252 (1957) (denying admission to bar applicant because of alleged sexual relations with 14-year-olds when applicant was their teacher, although criminal charges had been dismissed).
117. See, e.g., In re Zbiegien, 433 N.W.2d 871 (Minn. 1988) (holding single incident of plagiarism in law school not sufficient to deny applicant admission).
118. See, e.g., State Bar of Texas Annual Committee Reports, 58 TEX. B.J. 732, 737 (1995) (reporting that Texas Lawyers' Assistance Program has helped more than 1500 attorneys recover from substance abuse problems since 1989).
119. See ABA CTR. FOR PROF'L RESPONSIBILITY, CLIENT PROTECTION FUND SURVEY at iii (1993). As of 1993, all states except Maine and North Dakota had client protection funds. See id. at iv-v.
120. See id. at iv-v.
121. See id. at vi.
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be paid per lawyer against whom claims are made, ranging from $5000 to $800,000.122

Client security funds raise a troublesome question: Why should lawyers who behave pay for lawyers who do not? This, of course, is a question raised by any form of mandated insurance coverage. Insurance marketed explicitly as lawyer malpractice insurance is, in fact, available everywhere in the United States, often sponsored by state bar associations.123 This insurance coverage is optional in all states except Oregon, where it is mandatory for lawyers practicing within the state.124

In approaching problems of professional conduct, bar associations have been influenced in recent years by a widely prevalent view among lawyers that the bar is losing its sense of professionalism.125 Just what is meant by professionalism is often vague, but a variety of common behavioral traits have been cited for evidence of its decline.126 Matters often stressed include the frequent lack of civility in lawyers' relations with opposing counsel and judges; overly aggressive and confrontational tactics in litigation; and excessive concern with profitability, causing both a decrease in client loyalty and internal law firm collegiality and an increase in advertising and other promotional efforts. According to these critics, law practice increasingly resembles business in its goals, operations, and sense of service. Many within the profession believe that bar associations have an obligation to help counter this trend.127

122. See id.
127. See, e.g., Comm'n on Prof'lism Report, supra note 125, at 271-90 (recommending that bar associations help in training newly-admitted law associates on ethical issues that arise in practice); TEACHING AND LEARNING PROFESSIONALISM, supra note 88, at 25-31. But see Ted Schneyer, Policy-
and fulfilling this obligation has become a significant motivation for bar association attempts to encourage and enforce more professionally responsible behavior. Some associations even have a separate committee to help improve lawyer professionalism. 128

The promulgation and interpretation of standards of professional conduct are among the bar associations' most successful and commendable activities, despite the problems and controversies pertaining to these programs. The standards themselves, most notably the Model Rules of Professional Conduct, are, generally speaking, a fair balance between competing interests and values. Most of the credit for this goes to the ABA and its drafting commission. While there are, of course, many ambiguities in the Model Rules and the Model Code, this is inherent in any extensive written compendium of legal requirements. Moreover, the ambiguities are gradually being reduced through interpretive opinions of courts and bar association committees. There also is significant opposition to some Rule and Code provisions on policy grounds, like the provisions (and supporting case law) that permit advertising by lawyers, 129 those pertaining to whistleblowing when a lawyer is aware of wrongdoing within a client organization, 130 and those requiring that lawyers disclose misconduct by fellow lawyers. 131

Efforts to enforce the Rules and the Code have encountered problems and, indeed, these efforts have been severely criticized. 132 The effectiveness of enforcement is restricted because of the cost and a desire to avoid intrusive inquiries. The process of uncovering violations is, therefore, limited largely to

\[\text{making and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study, 35 ARIZ. L. REV. 363 (1993) (arguing that resort to idiom of professionalism can have negative consequences for formulation of public policy on acceptable conduct by lawyers and law firms).}

128. \text{See, e.g., ABA HANDBOOK, supra note 31, at 49 (summarizing purposes of Standing Committee on Professionalism); Annual Report: Committees of the Florida Bar, FLA. B.I., June 1996, at 58 (reporting activities of Professionalism Standing Committee).}

129. \text{See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 to 2-103. Many lawyers oppose lawyer advertising because they assume that it contributes significantly to negative public perceptions of the legal profession. Recent studies, however, have shown that this widely prevalent assumption is incorrect. See William F. Hornsby, Jr. & Kurt Schimmel, Regulating Lawyers Advertising: Public Images and the Irresistible Aristotelian Impulse, 9 GEO. J. LEGAL ETHICS 325, 351-57 (1996) (summarizing results of ABA Commission on Advertising study).}

130. \text{See, e.g., MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 201-05 (1990) (critically evaluating MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13); Stephen Gillers, Model Rule 1.13c Gives the Wrong Answer to Corporate Counsel Disclosure, 1 GEO. J. LEGAL ETHICS 289 (1987) (same).}

131. \text{See, e.g., Michael J. Burwick, Note, You Dirty Rat! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct, 8 GEO. J. LEGAL ETHICS 137 (1994) (criticizing MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3).}

132. \text{See RICHARD L. ABEL, AMERICAN LAWYERS 143-50, 156-57 (1989); MCKAY COMM'N REPORT, supra note 104, at xv-xx. Professor Rhode has been one of the most severe critics of the lawyer disciplinary enforcement process. For a summary of her criticisms, see Deborah L. Rhode, Institutionalizing Ethics, 44 CASE W. RES. L. REV. 665, 694-700 (1994).}
complaints volunteered by clients and others. Most of these complaints come from clients dissatisfied with their lawyers' fees, or some other aspect of the lawyer-client relationship. When reviewed by screening personnel (who, in many states, are bar association committee members), most complaints are found to be groundless. This screening process, however, has been criticized as being inefficient, overly secretive, and unduly lenient. Inefficiencies, where they exist, are largely the result of staffing inadequacies, including undue reliance on lawyer volunteers or a dearth of paid employees.

Critics who say that the complaint screening process is overly secretive point to the fact that the names of the lawyers who have been charged and the charges against them are commonly not made public unless further enforcement action is pursued. It is also frequent practice not to disclose names and charges if a private reprimand alone is given. The rationale for these secretive practices is that publicizing complaints found to be groundless or indicating only very minor infractions can unfairly damage the reputation, and thereby the practice, of the lawyer charged.

Critics who say that the disciplinary enforcement process is too lenient point to the comparatively small number of lawyers each year who receive serious sanctions and the large percentage of complaints that are dismissed or result in only a private reprimand. The assumption is that these figures are strongly indicative of leniency. Moreover, this ostensible leniency is often attributed to favoritism allegedly inherent in an enforcement process that relies so heavily on professional self-regulation. Self regulation, it is claimed,
leads to self-serving results. These changes, however, have not been proven.
Moreover, it may be argued that a large measure of professional self-regulation
leads to more effective control due to the added authority and influence of
respected persons inside the profession.

The contributions of the major comprehensive bar associations, particularly
the ABA, in drafting and interpreting standards of lawyer professional conduct
have been very creditable. The associations' record in enforcing the standards
is less commendable, although in most states their role in enforcement, and
hence their responsibility for the process, has been greatly curtailed in recent
years.

C. Unauthorized Practice of Law

Lawyers have a substantial, but limited, legal monopoly over the right to
practice law, and the major comprehensive bar associations have been active
in attempting to protect and expand that monopoly. In almost every state, the
monopoly is backed by statutes or by court rules prohibiting the unauthorized
practice of law. In many states, unauthorized practice is a crime. 139

What is considered to be "the practice of law" is not always clear, but it
generally includes representing others before courts and administrative agencies
and providing legal advice or legal drafting services to others. Examples of lay
conduct judicially held to constitute illegal practice of law include legal advice
by an accountant to a client unrelated to auditing, bookkeeping or tax return
preparation; 140 preparation of legal documents by a real estate broker in
connection with the conveyance of real estate; 141 and legal advice by the
owner of a secretarial service to persons seeking uncontested divorces. 142

The principal rationale for excluding lay individuals and organizations from
practicing law is that consumers of legal services need to be protected from the
possible incompetence and dishonesty of lay legal service providers. 143 Not
only are consumers insufficiently informed to determine whether lay providers
are competent and honest, the risks are too great to allow them to make that
choice. The usual arguments given against lawyers' monopoly privileges are
that the monopoly results in clients paying higher than necessary legal fees;

139. See generally ABA COMM’N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW­
RELATED SITUATIONS, A REPORT WITH RECOMMENDATIONS 16-32 (1995) [hereinafter NONLAWYER
PRACTICE REPORT]; GEOFFREY C. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING 936-56
(2d ed. 1994); WOLFRAM, supra note 98, at 824-49.

According to Terence Halliday, the legal profession was more concerned with maintaining its
monopoly before the profession was firmly established and could take its market position for granted. See
HALLIDAY, supra note 1, at 347-56. This position assumes that monopoly benefits for much of the
bar are more firmly established than currently is true.


141. See Chicago Bar Ass’n v. Quinlan & Tyson, 21 N.E.2d 771 (Ill. 1966).

142. See Florida Bar v. Furman, 451 So. 2d 808, 809-10 (Fla. 1984).

143. See QUINTIN JOHNSTONE & DAN HOPSON, JR., LAWYERS AND THEIR WORK 174 (1967).
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that availability of substantial numbers of lay legal service providers could relieve the unmet legal service needs of low- and moderate-income persons; and that where lay providers are operating, legally or illegally, their clients appear to be satisfied with the services they are receiving. 144

The lawyers' monopoly over the right to practice law has often been under attack as unjustified or overbroad. Among the many troublesome issues raised by the monopoly are whether lay legal service providers would subject clients to such greater risks of incompetence, conflict of interest, and dishonesty that their exclusion from practicing law would be justified; whether any such risks would be sufficiently reduced by licensing lay providers, perhaps with demanding educational and examination prerequisites; and whether the cost to clients for satisfactory services would be less in most instances if made available by lay providers practicing independently. Stated differently, the basic issues are whether or to what extent the market for legal services should be open to lay providers. Would lay competition result in lawyers becoming more efficient and providing as good, or better, legal services at lower prices than without lay competition? Or would lay competition result in forcing out lawyers entirely from some important fields of law practice?

Based on available data, answers to the above questions can adequately be answered only by conjecture. However, it is clear that lay practice does not pose the same threat to all kinds of law practices. The threat is lowest to the kinds of practices engaged in by big law firms representing major business enterprises and individuals of great wealth than it is to the practices of lawyers representing ordinary people in such matters as real estate conveyances, administering decedents' estates, organizing small businesses, divorce and child custody cases, and tort claims.

Bar association efforts to protect or expand the lawyers' monopoly have included lobbying pressure to obtain statutes or court rules supportive of the monopoly, instigating litigation against alleged unauthorized practitioners to force termination of asserted illegal practices, and even agreements with other occupational associations in furtherance of the monopoly. In addition, the Model Rules of Professional Conduct and Model Code of Professional Responsibility expressly prohibit lawyers from engaging in or assisting others in engaging in the unauthorized practice of law.145 Bar association efforts in relation to the unauthorized practice of law are usually centered in unauthorized

144. See id. at 175-76; Roger Hunter & Robert Klonoff, A Dialogue on the Unauthorized Practice of Law, 25 VILL. L. REV. 6, 10-15 (1979); Deborah L. Rhode, The Delivery of Legal Services by Nonlawyers, 4 GEO. J. LEGAL ETHICS 209, 229-331 (1990).
145. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101(A), (B).
practice committees, which are frequently assisted by paid association counsel.146

Beginning about twenty years ago, the ABA and many of the other major comprehensive bar associations, took a much less active approach to the unauthorized practice of law.147 This decline in activity against unauthorized practice by so many major comprehensive bar associations is somewhat anomalous, since preserving and expanding the market share for its constituents—by reliance on legal protections when feasible—is such an important function of most professional and trade associations. The retreat seems to have been a reaction to rising popular opposition to monopolies generally, including those that are legally authorized. Furthermore, attempts by bar associations to protect the bar’s monopoly can result in damaging media campaigns by the bar’s opponents.148 In addition, there is some principled opposition within the profession to most monopolistic privileges granted lawyers.149 Bar associations have also encountered antitrust problems in some of their monopoly-related practices.150

In the past few years, there has been a revival of concern about unauthorized practice in some of the major comprehensive bar associations, including the ABA.151 Much of this renewed concern is over whether and how extensively lay legal technicians should be licensed to practice law independently. The term “legal technicians” refers to what in effect, are lay paralegals legally authorized to practice law on their own. There is growing interest-group support and some popular support for permitting legal technicians to practice law independently as a means of expanding the availability of legal services at acceptable cost. Licensing legal technicians to practice law independently is

146. Some unauthorized practice committees will, on request, give opinions on whether or not certain conduct constitutes unauthorized practice. See, e.g., Report of Committee on Unauthorized Practice of Law, in CONNECTICUT REPORTS, supra note 53, at 62.
147. In 1977, for example, the ABA ceased publication of the Unauthorized Practice News, a periodical that had served for many years as an important resource for bar groups trying to prevent unauthorized practice. As recently as 1992, only 22 state bar associations had active unauthorized practice committees. See STATE LEGISLATIVE CLEARINGHOUSE BRIEFING BOOK: UNAUTHORIZED PRACTICE OF LAW 96 (1992).
148. See Rhode, supra note 144, at 219.
149. See, e.g., Barlow F. Christensen, The Unauthorized Practice of Law: Do Good Fences Make Good Neighbors—Or Even Good Sense, 1980 AM. B. FOUND. RES. J. 159; Rhode, supra note 132, at 728; Rhode, supra note 144, at 222-33.
150. Law school accreditation and minimum fee schedules are two areas in which bar associations have encountered antitrust problems. See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (holding bar association minimum fee schedules subject to antitrust laws); supra note 86 (discussing recent antitrust consent decree restricting ABA’s accreditation standards). On Goldfarb, see WOLFRAM, supra note 98, at 40-42.
151. In Florida, for example, the state bar recently doubled the budget of its unauthorized practice of law department to almost one million dollars annually. See John A. DeVault III, President’s Page, Trusts, Adoptions, Divorces—Cheaper Without a Lawyer, FLA. B.J., May 1996, at 8. In Arizona, the revival of concern about unauthorized practice is evidenced by the state bar’s aggressive lobbying effort for a criminal unauthorized practice statute. See Michael D. Kimerer, President’s Message, UPL—The Fight Goes On, ARIZ. ATT’Y, Dec. 1995, at 8.
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very controversial. Licensing proposals have generated considerable support in some state legislatures and it appears that support efforts will increase. The threat to lawyers’ practices, and arguably to the quality of available legal services, is so substantial that it seems inevitable that bar associations will become increasingly involved in this escalating controversy. The ABA’s renewed concern over the lay practice problem manifested itself in the ABA’s appointment in 1992 of a diverse, sixteen-member Commission on Nonlawyer Practice to “conduct research, hearings and deliberations to determine the implications of nonlawyer practice for society, the client and the legal profession.” Special attention was given to the work of paralegals and legal technicians. The commission issued a detailed report in 1995 extensively surveying and analyzing nonlawyer activity in law-related situations but with a vague and indecisive set of recommendations.

Comparison of the ABA’s involvement in monopoly-related problems with that of its parallel organization in medicine, the American Medical Association (AMA), is instructive. In many respects the two organizations are strikingly similar. Established over one hundred years ago, they both are voluntary national organizations with less than half of those in their profession as members, and are similarly organized and run by their members with considerable help from employee support staff. They have many comparable programs on professional education, professional conduct, and furthering the public interest through advancing knowledge and advocating legal controls on matters within their respective fields of expertise. Both also have


153. See, e.g., NONLAWYER PRACTICE REPORT, supra note 139; Quintin Johnstone, Lawyer Obligations to Moderate-Income Persons, 21 CAP. U. L. REV. 845, 847-49 (1992); Kathleen Eleanor Justice, Note, There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law, 44 VAND. L. REV. 179 (1991). Most of the recent state bills to permit legal technicians to provide legal services have, however, died in committee. See NONLAWYER PRACTICE REPORT, supra note 139, at C-1.

154. NONLAWYER PRACTICE REPORT, supra note 139, at xiii.

155. See id. at 73-158. Among other things, the commission recommended that the role of traditional paralegals be expanded, that the ABA review its policies and standards to promote further the delivery of affordable legal services, and that states adopt an analytical approach to the regulation of nonlawyer activity, measuring such variables as the risk of harm and the ability of consumers to evaluate qualifications. For a summary of the commission’s recommendations, see id. at 11-12.

156. Of the approximately 650,000 licensed physicians in the United States, about 38% are AMA members. See HOWARD WOLINSKY & TOM BRUNE, THE SERPENT ON THE STAFF: THE UNHEALTHY POLITICS OF THE AMERICAN MEDICAL ASSOCIATION 5-6 (1994). In addition, the AMA has about 32,000 medical student members. See id. The AMA has a support staff of about 1200. See id. at 8. For comparable figures on the legal profession, see supra notes 13-14 and accompanying text.

157. For discussions of the AMA, see generally FRANK D. CAMPION, THE AMA AND U.S. HEALTH POLICY SINCE 1940 (1984); JAMES A. JOHNSON & WALTER J. JONES, THE AMERICAN MEDICAL ASSOCIATION AND ORGANIZED MEDICINE: A COMMENTARY AND ANNOTATED BIBLIOGRAPHY (1993); PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE (1982); WOLINSKY & BRUNE, supra note 156. For an excellent (but unsigned) overall analysis of the AMA as of the early
concerns in the professional monopoly area: protecting their occupation's share of the professional services market and control over that market. But it is on this monopoly issue that the approaches of the two associations diverge. The ABA, in recent decades, has generally shown little interest in political advocacy as a means of protecting its profession's monopoly. The AMA, however, has been heavily involved in such advocacy. The AMA has lobbied strenuously, mostly at the federal level, on issues which are perceived to threaten its profession, such as Medicare, national health insurance, and managed health care,158 often resulting in damaging criticism from within and without the organization.159 In its lobbying, the AMA commonly has opposed government regulation of the medical profession and favored solo practice by physicians, with private practitioner autonomy in doctor-patient relations.160 The AMA has spent large sums in lobbying and operates one of the nation's largest-spending political action committees, the American Medical Political Action Committee (AMPAC).161 The AMA has suffered major political losses in its lobbying efforts, but over time has adjusted to these losses, changing its position when necessary, and often been astute in moving from an aggressive confrontational approach to one of adapting and negotiating.162

For the ABA, the AMA's political advocacy experience provides some lessons. It shows that vigorous political intervention by a profession's leading national association is inevitable if the profession's monopoly privileges are very seriously threatened. Such intervention is not only financially expensive to the association and its affiliates, but also can lead to troublesome dissension within the association and decline in its public reputation. Moreover, while the association will lose on some issues over time, these losses can be limited if the association is willing to negotiate, adapt, and compromise rather than hold out for all it wants when defeat seems likely. However reluctant it is now, the

1950s, see The American Medical Association: Power, Purpose, and Politics in Organized Medicine, 63 YALE L.J. 938 (1954).
158. See CAMPION, supra note 157, at 253-83, 305-28; WOLINSKY & BRUNE, supra note 156.
159. See JOHNSON & JONES, supra note 157, at 189-90. Controversy over the AMA's efforts to prevent the adoption of Medicare was particularly troublesome for the organization. See CAMPION, supra note 157, at 253-83. For the "scars of conflict" created by AMA efforts to block an earlier compulsory health insurance program, one endorsed by President Truman, see JAMES G. BURROW, AMA: VOICE OF AMERICAN MEDICINE 373-74 (1963).
160. See JOHNSON & JONES, supra note 157, at 189; STARR, supra note 157, at 146.
162. See ROSEMARY STEVENS, AMERICAN MEDICINE AND THE PUBLIC INTEREST 532 (1971); WOLINSKY & BRUNE, supra note 156, at 217-18; see also id. at 44-67 (discussing AMA's profitable adjustment following significant political loss in fight over adoption of Medicare).
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ABA may again be drawn back into political advocacy on the unauthorized practice issue. If this happens, the AMA's experience indicates the commitment needed and the risks involved. Self-serving political advocacy can be rewarding to a professional association and those it represents. Such advocacy can also be damaging.

D. Legal Services for the Poor and Persons of Moderate Means

In principle, major comprehensive bar associations have strongly supported providing needed legal services to the poor at little or no cost to clients. The associations consider access to the legal system by all, rich or poor, an essential feature of a democratic order. There have been some association lobbying successes on legal aid and public defender funding, especially the ABA's strong stance with Congress on behalf of the Legal Services Corporation. These efforts undoubtedly helped considerably in obtaining continued funding for this beleaguered agency and in preventing the agency's termination. Some state bar associations have also engaged in lobbying efforts to support legal aid. Pro bono representation is another program of legal services to the poor that bar associations have helped foster. They have done so by publicizing the need for such services, conducting recruitment of pro bono volunteer attorneys, and providing training in poverty law for pro bono volunteers. Mandatory pro bono has been extensively debated within bar associations but generally rejected. It was, however, approved in early


165. Leaders of the Texas State Bar, for example, lobbied members of the Texas delegation to Congress to preserve federal funding for legal services. See LSC: Fighting for Survival, 58 TEX. B.J. 500 (1995). In Tennessee, the state bar association lobbied successfully for a litigation tax to help fund legal aid. See Harris A. Gilbert, President's Perspective, Lawyers Should Remain Leaders in the Legislative Process, TENN. B.J., May-June 1995, at 3.

166. See STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF MODERATE MEANS (1996). For statistical data on pro bono programs, see ABA INVENTORY, supra note 2, §§ 3-XIII, 4-XIII.

The Connecticut Bar Association has been particularly successful in recruiting lawyers to give some of their time to pro bono representation. Two thousand volunteer pro bono attorneys take part in its "Law Works for People" program and receive free training in family law, Social Security law, and other common legal fields of pro bono practice. See Pro Bono Committee Report, in CONNECTICUT REPORTS, supra note 53, at 57.

167. No state bar association has imposed a mandatory pro bono requirement on its members. See HAZARD ET AL., supra note 139, at 1043-49; Kendra Emi Nitta, An Ethical Evaluation of Mandatory Pro Bono, 29 LOY. L.A. L. REV. 909 (1996). A few local bar associations, however, have done so. See John R. DeSteiger, Comment, Mandatory Pro Bono: The Path to Equal Justice, 16 PEPP. L. REV. 355, 365 (1989). In 1990, the Association of the Bar of the City of New York endorsed a proposal to require that each New York lawyer donate a minimum of 40 hours every two years to pro bono representation, with certain cash or service substitutes possible. The state's highest court rejected the
discussion drafts of the ABA Model Rules of Professional Conduct.168 There has been a scattering of other bar association efforts helpful in providing more or better legal representation to the poor, such as administering Interest on Lawyer Trust Account (IOLTA) programs that provide funding for legal aid;169 advocating better procedures for court appointment of attorneys for indigent parties when such appointments are necessary;170 and pro se training programs for litigants who wish to represent themselves.171

The major comprehensive bar associations have also given some attention to the legal representation problems of another sizable under-represented group: low- and moderate-income persons with incomes above what would qualify them for legal aid. It is recognized that many in this low- to moderate-income range fail to seek legal representation. This usually is due to those in need not knowing that they have a legal problem, not knowing how to select a suitable lawyer, apprehension over likely legal fees, or an inability to pay substantial legal fees absent contingent fee possibilities. Bar associations frequently make some attempts to increase representation opportunities for these people, most often by operating lawyer referral programs in which inquirers seeking help in finding a lawyer are directed to appropriate lawyers for the type of problem involved, commonly with assurance that there will be no fee or only a low fixed fee for the initial consultation.172 Inquiries normally are by telephone to a central location and referrals made only to lawyers willing to participate in the program.173 Obviously these programs can be of benefit not only to the potential clients, most of whom are in the low- to moderate-income range, but also to the lawyers receiving referrals. The ABA has adopted model rules for

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168. See Stephen Gillers & Roy D. Simon, Jr., Regulation of Lawyers: Statutes and Standards 317 (1996). In one of its few aspirational provisions, the Model Rules provide that a lawyer should “aspire” to render at least 50 hours of pro bono services per year. See Model Rules of Professional Conduct Rule 6.1. In addition to Rule 6.1, the ABA has adopted several resolutions supporting pro bono on a voluntary basis. See ABA Handbook, supra note 31, at 263.

169. See Arthur J. England, Jr., Modern Day Alchemy: Interest on Lawyers’ Trust Accounts, in Civil Justice, supra note 163, at 561. Most states have IOLTA programs and the ABA operates a clearinghouse to provide information and technical assistance to them. Besides Oregon, California and North Carolina, however, the IOLTA programs are usually administered by bar foundations rather than bar associations.


171. See, e.g., Pro Bono In Iowa, Iowa Law., Oct. 1994, at 6 (discussing efforts by Iowa Bar Association to educate domestic abuse victims and lay counselors about available legal steps). While persons may represent themselves, a nonlawyer officer or employee is generally prohibited from representing corporations and other organizations in court. See Wolfram, supra note 98, at 803-06.

172. There are at least 325 such referral programs nationwide, most of which are operated or sponsored by state or local bar associations. See ABA Standing Comm. on Lawyer Referral and Info. Servs., Characteristics of Lawyer Referral Programs, 1990 Survey Results 1-2 (1991) [hereinafter Lawyer Referral Survey]; see also ABA Inventory, supra note 2, §§ 3-11, 4-13.

173. The referral volume in some programs is tremendous. In 1995, for example, the program operated by the Florida Bar Association made nearly 95,000 referrals. See Report of the Lawyer Referral Service Committee, Fla. B.J., June 1996, at 74.

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lawyer referral services\textsuperscript{174} and collects and publishes detailed statistics on such services.\textsuperscript{175} Some bar associations have also tried to help low- and moderate-income people with their legal problems through programs informing them about common legal problems.\textsuperscript{176} A few bar associations even provide free clinics staffed by volunteers for low- and moderate-income persons.\textsuperscript{177}

Other than lobbying support for legal aid and helping to add more legal services through pro bono programs they sponsor, the major comprehensive bar associations have had little impact on expanding the availability and quality of legal services for those in poverty. Underlying this problem are basic questions of public policy as to who should bear the financial responsibility for providing needed legal services to those in poverty. Should lawyers provide these services for free or should the cost be borne by government or the broader charitable community? If lawyers must assume the financial obligation, can and should they pass the cost back to their other clients through higher fees so that much of the client community ultimately pays? And if lawyers ultimately should carry much of the cost, what should be the responsibilities, if any, of bar associations in requiring lawyers to bear this cost? These questions have proven troublesome to the bar associations. The associations' approach has largely been limited to pushing for continued government funding of legal aid organizations and urging lawyers voluntarily to provide some no-fee legal representation to the poor.\textsuperscript{178} American society is in a quandary as to what kinds of aid should be available to those in poverty, on what terms, and who should bear the cost of this aid. Needed legal services are merely a part of this much larger dilemma.

The impact of the comprehensive bar associations on legal services to low- and moderate-income persons above the legal aid level has likewise been modest. But the problems of providing more and better legal services to this group are considerably different from that of providing such services to those in poverty, and in some respects more difficult. Most of those in the somewhat higher income range can afford to pay typical lawyers' fees charged for most legal services they need, although payment in many instances may entail considerable financial sacrifice. Assuming that those in this potential client group are aware of their legal needs and that lawyers can be of help, the problems largely are market ones. Should one be concerned about those who can afford to pay market fees but refuse to seek help because they consider the fees too high? Are the market legal fees typically charged this low- to moderate-income group by lawyers so high and so burdensome that fees should

\textsuperscript{174} Model Supreme Court Rules Governing Lawyer Referral Services (1993).
\textsuperscript{175} See Lawyer Referral Survey, supra note 172.
\textsuperscript{176} See supra note 92 and accompanying text.
\textsuperscript{177} See Nonlawyer Practice Report, supra note 139, at 103.
\textsuperscript{178} See supra notes 165-168 and accompanying text.
legally be regulated? Should most legal services to this group be brought under some kind of mandatory insurance scheme or perhaps subsidized? Is the lawyers' monopoly part of the problem and would a desirable solution lie in abolishing or substantially reducing lawyers' monopoly privileges so that cheaper legal service providers can enter the market? Can law firms restructure themselves, voluntarily or with legal inducements and coercion, so that they can cut costs and cut fees? Finally, what role, if any, should the major comprehensive bar associations assume in relation to these questions? These are all questions with which the profession at large, bar associations included, must struggle. They have a direct bearing on such difficult issues as unauthorized practice of law, lawyer advertising, and expansion in alternative dispute resolution systems. Clearly, lawyer referral programs, although helpful, are insufficient answers. More attention needs to be given to ways in which lawyers can remain competitive in the low- to moderate-income market for legal services, especially as to matters in which contingent fees are not appropriate.

E. Litigation

Most aspects of litigation are of concern to major comprehensive bar associations. The judiciary is often the focus of attention, including recommendations by some associations to fill judicial vacancies. The ABA's Standing Committee on the Federal Judiciary regularly makes such recommendations for vacancies on the federal bench, the Supreme Court included, and is the best known example of bar association action of this kind, but many state and larger local bar associations make recommendations to fill state or local judicial vacancies. There are also bar associations that administer regular lawyer evaluations of sitting judges and judgeship candidates. Some bar associations have taken public positions on such matters pertaining to the judiciary as judicial salaries and retirement funding, and on the rotation of judges. The relevant committees of bar associations also frequently propose amend-


181. See, e.g., John B. Simon, President's Page, CBA REC. (Chicago Bar Association), June 1994, at 10 (reporting that 47% of subcircuit judgeship candidates were not recommended in evaluation by bar association Judicial Evaluation Committee).


183. See, e.g., Committee on Rules of Judicial Administration Report, FLA. B.J., June 1995, at 73.
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ments to court rules and jury charges for different kinds of cases. Alternative dispute resolution (ADR) is still another subject that has attracted considerable bar association consideration and proposals for expansion and improvement. The ABA has taken a leadership position in promoting the ADR concept. In addition, the ABA has adopted a Model Code of Judicial Conduct that sets widely followed standards of judicial behavior. The ABA also has been particularly active recently in broad evaluations of judicial administration problems and has adopted prescriptive standards. A number of state and local bar associations have been developing better solutions to basic problems of judicial administration as well.

The major comprehensive bar associations not surprisingly exert considerable influence on the litigation process, most notably in shaping procedural rules and selecting judicial personnel. Much of this influence comes from proposals by bar association sections and committees especially concerned with one aspect or another of the litigation process. Courts and legislatures can be expected to take seriously proposals for improving judicial operations when these proposals come from practitioners who regularly appear before the courts. In judicial selections, legislatures and executive branch officials with responsibility for judicial appointments are especially prone to weigh heavily judicial recommendations from the bar. Bar association recommendations seem to be particularly effective in states with merit selection commissions and less effective in states where judges are popularly elected. At the federal level, controversy over ABA judicial recommendations is an indication of the seriousness with which these recommendations are taken by political

184. See, e.g., Committee on Court Rules Report, 58 Tex. B.J. 734 (1995). The Florida Bar has 10 different court rules committees. For recent reports by these committees, see Fla. B.J., June 1996, at 65-72.
185. In 1994, the State Bar of Texas had five separate committees preparing jury instructions for different fields of law. For reports on these committees, see 57 Tex. B.J. 778 (1994).
188. See supra note 96.
189. See 2 Standards of Judicial Administration (1992) (Standards Relating to Trial Courts); 1 Standards of Judicial Administration (1990) (Standards Relating to Court Organizations); see also Blueprint for Improving the Civil Justice System, supra note 187; Standards for Criminal Justice, Fair Trial and Free Press (3d ed. 1991).
191. See generally Sheldon, supra note 180.
F. Substantive Law Reform

Substantive law in all fields is, of course, always subject to change and proposals for change are frequent. As major comprehensive bar associations are concerned with this dynamic, they regularly review current proposals—especially pending legislation—and often seek to influence the final adoption process by initiating their own proposals.

Much bar association law reform activity is carried out by association committees and sections. Collectively, committees and sections cover nearly every field of law. A variety of approaches are taken by bar associations to law reform. For example, through committees or sections, they commonly evaluate bills currently before the state legislature in particular fields, then publicly declare their support or opposition to those in which the association has a special interest. They also make in-depth studies of troublesome legal problems and prepare drafts of recommended statutes or regulations. In some instances they merely declare publicly their position on a matter, perhaps issuing press releases, thereby relying on the merits of their position and their reputations to influence the ultimate outcome. Sometimes, bar associations do much more. For example, through their own staff lobbyists or influential association members, they may either meet privately with individual legislators or other important government decisionmakers to urge backing for the association’s position on a proposed legal change or testify at legislative hearings in support of the association’s position. Occasionally, too, bar associations file amicus curiae briefs reflecting association preferences on matters that raise important legal issues. In rare instances they will litigate issues they consider highly important.


196. See, e.g., Florida Bar v. Furman, 451 So. 2d 808 (Fla. 1984) (holding in contempt nonlawyer who prepared pleadings and gave legal advice on family law matters after being enjoined from doing so); Greenwell v. State Bar of Nevada, 836 P.2d 70 (Nev. 1992) (enjoining typing service from
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Since the Supreme Court's decision in *Keller v. State Bar in California*, one large group of state bar associations, the unified associations, are considerably restricted in their lobbying efforts on contentious social issues. Although *Keller* is unclear as to just what bar association actions are proscribed, it has had a substantial deterrent effect on unified bar associations' lobbying efforts, as well as their filing of amicus briefs. Although not bound by *Keller* restrictions, the ABA and other voluntary bar associations have occasionally been faced with the controversial question of whether they should take positions on social problems, such as abortion, that may lead to member resignations and other organizational disruptions. A number of voluntary associations have self-imposed restrictions on involvements of this kind.

Where not deterred by *Keller*, the major comprehensive bar associations have actively supported or opposed a broad range of substantive legal proposals. This is not surprising given the diversity of interests of the associations' sections and committees. But how successful are the associations when they intervene? As is to be expected of organizations that regularly seek to influence law reform, their record is mixed. Presumably, the record of success is higher for those associations which go beyond merely issuing press

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198. See supra notes 72-73 and accompanying text.
199. See supra note 74.
200. See, e.g., Steven Keeva, *Cooper Wants to Reverse ABA Focus*, A.B.A. J., Oct. 1995, at 104 (discussing view of then-incoming ABA president that social issues should be downplayed); Leonard, *supra* note 192, at 547-49 (arguing that ABA is excessively politicized and should avoid taking stances on public policy issues); James Podgers, *Which Way ABA? Pondering New Directions*, A.B.A. J., Dec. 1992, at 61 (reviewing ABA positions on social issues and reactions to these positions).
201. The Bar Association of Metropolitan St. Louis, for example, has adopted guidelines for intervention on social issues. They provide that before taking any positions on a matter of public policy, the board of governors should: determine that the issue is not clearly inappropriate; have sufficient facts concerning the issue; believe that the position to be taken would be supported by an informed membership; believe that the issue is of general significance to lawyers; and believe that the position taken by the association would have an effect on the outcome. See Deirdre O. Smith, President's Report, *Where We Stand*, St. LOUIS B.J., Winter 1995, at 3.
203. Bar association efforts to influence substantive law reform appear to be successful only about one-third of the time. In California, for example, an average of only 35% of bills sponsored by the California State Bar usually become law. See Kathleen O. Beitiks, *Plebiscite Signed by the Governor; Other Bar Bills Become Law*, CAL. ST. B.J., Nov. 1995, at 1. In New York, on the other hand, only seven of 24 bar-sponsored legislative proposals in a recent year became law. See Maxwell S. Pfeifer, President's Message, *Strategic Planning*, N.Y. ST. B.J., Dec. 1995, at 4.
releases and exert added pressure on lawmakers.

G. Conclusions

Whatever the effectiveness of each individual program, like many nonprofit organizations, most comprehensive bar associations have overextended themselves, spreading their resources too thinly over too many activities. Some of the associations are recognizing this problem and taking steps to realign their organization and operations. The Oregon State Bar, for example, is engaged in a comprehensive performance review of all its programs, pursuant to which ineffective programs will be modified or discontinued.\textsuperscript{204} Part III discussed some of the specific problems facing bar association programs. In Part IV the Article moves from the specific to the more general, discussing some limitations on the effectiveness of associations broadly speaking.

\textbf{IV. LIMITATIONS ON EFFECTIVENESS}

Like other organizations, the major comprehensive bar associations have limitations that tend to prevent or deter effective association performance. These limitations are important reasons for the mixed effectiveness record of association programs and the associations' failure to advance more fully their policy objectives. One of the associations' principal limitations is financial. For organizations with so many programs, the major comprehensive bar associations are very restricted in the funds with which they have to work. Moreover, their funds come largely from members' dues; hence, if membership declines, income normally declines. There also is considerable member resistance to raising dues and, in some associations, even pressure to lower existing dues.\textsuperscript{205}

Another limitation on more effective action by major comprehensive bar associations is their reliance on member volunteers for a high percentage of association work. Members who assume these work assignments are volunteers: They are unpaid and willingly assume certain duties, such as drafting proposed legislation or professional ethics opinions, lecturing at legal education sessions, participating in association-sponsored pro bono representation programs, taking part in committee or governing board deliberations, or advising on internal management problems. In many instances, members are appointed by the association's leadership to perform designated tasks, but selection for top association and section leadership positions may be by election. For some assignments, such as participation in association pro bono


\textsuperscript{205} See supra notes 32-33 and accompanying text.
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efforts, any member who requests the assignment ordinarily will be accepted. Association reliance on unpaid member volunteers for so much association work is partly due to the associations' financial limitations but is largely attributable to the perception of many members that active involvement in association work is a benefit, even a duty, of membership. But volunteer workers can create problems: Volunteers are greatly restricted in the amount of time they can give, some of them shirk their responsibilities, and supervision is difficult. This extensive reliance on volunteers can also contribute to the lethargy and inertia that too often characterize association performance. Moreover, paid support staffs are small given the need, and most of the paid staff have little authority.

There are also serious weaknesses in association leadership structures. Not only are top association officers, governing legislative board members, and section and committee officers all volunteers, but typically the president and other top officers hold their positions for very short terms. The president in almost all cases holds office for only one year and is prohibited from running again. Short terms of the top leadership result in a lack of continuity for priorities for many associations. On assuming office, it is common for a bar association president to declare and publicize one or more priority objectives for his or her one-year term of office. These priorities fade at the end of the president's term to be replaced by one or more new priorities that the new president declares.

Another member-related limitation of the major comprehensive bar associations is the diversity of their membership in so many respects: age, gender, income, practice specialties, political ideologies, and racial, ethnic and class backgrounds. Membership diversity certainly has benefits, including strengthening association claims of representing the entire profession regionally or nationally, and on many issues diversity helps create common bonds among disparate professional groups. However, membership diversity in some situations can be a limitation on association effectiveness by causing internal divisions that make it difficult or impossible to pursue a particular program of action or that result in compromises that hamper a program's results. So, for example, bar association support of civil rights legislation favored by politically liberal association members has on occasion been blocked by more conservative members. Interests represented by members of at least one state bar association section are so diverse that the section has adopted a policy of


207. In the 1950s and 1960s, for example, the Chicago Bar Association's Civil Rights Committee was unable to obtain the association's backing for state and federal civil rights legislation. See Halliday, supra note 1, at 237-45.
engaging in no lobbying or other political advocacy on matters within its sphere of concern.\textsuperscript{208} The comprehensive bar associations, being open to widely diverse memberships, are particularly vulnerable to the inhibiting influence of member differences on programming.\textsuperscript{209} Yet the comprehensive bar associations all seek large memberships, and the greater income and influence that accompany such memberships. The unified bar concept even legally requires large and fully open memberships. What follows almost invariably from large memberships in comprehensive bar associations is more membership diversity and consequent added risk of stultified programmatic action.

This risk, however, has been reduced appreciably in most comprehensive associations by allowing association sections and committees a large measure of autonomy. Within their primary sphere of concern, most sections and committees can develop their own programs with few restrictions, although taking public positions, lobbying, and other law reform advocacy efforts may require approval of the association leadership.\textsuperscript{210} This fragmentation of authority decreases the possibilities of the broader membership blocking or qualifying association programs. When the rather frequent differences between different committees or sections develop, leadership usually intervenes to resolve the differences by favoring one side over the other, accepting the position of neither side, or working out some kind of compromise arrangement.\textsuperscript{211} If the differences are over law reform proposals, such a compromise agreement may consist of permitting each side to express its views before appropriate government authorities without the larger association's endorsement of any view.

\textsuperscript{208} This section is the Health Law Section of the Florida Bar Association. Although it does not engage in lobbying, the section provides technical assistance to the state legislature on non-tort-related health law matters, subject to approval by the bar association's board of governors. See Lewis W. Fishman, \textit{Health Law Section Report, FLA. B.J.}, June 1996, at 42.

\textsuperscript{209} In considering the implications of bar association membership diversity, Heinz and Laumann make this general observation:

\begin{quote}
Herein lies the dilemma of every professional association. The more its membership reflects the diversity of the larger society, the more limited and noncontroversial will be the goals that it is able to achieve. Conversely, the more limited or elitist its recruitment, the more it is able to take clear stands on controversial issues, but the less it is able to serve as an effective vehicle for mobilizing both public and professional opinion behind particular courses of action.
\end{quote}

\textit{John P. Heinz \& Edward O. Laumann, Chicago Lawyers: The Social Structure of the Bar} 272 (1982); \textit{see also} Powell, \textit{supra} note 1, at 115-38 (discussing deterrent impact on association programs of diverse association membership and consequent internal dissension with reference to Association of the Bar of the City of New York). \textit{But see id.} at 137-38 (arguing that dominance of association by elite segment of bar can reduce deterrent effect of more diverse membership as to positions and programs favored by this elite).

\textsuperscript{210} An ABA section, for example, must follow detailed internal procedures before presenting a statement to a governmental agency. \textit{See ABA Handbook, supra} note 31, at 77-80. The ABA has similar procedures with respect to the filing of amicus curiae briefs in the name of the association. \textit{See id.} at 80-86.

\textsuperscript{211} \textit{See Powell, supra} note 1, at 115-38.
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Still another member-related limitation faced by the ABA and all but a few state bar associations is the wide geographic distribution of their members. This dispersion restricts the frequency of meetings and other in-person sessions, and it further restricts the effectiveness of top leadership who often reside some distance from association headquarters. It also results in many association activities being crammed into the few days devoted each year to the annual meeting. This limitation of scattered membership does not, of course, exist for local bar associations or for state bar associations in states that are geographically small, such as Rhode Island and Connecticut.

An added significant limitation for the major comprehensive bar associations is the potential inconsistency between two of the associations' most basic policy goals. The two policy goals are furthering members' interests and furthering broader public interests. The associations are committed to both goals and usually the two do not conflict, but how the associations should react when the two are or are perceived to be in conflict can be highly contentious and can subject the associations to extensive criticism from within and without the profession. Examples of issues that have been embroiled in professional interest/public interest controversies, and on which the bar associations have been under pressure to take sides include: the right of paralegals or legal technicians to practice law independently, the need to impose more severe legal restrictions on lawyers’ contingency fees, and the need for tort law reform that would cut back on plaintiffs’ available remedies. If the interests of bar association members, or a large percentage of them, are seriously affected by a particular issue, the position and action the association takes on that issue, however rationalized, will in all probability be in accord with member self-interest. This result is true of most all professional and trade associations. The American Medical Association, for example, is now experiencing the result of members' self-interest in its stands on current proposals to restructure the medical profession and its funding. The result is apparent in bar association positions on issues such as contingency fees, and in a few provisions of the Model Rules of Professional Conduct and Model Code of Professional Responsibility, both of which originated with the

212. See supra notes 139-155 and accompanying text.
216. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (permitting disclosure of confidential information relating to representation of client "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (same); MODEL RULE 6.2(b) (permitting lawyer to avoid court appointment as counsel for client if representation would be unreasonable financial burden on lawyer);
ABA. Even the concepts of mandatory lawyer professional conduct standards, such as those articulated in the Rules and the Code, have a self-interest element to them, for they help create a more favorable public perception of lawyering as a profession with estimable and widely followed principles of lawyer conduct.

External factors also limit bar association performance. Among these forces are legal restrictions and obligations imposed on the associations. For instance, court rules or statutes impose the unified state bar association format in most states, prescribe how unified associations may be structured, and mandate that they have open memberships. In addition, recent case law has added important restrictions on how unified bar association dues may be spent. The antitrust laws also limit some bar association activities, such as the setting of minimum fee schedules or accreditation standards for law schools.

There also are constitutional limits on the extent to which standards of professional conduct (the drafting and revising of which have largely been a bar association function) may restrict advertising and client solicitation by lawyers. Another example is specialty certification of lawyers, a procedure in which bar associations often are involved and that is regulated by court rule in some states.

A further external limitation on all comprehensive bar associations is competition for members, funds, and influence from specialty bar associations. There are many specialty bar associations; a few have large memberships, but most have relatively small memberships and generally quite limited financial assets. Collectively, however, the specialty bar associations do have an effect in drawing away members, money and influence from the comprehensive associations. There are many lawyers who belong to both comprehensive and specialty bar associations, but many others belong only to a specialty association. Conversely, comprehensive bar associations, and particularly unified associations, have a similar restrictive effect on membership and dues income of the specialty associations. Similar to specialty bar associations, but usually not referred to as bar associations, are a number of other lawyer

MODEL RULE 1.8(d) (effectively permitting lawyer, on concluding representation of client, to contract for literary or media rights drawing on information obtained during representation); MODEL CODE DR 5-104B (same).

217. See supra note 18.
218. See supra notes 72-74 and accompanying text.
219. See supra notes 86 & 150 and accompanying text.
222. See supra note 83.
223. See Van Duch, supra note 13, at A22.
224. One deterrent to multiple bar association membership by individual lawyers is the unwillingness of many law firms to pay their lawyers' dues in more than one association. See id.
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organizations that also have some effect in drawing resources and influences away from comprehensive bar associations. Such organizations include bar foundations, the American Judicature Society, and the National Lawyers Guild.

An obvious limitation on all comprehensive bar associations, particularly relevant to their law reform efforts, is that they are pressure groups, rarely lawmakers, and as pressure groups can influence legal change but lack the power finally to effectuate change. How successful they are in helping to bring about or block change varies with the type of issue, what opposition they have, the lawmaking body involved, and how convincing their arguments are to the final decisionmakers.

The associations cannot be expected to do much about most of the limitations that they face. Some limitations are beyond the associations’ authority to change, such as their position as mere pressure groups rather than as final decisionmakers on most law reform matters. Also, some limitations, like reliance on volunteer work, are now so deeply ingrained in conventional bar association practices that change is probably impossible. Some limitations are so dictated by circumstances that there is no feasible way of overcoming them; one such limitation is the necessity of relying on members for a substantial percentage of association funding. However, it is possible to ease a few limitations, with resulting improvements in what the associations can accomplish. For example, there are a number of ways in which the associations could be made more efficient; these methods include strengthening top leadership by giving more authority to paid, full-time officials employed long-term, and integrating and streamlining association operations. Some of the recommendations in the next Part, if followed, would have the effect of at least easing the adverse consequences of some association limitations.

V. RECOMMENDATIONS

Despite limitations, comprehensive bar associations have a generally positive influence on the legal profession and the administration of justice. They help to create and maintain a strong sense of common professional identity among lawyers—a vital contribution, given the increasing diversity of the profession—and they offer valuable services to enhance the competence and income of members of the bar, including lectures, discussion sessions, and publications covering a wide range of legal topics. In addition, associations provide many opportunities for members to make personal contacts and to widen their exposure, which can be helpful in an occupation where career success is so often based on one’s visibility and network of acquaintances.

Although the comprehensive bar associations are large, influential organizations that make a variety of contributions to the legal profession and the justice system, their effectiveness is subject to serious limitations, as previously indicated. For the most part, little can realistically be done to
overcome these deficiencies. Bringing about significant change in mature and relatively successful nonprofit organizations is usually a difficult process, and proposals for meaningful change will certainly meet strong resistance if they begin to attract support. Nevertheless, recommendations for dealing with some of the limitations are outlined below; each of these proposals has some chance of generating enough support over time to be adopted.

1. **Strengthen top leadership.** To deal with the lack of continuity in top leadership and the limited time that volunteer officers can give to association affairs, full-time executive directors should enjoy more authority and higher status. Under this proposal, an executive director would resemble a chief executive officer of a typical large business corporation and would be employed on a permanent basis rather than a short-term basis. The full membership or the board of governors would select the executive director, often from a pool of prominent lawyers. The board of governors would resemble the board of directors of a typical corporation and would be composed of unpaid members elected by the association's full membership. There would no longer be part-time unpaid officers. By granting more authority to full-time executives with indefinite tenure, the associations should prove more efficient and productive, with the full membership retaining a large measure of ultimate control. The volunteer leadership structure that currently prevails, even in the larger associations, may have worked in the past when associations had fewer members and activities; such a leadership structure, however, is ill-suited to the larger and more multi-faceted associations of today.

2. **Consolidate and streamline operations.** The organized bar could increase its effectiveness if the efforts of different bar associations were better integrated. For ideological reasons, some bar associations bitterly oppose the objectives of others, but the policy goals and programmatic efforts of the different groups are generally not antagonistic. For better efficiency, comprehensive bar associations and compatible specialty bar associations should cooperate more closely on matters of common interest. In some instances, sections of some comprehensive associations might even merge with the specialty bodies. In addition, the ABA should provide more service and guidance to other comprehensive bar associations, with the expectation that local and state organizations would assume more responsibility for implementing programs. All too often, the ABA duplicates an existing function of the state and local comprehensive associations. Examples include the ABA's educational programs, much of its review of state and local laws, its interpretive opinions of the Rules of Professional Conduct, and its pro bono programs. The ABA, with its national network of contacts and affiliations, can best initiate closer integration. A tightly knit federated system controlled from the top is neither feasible nor desirable, but a better coordinated, less redundant organizational structure is both possible and necessary. The associations should
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also develop better means of exchanging information among themselves, especially regarding organizational experiments and program innovations. Here again, the ABA is already active, especially through its Division of Bar Services and its Bar Activities and Services Committee, but more activity is necessary.

Furthermore, all major comprehensive bar associations, including the ABA, need to have a common core of sections and committees, whatever additional subunits they might have. The core group of ABA sections and committees would include among its members official delegates from state and local sections and committees. Each core ABA section and committee would act as an exchange center for information about problems, successes, and failures on matters of common concern, as well as the development of national programs and standards. In particular, state and local delegates would inform other members about innovative approaches to such matters as CLE, review of proposed legislation, lobbying, media contacts, and the funding of association programs. Where appropriate, ABA core sections and committees would help not only to develop but also to generate state and local support for ABA-sponsored federal law reform, model state and local laws, and model standards and creeds of professional conduct.

Since bar associations cannot be all things to all lawyers, they should try seriously to keep their activities within appropriate limits, taking the Oregon State Bar's performance review process as a model. Each major comprehensive association should periodically review its priorities and examine the efficiency of its programs. Programs found unsatisfactory should be modified or canceled; most sections and committees with few members should be terminated; CLE offerings should be regularly evaluated, and those that provide little of substance should be discontinued; inessential, loss-incurring publications should be eliminated; and, finally, support staff should not be wasted on low-priority programs.

3. Reconsider the unified bar concept. There has been widespread opposition among lawyers to the unified bar concept in a number of unified bar states. The Supreme Court's opinion in Keller v. State Bar of California has added to the opposition by restricting association activities and income. Where opposition is strong, and especially where it appears to be growing, unified organizations should be formally reconsidered, preferably by a statewide lawyer referendum, as California recently did. The final decision to unify should be by the bar, not by the courts or the legislature. Lawyers should not be forced into organizations that most of them oppose.

225. See supra note 61. The Bar Activities Inventory provides an example of the useful information assembled and distributed by this division. See ABA INVENTORY, supra note 2.
226. See supra note 204 and accompanying text.
4. Improve the disciplinary process. Where major comprehensive bar associations are expected to remain extensively involved in disciplining lawyers, they should have enough funding to hire staff. Uncompensated appointees can take over some of the complaint review and hearing work, but a full-time, paid staff can best perform investigations and presentments, as well as much of the supporting administrative work. Since bar disciplinary proceedings examine the behavior of state licensees, state government should help pay for the proceedings. In addition, bar associations could force disciplined lawyers to pay for their own proceedings, an option not sufficiently utilized in most states. Moreover, the McKay Commission has recommended that disciplinary counsel may, with the consent of the respondent lawyer, refer cases of minor infractions for nondisciplinary action, such as fee arbitration, mediation, substance abuse treatment, or psychological counseling. This recommendation deserves wider adoption. The disciplinary procedures in each state also should be periodically evaluated to ensure fairness and efficiency, preferably pursuant to directives from the state’s highest court. Random spot checks of individual cases might prove helpful as well. High dismissal rates at the screening stage, where they exist, should be regularly monitored to guard against favoritism or undue leniency.

If lawyer security funds had sufficient financing to pay all legitimate claims, clients would be more adequately protected from lawyer malpractice. Absent this unlikely financing, lawyer malpractice insurance should be mandatory, and bar associations in unified bar states should adopt and administer the Oregon mandatory malpractice insurance plan. Mandatory insurance not only protects clients but also strengthens the competitive position of lawyers relative to lay providers of legal services, most of whom do not provide such client protection.

5. Increase concentration on the justice system’s most serious problems. Major comprehensive bar associations should persistently and aggressively try to resolve the most serious problems facing the American justice system. Among these problems are: (1) court congestion and delay, including the need for more judges and more opportunities to use alternative dispute resolution
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... techniques; (2) pro bono legal representation for those in poverty; (3) cheaper and more readily available legal services for the poor and those of moderate income who can afford to pay reasonable lawyers' fees; and (4) the improvement of incarceration facilities and alternatives to incarceration for those convicted of crimes. The associations are concerned with all these problems, but their efforts to deal with them have been disappointing. Arguably they have not tried hard enough, perhaps because the issues are too political to attract sufficient association support, or because activists within the associations are discouraged by slow progress, or because top leadership lacks sustained focus. Whatever the reasons, efforts by the associations are inadequate. Since each new association president commonly supports a different action agenda during her year in office, association efforts to solve important problems are less effectual than might otherwise be the case. The most crucial problems facing the justice system deserve the continued and concentrated attention of top association leadership over a protracted period, normally much longer than a year.

Furthermore, support for research, including staff, should be made available, and coordinated action with other bar associations should be initiated whenever helpful. Each association should also give clear instructions to its commissions, task forces, or committees involved with a crucial problem area, and such groups should be pushed to meet deadlines set for them.

The unauthorized practice of law, especially the growing movement to license legal technicians to practice law independently (without supervising lawyers), is another problem demanding more attention from bar associations. This issue potentially has very important implications for the justice system in general and the legal profession in particular. The bar associations should carefully consider how to respond and then take action accordingly. Among the possible responses, the associations could categorically oppose all proposals for licensing legal technicians to practice law independently of lawyers. Alternatively, the associations could support licensing of these technicians only in a limited number of practice areas but with rigorous educational prerequisites. Certain kinds of businesses, such as banks, insurance companies, real estate brokers, and accounting firms, would be prohibited from using this licensing device as a means to move more extensively into providing legal services to others. If it is assumed that independent legal technicians, and other lay groups as well, will increasingly be engaged in the practice of law, bar associations could greatly expand their efforts to help lawyers meet this competition through greater efficiency, lower fees, enhanced advertising, and other promotional efforts. Whatever the bar associations perceive their options to be, they should recognize the seriousness of the licensed legal technician problem and promptly take adequate steps to address it.

If the ABA wishes to influence the resolution of these issues, it must do...
much better than its Commission on Nonlawyer Practice has done.\textsuperscript{232} The work of the Kutak Commission and the McKay Commission, among others, shows that ABA commissions can come up with many constructive proposals on difficult and contentious issues affecting the legal profession.

6. \textit{Avoid highly disruptive issues}. Although some important issues deserve more attention from the major comprehensive bar associations, others should be avoided. The latter are the occasional highly contentious law reform issues that can cause extreme internal disruption, especially when an association decides either to advocate a position or to intervene by taking further action. An association should limit or avoid involvement with an issue if that involvement threatens to cause a substantial number of its members to resign or become inactive, or if that involvement threatens the association's general effectiveness. Caution is especially advisable on contentious social issues that have little direct bearing on the legal profession and the usual work of lawyers. It seems particularly foolish for a bar association to risk its viability over issues regarding which it cannot realistically expect to exert much influence. For example, there have been very disruptive consequences for the ABA when it has taken up the issue of abortion.\textsuperscript{233}

Each association should carefully determine for itself what it will do about the contentious issue problem. One sensible procedure, followed by some associations, is to require approval by the association's governing board before an association position or advocacy action may be undertaken.\textsuperscript{234} Under such restrictions, sections, committees, or other groups within the association may examine any issue and articulate their own position, but no further action is allowed without board approval. This does not solve the disruptive issue problem entirely, but it does place responsibility for association-wide action on a governing board. Such an arrangement is desirable because governing boards are normally very sensitive to the association's overall well-being and their decisions are likely to find broad member support.\textsuperscript{235}

7. \textit{Improve research efforts}. The major comprehensive bar associations could benefit from closer ties to the legal academic community generally. Most full-time law teachers have little or no contact with bar associations, and the bar associations make little effort to draw law teachers into their programs. This is unfortunate given the possible benefits for both associations and academics in the encouraging of academic research on important legal problems. In many such instances law teachers would be willing and able to

\footnotesize{\textsuperscript{232} See supra note 155 and accompanying text.  
\textsuperscript{233} In 1990 and 1991, for example, more than 1500 lawyers resigned from the ABA over the abortion issue. See Podgers, supra note 200, at 62.  
\textsuperscript{234} See, for example, the guidelines of the Bar Association of Metropolitan St. Louis, discussed supra, note 201.  
\textsuperscript{235} In taking on this responsibility, the boards of unified bar associations would, of course, be limited by the restrictions in Keller. See supra notes 72-74 and accompanying text.}
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conduct necessary background research, prepare more useful reports, and draft better legislation than if the associations relied on others for this work. Almost all full-time law teachers do considerable research and writing for legal publications, often producing articles that turn out to be of little consequence and that attract little interest. An important bar association research project would be attractive to many legal academics, if properly approached, given that the product would be considered seriously by experts in the field and could lead to important reform.

Additionally, the bar associations’ research base would be strengthened if the American Bar Foundation were to focus more attention on issues of high priority to those associations, especially through empirical studies on the profession and the administration of justice. The American Bar Foundation is an important research center with a cadre of able scholars, but it has become principally a research medium for social scientists’ interests in law, especially those of sociologists; a high percentage of its studies are irrelevant or highly tangential to concerns of bar associations and lawyers generally.236 Yet the American Bar Foundation is largely funded by bar associations and other lawyer sources,237 and the ABA is generally well represented on the Foundation’s Board of Directors.238 If the Foundation does not reorient its research efforts, lawyers and their organizations would be justified in withdrawing or sharply curtailing their support. Potential benefits to the legal profession from this quality research center are so substantial that the organized bar should not encourage its research funding to be so extensively diverted from matters of its concern.

8. Increase law school involvement in continuing legal education. The law schools should institutionally be drawn more heavily into furthering bar association post-admission educational objectives. Much CLE instruction is substantively superficial and pedagogically ineffective, and mandatory CLE programs are worthless to many participating lawyers. If the major comprehensive bar associations and other sponsors of post-admission legal education are serious about improving continuing legal education, the most promising approach may be to induce the law schools to participate, adapting CLE to fill the real needs of the lawyers who could benefit. In order to improve CLE programs, difficult questions will have to be addressed regarding course design, teacher staffing, testing, the effect on lawyer licensing or certification, and funding. Greater law school involvement may be the way to assure the best answers.

Of course, not all law schools would be interested in offering CLE

236. See supra note 59.
237. See supra note 56.
238. See ABA HANDBOOK, supra note 31, at 74-75 (discussing Foundation’s governance ties to ABA).
programs. There would be sufficient law school cooperation, however, to test important new experimental approaches to CLE and to improve existing programs, if those schools could be assured of adequate funding and convinced of the bar associations' commitment to more effective continuing education.

VI. CONCLUSION

However much the need, over the next few years the major comprehensive bar associations are unlikely to change appreciably. They are too firmly established, and their organization and procedures are generally accepted both within the bar itself and by courts and legislatures, to the extent these latter bodies exert authority over the associations. But in the longer term, the associations inevitably will encounter new or more acute problems, and these will force the associations to consider seriously recommendations such as those outlined above, if not even more drastic proposals.

Trends are now emerging that suggest the kind of changes to come. For instance, there is growing dissatisfaction with the unified bar concept, which may ultimately persuade a number of unified state bars to abandon the form altogether. In addition, membership numbers of many major comprehensive bar associations are stable or in decline. This is due to several factors, including relatively high association dues, the competitive pull of specialty and smaller county bar associations, and the feeling of many lawyers that the major comprehensive bar associations have little to offer them. Without regular membership growth, and the financing this brings, associations are likely to come under increasing pressure to cut programs and services that they should be providing.

Furthermore, there appears to be growing support for allowing lay legal technicians to practice law on their own. Because this threatens so many members of the bar, the major comprehensive bar associations may be moved to oppose the licensing of lay persons to practice law independently. Occupational self-protection is, after all, a fundamental objective of most professional and trade associations, including bar associations.

As funding of traditional legal aid agencies declines, there will be significant consequences for the major comprehensive bar associations. Underrepresentation of the poor has long been a problem, and it will become much more serious as traditional legal aid funding and staffing are further reduced or eliminated. As a result, the major comprehensive bar associations will come under increased pressure to develop new solutions to legal representation for those in poverty through, for example, expansion of existing pro bono and pro se assistance programs.

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239. But see supra note 77.
240. See supra notes 152-155 and accompanying text.
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Despite some organizational weaknesses and a number of limitations on their operational effectiveness, the major comprehensive bar associations currently are important organizations that make many valuable contributions to the legal profession and the justice system. They are the principal organizations representing the interests of a powerful and diverse profession that is increasingly subject to market forces. Yet the associations are concerned with more than just the legal profession's interests, and they are frequently a positive force in furthering the public interest, at least as they perceive the public interest. How well the associations perform in the future will depend in part on their willingness to make changes that will increase their effectiveness. To be most effective, however, the associations must also be alert to trends indicative of future opportunities, and they must shape their programs in whatever ways will best take advantage of those upcoming opportunities, consistent with their policy goals. Whatever the implications of current trends, it is certain that in important respects the major comprehensive bar associations will be very different kinds of organizations in fifty years. Substantial change is certain to occur.