Phoenix Journal #167

By Gyeorgos Ceres Hatonn

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DEDICATION

This volume is dedicated equally to two stellar individuals working within the legal profession, namely, Gerry Spence and Ralph Nader.

While very different in their individual legal focus, both represent the very best of the profession in living the highest ideals of what could be a very honorable profession.

It is indeed unfortunate that the legal system has slipped so terribly into the current morass. But it is only through the unrelenting efforts of men of vision such as Spence and Nader that the legal profession can "get a hold of itself" and initiate some real change. It also becomes abundantly clear that if we do not move back to law under the *Constitution*, our freedoms will truly be lost forever.

The sands of time slip through the hourglass at, seemingly, an ever increasing rate. As the hour is growing late, let us hold forth the torch of freedom. Then, and only then, will justice in America ultimately prevail.

FOREWORD

"*Woe unto you, lawyers! for ye have taken away the key of knowledge: ye entered not in yourselves, and them that were entering in ye hindered...Woe unto you also, ye lawyers! for ye lade men with burdens grevous to be born...Ye serpents, ye generation of vipers, how can ye escape the damnation of hell? But the...lawyers rejected the counsel of God...*"

LUKE 11:52, 46; MATTHEW 23:33; LUKE 7:30

I originally chose to research and write on this subject for very personal reasons—namely, to find out the truth of how to defend oneself in an age of lawsuits!

This *Journal* consists of writings which originally appeared in the newspaper *CONTACT* as a series.

When researching this information, it became instantly clear to me, which I suspected all along, that the procedures and methods whereby the law is "dispensed" are well hidden and buried in countless volumes of law books and legal citations. The "average" person, if deciding to brave the court system alone under "*in pro per*" status, soon finds himself in over his head.

The information contained within this volume is designed to assist the average person in understanding the system overall, with some very specific information which will help with individual, *in pro per* lawsuits. I HAVE NOT exercised the unauthorized practice of law herein. Rather, I present many well-respected experts in the law, in their own words. Further, I AM exercising my right under the *Constitution* to understand the law, use it in my own defense *in pro per*—and, under the *1st Amendment*, share that knowledge with others. Perhaps this volume should be called *A Survival Guide for The Average Citizen*, but we'll leave the current title intact.

Please remember that becoming informed is literally the only means of true "protection". Carefully chosen information can then become knowledge, and armed with knowledge, it is hoped, actions can move in wisdom. May your choices be "informed" ones.

CHAPTER 1

MONOPOLY: THE BAR ASSOCIATION'S STRANGLEHOLD AT THE THRONE OF JUSTICE, PART I

by Rick Martin 1/16/96

THERE'S A CAMEL IN THE TENT

So, you want to represent yourself in court? You know what lawyers have to say about that. "A man who is his own lawyer has a fool for a client."

Even Gerry Spence, in his book *With Justice For None*, said, "One can no more search for justice through the entangled labyrinths of the law without a lawyer than one can trod through fearsome, uncharted jungles without a guide."

Spoken like a true lawyer.

But what are these nebulous terms: *law, justice*? And how did lawyers come to play such a key and, dare I say it, parasitic role in our lives today? Have **you** ever tried to represent yourself in court?

Again quoting Spence: "What is justice? Clarence Darrow insisted, 'There is no such thing as justice. In fact, the word cannot be defined.' Darrow was right. Justice, like life, cannot be adequately defined. Justice is the divine mist, and is something inexorably connected to the state of being. But Darrow understood clearly the meaning of *injustice*, and all his life fought against it."

Spence also said, "Justice is not a willow in the wind; justice is the great tree that stands immutable against unjust forces, and the law, the massive trunk of the great tree, must resist the tempests that storm upon it.

"Most of us maintain vague notions of justice, but its precise meaning escapes us until we are deprived of it."

You are about to embark on a historical journey, a search, where we will discover just how the American Bar Association and more recently, state bar associations, have gained their literal monopoly over the judicial process.

JOHN LOCKE ON *THE LAW*

In 1609, John Locke wrote the treatise *Of Civil Government*. In it, he writes of Law [quoting:]

And Reason, which is the Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty or Possessions...For Law, in its true notion, is not so much the limitation as the direction of a free and intelligent Agent to his proper interest, and prescribes no farther than is for the general good of those under that Law; Could they be happier without

it, The Law, as a useless thing, would itself vanish: and that ill deserves the name of confinement which hedges us in only from Bogs and Precipices. So that, however it may be mistaken, the end of the Law is not to abolish or restrain, but to preserve and enlarge Freedom. For in all the States of created beings capable of Laws, where there is no Law, there is no Freedom. For liberty is to be free from restraint and violence from others; which cannot be where there is no Law; But Freedom is not, as we are told, A Liberty for every Man to do what he lists: (For who could be free, when every other Man's honor might domineer over Him.) But a liberty to dispose, and order as he lists, his person, actions, possessions and his whole property, within the allowance of those Laws, under which he is, and there is not to be subject to the Arbitrary Will of another, but freely follow his own. [End quoting.]

Now, moving ahead in time three-hundred years to England, let's see what the well respected Barrister William Blackstone has to say about the law. Then we'll take a look at modern time and see if there are any similarities or divergence. I think you'll eventually agree that it is an *eye opening* experience to view this historical perspective against the backdrop of present day concerning the subject of "the law".

SIR WILLIAM BLACKSTONE ON *THE LAW*

In his 1915 classic *Commentaries On The Laws Of England*, we read the following insight on the meaning of law. [Quoting:]

Law, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nation. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.

Thus when the Supreme Being formed the universe, and created matter out of nothing, He impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When He put the matter into motion, He established certain laws of motion, to which all movable bodies must conform. And, to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes at his own pleasure certain arbitrary laws for its direction; as that the hand shall describe a given space in a given time; to which law as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

If we further advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws; more numerous indeed, but equally fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to the seed again; the method of animal nutrition, digestion, secretion and all other branches of vital economy—are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great Creator.

This, then, is the general significance of law, a rule of action dictated by some superior being; and, in those creatures that have neither the power to think, or to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but

of *human* action or conduct: that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and free will, is commanded to make use of those faculties in the general regulation of his behavior.

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of independence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct: not indeed in every particular, but in all those points wherein his dependence consists. This principle, therefore, has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should in all points conform to his Maker's will.

This will of his Maker is called the laws of nature. For as God, when He created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when He created man, and endued him with free will to conduct himself in all parts of life, He laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

Considering the Creator only as a Being of infinite *power*, He was able unquestionably to have prescribed whatever laws He pleased to His creature, man, however unjust or severe. But as He is also a Being of infinite *wisdom*, He has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the Creator Himself in all His dispensations conforms; and which He has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such, among others, are these principles: that we should live honestly, should hurt nobody, and should render to everyone his due; to which three general precepts Justinian has reduced the whole doctrine of law.

But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance its inseparable companion. As, therefore, the Creator is a Being, not only of infinite *power*, and *wisdom*, but also of infinite *goodness*, He has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For He has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, He has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised; but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness." This is the foundation of what we call ethics, or natural law. For the several articles into which it is branched in our systems, amount to no more than demonstrating, that this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive to man's real happiness, and

therefore that the law of nature forbids it.

This law of nature, being coeval with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all time: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.
But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason; whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life; by considering, what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error. [End quoting.]

In R. Randall Kelso and Charles D. Kelso's book titled *Studying Law: An Introduction*, we read [quoting:]

Some people shy away from general reflections on law, believing that they are best left to others, such as social scientists or philosophers, who are thought to be more capable or competent in developing an overall synthesis. That is a mistake. Jurisprudence, to give such general reflections their proper name, is everyone's business, and those who claim to be experts at it are typically no better than anyone else. The experts may be aware of a special vocabulary and the standard arguments. Neither vocabulary nor prior reading necessarily translates into special competence. A sure sign of incompetence in jurisprudence is a bluster about knowing it all.

Some people shy away from questions of jurisprudence, as from politics or religion, because the discussion may appear to become personal. This too is a mistake. The give and take of jurisprudential argument, like the give and take of any argument, does not and should not implicate personalities. So far as jurisprudence is concerned, people are conduits through which arguments get made and the great debates of the past are continually renewed. It is the arguments, i.e., the reasons one can give for positions, that count. If during a discussion one comes to see an argument in a different light, that is good. A faulty argument doesn't indicate a faulty person; it is a useful reminder that there is always something to learn. The important thing is that the dialogue continue between students of all ages, with respect on all sides for everyone conscientiously involved. [End quoting.]

LAW "PRACTICE"
(as defined in various actual cases)

"The legal definition of ***practice*** is: Repeated or customary action; habitual performance; a succession of acts of similar kind; custom; usage. Application of science to the wants of men. The exercise of any profession.

"The form or mode or proceeding in courts of justice for the enforcement of rights or the redress of wrongs, as distinguished from the substantive law which gives the right or denounces the wrong. The form,

manner, or order of instituting and conducting an action or other judicial proceeding, through its successive stages to its end, in accordance with the rules and principles laid down by law or by the regulations and precedents of the courts. The term applies as well to the conduct of criminal as to civil actions, to proceedings in equity as well as at law, and to the defense as well as the prosecution of any proceeding." *Wells Lamont Corp. v. Bowles*, Em.App., 149 F.2d 364, 366.

"The legal definition for ***practice of law*** is: The 'practice of law' is the rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent." *R.J. Edwards, Inc. v. R.L. Hert,* Okl., 504 P.2 407, 416. "It is not limited to appearing in court, or advising and performing of services in the conduct of the various shapes of litigation, but embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and in larger sense includes legal advice and counsel and preparation of legal instruments by which legal rights and obligations are established." *Washington State Bar Ass'n v. Great Western Union Federal Sav. and Loan Ass'n*, 91 Wash.2d 48, 586 P.2d 870. "A person engages in the 'practice of law' by maintaining an office where he is held out to be an attorney, using a letterhead describing himself as an attorney, counseling clients in legal matters, negotiating with opposing counsel about pleading litigation, and fixing and collecting fees for services rendered by his associate." *State v. Schumacher*, 214 Kan. 1, 519 P.2d 1116, 1127.

THE AMERICAN BAR ASSOCIATION

In a pamphlet from the American Bar Association titled *ABA Profile—August 1995* [prepared by the Division for Media Relations & Public Affairs Communications Group], we read [quoting:]

The American Bar Association, with approximately 370,000 members, is the world's largest **VOLUNTARY** professional association. The Association has long served a dual role as advocate for the profession and for the public. With the growing complexity of society and our legal system, the Association's public role has gained both emphasis and breadth. [The current President of the American Bar Association is Robert A. Stein.]

During the past decade, the Association has initiated hundreds of programs addressing a wide range of public concerns: from child abuse to the problems of the elderly; from governmental corruption to the high cost of justice; from juvenile crime to transnational pollution.

The Association's response to these and other problems is made possible by thousands of members who contribute both time and money. It is estimated that the Association's total annual budget of over $100 million would be a minimum of six times greater if dollar values were assigned to the uncompensated hours contributed by its members.

The Association is the national organization of the legal profession. It is composed principally of practicing lawyers, judges, court administrators, law teachers, public service attorneys and many non-practicing lawyers who are business executives, government officials, and so forth. It represents geographic interests such as those of state and local bar associations. It represents practitioners in specialized areas of the law. It also represents affiliated law-related organizations and groups with specialized interests or needs such as administrative law judges, lawyers in the armed forces, and minority and women's bar associations.

The legal profession can be viewed as a giant confederation at the center of which is the American Bar Association. While the ABA does not have the power to discipline attorneys or enforce rules, the Association leads by developing model rules and guidelines. The ABA serves as the national voice of the profession. It is a maker of models, a codifier, a searchlight, an experimenter, a moral force working to make the justice system work better for all Americans.

ABA HISTORY

[Still quoting from *ABA Profile*,]

The ABA was founded on August 21, 1878, in Saratoga Springs, New York, by 100 lawyers from 21 states. The legal profession as we know it today barely existed at that time. Lawyers were generally sole practitioners who trained under a system of apprenticeship. There was no national code of ethics; there was no national organization to serve as a forum for discussion of the increasingly intricate issues involved in legal practice.

The original ABA constitution, which is still substantially the charter of the Association, defined the purpose of the ABA as being for "the advancement of the science of jurisprudence, the promotion of the administration of justice and a uniformity of legislation throughout the country..."

Today, the stated mission of the American Bar Association is "to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law."

The eleven goals of the Association are:

(1) to promote improvement in the American system of justice;
(2) to promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition;

(3) to provide ongoing leadership in improving the law to serve the changing needs of society;

(4) to increase public understanding of and respect for the law, the legal process and the role of the legal profession;

(5) to achieve the highest standards of professionalism, competence, and ethical conduct;

(6) to serve as the national representative of the legal profession;

(7) to provide benefits, programs and services which promote professional growth and enhance the quality of life <u>of the members</u>;

(8) to advance the rule of law in the world;

(9) to promote full and equal participation in the legal profession by minorities and women;

(10) to preserve and enhance the ideals of the legal profession as a common calling and its dedication to public service; and

(11) to preserve the independence of the legal profession and the judiciary as fundamental to a free society.

The ABA's influence today stems from both the number and diversity of its membership. ABA members represent approximately half of all lawyers in the United States. In addition, the Law Student Division has more than 33,000 members.

ABA membership is open to lawyers admitted to practice and in good standing before the bar of any state or territory of the United States. [End quoting.]

An article sent to *CONTACT* by the American Bar Association, titled "The First Century Of The American Bar Association", was written by Whitney North Seymour and appeared in the *American Bar Association Journal*, July 1978. [Quoting excerpts:]

At the time of the founding of the American Bar Association in 1878, most lawyers were sole practitioners, trained in law offices, with no pressure beyond their own consciences to feel that public or professional responsibility required concern with the public interest. Most thought it enough to use the skills they had to advance the interests of their clients and their own fortunes. No uniform code of ethics governed their conduct; few institutions for common effort were available. The spirit of brotherhood was found primarily in the tavern, the courtroom, and the home. Judges and courts did what they thought right with no organized help from the bar. And the problems of judicial administration created by modern social welfare, regulatory, and environmental legislation were literally unknown.

It would, of course, be wrong to assume that those lawyers were benighted or without standards. Like the rest of their countrymen, they had the benefit of the moral lessons then generally learned in church, home, and school.

The lawyers who largely wrote the *Constitution* and later helped the Supreme Court reach its views about interpreting it were scholarly, inspired men. Some had been educated in the Inns of Court, some in great private law schools at Williamsburg, Virginia, and Litchfield, Connecticut.

Langdell had introduced the case method of teaching law at Harvard in 1870; an important local bar association (the Association of the Bar of the City of New York) had been formed in New York City in 1870, largely to fight the corruption of the courts by the Tweed Ring; a state bar association had been formed in New York in 1876; and some other associations were also in their infancy or had come and gone or become moribund. The need for legal aid, particularly for poor German immigrants, had called forth an organized effort to provide help (later the New York Legal Aid Society). On the whole, however, it could be said that the bar, like the rest of society, was made up of individuals, with few outside guides.

Some lawyers, on the other hand, particularly in larger cities, participated in political and other activities that caused history to blush. There can be no doubt that the creation of the organized bar and particularly the national reach of the American Bar Association elevated the standards of the bar generally.

HEADQUARTERS IN CHICAGO

[Still quoting excerpts:]

To jump ahead, for those who like to see how a story comes out before they start reading it, the American Bar Association, which started in 1878 as a tiny corporal's guard of lawyers, largely from the East, meeting very tentatively in Saratoga Springs to see the races and to talk about an organization, now has some 235,000 [this was written in 1978] members located in every state, city, town, village, and hamlet in America. After ten years of annual meetings in Saratoga Springs, the meetings were held in other cities, none of which could have felt any particular squeeze from their presence. Now fewer than a dozen cities in the nation can accommodate the Association meetings. It has a headquarters building on the campus of the University of Chicago with a staff of more than 475.

The importance of the development of this staff cannot be overemphasized. For much of its early life the dedicated administrative staff was headed by an executive secretary, Olive G. Ricker, who retired in 1952. The present larger and more specialized staff began to develop under Whitney R. Harris, who was appointed executive director in 1954, under Joseph D. Stecher, who served as executive director from 1956 to 1964, and under Bert H. Early, who succeeded him.

[Later in the article:] By 1889, however, the Association was prepared to "put [the American Bar Association] on wheels", in the words of one of its members, and the annual meeting that year was held in Chicago. In the remaining decade of the nineteenth century, it alternated annual meetings between Saratoga Springs and other American cities, attracting new membership and creating a national constituency.

Solid accomplishment followed this commitment to a national orientation. These accomplishments of the Association's early years were realized chiefly in the critical areas of law reform and legal education.

The Association's interest in the drafting and enactment of uniform laws was embodied at its founding in Article I of its Constitution. The first efforts, chiefly by the Committee on Jurisprudence and Law Reform, centered on forms of acknowledgement for real estate and testamentary instruments, and on marriage and divorce. These efforts resulted in the scattered adoption of a few uniform statutes.

In 1889 a special Committee on Uniform State Laws was created. The following year, citing New York state legislation authorizing the appointment of "commissioners for the promotion of uniformity of legislation in the United States", the committee recommended that each state pass a similar law. As a result of the action of New York, of the recommendation of the Association, and of the efforts of various interested persons, the first National Conference of Commissioners on Uniform State Laws was held in August, 1892, in Saratoga Springs, in conjunction with the American Bar Association annual meeting. While only nine states were represented at the first meeting, since 1912 lawyers from all the states, territories, the District of Columbia, and Puerto Rico have been present at meetings of the conference.

The object of the national conference as stated in its constitution is "to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable." Since 1903, the Association's Standing Committee on Uniform State Laws has worked closely with the conference by coordinating Association consideration of proposed uniform laws submitted by the conference for Association approval. The

Association's interest in the uniformity of state laws was further implemented in 1926 by the appointment of two members in each state to constitute special Association legislative committees to press of the enactment of legislation recommended by the National Conference of Commissioners on Uniform State Laws. Today, the national conference has drafted and approved more than two hundred acts, which have received the sponsorship of the American Bar Association.

The Section of Patent Law, created in 1894, addressed an issue of law reform on a national scale. The section's proposed amendments to the nation's patent laws were approved by the Association and, in 1887, enacted by Congress. In succeeding years the Committee on Patent, Trademark, and Copyright Law addressed the goal of a national trademark law, and considered means of ensuring international protection of patents and trademarks. The section has been a powerful factor in improving these laws and their administration, working in close harmony with the American Patent Law Association.

In 1886 the Committee on Commercial Law set about drafting a national bankruptcy act. The Association approved the proposed law, and in 1898 the Bankruptcy Act was enacted. The committee worked in close co-operation with the chairmen of committees of both houses of Congress and remained active in the advocacy of amendments, many of which were adopted by Congress in 1903.

While the section has become, in this century, the chief organizational unit for implementing the Association's goals, only two sections were created in the nineteenth century—the Section of Patent Law and the Section of Legal Education. The latter, formed in 1893, was the first of the Association sections and reflected one of its earliest interests. The Committee on Legal Education had been the first committee created by the original constitution.

The Section of Legal Education was instrumental in organizing the Association of American Law Schools, which in turn has defined the requisites of legal education in America.
The Association has also been active in formulating standards for admission to the bar and developing better and more nearly uniform methods for examining candidates. Prior to 1890 only four states had boards of bar examiners. One of the main causes of dissatisfaction with the structure of the bar was that it was too easy to set up as a lawyer. In 1898 the Committee on Legal Education and Admissions to the Bar convened a conference of State Boards of Law Examiners in Saratoga Springs. This conference met annually thereafter and, in 1931, a National Conference of Bar Examiners was formed as a permanent agency designed to aid the various state boards in performing their duties.

The Bar Examination Committee of the National Conference of Bar Examiners developed a new multi-state bar examination in 1972. It is administered in more than twenty-five states. The planning, development, and administration of the examination were funded by a grant from the American Bar Endowment. [The President of the American Bar Endowment is Arthur W. Leibold, Jr.] The grading of this examination is conducted by an expert outside group and, despite some recent attacks on today's bar examinations, the criticisms have generally been found to be without substance.

REFORM AND ACCOMPLISHMENT (1906-36)

[Still quoting:] At the close of the century the American Bar Association was still an infant organization compared to its ultimate role as a national bar. Its membership had grown from 289 in 1878 to 2,049 in

1905, but it still represented only a small fraction of the nation's lawyers, meeting once a year and functioning in the manner of a town meeting. The annual meetings were ill-suited to definitive or conclusive discussions of substantive resolutions; its machinery and influence were still less adapted to the accomplishment of the ends called for in its resolutions. Moreover, the new century saw a growing clamor for reform of the system of justice and of the legal profession itself, which the Association, as then constituted, was without power or influence to achieve.

Those who attended the 1906 annual meeting in the Minnesota State Capitol witnessed the historic articulation of this discontent. On August 29 Roscoe Pound, then dean of the University of Nebraska Law Department, delivered an address the force and clarity of which would be catalytic in reforming the American system of justice and, indirectly, in changing the Association itself into a vehicle for implementing reform.

Dean Pound began his address, "The Causes of Popular Dissatisfaction with the Administration of Justice", with the mild observation that dissatisfaction "is as old as law". In particular, he condemned the "environment of our judicial administration", and attacked "the sporting theory of justice" prevalent in America.

Dean Pound's speech was condemned by some at the 1906 meeting as destructive of public confidence in legal institutions. Other hearers thought otherwise, and while it cannot be said that the monumental reform of federal civil procedure and the reform of the American Bar Association—efforts that came to fruition in the 1930s—were products of Dean Pound's exhortations, the address certainly galvanized those who thought as he thought, and their labors dominated the reforms and accomplishments of the Association during the first third of the twentieth century.

Calls for reorganization of the Association mark the beginning of this period. In 1908 Jacob M. Dickinson, as president, proposed a representative system of delegates elected from the state bar associations. While this proposal met defeat, the underlying reform retained a constituency. The necessity for reform arose from the increasing numbers and influence of state and local bar associations, which numbered more than fifty by the time the new constitution was adopted in 1936. In his presidential address in 1923, John W. Davis advocated the fundamental reconstruction and expansion of the Association that was ultimately realized in the constitution of 1936.

In 1930 a Committee on Co-ordination of the Bar was created to propose ways to establish closer ties between the Association and lawyers throughout the country. The work of the committee resulted in the constitution of 1936, which is basically the structure of organization we know today. Edson R. Sunderland, the author of the most comprehensive treatise on the American Bar Association and its work, characterized the year 1936 as the turning point in the Association's development.

The present strength of the organized bar in this country, from the America Bar Association through the state and local bar associations and the many groups concerned with particular areas of reform, like the American Judicature Society and the network of mutual exchanges and co-operation, all rest ultimately on the farseeing reforms adopted in 1936.

The Association's wide-ranging activities in the area of judicial administration have been both innovative

and prescient. Within a decade of its founding, the Association had adopted a resolution calling for the creation and adoption of a uniform system of federal procedure.

The Association's continuing interest in court reform early embraced both the federal and the state courts. In 1907 the Committee on Judicial Administration recommended the creation of a special committee to formulate a comprehensive scheme of judicial procedure. At that time federal procedure was governed by the Conformity Act of 1872, which linked federal procedure in each district to the procedure prevailing in the state in which it sat.

The Association adopted a resolution at its 1911 meeting recognizing the failure of that act to bring about the conformity between federal and state procedure and proposing the adoption of federal rules of practice that would be an exemplar for the reform of the disparate judicial procedures in the several states. In 1912 the Committee on Uniform Judicial Procedure was established. The Association declared that "a complete uniform system of law pleading should prevail in the federal and state courts."

The Association was active in the legislative proceedings that concluded with the enactment of the Federal Rules. While the House Committee on the Judiciary heard testimony in support of the Federal Rules from such members as William Howard Taft and Elihu Root in 1914, twenty years elapsed before senatorial opposition to the revolutionary idea of a uniform federal practice was overcome. **The Federal Rules of Civil Procedure, enacted in 1934 and adopted by the Supreme Court in 1938, effected a revolution in practice.**

[Then, later in the article, we read, still quoting:]

TRIALS AND CONTROVERSIES (1937-54)

Much of the early history of the Association was concerned with the creation and fostering of institutions. The principles that animated the organization in these endeavors were that the public interest would be safeguarded by the personal character of the individuals who compose its institutions, and that the institutions themselves would be safeguarded by the respect of their constituencies. As the Association moved toward mid-century, it took an active role in the trials and controversies of the nation and of the profession as it sought to strengthen and preserve organizational, national, and international institutions. This was a lively period in the life of the Association as well as the nation. Controversies which sometimes became bitter now seem the growing pains of an institution that recognized its primary obligation to the public interest.

The attempt by President Franklin D. Roosevelt in 1937 to overcome judicial opposition to his legislative program by packing the membership of the Supreme Court deeply troubled the institutional conscience of the America Bar Association. The independence of the pre-eminent legal institution in the country was at issue, and while at the outset the membership was heard on both sides of the extraordinary and spirited national debate, it soon became clear that an independent judiciary was imperiled by the proposal.

The Association determined to oppose the Court-packing plan, and it lobbied against the proposal by providing speakers for local bar associations and other civic organizations, by urging all citizens to communicate their opposition to Congress, and in other ways. Members and representatives of the Association

were present and assisted throughout the hearings of the Senate Committee on the Judiciary, marshalling an impressive array of factual data and reasoned opinion.

The *Journal* was a forum for both sides in the debate. Its pages for April and May of 1937 reflect both the passion and the vision of the Association's participation in that debate. One editorial in the *Journal* warned:

Before a step is taken which will lead to reduce the Supreme Court to a subordinate state, which will destroy the balance between the branches on which our whole system of Government depends, a step which will set a precedent only too sure to be followed, and probably improved on, in the future, it is well to remember what an independent and impartial Supreme Court has meant to the people. The individual may well ask what guarantee of his individual rights is likely to be found in executive and congressional supremacy which can compare with the guarantee offered and still offered by such a Court.

In the same vein, Warren Olney, Jr., spoke of the profound importance of independent judicial institutions:

Assuming that each and all of the measures desired by the president represent changes that should be had in our social system and crediting him with the utmost purity of motive, the advantages of those changes are not to be compared with the value of preserving to the American people the independence of their courts and with that independence the only means they have of protecting their fundamental liberties.

As the debate progressed, the majority of the Supreme Court upheld some Roosevelt legislation, leading to the quip by the Washington correspondent of the *LONDON TIMES* that "A switch in time saved nine." This episode in American history contributed to the recognition of the Association by the public as the legitimate spokesman of the organized bar.

Following the adoption of the new Association Constitution in 1936, new committees were formed to deal with a broad range of social, political, and economic problems. Among the most important was the Special Committee on the Bill of Rights, created in 1938.

In recognition of the importance of the work and its own inadequacy to deal with the number of complaints which came to its attention the special committee, headed by Grenville Clark of New York and including such younger leaders as later president Ross L. Malone of New Mexico and Frederick A. Ballard of Washington, D.C., recommended the organization of committees by state and local bar associations to function as protectors of rights safeguarded by state or federal constitutions. Forty-eight committees were formed. The *BILL OF RIGHTS REVIEW*, launched in 1940 under the guidance of Grenville Clark, provided a sounding board for civil liberties controversies.

In later years further work in the civil liberties field has been carried on by the relatively new Section of Individual Rights and Responsibilities.

The post-World War II anti-Communist concerns also created problems that evoked Association interest. Congressional investigations into the national security had raised questions about the fairness of some investigations, and the difficulty some unpopular persons had in obtaining counsel raised other question.

As a result in 1952 the Association created the Special Committee on Individual Rights as Affected by National Security.

The next year the House of Delegates approved a resolution offered by the committee that emphasized the right of all defendants to counsel, including those accused of the most unpopular offenses, and the concomitant duty of the bar to provide counsel. In 1954, the House of Delegates approved a code of fair procedure for congressional investigations prepared by the committee, which endeavored to strike a balance between the rights of witnesses and the investigatory role of Congress.

The social revolutions and conflicts of the 1930s had made the law and the courts, in the words of Chief Justice (and former Association president) Arthur T. Vanderbilt, "peculiarly the target of attacks by enemies both within and without the country." With his active participation and support, the Association moved to protect the effectiveness and prestige of the nations courts. The Section of Judicial Administration, created in 1937 under the chairmanship of John J. Parker of North Carolina, chief judge of the Fourth Circuit, sought to focus the Association's energies in judicial administration on a set of practical and well-defined goals for reform.

In 1938 the section presented a set of recommendations in the fields of judicial administration, pretrial, trial and appellate practice, jury selection and jury trial, evidence and administrative agencies. Except for one issue of appellate practice, every recommendation was approved unanimously.

The recommendations, designated the Minimum Standards of Judicial Administration, contemplated practical, specific reforms rather than ideal guidelines. Vanderbilt, one of the leading architects and advocates of these standards, noted:

The draftsmen...wisely concentrated on the fundamental problems of judicial administration, knowing that if the minimum standards they advocated were achieved, all the other desirable advances in improving the administration of justice would inevitably follow.
In the field of administrative law the contributions of the Section of Administrative Law deserve mention. That section was largely responsible for the enactment of the Administrative Procedure Act, which first brought order to a rapidly burgeoning field of law that had become a rambunctious competitor of the courts in the judicial process.

The American Bar Association has long labored to improve the manner of selecting judges at both state and federal levels as well as the conditions under which they work. That work was carried on through the Special Committee on Judicial Selection and Tenure, established in 1936; the Special Committee on the Judiciary, established in 1946; and, at present, the Standard Committee on the Federal Judiciary, established in 1949. A high-water mark of these activities occurred in 1952 when arrangements were first made with Ross L. Malone, then deputy attorney general, for the Association to participate in judicial selection by reviewing the qualifications of those under consideration by Attorney General Brownell, has been continued to the present by all subsequent attorneys general. It has greatly minimized political considerations in federal appointments and has contributed significantly to the high caliber of those nominees.

[Later in the article, we read:]

The contemporary period of the Association has seen an appropriate emphasis on international law and international activities of all kinds. In large measure, this broadened outlook has been the work of individuals; the membership at large has benefited and participated, however, most especially through those annual meetings joined in by the bars of other nations. **The 1924 trip to London was, of course, a shining beginning.** In 1942, when the Association met in Detroit, the council of the Canadian Bar Association met in the sister city of Windsor, Ontario; and a joint meeting with the Canadian bar was held in 1950 in Washington, D.C.

The 1957 annual meeting in London was, in part, a pilgrimage. On July 28 hundreds of members met at Runnymede to commemorate the granting of Magna Charta by King John on that field 742 years before. In a moving ceremony, the Association unveiled a handsome memorial, erected by the contributions of more than eight thousand American Bar members.

The meeting convened in the Guildhall for a ceremonial dinner three days later, and Sir Winston Churchill delivered a toast to the legal profession in what turned out to be his last public speech. Sir Winston spoke of Magna Carta and its place in the Anglo-American tradition:

Between Magna Carta and the formulation of the American Constitution, we in Britain can claim the authorship of the whole growth of the English common law. Our pioneers took it with them when they crossed the Atlantic. For many centuries in the Middle Ages, English lawyers would not admit that the law could be changed even by Parliament. It was something sacrosanct, inviolable, above human tampering, like right and wrong. This seems to have been the view of the English Chief Justice Coke. He, as early as the sixteenth century, unfolded his dream of a supreme court, above the legislature, for Great Britain. This dream vanished in our civil war; we have had some of it ourselves. The Supreme Court, however, survived and flourished in the United States. England was too compact and uniform a community to have need of it, but the Supreme Court in America has often been the guardian and upholder of American liberty before the world. Long may it continue to thrive.

On that last night of the 1957 London meeting, Viscount Kilmuir, the lord chancellor, voiced the hope that the British and American bars would continue "this two-way traffic of legal points of view." Three years later, Viscount Kilmuir led 870 members of the bars of England, Scotland, Australia, and Canada to attend the Association's meeting in Washington, D.C. The theme of most of those who spoke at the ceremonial event before the Washington Monument in 1960 was the spirit of internationalism and the faith that the rule of law would come to govern the conflicts among nations.

In 1971 the American Bar Association again held its annual meeting in England. The optimism so frequently voiced at these meetings was in part founded on the dedication of those members of the Association who have labored, through the International Law Section and the Special Committee on World Peace through Law and otherwise, toward an international order governed by law.

In 1958 recent presidents of the Association joined in seeking to encourage the organization of the world's lawyers toward the end of bringing international controversies and international trade within a framework of law and legal institutions. The fruit of those efforts was the first meeting of the World Conference on World Peace through Law, held in Athens in 1963, at which the World Peace through Law Center was

founded. The center is a permanent and independent institution which has drawn together thousands of the world's lawyers. Former Association president Charles S. Rhyne heads the center's executive committee. Mr. Rhyne was also the originator of Law Day, which has been celebrated on May 1 in the United States since 1958—in contrast with the celebrations on the same date in the U.S.S.R., where law and freedom are not the subjects of the celebration.

In September, 1965, the center sponsored an extraordinary meeting in Washington of the world's lawyers and judges for the second World Conference on World Peace through Law. That meeting was attended by 254 justices of the high courts of more than 100 nations, and by 59 heads of the ministries and departments of justice. [End quoting.]

CONSIDER THIS

Eustace Mullins, in his book *The Rape Of Justice—America's Tribunals Exposed*, writes:

"We must be aware of what has happened to our legal guarantees which were written down in our *Constitution*. We must be able to challenge the stealthy takeover of our judicial system by furtive conspirators, hiding behind the international allegiances of the law merchant, the Star Chamber procedures of the equity courts, and the secret fraternal associations which dictate judicial decisions diabolically opposed to the interests of our citizens and our nation."

CHAPTER 2

MONOPOLY ON JUSTICE
UNDERSTANDING HISTORY, PART II

by Rick Martin 1/24/96

THE BAR ASSOCIATION—"CLUB MEMBERS ONLY"
AMERICA'S JUDICIARY UNDER MICROSCOPE

To counter a charge that he had made some errors in judgment, Abraham Lincoln once told a story about a lawyer and a minister who were arguing.

As they rode down the road together, the minister said, "Sir, do you ever make mistakes while in court?"

"Very rarely," the lawyer sniffed. "But on occasion, I must admit that I do."

"And what do you do when you make a mistake?" asked the minister.

"Why, if they are large mistakes, I mend them. If they are small, I let them go. Tell me, don't you ever make mistakes while preaching?"

"Of course," said the preacher. "And I dispose of them in the same way you do. Not long ago, I meant to tell the congregation that the devil was the father of liars, but I made a mistake and said the father of lawyers. The mistake was so small that I let it go."

JUDICIARY ACT OF 1789

The First Congress enacted the Judiciary Act of 1789, which was then signed by President Washington, one day before the *Fifth Amendment* to the *Constitution* was proposed. Section 35 of the Judiciary Act reads, in part: **"And be it further enacted, That in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein."**

THOMAS PAINE

Also in the late 1780s, Thomas Paine wrote the *Declaration of the Rights of Man*, which says, [quoting:]

The law ought to prohibit only actions hurtful to society. What is not prohibited by the law should not be hindered; nor should any one be compelled to that which the law does not require.

The law is an expression of the will of the community. All citizens have a right to concur, either personally or by their representatives, in its formation. It should be the same to all, whether it protects or punishes; and all being equal in its sight, are equally eligible to all honors, places, and employments, according to their

different abilities, without any other distinction than that created by their virtues and talents.

No man should be accused, arrested, or held in confinement, except in cases determined by the law, and according to the forms which it has prescribed. All who promote, solicit, execute, or cause to be executed, arbitrary orders, ought to be punished, and every citizen called upon, or apprehended by virtue of the law, ought immediately to obey, and renders himself culpable by resistance.

The law ought to impose no other penalties but such as are absolutely and evidently necessary; and no one ought to be punished, but in virtue of a law promulgated before the offence, and legally applied.

Every man being presumed innocent till he has been convicted, whenever his detention becomes indispensable, all rigor to him, more than is necessary to secure his person, ought to be provided against by the law.

No man ought to be molested on account of his opinions, not even on account of his religious opinions, provided his avowal of them does not disturb the public order established by the law. [End quoting.]

ULYSSES S. GRANT

In the 1860s, undistinguished and often shabby in appearance, Ulysses S. Grant did not recommend himself to strangers by his looks. He once entered an inn at Galena, Illinois, on a stormy winter's night. A number of lawyers, in town for a court session, were clustered around the fire. One looked up as Grant appeared and said, "Here's a stranger, gentlemen, and by the looks of him he's traveled through hell itself to get here."

"That's right," said Grant cheerfully.

"And how did you find things down there?"

"Just like here," replied Grant. "Lawyers all closest to the fire."

THE "MISSING" *13TH AMENDMENT*

"*If any citizen of the United States shall accept, claim, receive, or retain any title of nobility or honor, or shall, without the consent of Congress, accept and retain any present, pension, office, or emolument of any kind whatever, from any emperor, king, prince, or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.*"

In Vol. XVI, #2 of *THE PHOENIX JOURNAL EXPRESS* (predecessor to the *PHOENIX LIBERATOR* and *CONTACT*) we find, [quoting:]

At first reading, the meaning of this *13th Amendment* (also called the "title of nobility" amendment) seems a bit obscure, unimportant. The references to "nobility", "honor", "emperor", "king", and "prince" lead you to dismiss this amendment as a petty post-revolution act of spite directed against the British monarchy.

But in your modern world of Lady Di and Prince Charles, anti-royalist sentiments seem so archaic and quaint that the amendment can be ignored. Not so!

Consider some real hard evidence of its historical significance: First, "titles of nobility" were prohibited in both Article VI of the *Articles of Confederation* (1777) and in Article I, Sect. 9 of the *Constitution of the United States* (1788); Second, although already prohibited, an additional "title of nobility" amendment was proposed in 1789, again in 1810, and was finally ratified in 1819. Clearly the founding fathers saw such a serious threat in "titles of nobility" and "honors" that anyone receiving them would forfeit their citizenship. Since the government prohibited "titles of nobility" several times over four decades, and went through the amending process (even though "titles of nobility" were already prohibited by the *Constitution*), it's obvious that the amendment carried much more significance for your founding fathers than is readily apparent to you today.

There are many examples of the monarchy's efforts to subvert or destroy the United States; some are common knowledge, others remain to be disclosed to the public. There is, for example, a book called *2 VA LAW* in the Library of Congress. This is an uncataloged book in the rare book section that reveals a plan to overthrow the constitutional government by secret agreements engineered by the lawyers. That is one reason that the *13th Amendment* was ratified by Virginia and the notification "lost in the mail." There is no public record of this book's existence.

Does this sound surprising? Perish the thought of surprising. The Library of Congress has over 349,402 uncataloged rare books and 13.9 million uncataloged rare manuscripts, laws and ratifications! There are secrets buried in that mass of documents even more astonishing than a missing constitutional amendment, I can well assure you.

Historically, the British peerage system referred to knights as "Squires" and to those who bore the knight's shields as "Esquires". As lances, shields, and physical violence gave way to more civilized means of theft, the pen grew mightier (and far more profitable) than the sword, and the clever wielders of those pens (bankers and lawyers) came to hold titles of nobility. The most common title was "Esquire" (used, even today, by lawyers!)

cartoon guillotine

In Colonial America, attorneys trained attorneys but most held no "title of nobility" or "honor". There was no requirement that one be a lawyer to hold the position of district attorney, attorney general, or judge; a citizen's "counsel of choice" was not restricted to a lawyer; there were no state or national bar associations. The only organization that certified lawyers was the International Bar Association (IBA), chartered by the King of England, headquartered in London, and closely associated with the international banking system. Lawyers admitted to the IBA received the rank "Esquire"—a "title of nobility"!

"Esquire" was <u>the</u> principle title of nobility which the *13th Amendment* sought to prohibit from the United States. Why? Because the loyalty of "Esquire" lawyers was suspect. Bankers and lawyers with an "Esquire" behind their names were agents of the monarchy, members of an organization whose principle

purposes were political, not economic, and regarded with the same wariness that some people today reserve for members of the KGB or the CIA.

Article I, Sect. 9 of the *Constitution* sought to prohibit the International Bar Association (or any other agency that granted titles of nobility) from operating in America. But the *Constitution* neglected to specify a penalty, so the prohibition was ignored, and agents of the monarchy continued to infiltrate and influence the government (as in the Jay Treaty and the U.S. Bank charter incidents). Therefore, a "title of nobility" amendment that specified a penalty (loss of citizenship) was proposed in 1789, and again in 1810. The meaning of the amendment is seen in its intent to prohibit persons having titles of nobility and loyalties to foreign governments and bankers from voting, holding public office, or using their skills to subvert the government.

In 1789, the House of Representatives compiled a list of possible Constitutional amendments, some of which would ultimately become the *Bill of Rights*. The House proposed seventeen; the Senate reduced the list to twelve. During this process Senator Tristrain Dalton (Mass.) proposed an amendment seeking to prohibit and provide a penalty for any American accepting a "title of nobility" (*RG 46 Records of the U.S. Senate*). Although it wasn't passed, this was the first time a "title of nobility" amendment was proposed.

Twenty years later, in January, 1810, Senator Reed proposed another "title of nobility" amendment (*History of Congress, Proceedings of the Senate*, p. 529-530). On April 27, 1810, the Senate voted to pass this *13th Amendment* by a vote of 26 to 1; the House resolved in the affirmative 87 to 3; and the following resolve was sent to the states for ratification:

If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honor, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them."

The *Constitution* requires three-quarters of the states to ratify a proposed amendment before it may be added to the *Constitution*. When Congress proposed the "title of nobility" amendment in 1810, there were seventeen states, thirteen of which would have to ratify for the amendment to be adopted. According to the National Archives, the following is a list of the twelve states that ratified, and their dates of ratification: Maryland, Dec. 25, 1810; Kentucky, Jan. 31, 1811; Ohio, Jan. 31, 1811; Delaware, Feb. 2, 1811; Pennsylvania, Feb. 6, 1811; New Jersey, Feb. 13, 1811; Vermont, Oct. 24, 1811; Tennessee, Nov. 21, 18ll; Georgia, Dec. 13, 1811; North Carolina, Dec. 23, 1811; Massachusetts, Feb. 27, 1812; New Hampshire, Dec. 10, 1812.

In an early demonstration of sleight of hand and footwork (it has now become the modus operandi when the going gets tight): Before the thirteenth state could ratify, the War of 1812 broke out with England. By the time the war ended in 1814, the British had burned the Capitol, the Library of Congress, and most of the records of the first 38 years of government. I'm sure the connection between the proposed "title of nobility" amendment which would close England out of the U.S. government forever, and the War of 1812, becomes self-evident. You have entered massive wars for far less—like Desert Storm in Iraq.
Four years later, on Dec. 31, 1817, the House of Representatives resolved that President Monroe inquire

into the status of this amendment because all sorts of "strange" things were beginning to happen in the government. In a letter dated Feb. 6, 1818, President Monroe reported to the House that the Secretary of State Adams had written to the governors of Virginia, South Carolina and Connecticut to tell them that the proposed amendment had been ratified by twelve states and rejected by two (New York and Rhode Island), and asked the governors to notify him of their legislature's position. (House Document No. 76). This, and other letters written by the President and the Secretary of State during the month of February 1818, note only that the proposed amendment had not yet been ratified. However, these letters would later become crucial because, in the absence of additional information, they would be interpreted to mean that the amendment was never ratified.

On February 28, 1818, Secretary of State Adams reported the rejection of the amendment by South Carolina (House Doc. No. 129). There are no further entries regarding the ratification of the *13th Amendment* in the Journals of Congress; whether Virginia ratified is neither confirmed nor denied. Likewise, a search through the executive papers of Governor Preston of Virginia does not reveal any correspondence from Secretary of State Adams. However, there is a journal entry in the Virginia House that the Governor presented the House with an official letter and documents from Washington within a time frame that includes receipt of Adams' letter. Again, however, no evidence of ratification; none of denial.

However, on March 10, 1819, the Virginia legislature passed Act No. 280 (Virginia Archives of Richmond, "mis." file, p. 299 for micro-film): *"Be it enacted by the General Assembly, that there shall be published an edition of the Laws of this Commonwealth in which shall be contained the following matters, that is to say; the Constitution of the (u)nited States and the amendments thereto..."* This act was the specific legislated instructions on what was, by law, to be included in the republication (a special edition) of the Virginia Civil Code. The Virginia Legislature had already agreed that all Acts were to go into effect on the same day—the day that the Civil Code was to be republished. Therefore, the *13th Amendment*'s official date of ratification would be the date of re-publication of the Virginia Civil Code: March 12, 1819!

The Delegates knew Virginia was the last of the 13 states that were necessary for the ratification of the *13th Amendment*. They also knew there were powerful forces allied against this ratification so they took extraordinary measures to make sure that it was published in sufficient quantity (4,000 copies were ordered, almost triple their usual order), and instructed the printer to send a copy to President James Monroe, as well as James Madison and Thomas Jefferson. (The printer, Thomas Ritchie, was bonded. He was required to be extremely accurate in his research and his printing, or he would forfeit his bond.)

In this fashion, Virginia announced the ratification: by publication and dissemination of the *13th Amendment* of the *Constitution*.

cartoon mr. pitkin

Some argue that there is question as to whether Virginia ever formally notified the Secretary of State that they had ratified this *13th Amendment*. Some have argued that because such notification was not re-

ceived (or at least, not recorded), the amendment was therefore not legally ratified. However, printing by a legislature is prima facie evidence of ratification.

Further, there is no Constitutional requirement that the Secretary of State, or anyone else, be officially notified to complete the ratification process. The *Constitution* only requires that three-fourths of the states ratify for an amendment to be added to the *Constitution*. If three-quarters of the states ratify, the amendment is passed. Period. The *Constitution* is otherwise silent on what procedure confirms, or communicates the ratification of amendments.

Knowing they were the last state necessary to ratify the amendment, the Virginians had every right to announce their own and the nation's ratification of the amendment by publishing it on a special edition of the *Constitution*, and so they did.

Word of Virginia's 1819 ratification spread throughout the states and both Rhode Island and Kentucky published the new amendment in 1822. Ohio first published in 1824. Maine ordered 10,000 copies of the *Constitution* with the *13th Amendment* to be printed for use in the schools in 1825, and again in 1831 for the Census Edition. *Indiana Revised Laws* of 1831 published the 13th Article on p. 20. Northwestern Territories published in 1833. Ohio published in 1831 and 1833. Then came the Wisconsin Territory in 1839; Iowa Territory in 1843; Ohio again, in 1848; Kansas Statutes in 1855; and Nebraska Territory six times in a row from 1855 to 1860.

So far, David Dodge [the person sending the original research to *THE PHOENIX JOURNAL EXPRESS*] has identified eleven different states or territories that printed the amendment in twenty separate publications over forty-one years. And more editions including this *13th Amendment* are sure to be discovered for they are there, waiting!

In 1829, the following note appears on p. 23, Vol. 1 of the *New York Revised Statutes:*

*"*In the edition of the *Laws of the U.S.* is an amendment printed as article 13, prohibiting citizens from accepting titles of nobility or honor, or presents, offices, etc., from foreign nations. But, the message of the President of the United States of the 4th of February, 1818, in answer to a resolution of the House of Representatives, it **appears** that this amendment had been ratified only by 12 states, and therefore had not been adopted. See vol. iv of the printed papers of the lst session of the 15th Congress, No. 76." In 1854, a similar note appeared in the *Oregon Statutes*. Both notes refer to the *Laws of the United States*. 1st vol. p. 73/74.

It's not yet clear whether the *13th Amendment* was published in *Laws of the United States*, 1st Vol., prematurely, by accident, in anticipation of Virginia's ratification, or as part of a plot to discredit the amendment by making it appear that only twelve States had ratified. Whether the *Laws of the United States* Vol. 1 (carrying the *13th Amendment*) was re-called or made-up is unknown. In fact, it's not even clear that the specified volume was actually printed—the Law Library of the Library of Congress has no record of its existence.

However, because the notes' authors reported no further references to the *13th Amendment* after the Presidential letter of February, 1818, they apparently assumed the ratification process had ended in failure

at that time. If so, they neglected to seek information on the amendment after 1818, or at the state level, and therefore missed the evidence of Virginia's ratification. This opinion—assuming that the Presidential letter of February 1818, was the last word on the amendment—has persisted to this day.

In 1849, Virginia decided to revise the 1819 *Civil Code of Virginia* (which had continued the *13th Amendment* for 30 years). It was at that time that one of the code's revisers (a lawyer named Patton) wrote to the Secretary of the Navy, William B. Preston, asking if this amendment had been ratified or appeared by mistake. (A most interesting resource for information at any circumstance.)

Preston wrote to J.M. Clayton, the Secretary of State, who replied that this Amendment was not ratified by a sufficient number of states. This conclusion was based on the information that Secretary of State J.Q. Adams had provided the House of Representatives in 1818, **before** Virginia's ratification in 1819. (Today, the Congressional Research Service tells anyone asking about this *13th Amendment* this same story—that only twelve states, not the requisite thirteen, had ratified.)

Note, however, that despite Clayton's opinion, the amendment continued to be published in various states and territories for at least another eleven years (the last known publication was the Nebraska Territory in 1860).

Once again the *13th Amendment* was caught in the riptides of American politics. South Carolina seceded from the Union in December of 1860, signalling the onset of the Civil War. In March, 1861, President Abraham Lincoln was inaugurated.

Later in 1861, another proposed amendment, also numbered thirteen, was signed by President Lincoln. This was the only **proposed** amendment that was ever signed by a president. That resolve to amend read: "*Article Thirteen—No amendment shall be made to the constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."* (In other words, President Lincoln had signed a resolve that would have permitted slavery, and upheld states' rights.) Only one state, Illinois, ratified this proposed amendment before the Civil War broke out in 1861.

In the tumult of 1865, the original *13th Amendment* was finally removed from our *Constitution*. On January 31, another *13th Amendment* (which prohibited slavery in Sect. 1 and ended states' rights in Sect. 2) was proposed. On April 9, the Civil War ended with General Lee's surrender. On April 14, President Lincoln (who, in 1861, had signed the proposed amendment that would have allowed slavery and states rights) was assassinated. On December 6, the "new" *13th Amendment* loudly prohibiting slavery (and quietly surrendering states' rights to the federal government) was ratified, replacing and effectively erasing the original *13th Amendment* that had prohibited "titles of nobility" and "honors".
To create the present oligarchy (rule by lawyers) which you now endure, the lawyers first had to remove the *13th* "titles of nobility" *Amendment* that might otherwise have kept them in check. In fact, it was not until after the Civil War and after the disappearance of the *13th Amendment* that the newly developing bar associations began working diligently to create a system wherein lawyers took on a title of privilege and nobility as **"Esquires"** and received the **"honor"** of offices and positions (like district attorney or judge) that **only** lawyers may now hold. By virtue of these titles, honors, and special privileges, lawyers have assumed political and economic advantages over the majority of U.S. citizens. Through these privileges,

they have nearly established a two-tiered citizenship in this nation where a majority may vote, but only a minority (lawyers) may run for political office. This two-tiered citizenship is clearly contrary to Americans' political interests, the nation's economic welfare, and the *Constitution's* egalitarian spirit.

The significance of the *13th Amendment* and its deletion from the *Constitution* is this: Since the amendment was never lawfully nullified, it is **still** in full force and effect and is the Law of the land. If public support is awakened, this missing amendment would provide a legal basis to challenge many existing laws and court decisions previously made by lawyers who were unconstitutionally elected or appointed to their positions of power; it might even mean the removal of lawyers from your current government system.

At the very least, this missing *13th Amendment* demonstrates that two centuries ago, lawyers were recognized as enemies of the people and nation.

In his farewell address, George Washington warned of "...change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."

In 1788, Thomas Jefferson proposed that you have a Declaration of Rights similar to Virginia's. Three of his suggestions were "freedom of commerce against monopolies, trial by jury in ALL cases" and "no suspensions of the habeas corpus."

No doubt Washington's warning and Jefferson's ideas were dismissed as redundant by those who knew the law. Who would have dreamed your legal system would become a monopoly against freedom when that was one of the primary causes for the rebellion against King George III?

Yet, the denial of trial by jury is now commonplace in the courts, and habeas corpus, for crimes against the state, suspended.

The authority to create monopolies was judge-made law by Supreme Court Justice John Marshall, et al, during the early 1800s; Judges (and lawyers) granted to themselves the power to declare the acts of the People "unconstitutional", waited until their decision was grandfathered, and then granted themselves a monopoly by creating the bar associations.

Although Article VI of the *U.S. Constitution* mandates that executive orders and treaties are binding upon the states ("...and the Judges in every State shall be bound thereby, anything in the *Constitution* or Laws of any State to the Contrary notwithstanding"), the Supreme Court has held that the *Bill of Rights* is not binding upon the states, and thereby resurrected many of the complaints enumerated in the *Declaration of Independence*, exactly as Thomas Jefferson foresaw in *Notes on the State of Virginia*, Query 17, p. 161, 1784:

Our rulers will become corrupt, our people careless...the time for fixing every essential right on a legal basis is [now] while our rulers are honest, and ourselves united. From the conclusion of this war we shall be going downhill. It will not then be necessary to resort every moment to the people for support. They will be forgotten, therefore, and their rights disregarded. They will forget themselves, but in the sole faculty of making money and will never think of uniting to effect a due respect

for their rights. The shackles, therefore, which shall not be knocked off at the conclusion of this war, will remain on us long, will be made heavier and heavier, till our rights shall revive or expire in a convulsion." [End quoting.]

Readers, please remember that everything is connected to everything else. So, while it may seem that I am jumping around a bit to offer specific quotes, in the final analysis a very clear picture will be formed in your minds. With that said, let's continue.

BAR ASSOCIATION—
INTEGRATED BAR—*DEFINED*

If we look for a definition of "Bar Association" in *Black's Law Dictionary*, here is what we find [quoting:]

An association of members of the legal profession. Such associations have been organized on the nation (American Bar Association; Federal Bar Association), state, county, and even on city levels (e.g., New York City Bar Ass'n). The first was established in Mississippi in 1825, but it is not known to have had a continued existence. An association of Grafton and Coos counties in New Hampshire had an existence before 1800, and probably a more or less continuous life since then, having finally merged into a state association. Membership may be either compulsory (integrated bar) or voluntary. *See Integrated Bar*.

[Under "Integrated Bar", we find:] The act of organizing the bar of a state into an association, membership in which is a condition precedent to the right to practice law. Integration is generally accomplished by enactment of a statute conferring authority upon the highest court of the state to integrate the bar, or by rule of court in the exercise of its inherent power. *Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604.

[Still quoting:] A "unified bar" or an "integrated bar" is qualitatively different from a "voluntary bar"; membership in a unified or integrated bar is compulsory, whereas membership in a voluntary bar is voluntary, and in effect, one is not at liberty to resign from a unified bar, for, by so doing, one loses the privilege to practice law. *Petition of Chapman*, 128 N.H. 24, 509 A.2d 753, 756.

[Under "American Bar Association", we find:] A National association of lawyers, a primary purpose of which is the improvement of lawyers' services and the administration of justice. Membership in the ABA is open to any lawyer who is in good standing in his or her state. [End quoting.]

When reading about the history of the bar associations in this country, the New York Bar Association is always held up as the early *model*. With that in mind...

THE NEW YORK BAR ASSOCIATION

In a document supplied by the New York Bar Association, titled *Welcome To The Association Of The Bar—Serving The Profession For 125 Years*, we read [quoting:]

The years following the Civil War were tumultuous ones for New York City, offering many opportunities to the dishonest. Unsavory politicians and errant members of the bench and bar were among those who took advantage of those troubled times. In December 1869, a letter was circulated among some of the city's

lawyers addressing those improprieties. It called for the creation of a new bar association to "sustain the profession in its proper position in the community, and thereby enable it...to promote the interests of the public..." More than 200 lawyers responded by signing a declaration of organization and the Association of the Bar of the City of New York was born in 1870. The young organization quickly made its presence felt. Among its first activities was a campaign to defeat corrupt politicians and judges at the polls and to establish standards of conduct for those in the legal profession.

1995 marks the 125th anniversary of the Association and that professional and ethical tradition continues as the same sense of civic duty guides the Association's goals today. The Association continues to work at political, legal and social reform. It is concerned with clarifying and improving ethical standards for lawyers, and continues to implement innovative means by which the disadvantaged may be helped. Much of this work is accomplished through the Association's more than 180 committees, each charged to consider a specific area of law or the profession.

The Association has grown to more than 20,000 members. To serve them, the Association strives to move ahead in many areas. The Library—including a new Technology Center—is the largest member-funded law library in the country, and provides members with a "gateway" to on-line services while continuing to provide more traditional library services.

The public good remains one of the Association's highest priorities. The Legal Referral Service, jointly sponsored by the Association and the New York County Lawyer's Association, provides an array of services directly aimed at serving the needs of the public. The Robert B. McKay Community Outreach Law Program identifies the most pressing legal concerns of New York's neediest and uses novel approaches to address them, often involving community participation.

The Association of the Bar is located at 42 West 44th Street in Manhattan. The House of the Association is an elegant historic landmark building that was completed in 1896. With the computers and high-tech equipment within its walls, the House and all it holds are emblematic of the Association's history, status and reputation in the legal profession: firmly rooted in sound traditions, but always pushing against perceived boundaries. Because of the strength and dedication of its members, the Association continually renews its spirit and that of the community it serves. [End quoting.]

In *Causes And Conflicts—The Centennial History Of The Bar Association* by George Martin, we read the following concerning the Bar Association of the city of New York. "The first part of the meeting [February 15, 1870], necessarily was taken up with completing the Association's organization. The subscribers voted 'after prolonged debate', in the secretary's opinion, to adopt 'the Constitution and By Laws, substantially as reported by the Committee.' Then they elected William M. Evarts president and Samuel J. Tilden the first of five vice-presidents, and in effect elected Henry Nicoll chairman of the executive committee by authorizing him to organize it."

In *Law For The Layman*, George Gordon Coughlin (member of the New York State Bar), writes [quoting:]

The term *organized bar* refers to members of bar associations as distinguished from lawyers as individuals. A bar association generally is established for the purpose of advancing the science of law and promot-

ing the administration of justice and upholding the standards of the legal profession.

In 1870 the Association of the Bar of the City of New York was organized. Almost immediately the association came in conflict with the Tweed Ring (which then dominated New York politics), for an investigation it had recommended resulted in the impeachment of two judges and the resignation of a third. This action played an important part in the downfall of the Ring and established public confidence in that bar association.

The American Bar Association was organized in Saratoga Springs, New York, in July 1878. Each state has its own bar association, as do large cities and many counties. The Association of the Bar of the City of New York is regarded as a model for all other city and county bar associations.

The American Bar Association in 1921, led by such men as Elihu Root and William Howard Taft, recommended that all law colleges require of students the following conditions for admission to the bar: (1) at least two years of college study before attending law school, (2) at least a three-year course in law school, (3) full-time attendance at law school and instruction by full-time teachers, and (4) examination by public authority (that is, graduation from law school should not automatically determine fitness for admission to the bar).

In 1923 the American Bar Association published its first list of approved law schools. It became apparent, however, that it was impossible to evaluate the qualifications of law schools without personal inspection. In 1927 advisers of the American Bar Association began inspecting law schools and assisting them with their problems. They also began urging the state and local bar associations to adopt the American Bar Association standards for admission to the bar. As a result of these activities law schools in 1952 increased to three the number of years of acceptable college study necessary for admission. [End quoting.]

THE AMERICAN BAR ENDOWMENT

In a document obtained from the American Bar Association, we read [quoting:]

The American Bar Endowment [ABE] was formed as an Illinois not-for-profit corporation in February 1942. Dedicated to the advancement of jurisprudence and the promotion of justice, the Endowment fulfills its charter purposes by supporting research and educational activities of the bar. Grants to eligible organizations have made possible many important professional and public service programs. Making substantial funds available to these organizations, through primary grants to the ABA's Fund for Justice and Education or the American Bar Foundation, is the Endowment's overall objective.

The Endowment's principal source of funding comes from contributions of dividends by participating members in the groups insurance programs administered by ABE. Such funds, after administrative expenses, are distributed as grants to fulfill its tax-exempt purpose. The Endowment has obtained a ruling from the I.R.S. that members who permit the Endowment to retain their dividends may be eligible for a charitable contribution deduction on their income tax returns.

THE AMERICAN BAR FOUNDATION

[Still quoting:] The American Bar Foundation is a major research institution which is affiliated with the

American Bar Association. Established in 1952 as an Illinois not-for-profit corporation in response to the need for continuous and thorough examination of important problems confronting the law and legal institutions. The American Bar Foundation is supported by the American Bar Endowment, the Fellows of the American Bar Foundation and private foundations, which organizations provide the basic unrestricted operating funds for the Foundation's program. The Fellows are comprised of an honorary group of practitioners, judges and legal educators limited to one-third of one percent of the attorney population in each U.S. jurisdiction.

The members of the corporation of the Foundation are the persons who from time to time are the members of the Board of Governors of the American Bar Association. [End quoting.]

THE AMERICAN BAR ASSOCIATION

Beginning where we left off in Part I of this series, the following is found in an article provided by the American Bar Association and appearing in the July 1978 edition of the *American Bar Association Journal*. This article, titled *The First Century Of The American Bar Association*, is written by Whitney North Seymour. [Quoting:]

During the turmoil of the 1960s, Lewis F. Powell, Jr., when president of the Association, expressed the view that the Canons of Professional Ethics were in need of major revision, particularly with respect to the relationship between the press and the bar, the presentation of unpopular causes, and grievance procedures. The Special Committee on Evaluation of Ethical Standards, headed by former president Edward L. Wright, proposed and in August, 1969, the Association adopted a new Code of Professional Responsibilities to supersede the Canons of Professional Ethics. The preamble to the Canons of Ethics adopted in 1908 emphasized that the "maintenance of justice, pure and unsullied," depended on the character of the individual members of the profession; the preamble to the 1969 Code of Professional Responsibility additionally focused on the rights and needs of the individual citizen.

One of the most important and productive recent enterprises of the American Bar Association was the work of the Committee to Establish Minimum Standards for the Administration of Criminal Justice, under the chairmanship of Judge J. Edward Lumbard of New York, a joint activity of the American Bar Association and the Institute of Judicial Administration. The formulation of minimum standards of criminal justice was proposed in 1963 by the Institute of Criminal Justice, of which the first two presidents—Arthus T. Vanderbilt and John J. Parker—had been leaders in the promulgation of minimum standards of judicial administration twenty-five years earlier.

While the scope of the project's concern was the entire spectrum of criminal justice, a particularly noteworthy and laudable contribution of the committee was the promulgation of standards for "providing defense services," which were approved by the Association in February, 1968. Those standards incorporate and expand the pre-*Gideon* standards adopted in 1960, which had recognized the need to "provide counsel for every indigent person unable to employ counsel who faces the possibility of the deprivation of his liberty or other serious criminal sanction."

Another significant achievement in the field of the administration of justice was the work of the Advisory Committee on Fair Trial and Free Press. Created in 1964, this committee, under the chairmanship of Paul

C. Reardon, then a justice of the Supreme Judicial Court of Massachusetts, proposed standards designed to strengthen the right of an accused to a fair trial within the framework of the constitutional rights of freedom of speech and the press. These standards, adopted in 1968, have provoked considerable controversy in the press and scholarly journals. Many have been stimulated to understand the importance of striking a proper balance between two great values in our system: the need to ensure both a fair trial and a free press.

There are at present eighteen volumes of the Standards for Criminal Justice, which have improved the quality of criminal justice and influenced the practice of criminal law. All fifty states, the District of Columbia, and Puerto Rico have taken steps to implement these standards. Thirty states have made substantial implementation, with new codes of substantive and procedural criminal law and new or amended rules of criminal procedure. More than four hundred appellate court decisions have cited the Association standards as authority.

Work with respect to the implementation of minimum standards of judicial administration continues. In April, 1976, the Association, the Conference of Chief Justices, and the Judicial Conference of the United States, under the leadership of Chief Justice Burger, jointly sponsored a National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. At that conference, which commemorated the seventieth anniversary of Dean Pound's 1906 speech to the Association, the chief justice, in a keynote address, focused on the need "to resolve minor disputes fairly and more swiftly than any present judicial mechanisms make possible." That proposal by the chief justice, as well as other specific proposals for the transfer of certain controversies from the courts to agencies better adapted to their resolution, are now being considered by the Association's Commission on Law and the Economy under the chairmanship of John J. McCloy. The present attorney [1978] Griffin B. Bell, was an active participant in this conference, and it is to be hoped that the Justice Department, under his leadership, will play a role in forwarding the conference objectives. [End quoting.]

NATIONAL BAR ASSOCIATION

In a brochure received from the National Bar Association, we read the following [quoting:]

The National Bar Association is the oldest and largest organization consisting primarily of Black attorneys in the United States of America. It is the principle advocate for the interest of Black lawyers, judges and law students. Through the NBA, informal and formal networks of Black lawyers provide professional support for enhancing professional growth and development.

When the NBA was organized in 1925, it was the only national professional bar association for Black lawyers. The purpose of the National Bar Association is..."to advance the science of jurisprudence, uphold the honor of the legal profession, promote social intercourse among the members of the bar, and protect the civil and political rights of all citizens of the several states of the United States."

Throughout the NBA's 70-year history, legions of Black lawyers affiliated with the NBA ushered in the rule of law through the turbulent 1920s and 1930s and up through the 1950s and 1960s and continues today.

The NBA has grown enormously in size and influence and currently has a network within the United States

of over 17,000 lawyers, judges and student members. It has 87 affiliate chapter institutions throughout the United States, Canada, United Kingdom, Africa and the Caribbean. [End quoting.]

ALEXANDER HAMILTON— *FEDERALIST PAPER #78*

In Alexander Hamilton's *Federalist Paper* No. 78, we read [quoting:]

The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that "there is no liberty if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, **that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments;** that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being over-powered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited *Constitution*. By a limited *Constitution*, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the *Constitution* void. Without this, all the reservations of particular rights or privileges would amount to nothing. [End quoting.]

THE INTEGRATED BAR— TWO *KEY* CASES

Now, let's take a closer look into the *Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604, (refer back to definitions for Integrated Bar) which set legal precedent. [Quoting:]

In view of the nature of the subject matter dealt with and its importance to the people of the State of Wisconsin as well as to the members of the Bar of this state, it seems appropriate to begin the discussion with a short outline of the steps that have been taken in this and other jurisdictions relating to the integration

of the bar.

For more than twenty years in one form or anther the matter has been before the Wisconsin State Bar Association and so far as the record discloses it has met with the approval of the Association. By 1935, consideration of the matter had reached such a stage that it seemed appropriate to present it to the Legislature. A bill was introduced into the Senate known as Bill No. 119, S. By the terms of that bill the Bar was to be completely integrated by act of the Legislature itself. The bill passed both Houses but was vetoed by the Governor. A similar bill introduced into the Assembly was indefinitely postponed. In 1937, two bills were introduced into the Senate, one of which was withdrawn. A companion bill, No. 424, A., was introduced into the Assembly, was ordered engrossed and read a third time to the *sine die* adjournment of the Legislature. In 1939, Bill No. 462, A., was introduced into the Assembly and passed but was nonconcurred in by the Senate. Bills were introduced into the Senate and Assembly in 1941—Bill 153, A., was introduced into the Assembly and passed but was nonconcurred in by the Senate. Bills were introduced into the Senate and Assembly in 1941—Bill 153, A., was passed by the Assembly and considered by the Senate but final action was not taken because of the *sine die* adjournment of the Legislature.

The bills introduced in 1937, '39, '41 and '43 while not identical, were substantially the same. Each created an association to be known as the State Bar of Wisconsin and conferred upon the Supreme Court power to provide by order for the organization of the association.

Since discussion of the matter was begun in Wisconsin, the matter of integration has been considered in other states. The Bar has been integrated in twenty-one states. (1) North Dakota, (2) Alabama, in 1921, (3) Idaho, in 1923, (4) New Mexico, in 1925, (5) California, in 1927, (6) Nevada (7) Oklahoma, in 1929, (8) Mississippi, in 1930 (9) South Dakota (10) Utah, in 1931 (11) Washington (12) Arizona (13) North Carolina, in 1933 (14) Kentucky, in 1934, (15) Oregon (16) Michigan, in 1935, (17) Nebraska, in 1937, (18) Virginia, in 1938, (19) Texas (20) Wyoming, in 1939, (21) Louisiana, in 1940.

Integration was accomplished by three different methods: (1st) By the enactment of detailed statues; (2d) By the enactment of a short statute conferring authority upon the highest court of the state to integrate the Bar; and (3rd) By rule of court without statutory authority in the exercise of its inherent power.

With a single exception no state which has integrated the Bar either by act of the Legislature or order of the court, has returned to the former practice. In 1929, the Legislature of Oklahoma passed what was known as the State Bar Act. This act in effect unified or integrated the Bar of that state. It was repealed by the Legislature of 1939, 5 O.S.1941 S 12 et seq. whereupon the supreme court in the exercise of its inherent power upon the petitions of the Board of Governors of the State Bar and various bar associations within the state entered an Order October 10, 1939, providing for the organization of the Oklahoma Bar Association. That order has ever since remained in force. In re *Integration of State Bar of Oklahoma*, 1939, 185 Okl. 505, 95 P.2d 113.

Enough has been said to indicate that the matter of bar integration is not a sporadic or evanescent movement. The movement was called into being to meet situations in the various jurisdictions which could not be dealt with efficiently under presently existing laws. Scattered as the states are from the Atlantic to the Pacific and from Canada to the Gulf of Mexico, the extent of the movement is strong evidence of the fact that there is a general widespread recognition of the fact that the conduct of the Bar is a matter of general

public interest and concern. We shall postpone to a later time a discussion of the merits and demerits of bar integration.

[Then, later in the ruling, still quoting:]

It is the primary function of the Legislature to declare rules of conduct to govern the future action of the citizens of the state. The Legislature does this in the discharge of its constitutional duty to promote the general welfare. Integration of the Bar, while it concerns most intimately the courts and the Bar, must necessarily affect the general welfare. What is true of the admission of attorneys to practice in the courts applies equally to the integration of the Bar. It is because the public interest is necessarily involved in prescribing the conditions upon which persons shall be admitted to the practice of the law that courts generally have deferred to some extent to the legislative branch of the government in matters relating to the Bar. In this field we have a fine example of the benefits derived from the co-operation and collaboration of two co-ordinate departments of the government. [Remember Hamilton's warning in *Federalist Paper* No. 78 above.] Without such co-operation and collaboration unseemly conflicts might easily arise because it is an area in which each department may within the exercise of its powers act with propriety.

It is quite obvious from a study of the history of the Bar and the consideration of judicial decisions that the line of demarcation between the legislative field and the judicial field in matters relating to the Bar is not a straight line, or even a fixed one. Heretofore courts have dealt with attorneys as individuals. It has denied the right of persons to practice before it who are unworthy of the trust and confidence of clients and of those who are not properly qualified and learned in the law. Chapter 315 deals with the members of the Bar in their aggregate or in a corporate capacity. To that extent it is an innovation in the law of this state. Inasmuch as the corporate body will include all the persons admitted to practice before the court, the court must of necessity, in the exercise of its judicial function, retain some measure of control over the organization; otherwise the court would be deprived of its unquestioned right to determine who shall be admitted to the practice of the law. We shall not attempt to delimit any farther than is necessary for the purposes of this case, the respective powers of the Legislature and the court in relation to the admission of attorneys to the Bar and the regulation of their conduct.

It is obvious that whether the general welfare requires that the Bar be treated as a corporate body is a matter for the consideration of the Legislature. Inasmuch as the functioning of an integrated Bar involves the exercise of regulatory control over its members, it directly affects the exercise of the power of the court over attorneys. So that the character and extent of the regulation is a matter of immediate concern to the court in the exercise of its functions.

While the court recognizes the power of the Legislature to fix minimum standards of qualifications to be required of attorneys at law, it will determine for itself whether the qualifications so fixed invade the judicial field or embarrass the court in the discharge of its functions. It is no more within the power of the Legislature to prescribe qualifications for attorneys which are too rigorous than it is to prescribe with finality those which are too low. In the promotion of the general welfare the Legislature may prescribe required qualifications but its acts are always subject to review by the court for the purpose of ascertaining whether they embarrass the administration of justice or invade the proper exercise of the judicial function.

Because of the familiarity of the court with rules of procedure and with the conduct and qualifications of

attorneys, it is in the public interest that the integration of the Bar should be by order of court. Not only is the court more familiar with the matters to be dealt with but it is in regular session throughout the year. Necessary adjustments and amendments can be made with a minimum of effort and inconvenience.

[Still referring to the *Integration of Bar Case*, we find the following statements, quoting:]

* The act directing Supreme Court to provide for organization and government of State Bar Association is not unconstitutional as delegating legislative power to Supreme Court, since integration of the bar is a "judicial power".

* The act providing for integration of state bar and making membership in State Bar Association a condition precedent to right to practice law, is not unconstitutional as denial of "equal protection of the laws".

* The act directing Supreme Court to provide for organization and government of State Bar Association is not unconstitutional as denying benefit of federal statute relating to practice of law in federal courts to attorneys admitted to practice in Wisconsin.

* The Supreme Court is not without power to integrate the bar because Supreme Court has only appellate jurisdiction.

* The *Constitution* is primarily a set of principles and not of rules, and in application of such principles there must be co-operation between the several departments in adapting the principles to practical affairs of government to make the government workable.

* The Legislature in discharge of its constitutional duty to promote the general welfare may declare rules of conduct to govern future action of citizens of the state and may provide for integration of the bar which necessarily affects the general welfare.

* Whether the general welfare requires that the bar be treated as a corporate body is for the Legislature, but the character and extent of regulation are for the Supreme Court.

* While Legislature may fix minimum standards of qualifications to be required of attorneys, the Supreme Court will determine for itself whether qualifications so fixed invade the judicial field or embarrass the court in discharge of its functions.

* The act directing Supreme Court to provide for organization and government of State Bar Association would not be construed as mere memorial invoking power of Supreme Court, in view of the fact that Supreme Court had attached much weight to legislative enactments pertaining to the bar, and by deferring to them had in practice given them a degree of finality.

* While Legislature cannot compel Supreme Court to act or to act in a particular way in discharge of judicial function, Legislature may declare itself upon questions relating to the general welfare which includes integration of the bar, and court will adopt such declarations so far as they do not embarrass the court or impair its constitutional functions. [End quoting.]
The case above and the next case below are SO IMPORTANT regarding the status of the integrated Bar,

that some of the case ruling is included here.

The *Petition of Chapman*, 509 A.2d 753 (N.H. 1986) [quoting some portions:]

It is here that the petitioner's second argument, a federal constitutional claim, becomes relevant. He asserts that, by taking a position on the tort package, the [Bar] Association has violated his right to freedom of speech and what he terms his "rights of conscience" under the Federal and State Constitutions, *U.S. CONST.* amends. I, XIV; *N.H. CONST.* pat. I, arts. 4 (1970), 22 (Supp.1985). The federal right that he asserts is part of that category known as "negative *First Amendment* rights," which may be defined as the right to be free from "government action [compelling one] to associate and...to participate in certain forms of expression." *Falk v. State Bar*, 418 Mich. 270, 282-83 & n. 12, 342 N.W.2d 504, 507 & n. 12 (1983), *cert. denied*,—U.S.—, 105 S.Ct. 315, 83 L.Ed.2d 253 (1984); *see also Gaebler, First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L.Rev. 995, 995-96 (1982).

At the outset, we note that the constitutionality of the integrated, or unified, bar is not at issue here. In addition to the fact that the history of the unified bar since its creation is one of impressive accomplishment and service to the public and lawyers of our State, the success of such a challenge is made all the more unlikely by decisions of both the U.S. Supreme Court and this court. *See Lathrop v. Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961); *In re Unification of the New Hampshire Bar*, 109 N.H. at 264, 248 A.2d at 712; *see also Note, First Amendment Proscriptions on the Integrated Bar: Lathrop v. Donohue Re-examined*, 22 Ariz.L.Rev. 939, 940 (1980). The Association has played a crucial role in maintaining and upgrading the quality of the bar in New Hampshire. The lawyer referral network has increased the availability of, and access to, lawyers in this State. Its public education and information efforts have been exemplary, and its continuing education program is among the best. The various committees of the Association provide substantive and procedural assistance both to the bar and to the courts. Unification of the bar may not be the sole reason for these successes, but we are confident that it has played a substantial role in contributing to these accomplishments.

The gravament of the petitioner's federal constitutional argument is that this legislative activity by the Association is unrelated to the Association's legitimate aim of promoting "the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process," *Lathrop, supra* 367 U.S. at 843, 81 S.Ct. at 1838, and violates the *First Amendment*. The petitioner asserts that no compelling governmental interest is served by allowing the Association to take a position in favor of or against this tort legislation. *See Arrow v. Dow,* 544 F.Supp. 458, 463 (D.N.M. 1982). Further, he argues, even if the taking of a position on tort reform by the Association serves a compelling State interest, his *First Amendment* rights are still violated because that interest could be served through less drastic means, such as the appearance of Association members before the legislature, either individually or as members of voluntary groups of attorneys, and not as representatives of the Association.

The constitutional claim that the petitioner raises is a serious one. *See Schneider v. Colegio de Abogados de Puerto Rico*, 546 F.Supp 1251, 1261-62 (D.P.R.1982). It involves the delicate balance between the free speech rights of an individual and those of an organization of which he is required to be a member. As such, he has only limited input into legislative positions taken by the Association. Nonetheless, whatever

his level of influence within the organization, the most extreme form of protest, withdrawal, is not open to him. On the other hand, requiring silence on the part of the Association would pose serious prudential questions. The problem we face is how to accord proper weight to each substantial, and in this case conflicting, interest.

In *Lathrup,* the United States Supreme Court upheld the constitutionality of integrated State bar associations, but did not decide whether a dissenter from the positions espoused by such an association could constitutionally be compelled to finance those positions through the payment of dues. *Lathrop*, 367 U.S. at 847-48, 81 S.Ct. at 1840. In later cases concerning agency shops arrangements whereby an employee is required to contribute dues to the union representing him or her, but is not required to be a formal member of it, the Court held that employees could not constitutionally be forced to contribute dues to ideological activities unrelated to collective bargaining, *see, e.g., Abood,* 431 U.S. at 234-35, 97 S.Ct. at 1799. More recent federal cases have centered around the adequacy of procedural schemes designed to deal with this problem, *see e.g., Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984).

This court, in the exercise of its inherent constitutional power to regulate the practice of law, ordered the integration of the bar and retains continuing supervisory authority over the Association and its activities, *see In re Unification of the New Hampshire Bar*, 109 N.H. at 263-64, 248 A.2d at 711-12. In the exercise of that authority, the court is obligated to interpret the limits on bar activities so as to preclude the *First Amendment* infringement that would result if the Association were to take positions on issues outside the scope of those responsibilities that justify compelling lawyers to belong to it. The line that we draw below is intended to divide issues that are within the scope of the Association's objectives, and on which official positions abridge no negative *First Amendment* rights, from those that fall outside those objectives, such that official comment would risk *First Amendment* infringements.

Given these preliminary observations, we will endeavor to define more clearly than we have before the standard which should govern the Association's activities before the General Court. In view of the Association's special status as a unified bar, we conclude that concerns for *First Amendment* liberties require a narrower view of its permitted legislative activities than the Association has taken. Hence, the Association should limit its activities before the General Court to those matters which are related directly to the efficient administration of the judicial system; the composition and operation of the courts; and the education, ethics, competence, integrity and regulation, as a body, of the legal profession. The Board's opposition to tort revision as a whole is not within the mandate of the Association's constitution. In essence, to interpret the phrase "administration of justice" in the Association's constitution as broadly as the dissenter does would be to eliminate any limitation on the legislative activities of the association where one was clearly intended.

We believe that circumspection is the watchword to be observed by the Board. Where it can reasonably be argued that an issue is outside the scope of its authority, the Board should take no position on the matter.

Some key points at law in this case, as listed before the narrative of the ruling, are:

* A "unified bar" or an "integrated bar" is qualitatively different from a "voluntary bar"; membership in a unified or integrated bar is compulsory, whereas membership in a voluntary bar is voluntary, and in effect,

one is not at liberty to resign from a unified bar, for, by so doing, one loses the privilege to practice law.

* In exercise of its continuing supervisory authority over State Bar Association and its activities, Supreme Court is obligated to interpret limits on bar activities so as to preclude *First Amendment* infringement that would result if Association were to take positions on issues outside scope of those responsibilities which justify compelling lawyers to belong to the Association. *U.S.C.A. Const.Amend.* 1
* State Bar Association should limit its activities before general court to those matters which are related directly to efficient administration of judicial system; composition and operation of courts; and education, ethics, competence, integrity, and regulation, as a body, of the legal profession.

* Opposition of Board of Governors of State Bar Association, a unified bar, to so-called "tort reform" legislation pending before general court was not within mandate of Association's constitution.

* Circumspection is watchword to be observed by Board of Governors of State Bar Association in its activities before the general court.

* Where it can reasonably be argued that an issue before general court is outside scope of its authority, Board of Governors of State Bar Association should take no position on the matter.

* Where substantial unanimity does not exist or is not known to exist within bar as a whole as to an issue before the general court, particularly with regard to issues affecting members' economic self-interest, Board of Governors of State Bar Association should exercise caution.

* Positions taken by State Bar Association and its Board of Governors as to a matter before general court should be tailored carefully and limited to issues clearly within Association's constitution mandate.

* Nothing prevents officers and members of the Board of Governors of State Bar Association from appearing before general court to express their views as individuals, as members of voluntary associations, or as representatives of clients. [End quoting.]

THE PRACTICE OF LAW— A *KEY* CASE

When looking under Practice of Law in *Black's Law Dictionary*, you find the case *R.J. Edwards, Inc. v. R.L. Hert, Okl.,* 504 P.2d 407, 416. In that case, they determined, in part, the following. [Quoting:]

Original proceedings for writs of prohibition. The Supreme Court, *Barnes, J.*, **held that Judicial Department is vested with full and complete authority, independent of the Legislative Department, to control and regulate the practice of law in all its forms and to prevent the intrusion of unlicensed persons into the practice, without regard to whether the acts involved are forensic or nonforensic,** and further held that where defendant municipal bond marketers and their agents merely reproduced forms prepared by Attorney General, furnished them to school districts and filled them out according to directions set out in the attorney general's handbook, to extent that defendants merely filled in the uniform forms prescribed, such activity did not call for determination of questions involving legal skill and did not constitute the practice of law.

* The "practice of law" is the rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent.

* A service which otherwise would be a form of the practice of law does not lose that character merely because it is rendered gratuitously.

* If practitioner of a "distinct occupation" goes beyond the determination of legal questions for purpose of performing this special service and instead advises his patron as to course to be taken to secure a desired legal status, he is engaged in the practice of law.

* It is necessary to fully develop the facts in order to determine if conduct of a particular business constitutes an enjoinable practice of law.

* Supreme Court has original jurisdiction to entertain complaints alleging unlawful practice of law by unlicensed persons but unlimited original jurisdiction of all justicable matters vested in the district courts includes such controversies. O.S. 1971 Const. art. 4, sec. 1; art. 5, sec. 1, 36; art. 7, sec. 1 et. seq., 1, 4, 7(a); art. 10, sec. 6. [End quoting.]

In *State v. Schumacher*, Kan., 519 P.2d 1116, practice of law is defined in the following manner, [quoting:]

Although it may sometimes be articulated more simply, one definition has gained widespread acceptance, and has been adopted by the Court:

A general definition of the term frequently quoted with approval is given in *Eley v. Miller*, 7 Ind.App. 529, 34 N.E. 836, as follows:

As the term is generally understood, the 'practice' of law is the doing or performing of services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court. State ex. rel. v. Perkins, 138 Kan. 899, 907, 908, 28 P.2d 765, 769 (1934).

The court, in *Perkins*, also pointed out that "one who confers with clients, advises them as to their legal rights, and then takes the business to an attorney and arranges with him to look after it in court is engaged in the practice of law." 138 Kan. at 908, 28 P.2d at 770. The quotation from the *Eley* case has been adopted as the general rule in 7 C.J.S. Attorney and Client S. 3 g (1937).

A more recent source defines the practice of law as "the rendition of services requiring the knowledge and application of legal principles and technique to serve the interests of another with his consent." *R.J. Edwards, Inc. v. Hert*, 504 P.2d 407, 416 (Okl. 1972).

It is clearly the prerogative of the Supreme Court to define the practices of law:

It is unnecessary here to explore the limits of judicial power conferred by Article 3, Sec. 1 of the Kansas *Constitution* but suffice it to say that the practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally and logically belongs to the judicial department of the government. (In re *Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W 265, 114 A.L.R. 151.) Included in that power is the supreme court's inherent right to prescribe conditions for admission to the Bar, to define, supervise, regulate and control the practice of law, whether in or out of court, and this is so notwithstanding acts of the legislature in the exercise of its police power to protect the public interest and welfare. *Martin v. Davis*, 187 Kan. 473, 478-479, 357 P.2d 782, 787, 788 (1960). [End quoting.]

LAWYER CLARENCE DARROW

Darrow was being interviewed for a magazine article on the reasons given by prominent men for their success. "Most of the men I've spoken to, so far, attribute their success to hard work," said the interviewer.

"I guess that applies to me, too," said Darrow. "I was brought up on a farm. One very hot day I was distributing and packing down the hay which a stacker was constantly dumping on top of me. By noon I was completely exhausted. That afternoon I left the farm, never to return, and I haven't done a day of work since."

CONSIDER THIS

"The minute you read something and you can't understand it, you can almost be sure that it was drawn up by a lawyer. Then if you give it to another lawyer to read and he don't know just what it means, why then you can be sure it was drawn up by a lawyer. If it's in a few words and is plain and understandable only one way, it was written by a non-lawyer.

"Every time a lawyer writes something, he is not writing for posterity, he is writing so that endless others of his craft can make a living out of trying to figure out what he said, 'course perhaps he hadn't really said anything, that's what makes it hard to explain." [Will Rogers]

CHAPTER 3

JUDICIAL MONOPOLY, PART III
THE RIGHT OF REPRESENTATION

by Rick Martin 1/30/96

EXAMINING THE U.S. LEGAL SYSTEM

Part I of Rick's well-researched series on the U.S. legal system apppeared in the 1/23/96 issue of CONTACT *on page 8; Part II was in the 1/30/96* CONTACT *on p. 5. We continue below with this exposé.*

In his legal practice, Abraham Lincoln was never greedy for fees and discouraged unnecessary litigation. A man came to him in a passion, asking him to bring suit for $2.50 against an impoverished debtor. Lincoln tried to dissuade him, but the man was determined upon revenge. When he saw that the creditor was not to be put off, Lincoln asked for and got $10 as his legal fee. He gave half of this to the defendant, who thereupon willingly confessed to the debt, and paid up the $2.50, thus settling the matter to the entire satisfaction of the irate plaintiff.

How many lawyers today would take this approach?

IMPORTANT PROTECTION
FOR *SELF-REPRESENTATION*

The right of self-representation in court [referred to as *pro per* or *pro se*, both of which will be explained momentarily], as written in the Judicial Reform Act of 1789, is currently codified in 28 USCS Sec. 1654, which reads:

Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Under 28 USCS Sec. 1654, we read under the heading of *Interpretive Notes and Decisions*, [quoting:]

28USCS Sec. 1654 only allows for two types of representation: (1) by attorney admitted to practice of law by governmental regulatory body, and (2) by person representing himself. *Turner v. American Bar Assoc*. (1975, DC Tex) 407 F. Supp 451.

Still reading the code under *Interpretive Notes and Decisions,* we read:

United States Constitution does not guarantee defendant's right to proceed pro se; right to pro se representation is only tangentially related to procuring fair trial. *United States ex. rel. Soto v. United States* (1974, CA3 Pa) 504 F2d 1339, 27 ALR Fed 475.

Right of accused to proceed in propria persona (pro per) is unquestioned, and such right whether it be founded on constitutional or statutory right, must be timely asserted and accompanied by valid waiver of counsel. *United States v. Jones* (1975) 169 App DC 90, 514 F2d 1331.

28 USCS Sec. 1654 was enacted to enforce *Sixth Amendment's* guarantees to right to counsel. *Turner v. American Bar Assoc.* (1975, DC Tex) 407 F Supp 451.

Right to defend pro se is deeply ingrained in our common law, and constitutional dimension of right to defend pro se is evidenced by fact that it has been sustained by various sections of federal constitution, and additionally, right of self-representation was codified in Judiciary Act of 1789 and is presently contained in 28 USCS Sec. 1654; however United States Supreme Court has never specifically determined whether or not right to conduct one's own defense is constitutionally guaranteed. *People v. McIntyre* (1974) 36 NY2d 10, 364 NYS2d 837, 324 NE2d 322.

Right to proceed pro se derives from belief that respect for human dignity is best served by respect for individual freedom of choice. *Soto v. United States* (1973, DC Pa) 369 F. Supp 232, affd (CA2 Pa) 504 F2d 1339, 27 ALR Fed 475.

[Still quoting, under Section 28 USCS Sec. 1654, heading *Civil Actions—Self Representation,* we read:]

Right of self-representation provided for in 28 USCS Sec. 1654 allows non-attorney to appear in propria persona in his own behalf, but that privilege is personal to him, and he has no authority to appear as attorney for others than himself, and individual did not have right under 28 USCS Sec. 1654 to appear in case where he was trustee for organization which in turn was alleged to be trustee of real parties in interest. *C.E. Pope Equity Trust v. United States* (1987, CA9 Or) 818 F2d 696, 7 FR Serv 3d 1170.

Court showed indulgence when party conducted his own suit without aid of counsel. *Brinkley v. Louisville & N.R. Co.* (1899, CC Tenn) 95 F 345.

Everyone has right to appear in his own proper person and represent himself. *Bocz v. Hudson Motor Car Co.* (1937, DC Mich) 19 F Supp 385.

[Continuing quotation under 28 USCS Sec. 1654, heading *Criminal Actions—Self Representation*, we read:]

Trial court erred upon trial of defendant in refusing him permission to defend himself and insisting upon his representation by local counsel. *Reynolds v. United States* (1959, CA9 Hawaii) 267 F2d 235.

Trial court erred in denying, on ground that defendant did not have skills adequately to defend himself, motion of defendant in armed robbery case to proceed in pro se. *United States v. Price* (1973, CA9 Cal) 474 F2d 1223, reh den (CA9) 484 F2d 485.

Party's assertion of right to conduct own defense under 28 USCS Sec. 1654 is timely, and must be honored, if made before jury is selected (absent affirmative showing that it is tactic to secure delay) al-

though made after court-appointed attorney has announced "ready for trial". *Chapman v. United States* (1977, CA5 Ga) 553 F2d 886.

Right of criminal defendant to self-representation upon voluntary and intelligent choice, found in 28 USCS Sec. 1654, is subject to reasonable limitations upon exercise of that right since such right may not be used to subvert trial or to effect other dilatory purposes; thus, limitations placed by court upon defendant's self-representation at trial were not unreasonable where court permitted government to prosecute 9 counts together against defendant rather than separately as desired by defendant. *United States v. Coupez* (1979, CA9 Wash) 603 F2d 1347.

Accused has unquestioned right to defend himself, and when it appears that defendant knows what he is doing, it would be error to force counsel not of his choice upon him. *United States ex rel. Puntari v. Maroney* (1963, DC Pa) 220 F Supp 801. [End quoting.]

In Eustace Mullins' book *The Rape of Justice—America's Tribunals Exposed*, we read [quoting:]

The problem of using the designation, attorney pro se, which the present writer has used for many years, is that it is defined in *Black's Law Dictionary* as "For Himself", which could mean he is appearing as another person who appears "for himself". *Black's* also defines it as "in person", which seems adequate. Purists prefer the appellation "In Propria Persona", which according to *Black's*, is "In one's own proper person". In either case, you become the attorney of record. And whichever you use, your primary problem is not what you call yourself, but the fact that you are appearing in an admiralty court which denies you the protection of the *Constitution*. [Equity Courts and Admiralty Law are terms which are heard continually. These will be explored, in detail, later.]

The legal profession has set up generous protection standards for one who wishes to represent himself. The Standards Relating to Trial Courts, American Bar Association Commission on Standards of Judicial Administration, 1976, sec. 2.23: "Conduct of cases where litigant appeared without counsel. When a litigant undertakes to represent himself, the court should take whatever measures may be reasonable and be necessary to insure a fair trial."

I have never met any judge or attorney who had read that particular recommendation.

On May 27, 1977, Chief Justice Warren Burger addressed the American Bar Association, "In the federal courts the right of self-representation has been protected by statute since the beginnings of our nation. Section 35 of the Judiciary Act of 1789, 1 Stat. 73,92, enacted by the First Congress, and signed by President Washington, one day before the *Fifth Amendment* was proposed, provided that in all the courts of the United States, the parties may plead and manage their own causes, personally, or by the assistance of counsel. The right is currently codified in 28 USC Sec. 1654." [End quoting.]

Now, returning to our discussion in (last week's) Part II concerning the Bar Association, let's take a look at one good example—how the Bar gained a footing in the State of California.

THE CALIFORNIA STATE BAR

In a faxed document sent to *CONTACT* from the California State Bar Association's headquarters in San Francisco, we read: [Quoting:]

Founded in 1927 by the legislature, and subsequently written into the state *Constitution*, The State Bar of California is an administrative arm of the California Supreme Court. The bar has been serving the public and seeking to improve the justice system for more than six decades.

Because The State Bar of California is an *integrated* or *unified* bar, all lawyers practicing in California must be active members. As of April 1995, the number of attorneys eligible to practice in California had climbed to more than 147,000—making The State Bar of California by far the largest state bar in the nation.

The State Bar of California is governed by a 23-member Board of Governors, including the president who is elected by the board. San Jose attorney James E. Towery currently serves as president of the State Bar.

The major functions of The State Bar of California fall into seven categories: admissions, administration of justice, attorney discipline, member and client relations, communications and public education, legal education and professional competence, and legal services.

Throughout its history, The State Bar of California has included among its primary goals protecting the public against unethical lawyers and responding to the public's need for legal information.

The public education programs of The State Bar of California help educate the public about their legal rights and about law, lawyers and the judicial system. A comprehensive legal literacy campaign, the "Legal Facts of Life"—includes the following programs: Consumer Information Pamphlets (including several translations for California's immigrant communities); Community Law Schools (for citizens in various California communities); Legal Resource Centers (a pilot program for minority and non-English-speaking residents).

The State Bar of California attorney discipline system—the only one of its kind in the nation—has at its pinnacle a nine-member, professional panel of judges, the State Bar Court, which hears cases and decides on disciplinary action, including disbarments and suspensions from the practice of law.

Financed mainly by membership and application fees, The State Bar of California uses no tax dollars to support its activities, which center on regulation of the legal profession and improving the administration of justice for all Californians. [End quoting.]

In Gerry Spence's book *With Justice For None*, we read [quoting:]

The California Bar Association brings us worse news. Its recent survey shows that 75 percent of the people form their bad opinion of the profession not on idle gossip and jokes but from direct dealing with lawyers themselves. That study concluded, "Overall, the general public's view of lawyers is not encouraging...Indeed, lawyers are perceived as arrogant people who create problems, not solve them, and who are unconcerned about their clients or the public at large." Only 19 percent of the respondents gave lawyers high marks for maintaining honest and ethical standards. The negative words and phrases most frequently chosen to describe lawyers were "greedy", "arrogant", "they charge too much", and they are "not nice

people." Forty-five percent of lawyers themselves thought their peers self-serving, and 59 percent thought their members overbearing. Ironically, a society committed to the rights of mankind, we have always seemed to hate the one profession that is charged with the preservation of such rights. [End quoting.]

In the *Constitution of the State of California (1849)*, under *Article VI: Judicial Department*, *Section 8*, we read [quoting:]

There shall be elected in each of the organized counties of this state, one County Judge, who shall hold his office for four years. He shall hold the County Court, and perform the duties of Surrogate, or Probate Judge. The County Judge, with two Justices of the Peace, to be designated according to law, shall hold Courts of Sessions, with such criminal jurisdiction as the legislature shall prescribe, and he shall perform such other duties as shall be required by law.

Sec. 9—The County Courts shall have such jurisdiction, in cases arising in Justices Courts, and in special cases, as the legislature may prescribe, but shall have no original civil jurisdiction, except in such special cases.

Sec. 10—The times and places of holding the terms of the Supreme Court, and the general and special terms of the District Courts within the several districts, shall be provided for by law. [End quoting California's 1849 State *Constitution*.]

Now, turning to the more revised, current, "corporate" State *Constitution* for California, we read [quoting:]

Sec. 8—(a) The Commission on Judicial Performance consists of 2 judges of courts of appeal, 2 judges of superior courts, and one judge of a municipal court, each appointed by the Supreme Court; 2 members of the State Bar of California who have practiced law in this State for 10 years, appointed by its governing body; and 2 citizens who are not judges, retired judges, or members of the State Bar of California, appointed by the Governor and approved by the Senate, a majority of the membership concurring. Except as provided in subdivision (b), all terms are 4 years. No members shall serve more than 2 4-year terms.

Commission membership terminated if a member ceases to hold the position that qualified the member for appointment. A vacancy shall be filled by the appointing power for the remainder of the term. A member whose term has expired may continue to serve until the vacancy has been filled by the appointing power.

(b) To create staggered terms among the members of the Commission on Judicial Performance, the following members shall be appointed as follows:

(1) The Court of appeal member appointed to immediately succeed the term that expires on November 8, 1988, shall serve a 2-year term.

(2) Of the State Bar members appointed to immediately succeed terms that expire on December 31, 1988, one member shall serve for a 2-year term. [*As amended November 8, 1988.*]
Sec. 9—[*Repealed November 8, 1966. See Section 9, below.*]

[*State Bar*]

***Sec. 9*—The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of records. [*New section adopted November 8, 1966.*]**

Sec. 10—[*Repealed November 8, 1966.* [End quoting.]
And so it goes.

ALAN DERSHOWITZ

In the August 9, 1982 edition of *U.S. News and World Report*, Attorney Alan Dershowitz wrote the following article. [Quoting:]

U.S. LEGAL SYSTEM: "ALL SIDES WANT TO HIDE THE TRUTH"

"We Hope The End Result Is A Just Verdict"

Our adversary legal system is hard to justify as a search for truth. Its goal is not simply to put the truth on the table but also to make sure that the proper process is followed. We hope that the end result is a just verdict that is also truthful, even though all sides in a trial want to hide at least some of the truth.

The defendant wants to hide the truth because he's generally guilty. The defense attorney's job is to make sure the jury does not arrive at *that* truth.

The prosecution is perfectly happy to have the truth of guilt come out, but it, too, has a truth to hide: It wants to make sure that the process by which the evidence was obtained is not truthfully presented, because, as often as not, that process will raise questions.
The judge also has a truth he wants to hide: He often hasn't been completely candid in describing the facts or the law.

Truth suffers enormously in the adversary system of justice. Despite this, the system generally produces accurate results. The system is the best we can get. As Churchill said about democracy: It's the worst system except for all the others.

"OCCASIONALLY, WE REPRESENT AN INNOCENT PERSON"

One basic truth of the system is that defense lawyers in criminal cases represent guilty people. Occasionally, we represent an innocent person, but I see only a few of them.

In the real world of criminal justice, there are plenty of villains but not many heroes. The defense attorney

doesn't deserve to be cheered; he deserves to be tolerated. He's an evil—but a necessary one. When I get a guilty guy off, I am not thrilled; it's not my idea of a jolly time. But the alternative—letting a guilty person go into court without a defense attorney and making him represent himself the way people do in the Soviet Union—is horrible to contemplate.

"PERRY MASON NEVER DEFENDS THE GUILTY"

We are doing a terrible job of educating the public to the fact that the legal process demands that we defend the guilty. On television, which is the most important means for learning about the legal system, Perry Mason never defends the guilty. In civics, we learn the myth that the *Constitution* is designed to protect the innocent. Then people come into a real court, where most are guilty, and they get terribly cynical. They don't think the system is working.

The liberals have been most responsible for presenting a misleading picture. They try to persuade the public you can have your cake and eat it, too. Civil libertarians say the *Fourth* and *Fifth Amendments* are designed to protect the innocent. People aren't fools. They know that when the police break into somebody's house and find drugs, he's not innocent. But it's very important to persuade the public that its own rights are being protected by defending the guilty and not necessarily just the innocent.

I was in China recently lecturing about criminal law, and there was no way to persuade the Chinese that the guilty deserve to be represented until I talked to them about the "cultural revolution". They said: "We were all innocent." I said: "Yes, but the government thought you were guilty. Wasn't it important to be represented even if you were guilty?" That's a hard point to convey.

"CORRUPTION CREATES TERRIBLE DANGERS FOR THE FUTURE"

The legal system is filled with corruption and dishonesty. Take a typical case: The cops are after a notorious drug dealer. The police know he's the guy, but they have no proof and can't get a warrant. So they bust him one night, search him illegally and find drugs in his pocket.

An officer comes to court and says that the drugs ended up on the floor; the butterfingered drug dealer dropped it by accident. But the prosecutor knows the officer's lying; the judge knows he's lying; the defense attorney, of course, knows he's lying.

The defendant will probably take the stand and lie also. He'll say, "No, I didn't do it, and he didn't even see me, and what he did is he beat me."

The law under such a circumstance requires that the guilty defendant must be acquitted to go back on the streets and prey on the kids again and sell drugs. The judge doesn't want that; he wants to do justice. So he closes his eyes and ears to some "white lies" by the police.

What's the result? The guilty man gets convicted and goes to jail. Who's going to shed tears about that? I do because I think it corrupts the system. It creates terrible dangers for the future when innocent people

might be effected.

WHY LAW-SCHOOL IDEALISTS BECOME "CYNICS AND LIARS"

Students coming out of Harvard Law School—or any good law school—with a high degree of idealism and a high commitment to truth see that the system is based on a superstructure of distortion, of twisting, of turning. Some become cynics and, ultimately, liars. In the interests of a higher justice they, too, engage in distortion.

First they do it as prosecutors. Then they go to work for plaintiffs in civil suits, and they say to themselves: "Well, this is a poor plaintiff. He was hit by a truck. All right, so he was drunk that day, but that shouldn't be relevant. The law says it's relevant, however, so I'll allow my plaintiff to lie about whether he was drunk. In that way justice will be done."

"DEMOCRACY REQUIRES THAT THE WARTS BE SHOWN"

In this entire process, judges really come out as the villains, not because they're any worse than others but because so much more is expected of them. They're suppose to be interested only in justice, but they are very much a part of this process of distortion. They engage in it because they want to see guilty people convicted and don't want to make bad law.

Let's take a situation where there are a lot of ways a judge could resolve a case, such as a drug dealer who is picked up after an illegal search. First, the judge could acquit the guilty person, but there are pressures not to do that. Second, the judge could change the law in a way that might come back to haunt the legal system. Third—and the easiest way to achieve a desired end—is to change the facts so as to apply them only to this particular case, without changing the law and without acquitting a guilty defendant.

That's the tack many judges take. They think they're doing right. They're praised as judicial statesmen for twisting the law. Even Supreme Court Justices engage in such behavior—both liberals and conservatives.

We must stop rewarding judges for being dishonest. Scholars and lawyers have an obligation to be tougher in evaluating judicial decisions. Once we tell judges that we are not going to praise them any longer for improper actions, we may see a dramatic change in the system.

There should also be much more scrutiny of the legal profession by the media. It's beginning now, but for years it hadn't happened because the law was seen as impenetrable. The press has not been hard enough on judges. A democracy requires that the warts be shown. If that undermines confidence in the system, so be it. Then we'll have to build a better system that engenders more confidence.

THE "ROULETTE WHEEL" OF CRIMINAL SENTENCES

Another shortcoming of the system is that criminal sentences in this country are both too harsh and too lenient. We see second-time armed robbers in New York City getting probation. At the same time, we see

first offenders who have the temerity to invoke their constitutional rights and plead not guilty getting long prison terms.

The incredible disparity makes the system a roulette wheel. It depends on where you commit a crime, which judge hears the case and whether you're smart enough to follow the first rule of crime: Commit it with somebody more important than you so that you can turn them in and make a plea bargain for yourself. The net result is that, however tough we may be in theory, the average criminal does not think he's going to do time for serious crimes. Criminals are gamblers by nature. They say to themselves, "If there's any chance that I might get off, I'll probably get off."

The system of deterrence breaks down because we don't keep our promises: We don't punish people for committing serious crimes. In my view—and this may sound strange from a civil libertarian—any person convicted of a serious crime of violence should go to jail. I believe in short, swift, effective and certain punishment. [End quoting.]

JUDGE NOT

In Eustace Mullins book *The Rape of Justice—America's Tribunals Exposed*, we read [quoting:]

The origin of the word "judge" is found in "juden", or, in Spanish, "juez". In the United States, the judge sees himself, first of all, as the guardian of the present legal system. While carefully cultivating his public image as the epitome of impartiality, he succeeds in letting interested inquirers know that his impartiality may be swayed by certain consideration. For this reason, it is crucial that a citizen entering an American court as a litigant should discard the assiduously cultivated myth of "judicial impartiality". If you are a farmer, a small business operator, or a wage earner in any type of business, you are already "beyond the pale", as far as the judge is concerned. You have been consigned to the never never land of the hoi polloi—the judge will not let anyone leave his court without being convinced that he is an elitist.

During a national campaign to increase judges' salaries in 1989, it was found that judges, whose salaries range from $89,500 to $115,000 a year, reported average extra earnings from $16,624 to $39,500. An Associated Press survey found that the median 1987 income for a federal judge was from $108,000 to $130,300. In pleading for the pay raise, Robert McWilliams of the 10th U.S. Circuit Court in Colorado, stated that "Judges' salaries, rather than being geared to the income of the average taxpayer, should be geared to the average of practicing lawyers." However, the Associated Press survey showed that median income for America's 707,000 lawyers and judges was only $45,069 (Census reports). McWilliams apparently was unaware that judges' median income was already more than double the median income for American lawyers. The demand for ever higher salaries is part of the judges' elitist drive. The judge has attended a university; his family had sufficient funds for him to go on to graduate law school and to become a professional man; and he later became a judge because he attracted the favorable attention of even more powerful elitists, who concluded that he would serve to protect their interests in the court. The judge resides in an upper income suburb, owning a home of considerable value in an area of other elitists. He belongs to a country club whose members are strictly limited to elitists. He maintains unadvertised affiliation in one or more religious, fraternal and political groups. Preeminent among such groups is the Masonic fraternal organization. The majority of Masonic members never go beyond the three degrees of the Blue Lodge. They are never informed that the higher degrees are forbidden, under pain of death, to disclose

any of the machinations of the higher degrees to any member of the Blue Lodge. This does not mean that members of the Blue Lodge reap no advantages from their membership. On the contrary, they continually receive favorable treatment in the banks, in the courts, and from other businessmen. The courts are preponderantly extensions of the Masonic brotherhood. Most lawyers and judges are fellow lodge members. Preferential treatment is extended to all members of the brotherhood who come before the court.

In our larger cities, most judges are also Zionist collaborators; if inactive Zionists, they have been screened by a Zionist organization and have been found satisfactory. A judge is almost always a member in good standing of one of the major political parties; he is almost never a member of an "independent" political movement. He is usually a member of an established church, if Protestant, usually Episcopalian, although more than half of the judges in the United States are Roman Catholic. He may even belong to some "extremist" organization, as Supreme Court Justice Hugo Black had long been a member in good standing of the Ku Klux Klan. After he had been appointed to the Supreme Court by President Franklin Delano Roosevelt, Black admitted his Klan membership. The lead had come from a Communist ideologue, during the heyday of the capture of the national Democratic Party by the fanatical Stalinist wing of the Communist Party. Klan membership was anathema to these ideologues; only Nazi affiliation carried a greater stigma. Black humbly promised never to go to another Klan meeting, and served on the Court for many years. Political realists in Washington knew that Black's political career had been built on his Klan membership in Alabama. Without it, he could not have been elected to the Senate. Once in Washington, he became a loyal supporter of FDR's most socialist policies, and was rewarded by the Supreme Court appointment. With the Klan affiliation hanging over his head, Black became an ardent supporter of every violation of the *Constitution*, as a member of the FDR court.

The Black episode illustrates the necessity of a judge having powerful political support. Conversely, he need know little or nothing about legal problems or the actual practice of law. He is expected to show unwavering loyalty to the prevalent party line during his service as a judge. Those judges who at some point begin to believe that they are a power in themselves, and who substitute their personal views for the exigencies of the current party line (which varies from day to day, as any practical political stance must do), are the judges whom you read about in the press. They are judges who are impeached for high crimes and misdemeanors, stripped of their office, and sent to prison. This is a very rare occurrence, as the sitting judge is never allowed to forget where his real allegiance lies. The judge exercises supreme power over the parties who stand before him in civil litigation or in criminal actions. He has equal power over the lawyers who stand before him, and he never allows anyone to forget that power. In this regard, the judge is not actually an employee of the city, state or nation which pays his salary. He is the tool of the secret entities who control all aspects of American life from behind the scenes. The servile press has made it fashionable to sneer at anyone who believes there are conspirators as probably mentally ill, and should be secluded for the safety of society. We are often reminded that persons who claimed to have some knowledge of the inner workings of "the conspiracy" have been promptly spirited off to an asylum, where the continuous administration of mind-altering drugs soon convinces him that he was mistaken in his charges. The "agitator" is soon reduced to a helpless, drooling inmate who, whenever he shows signs of recovering his wits, is immediately given a stronger dose of Thorazine, a la KGB.

The fallacy of judicial impartiality can be denied by any practicing attorney. In our larger cities, the practice of "judge-shopping" among scheduled members of the bench is a daily occurrence. A lawyer will use any stratagem, not the least of which is the employment of carefully cultivated relationships with clerks of the

court, to have a case moved from a judge known to be hostile either to the defendant, or to the type of crime he has committed, or to the lawyer himself. Throughout the legal profession, it is common knowledge that most judges with years of service on the bench are almost universally hostile to anyone who comes into a court without an attorney, and declares his intention of representing himself. The judges are also very hostile to women lawyers, and to blacks and other minorities.

Liberal elements in Washington had sought to replace the older members of the judiciary with blacks and women, a process hastened by President Jimmy Carter, who replaced some three hundred members of the federal judiciary. Some of them have since been indicted, while others have resigned.

In 1717, Bishop Benjamin Hoadley informed the King of England, "Whoever hath an absolute authority to interpret any written laws is truly the lawgiver to all intents and purposes, and not the person who wrote them."

Thus it is the judge, rather than the person who wrote the laws, who has been transformed from an impartial referee of the statutes into the creator of the statutes. Judges are now handing out excessive punishments, with little or no restraint on their decisions. *THE WALL STREET JOURNAL* noted April 28, 1989 that federal judge Richard Owen had given some defendants one hundred years in a criminal case, and fifteen years in a tax fraud case, which was at least five times more severe than most attorneys thought appropriate. A federal judge ruled June 5, 1980 that the city of Parma, Ohio must provide three hundred units of low income housing annually. This was described as "the first federal takeover of a city."

The D.C. Court of Appeals ruled May 10, 1989 that District of Columbia Superior Court Judge Tim C. Murphy should have withdrawn from an assault case which had been brought by federal prosecutors, because at that very time, he was applying for a position with the Department of Justice. It was ruled a clear-cut violation of ethical rules, although Judge Murphy defended his action by pointing out that "I taught judicial ethics for years."

The overweening power of the judge in the American legal system has increased inversely to the decline of *Constitutional* guarantees of individual rights, and the concurrent rise of equity law. Equity originates from the Latin Aequitas, meaning equality of justice. Equity is defined by Sir Henry Maine in "Ancient Law" as "any body of rules existing beside the existing original or civil law, founded on distinct principles, and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles, principles stemming from praetor edicts." This is a reference to the annual proclamation on administrative law which was added to each year by the praetor, who corresponded to the lord high chancellor in English law. Equitable jurisdiction had been established in England by the reign of Edward III. Equity has exclusive jurisdiction where it recognizes rights unknown to the common law, such as trusts; equity has concurrent jurisdiction where the law recognized the right but did not give adequate relief; and auxiliary jurisdiction where the machinery of the courts of law was unable to procure the new evidence." [There will be more definition of "equity law" later in this series.]

Maine goes on to deplore the evils of this double system of judicature. The present writer found early on that when his opponents realized that they could not destroy him in the civil courts, they moved to have the case heard in the equity or chancery courts. At first, I was mystified by this move, although I was soon convinced of its purpose. I doggedly hung on, and was finally able to settle the case on my own terms. The

existence of this double system of judicature is a powerful secret weapon, which both judges and lawyers use against the public, giving them a decisive tactic which they can deploy, just when the citizen believes that at last he will finally receive justice in the court. [End quoting.]

ALEXANDER HAMILTON

In *Federalist Paper #78*, Alexander Hamilton, in the late 1780s, wrote, in part [quoting:]

If, then, the courts of justice are to be considered as the bulwarks of a limited *Constitution* against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the *Constitution* and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. [End quoting.]

CONSTITUTIONAL PERSPECTIVE

In R. Randall Kelso's *Studying Law: An Introduction*, we read the following historical perspective concerning constitutional law. [Quoting, portions:]

We must never forget that it is a constitution we are expounding. Mr. Justice Marshall, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819).

During John Marshall's tenure as Chief Justice (1801-1835), the Supreme Court held that it was the final authoritative interpreter of the *Constitution* and had power to declare invalid any law that it decided was contrary to the *Constitution*. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). The Court continues to assert that its interpretations of the *Constitution* are the supreme law of the land. See, e.g., *Cooper v. Aaron,* 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958) (unanimous opinion not only joined, but written and signed, by all nine Justices). This claim of power has little basis in express constitutional language or convention history. See, e.g., W. Crosskey, *Politics and the Constitution* 938 et seq. (1953). Nor does the claim to power have much support in pre-*Constitution* history. Id. But see Berger, 8 U. Dayton L. Rev. 465, 492-95 (1983) (criticizing Crosskey's analysis), and sources cited therein. Nevertheless, other branches of the federal government have acquiesced in the Court's holding and it has been enforced on the states. As a result, the study of *Constitutional* Law is largely the analysis of almost 200 years of Supreme Court decisionmaking.

It is important to remember that the *Constitution* is a text. Interpreting the *Constitution*, like interpreting a statute, can begin and end with plain meaning. Where the meaning of the *Constitution* is truly plain, any judge will give it that meaning. Problems of *constitutional* interpretation arise when meaning is not so plain. In such cases a difference in approach often means a difference in result. This leaves considerable

room for judicial maneuvering because our *Constitution*, drafted in light of 18th century rules, (described by Crosskey, pp. 275-77), contains quite a few general terms as well as a number of terms whose original meaning has been forgotten as usage has changed.

NATURAL LAW (1776-1870)—According to Dean Roscoe Pound, natural law thinking from 1776 to 1870 went through three distinct phases: ethical, political, and economic.

Natural law thinking originally had an ethical bent. Jefferson reflected the times when he wrote in the *Declaration of Independence*, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Natural rights, grounded in a theory of morality, were thought to exist. See, e.g., T. Paine, *The Rights of Man* (1792). The existence of such rights was recognized and secured not only by the explicit protections of the first eight amendments to the *United States Constitution*, but also by the *Ninth Amendment*, which provides that: "The enumeration in the *Constitution*, of certain rights, shall not be construed to deny or disparage others retained by the people."

The second stage of natural law thinking, a political bent, accompanied John Marshall's tenure on the Supreme Court (1801-1835). As defined by Pound, the starting point for the political form of natural law was "the nature of American institutions and practices" or "the nature of free government". Pound, *The Formative Era of American Law* 23 (1938). Justice Marshall's opinions make frequent reference to the needs of American government, the nature of our system, and the genius and character of a free government.

The third and final stage of natural law, according to Pound, was economic. In this form, said Pound, "an economic ideal of a society ordered by the principles of classical liberal economy prevails." Id. Justice Story exemplified this stage. His famous opinion of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842), acknowledged a federal common law applicable to commercial transactions. This common law was based on the law of nations with respect to commerce. The law of nations (which was thought to rest on natural law) was to be imported into American common law, as Lord Mansfield had attempted to do in England. (Not surprisingly, Mansfield was Story's favorite judge.)

FORMALISM (1850-1920)—Story's economic natural law gradually became transformed into a formalist approach. Some have identified a judicial concern to protect slavery and other sectional interests as the main force that caused judges to retreat into formalism. Formalistic reasoning allowed judges to uphold pro-slavery laws while distancing themselves from a perceived immorality. Without doubt, there is some truth to this argument. yet, formalism remained the dominant mode of judicial reasoning in *Constitutional Law* (as in common law and statutory interpretation) for fifty years after the slavery issue was resolved by the Civil War and the Civil War Amendments.

Thus, it is likely that formalism came into judicial decisionmaking for reasons that extend beyond *constitutional* law or slavery, though perhaps they were catalysts that triggered formalistic reasoning. An alternative hypothesis faithful to this understanding is that in general formalism was a reaction to a breakdown in the national consensus on fundamental values that occurred following the Revolutionary War. Once a consensus no longer existed on what values constituted ethical natural law, judges first adopted political natural law arguments and then economic natural law arguments. Political natural law gave procedural

content to the one universally held ethical principle which remained in the period, i.e., that man should govern himself democratically. Economic natural law gave substantive content to certain "natural" principles of property and contract, principles founded upon the theories of John Locke and Adam Smith on which most members of the ruling elite could agree any political arrangement must protect.

The period of economic natural law might have been prolonged if it had not been undermined by debates on slavery and States' Rights. In *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), Justice Taney went beyond the political natural law understanding of due process as "procedural due process" (the processes or procedures called for by the *Constitution* or settled usages and modes of procedure existing at common law) and decided *Dred Scott* on the economic natural law grounds of "substantive due process". Depriving a person of property—the slave, Dred Scott—simply because the owner brought that property within a Territory could not be considered due process of law. When Justice Taney's decision in *Dred Scott* was reversed in practice by the election of Abraham Lincoln and the Union victory in the Civil War, economic natural law arguments went out of fashion. The Justices, having less legitimacy after the *Dred Scott* decision, responded by retreating from the political fray into a narrow formalistic style of reasoning already popular in common law cases because of the enormous popularity of Blackstone's *Commentaries*.

This formalism reflected the prevalent economic natural law theories of the time—the 19th century philosophy of *laissez-faire*. Great importance was thus attached to individual economic rights in formalist *constitutional* law opinions. Following a period of court acquiescence in political economic decisions because of decreased Court legitimacy (see, e.g., *The Legal Tender Cases*, 110 U.S. 421, 4 S.Ct. 122, 28 L.Ed. 204 (1884), and *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873), economic rights increasingly became protected by the doctrine of the liberty of contract. Liberty of contract was based on the *Dred Scott* decisions' postulate of substantive due process rights as re-legitimated, according to the Court, by adoption of the *14th Amendment*—but with slaves no longer treated as property. Used formalistically, liberty of contract became a mechanical catch-word to hold unconstitutional many progressive statutes that would have withstood judicial review under traditional economic natural law principles. *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), is the archetypical formalistic Supreme Court decision concerning economic matters.

Unlike individual economic rights, individual civil rights were narrowly construed. *The Slaughter-House Cases*, supra, and *The Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), were decided during this period of court retreat from active involvement in political matters. Together the two cases resulted in a construction of the *14th Amendment* which prevented court enforcement of federal civil rights legislation in the segregated South. Thereafter, formalist handling of these cases as precedents restricted or defeated most civil liberties claims. The formalist approach was also apparent in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), which adopted the doctrine that separate but "formally" equal facilities for racial minorities satisfied the equal protection clause of the *14th Amendment*. That national enforcement of civil rights in Southern states was not politically possible during this period appears to have been confirmed when the Union pulled its troops out of the South in 1877, ostensibly as part of a deal to swing 20 disputed electoral votes to Republican Presidential Candidate Hayes and, thus, to give him the election. Hayes needed every one of those votes to win.

HOLMESIAN (1900-1950)—Holmes viewed the *Constitution* as an experiment. It did not enact any

particular theory of government. It created institutions for transforming the will of the majority into law and it contained some express limitations on governmental power which reflected the will of the framers and ratifiers. In particular, Holmes believed that the *Constitution* did not mandate acceptance of any particular economic theory. Thus he thought the formalists were wrong in holding that liberty of contract was a value deeply ingrained in the *Constitution*. He thought that Supreme Court decisions which invalidated statutes on freedom of contract grounds interfered with the political process and the will of the majority as presented in democratically elected legislatures.

Holmes held similar views with respect to civil rights. As one article notes, between 1903 and 1928, in 25 non-unanimous civil rights cases (that is, in cases where at least one justice was on each side of the dispute), Holmes was only once on the side of what today would be called civil liberties. Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 Stan.L.Rev. 3, 254, 307-08 (1962-63). The general test Holmes set out was whether a reasonable person could find the legislation a rational means toward a legitimate governmental objective. Almost any statute could pass that test.

Of course, if the *Constitution* specifically mandated the protection of particular rights, Holmes would faithfully interpret the *Constitution* to protect those rights. In *First Amendment* cases, for example, Holmes is known for his view that the text and history of the *First Amendment* required protection of speech which did not constitute a "clear and present danger". If a clear and present danger was perceived to exist, as when a person falsely shouted "fire" in a crowded theater (or a socialist-pacifist urged persons not to cooperate with the war effort in World War I), then the speech could be regulated by the government. *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919).

Constitutional law in the early 1900's took an interesting turn because of two developments. First, while formalists continued to find unconstitutional many regulations that interfered with individual economic rights, logic compelled them to admit that if liberty of contract was part of due process because it was a fundamental freedom, then so was freedom of speech and so were other less textually specified civil liberties. Justice Brandeis put forward this argument while dissenting in *Gilbert v. Minnesota*, 254 U.S. 325, 343, 41 S.Ct. 125, 131, 65 L.Ed. 287 (1920), and the Court adopted it in *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). Formalist judges thus acknowledged both economic and personal freedoms as fundamental, and thus entitled to protection under the *14th Amendment*. This was contrary to Holmesian doctrine, whose view concerning the existence of fundamental freedoms was much more restrained. Holmes tended to raise constitutional barriers only when specific textual language, like that in the *First Amendment*, was implicated.

Second, despite this development, judges began to adopt Holmes' rational means test as the standard for constitutional review. This change in doctrine did not immediately effect the outcome of most cases. In both economic and civil liberties cases in the late 1920's and early 1930's, the "formalist" judges merely used the new Holmesian rhetoric to reach the same results. Thus, infringements on individual liberties tended to be upheld, while economic regulations tended to be struck down, even though the Court's language and tests increasingly reflected the Holmesian "rational relation" standard. Justice Brandeis was equally careful in using Holmesian language to support his pro-economic regulation, pro-civil liberties positions. The seeds for destruction of formalism and for adopting the Holmesian approach were nevertheless laid in the language used in the opinions. Further, the new Holmesian language did produce some decisions upholding economic regulations. See, e.g., *The Shreveport Rate Case*, 234 U.S. 342, 34 S.Ct.

833, 58 L.Ed. 1341 (1914) and *Railroad Commissioner v. Chicago, Burlington & Quincy Railroad*, 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 371 (1922). In addition, Justice Brandeis' equating of economic and personal freedoms as fundamental eventually produced some pro-civil liberties results. See, e.g., *Near v. Minnesota*, 283 U.S 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936); *De Jonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, ;81 L.Ed. 278 (1937). While formalism had seen its day as a theory in constitutional law by the mid-1920's (as by that time it had passed its prime in common law and, increasingly, in statutory interpretation), for the most part the same results as reached in the heyday of formalism occurred in constitutional law until the mid to late 1930's. [End quoting.]

EQUITY—DEFINED

In *Black's Law Dictionary*, *6th Edition*, under **"Equity"** we find [quoting:]

Justice administered according to fairness as contrasted with the strictly formulated rules of common law. It is based on a system of rules and principles which originated in England as an alternative to the harsh rules of common law and which were based on what was fair in a particular situation. One sought relief under this system in courts of equity rather than in courts of law. The term "equity" denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men. *Gilles v. Department of Human Resources Development*, 11 Cal.3d 313, 113 Cal.Rptr. 374, 380, 521 P.2d 110. Equity is a body of jurisprudence, or field of jurisdiction, differing in its origin, theory, and methods from the common law; though procedurally, in the federal courts and most state courts, equitable and legal rights and remedies are administered in the same court.

A system of jurisprudence collateral to, and in some respects independent of, "law"; the object of which is to render the administration of justice more complete, by affording relief where the courts of law are incompetent to give it, or to give it with effect, or by exercising certain branches of jurisdiction independently of them.

A stockholders' proportionate share (ownership interest) in the corporation's capital stock and surplus. The extent of an ownership interest in a venture. In this context, equity refers not to a legal concept but to the financial definition that an owner's equity in a business is equal to the business's assets minus its liabilities.

Value of property or an enterprise over and above the indebtedness against it (e.g., market value of house minus mortgage). *Dorfman v. Dorfman*, Tex.Civ.App. 457 S.W.2d 417, 422. [End quoting.]

Under **"Courts of Equity"**, we find [quoting:]

Courts which administer justice according to the system of equity, and according to a peculiar course of procedure or practice. Frequently termed "courts of chancery". With the procedural merger of law and equity in the federal and most state courts, equity courts have been abolished. [End quoting.]

Under **"Equity jurisprudence"**, we find [quoting:]

That portion of remedial justice which is exclusively administered by courts of equity as distinguished from courts of common law. More generally speaking, the science which treats of the rules, principles, and maxims which govern the decisions of a court of equity, the cases and controversies which are considered proper subjects for its cognizance, and the nature and form of the remedies which it grants. [End quoting.]

And, lastly, under **"Equity jurisdiction"**, we read [quoting:]

In a general sense, the jurisdiction belonging to a court of equity, but more particularly the aggregate of those cases, controversies, and occasions which form proper subjects for the exercise of the powers of a chancery court.
In the federal and most state courts there has been a merger procedurally between law and equity actions (i.e., the same court has jurisdiction over *both* legal and equitable matters), and, hence, a person seeking equitable relief brings the same complaint as in a law action and simply demands equitable relief instead of (or in addition to) money damages. *Fed.R. Civil P. 2*

"Equity jurisdiction", in its original acceptation, as distinguished on the one side from the general power to decide matters at all, and on the other from the jurisdiction "at law' or "common-law jurisdiction", is the power to hear certain kinds and classes of civil causes according to the principles of the method and procedure adopted by the court of chancery, and to decide them in accordance by the court of chancery, and to decide them in accordance with the doctrines and rules of equity jurisprudence, which decision may involve either the determination of the equitable rights, estates, and interests of the parties to such causes, or the granting of equitable remedies. In order that a cause may come within the scope of the equity jurisdiction, one of two alternatives is essential; either the primary right, estate, or interest to be maintained, or the violation of which furnishes the cause of action, must be equitable rather than legal; or the remedy granted must be in its nature purely equitable, or if it be a remedy which may also be given by a court of law, it must be one which, under the facts and circumstances of the case, can only be made complete and adequate through the equitable modes of procedure. *Norback v. Board of Directors of Church Extension Soc.*, 84 Utah 506, 37 P.2d 339. [End quoting.]

EQUITY

In their book *Cases and Other Materials on Civil Procedure*, A. Scott and R. Kent write on equity. [Quoting, in part:]

After the Revolution, most of the newly-constituted states established courts of chancery, but at first these for the most part administered only a rough layman's equity. There was no American equity jurisprudence; the English precedents were inaccessible and not well settled, and there was in any event a hostility to all things English; many of the judges were laymen. The history of equity in the United States as a system of law as distinguished from a system of lay magisterial discretion in hard cases dates from the second decade of the last century. Joseph Story became a Justice of the Supreme Court of the United States and began to sit in equity cases in the Circuit Court for Massachusetts in 1811; James Kent became Chancellor of New York in 1814. At that time the equity of the English Court of Chancery was becoming settled under Lord Eldon, and the time was ripe for the building of an American equity jurisprudence. The judicial labors of Kent and Story did much to domesticate equity in the United States; their writings, perhaps, did even more. Most of the original states developed courts with full equity powers comparatively early in the last

century and the newer states created such courts.
By Article III, Section 2 of the *Constitution of the United States*, "The judicial Power shall extend to all Cases, in Law and Equity" of certain classes. By the second clause of the same section of the Supreme Court is given original jurisdiction of certain cases, chiefly "those in which a State shall be a Party." Since this clause makes no distinction between law and equity, it is apparent that the original jurisdiction of the Supreme Court extends to both. When the first Congress created the inferior federal courts by the Judiciary Act of 1789, it followed the same plan. No separate equity courts were created; the same courts, circuit and district, were to administer law and equity, but on different sides of the court and by a different procedure. Some of the states followed this lead; others retained the system of separate courts. Then, beginning with 1848, when the Code of Procedure proposed and drafted by David Dudley Field was adopted in New York, there came a vigorous movement to merge or fuse law and equity. This movement spent its original force by about 1887, when some twenty-two states and territories had adopted codes of procedure purporting to abolish the distinction between actions at law and suits in equity, but has recently been revived, as evidenced by the Illinois Civil Procedure Act of 1933 and the Federal Rules of Civil Procedure of 1938.

At the present time, equity in the United States is administered in one of three ways. (1) Equity may be administered in a separate court from law and by a different procedure. This was the English system prior to 1875, and is still the system followed in Arkansas, Delaware, Mississippi, and Tennessee. (2) Equity may be administered in the same court as law, but by a different procedure and on a different side of the court. This was the federal system prior to September 16, 1938, and is the system in Massachusetts and some fourteen states. Where this system prevails, statutes usually provide for the easy transfer of causes from law to equity and the reverse. (3) Equity may be administered in the same court and by the same procedure as law. This has been the system in New York since 1848 and is now the system in the federal courts and in well over thirty states and territories.

The movement for the abolition of the forms of actions and the procedural merger of law and equity had its chronological beginning in the United States with the activities of the New York Commissioners on Practice and Pleading. Their report proposed a single form of action and that the distinction between law and equity be abolished; these proposals were embodied in the Code of Procedure adopted by the legislature of New York in 1848. Popularly known as the Field Code (the code was largely the work of David Dudley Field, one of the commissioners), the New York legislation was widely copied in many other states within a relatively brief period. A little later, as a result of the investigations of two Royal Commissions, substantial legislative changes were made in the English practice which brought about some degree of fusion but of a less complete character. The English legislation, unlike that of New York and the states which copied the New York code, did not purport to combine law and equity, but did permit a degree of equitable relief in actions at law and extended the jurisdiction of the Court of Chancery to decide question of law. In 1875 England made effective a completely unified procedure.

Procedural reform was by no means confined to those states which followed New York's example. Where the traditional framework was retained statutes were enacted either reducing the number of the forms of actions or minimizing the consequences of an erroneous choice of form. Also, expansion of the powers of courts of law to deal with matters of equity and enlargement of equity's competence to make legal determinations were developments characteristic of those states stopping short of full procedural unification. The movement toward abolition of the forms of actions and the full merger of law and equity attained great

impetus through the adoption in 1938 of the Federal Rules of Civil Procedure. Characterized by a single form of action applicable to actions both legal and equitable in nature, the Federal Rules have served as a model for over twenty states. Although many of these states had already abolished the New York precedent, for others adoption of rules based upon the Federal Rules represented their initial adoption of the principle of a single form of civil action. At the present time only about a dozen states have failed to make the full transition to the single form of action for both law and equity. [End quoting.]

PROFESSIONAL RESPONSIBILITY

In an article titled *Professional Responsibility in a Professional System,* referring to attorneys, Monroe Freedman writes [quoting, in part:]

One of the essential values of a just society is respect for the dignity of each member of that society. Essential to each individual's dignity is the maximization of his or her autonomy or, as Pope John expressed it, "the right to act freely and responsibly * * * act[ing] chiefly on his own responsibility and initiative [and] * * * on his own decision." In order to exercise that responsibility and initiative, each person is entitled to know his or her rights against society and against other individuals, and to decide to seek fulfillment of those rights through the due process of law.

The lawyer, by virtue of his or her training and skills, has a legal and practical monopoly with respect to access to the legal system and knowledge about the law. Legal advice and assistance are often indispensable, therefore, to the effective exercise of individual autonomy.

Accordingly, the attorney acts both professionally and morally in assisting clients to maximize their autonomy, that is, by counseling clients candidly and fully regarding the client's legal rights and moral responsibilities as the lawyer perceives them, and by assisting clients to carry out their lawful decisions. Further, the attorney acts unprofessionally and immorally by depriving clients of their autonomy, that is, by denying them information regarding their legal rights, by otherwise preempting their moral decisions, or by depriving them of the ability to carry out their lawful decisions. [End quoting.]

CHAPTER 4

JUDICIAL SCRUTINY, PART IV

by Rick Martin 2/5/96

A LOOK AT JUDGES & LAWYERS
LAWYER SELF-REGULATION?

Part I of Rick's well-researched series on the U.S. legal system apppeared in the 1/23/96 issue of CONTACT *on page 8; Part II was in the 1/30/96* CONTACT *on p. 5; Part III was in the 2/6/96 issue on p. 9. We continue below with this exposé.*

"To the people, justice is an ideal, not an instrument of Power. To the people, justice is as Justinian defined it—'the firm and continuous desire to render to everyone that which is his due.' But the legal system is not predominantly attentive to notions of equality and the rights of the individual. The legal system is concerned, instead, with law, and law is pledged to Power. As a consequence, law will most often stand against such human rights as threaten Power. The virulence of Power is not the question. By reason of Power's preoccupation with its own goals, all Power tends to function as if the system were designed to destroy the individual, for Power, by definition, can never permit itself to be subordinated to the individual. As a consequence, justice will be delivered to the people only when it is in the best interests of Power to deliver it." [Gerry Spence, *With Justice For None*.]

"To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. If you want great examples, read Mr. Leslie Stephen's *History of English Thought in the Eighteenth Century*, and see how a hundred years after his death the abstract speculations of Descartes had become a practical force controlling the conduct of men. Read the words of the great German jurists, and see how much more the world is governed today by Kant than by Bonaparte. We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty-thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law." [Oliver Wendell Holmes, *The Path of the Law*.]

THE JUDGES

In Gerry Spence's, *With Justice For None*, we read [quoting portions:]

Who are these judges who wield such power over us, a power reserved for God? Who are these mere humans with the power to wrest children from their mothers and to condemn men to death or cage them like beasts in penitentiaries? Who possesses the power to strip us of our professions, our possessions, our very lives? The judges of America have more influence over the course of the nation than Congress and the president. They interpret the laws, apply them, change them to match their private vision of the world, and

extend their collective nose into every manner of private or government business.

Judges decide whether the janitor was fired for just cause and whether GM is engaged in price-fixing. They review the hospital board's suspension of your doctor's surgical privileges and decide the constitutionality of the university's enrollment policies that gave a coveted slot to a minority student with lower grades and test scores than your child. They make law. They have the power to force children to be bussed into strange places, make abortion legal, and determine whether a quadriplegic who wants to die may be permitted to do so. They may take away your wife or your good name or your freedom or your fortune or your life. They are omnipotent. And the question is: To whom have we so carelessly granted that power? Are they the kind who would understand you, who from their experiences would know something of the fears and struggles you have faced? Will they care about you or about justice? The profile of the typical American judge is a white, Protestant male of about fifty years of age from an upper middle-class family, who has labored without stellar success as an attorney. He has been in politics, but there he was not a rising star, either. He is more likely to be from a large firm than a small one, and has had, during his practice, a variety of corporate clients but little experience in representing those charged with crimes, those who have been injured, and the poor.

The ascension of the judge to the bench does not, of course, alter his personal history, erase the memories of his experiences, modify his genes, change his parentage, or blot out his prejudices. Every president knows that, and achieves a sort of immortality by extending his influence over the nation through the judges he appoints. Moreover, the mating of a human being to the federal bench seems to produce an offspring that lives approximately forever.

Not long after his second term had begun, President Reagan had already appointed over half of the nation's 744 federal judges, including a new Chief Justice of the United States Supreme Court. The profile of these judges is starkly homogeneous: 91.6 percent are men, 92.6 percent white, and 89.5 percent Republican. Nearly twice as many were from moderate to large firms as from small ones, nearly half have been prosecutors, 60 percent went to Ivy League or private law schools, and 64.2 percent are Protestant. Seventy percent of the appeals-court judges and nearly 60 percent of the district-court judges have a net worth of between $200,000 and $1 million, and over 20 percent of the district-court judges and nearly 18 percent of the appeals-court judges appointed by Reagan have a net worth in excess of $1 million. These judges, who as private lawyers represented numerous corporate clients, will now hear the cases of people seeking justice against corporate America; as former prosecutors, they will now sit on the cases of citizens charged by the government with crimes. William Jones once said, "There is very little difference between one man and another; but what little there is, is very important." [End quoting.]

CODE OF PROFESSIONAL RESPONSIBILITY

"A profession to be worthy of the name must inculcate in its members a strong sense of the special obligations that attach to their calling. One who undertakes the practice of a profession cannot rest content with the faithful discharge of duties assigned to him by others. His work must finds its direction within a larger frame. All that he does must evidence a dedication, not merely to a specific assignment, but to the enduring ideals of his vocation." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958).

In R. Randall Kelso's book *Studying Law: An Introduction,* under the heading "The Professional Responsibilities of a Lawyer", we read [quoting, in part:]

THE AMERICAN BAR ASSOCIATION'S [OLD] CODE OF PROFESSIONAL RESPONSIBILITY [1969]

Each state is responsible for regulating the professional conduct of lawyers who practice within its borders. The Supreme Court of the state is the agency usually responsible both for promulgating and enforcing the rules of professional conduct.

Lawyers charged with violating a state's code of professional responsibility are brought before a state or local disciplinary committee. Such a committee, typically, has the power to make findings of fact and recommendations to the state Supreme Court regarding censure, suspension, or disbarment. Of course, lawyers can also be prosecuted for criminal conduct arising from their practice, e.g., for stealing a client's money, and lawyers are liable for malpractice and for civil or criminal contempt of court.

In 1969, the American Bar Association recommended a Code of Professional Responsibility (hereafter CPR) to Supreme Courts and other state agencies having responsibilities in disciplinary proceedings. Many courts adopted the CPR. Some states, such as California, used the Code as a source of ideas for locally drafted rules of professional conduct.

Under the conditions of modern practice it is peculiarly necessary that the lawyer should understand, not merely the established standards of professional conduct, but the reasons underlying these standards. In the duties that the lawyer must now undertake, the inherited traditions of the bar often yield but indirect guidance. Principles of conduct applicable to appearance in open court do not, for example, resolve the issues confronting the lawyer who must assume the delicate task of mediating among opposing interests. Where the lawyer's work is of sufficient public concern to become newsworthy, his audience is today often vastly expanded while at the same time the issues in controversy are less readily understood than formerly. While performance under public scrutiny may at times reinforce the sense of professional obligation, it may also create grave temptations to unprofessional conduct.

For these reasons the lawyer stands today in special need of a clear understanding of his obligations and of the vital connection between these obligations and the role his profession plays in society.

The Code of Professional Responsibility is divided into three parts: nine hortatory Canons, followed in each case by Ethical Considerations (EC's)(general guides for desirable conduct), and by Disciplinary Rules (DR's)(fixed standards of conduct on which disciplinary proceedings are based). Most Code provisions accommodate two sets of opposing interests:

(1) self-interests *versus* the interests of a client, and

(2) duties of candor to the court and other persons, *versus* duties of loyalty and zeal on behalf of a client.

In dealing with conflicts between a lawyer's self-interest and the interests of a client, the Code prohibits

excessive fees, condemns neglect of work, calls on lawyers to carry out contracts of employment, encourages zealous representation, and seeks to steer lawyers away from situations of conflicting interests (accepting employment in a case where professional judgment might be effected by the lawyer's own financial or personal interests). In this area of professional responsibility, the Code's requirements are not much different than the dictates of fairness and common sense (although without a reminder from DR 9-102 a lawyer might not always remember to deposit client funds in a separately identified account.)

Less self-evident is how to resolve the tension between candor and zeal. The Code's premises spring from an analysis of the role of a lawyer in relation to the institutions of our legal system. Distinctions are made in light of whether the lawyer is serving as an advocate, an advisor, an intermediate, a public servant, or a citizen. Whether the case is civil or criminal and whether the client is an adult or a juvenile can also be significant. Some scholars argue that a lawyer, acting as an advocate, can abjure personal responsibility so long as the law is not broken or the circumstances are not extreme (as where the client rushes out of the office declaring an intent to do another bodily harm). Others argue that because truth is such an important value in our system, lawyers should not be "hired guns", and in the interest of truth should be required or permitted to disclose relevant information even if that might be unfavorable to their clients' interests. In meetings of the American Bar Association, this issue has been the focal point of debates over the **Model Rules of Professional Conduct, which replaced the Code of Professional Responsibility as the ABA's recommended code.** [We will take a look at the new code a little later in the series.] A related debate centers on the extent to which lawyers are morally free to assist clients in taking action that is legal, but, in the opinion of the lawyer, unconscionable.

[Still in the (old) ABA Code of Professional Responsibility, we read:]

DR 4-101 PRESERVATION OF CONFIDENCES
AND SECRETS OF A CLIENT

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-1-1(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after full disclosure to

them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C), through an employee.

DR 7-102 REPRESENTING A CLIENT
WITHIN THE BOUNDS OF THE LAW

(A) In his representation of a client, a lawyer shall not:

...(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal. [End quoting.]

In Gerry Spence's book *With Justice For None*, we read the following. [Quoting:]

Judge John F. Grady of the United States District Court in Chicago, speaking to the American Bar Association, recently said, "What I see happening is that a growing percentage of the bar is not only primarily concerned with pecuniary gain but is preoccupied with pecuniary gain to the exclusion of everything else...[E]thics," he said, "have been harnessed in the service of pecuniary gain." [End quoting.]

In *Black's Law Dictionary* [*6th Edition*], we read, [quoting:]

Ethics. Of or relating to moral action, conduct, motive or character; as, ethical emotion; also, treating of moral feelings, duties or conduct; containing precepts of morality; moral. Professionally right or befitting; conforming to professional standards of conduct. *Kraushaar v. La Vin,* 181 Misc. 508, 42 N.Y.S.2d 857, 859. *Legal ethics. See Canon (Canons of judicial ethics);* Code of Professional Responsibility; Legal ethics.

Legal ethics. Usages and customs among members of the legal profession, involving their moral and professional duties toward one another, toward clients, and toward the courts. That branch of moral science which treats of the duties which a member of the legal profession owes to the public, to the court, to his professional brethren, and to his client. Most states have adopted the Model Rules of Professional Conduct of the American Bar Association. *See also Canon*.

Canon. A law, rule, or ordinance in general, and of the church in particular. An ecclesiastical law or statute. A rule of doctrine or discipline. A criterion or standard of judgment. A body of principles, standards, rules or norms.

In England, a cathedral dignitary, appointed sometimes by the Crown and sometimes by the bishop.

Canons of judicial ethics. Standards of ethical conduct for members of the judiciary. Such were initially adopted by the American Bar Association and later by most states. [End quoting.]

CONSIDER THIS:
EVIDENCE—ETHICAL QUICKSAND

Richard Vilkin, in the June 26, 1982 edition of *The National Law Journal*, presents the following example for consideration. [Quoting, in part:]

It's the end of a rather boring day of poring over interrogatories. A new client walks into your office carrying a paper bag. The client sits himself down, reaches into the bag, pulls out a blood-stained knife and a wallet bulging with cash and drops them on your desk.

He explains that during the course of a robbery, he stabbed and killed his victim and left the body in a vacant lot across town. He says he wants you to help him dispose of the incriminating evidence and "keep clear of the cops".

Should you examine the knife and wallet? Hold on to them or get rid of them? Hide them, maybe? Give

them to the authorities? Perhaps give them back to the client? What should you tell him to do with them? And, oh yes, what about the body? [End quoting.]

CAN THE BAR REGULATE ITSELF?

In an article presented before the American Bar Association Annual Meeting held on August 5, 1990, titled *Can The Bar Regulate Itself* by Deborah M. Chalfie, Legislative Director for HALT (Help Abolish Legal Tyranny, 1319 "F" St. NW, #300, Washington, D.C. 20004 (202-347-9600—An Organization of Americans for Legal Reform), we read, [quoting, with permission:]

Consistent with the doctrine of separation of powers, the police power gives the legislature control over the practice of law, absent convincing arguments to the contrary. Such arguments were of questionable authority in the past and have no more force today.

The title of today's panel poses the question, "Can the Bar Regulate Itself?" The answer to this question is, clearly, "yes, it can." In every single state, lawyers are regulated solely by other lawyers: lawyers in bar associations, lawyer-judges on state supreme courts, and the multitude of lawyers who dominate disciplinary staffs and hearing panels, "unauthorized practice of law" committees, boards of bar examiners, lawyer-client fee programs, and every other lawyer-regulation body that exists.

Moreover, the power of state supreme courts to regulate the bar is well-established in every state. Starting around the time of the depression, courts began interpreting their "inherent" power to regulate lawyers as an *exclusive* power, thereby thwarting any independent scrutiny or public accountability for the legal profession. Most state courts now claim the exclusive power to regulate lawyers, and the corresponding power to strike down regulatory attempts by other branches.

If, on the other hand, the question is revised to ask whether the Bar *should* regulate itself, or can the Bar regulate itself and still serve the *public* interest, consumers' answer is a resounding, "NO!" The conflict of interest inherent in *any* system of self-regulation necessarily results in an anti-consumer system of regulation.

THE CONFLICT OF INTEREST BUILT INTO SELF-REGULATION

[Still quoting:]

If anyone can recognize a conflict of interest when they see one, it's lawyers, right? In your own practices, you usually can't represent both spouses in a divorce because, even if the break-up is uncontested, the interests of the two parties *may* conflict in the future. And, you can't represent a company on one side of today's business deal and represent the other side in tomorrow's. In addition, lawyers recognize the conflict of interest inherent in the buyer-seller relationship, otherwise, lawyers wouldn't always be telling people to "get it in writing." Finally, lawyers are among the first to scream "foul" when there is conflict of interest in the self-regulation of *other* occupations. No self-respecting consumer lawyer, for example, would defend requiring patients to have their disputes or malpractice lawsuits decided by a panel of doctors.

Yet, when it comes to consumers of *legal* services, the legal profession instantly becomes blind to any conflict of interest. In fact, the profession makes outrageous claims such as "self-regulation is necessary because only lawyers know when a fellow lawyer has screwed up," or "lawyers should be self-regulating because lawyers have the highest stake in getting rid of the bad apples." Substitute the word "doctor" or "car manufacturer" or any other occupation for "lawyer" in these claims and lawyers wouldn't buy it for a minute.

Perhaps the fact that lawyers see themselves as agents, representatives, and advocates for their clients obscures the conflict of interest between lawyer and client, profession and public. Perhaps the fact that law is a "profession" with public service obligations obscures it. Perhaps the fact that lawyers have so often played the role of consumer advocate in reference to other industries, as noted above, obscures it. But, nevertheless, it's there, it's built-in, and it's got to go.

There's nothing "personal" in this conflict-of-interest criticism of lawyer self-regulation. "No matter how well intentioned...*no* vocational group is well-situated to pass judgment on matters that directly implicate its economic interests, social status, and self-image." This is because there is a fundamental conflict in the interests of buyers and sellers of services: buyers want to get the highest quality service at the lowest possible price, while sellers want to provide the least amount of service at the highest possible price. Buyers want the greatest possible level of competition and choice, sellers want the lowest. Buyers want strong consumer rights and remedies, sellers want weak ones.

In the particular case of *lawyer* self-regulation, the source of this conflict is two-fold. First, there is a conflict of interest in having lawyers dominate every aspect of lawyer regulation. Lawyers share a long, unique, and traumatic experience—becoming and being lawyers. The sense of camaraderie and elitism that results from that community creates in lawyers an "us/them" view of lawyers and nonlawyers. In light of this, there is little chance that even the best-intentioned lawyers can be "objective" when making public policy decisions about how lawyers and the practice of law should be regulated. And, although lawyers may be able to judge other kinds of disputes between other kinds of parties impartially, they cannot be impartial in judging lawyer-client disputes.

Beyond the conflict of interest in lawyer domination of lawyer regulation, there is a structural conflict of interest that is inevitable when *any* agency is charged with protecting the interests of multiple constituencies who have opposing interests, or who are in disputes with one another. This conflict is aggravated when the agency is also a *trade* association, as is the case with bar associations. Asking a trade association to pose as a consumer protection agency is asking for trouble: lawyers' trade associations cannot simultaneously advance the interests of lawyers *and* advance the interests of consumers because the two are in conflict.

Neither conflict of interest—the lawyer domination one nor the dual function one—is cured by having state supreme courts, or "independent" agencies under their jurisdiction, regulate lawyers. First of all, supreme court justices *are* lawyers; they may not be practicing lawyers, but are lawyers nonetheless. For the most part, judges are exclusively selected from lawyers' ranks, and upon leaving the bench commonly return to private practice. Second, there is little difference between court regulation and bar regulation because courts are too busy to take an active hand in regulation. In practice, courts delegate lawyer-regulation functions to agencies that are either run by or are heavily influenced by bar associations. Finally, the bench and bar are linked in a myriad of ways—ways that make judges beholden to the profession (and *vice*

versa)—such that neither can be counted on to "bite the regulatory bullet" with the other.

The conflict of interest in lawyer self-regulation shows. Lawyers design and maintain a "consumer protection" system that dismisses more than 90% of all consumer complaints. In most states, these 90+%, plus the additional three percent that end in "private" reprimands, are forever concealed from the public in whose interest the system ostensibly exists to protect in the first place. Even in the rare instance when discipline is imposed, making lawyers refund fees, pay for the damages they caused, or do what they promised rarely accompanies the imposition of discipline. The system is secret, slow, lenient, unfair, and unresponsive to consumers' needs.

At the front end, the bar enforces an extremely restrictive licensing scheme which give lawyers a monopoly that leaves most middle and low-income consumers with no affordable access to legal services. All of the entry requirements—ABA accreditation of law schools, charging bar dues, and everything in between—are set and overseen by lawyers. By making the hurdles high and expensive to jump, the profession assures that the number of providers will be reduced and the high costs of entry will be passed on to consumers. In addition, lawyers define what constitutes "the practice of law" and are the chief enforcers of unauthorized practice of law (UPL) prohibitions, thereby regulating the potential competition out of existence.

And, if anyone still doubts the existence of a conflict of interest between the profession and the consuming public, one need only look at the bar's track record in responding to consumer criticism and calls for reform. The bar actively evades and fights even the modest reforms at every opportunity. And, because the profession is accountable neither to the public nor the public's representatives in the legislature, it usually gets away with it.

THE RATIONALE FOR SELF-REGULATION IS FLIMSY

[Still quoting:] Traditionally, the legislature, not the judiciary, is the branch constitutionally-charged with protecting the public welfare by regulating businesses and occupations. Thus, judicial branch claims to exclusive regulatory power over lawyers is a usurpation of legislative police powers and, as such, is itself a violation of both the letter and spirit of the separation-of-powers doctrine. Therefore, the burden of justifying self-regulation is on the profession. And you can't sustain that burden.

The central premise of the courts' inherent and exclusive powers to regulate lawyers is that lawyer self-regulation is vital to maintaining separation of powers and, therefore, vital to a functioning, checked-and-balanced democracy. The essence of the argument is that lawyers must be "independent" from (i.e., unregulatable by) the other branches or else lawyers could be threatened with regulatory retaliation for bringing lawsuits that challenge legislative and executive abuses of power. Though lofty-sounding, such arguments are little more than *post hoc* rationalizations of the status quo.

There is little basis for speculating, let alone any hard evidence, that permitting outside regulation by the legislative and executive branches would prevent lawyers from challenging abuses by the other branches. In fact, lawyers *were* regulated by legislatures for many years before courts began usurping regulatory

power under the guise of the inherent-powers doctrine, and American's constitutional democracy didn't fall.

In contrast, there is plenty of evidence that *self-regulation* compromises lawyers' independence. Many a lawyer can testify to being disciplined, sanctioned, or having a case adversely affected, not for violations of the ethical code, but for challenging a judge or the bar establishment, handling controversial cases, making the "wrong" judicial campaign contributions and other political reasons, or simply for undertaking activity (e.g., "undignified" advertising) of which the bar disapproves.
If the real concern about outside regulation was shielding lawyers from regulatory retaliation, there are other, far less expansive options short of complete self-regulation for minimizing retaliation against the relatively few boat-rockers who challenge governmental action. First, for example, express statutory prohibitions on retaliation could be enacted, as they have been in other areas of the law, enabling the courts to act as a check on abuses. Second, the new regulatory agency could be structured so as to insulate agency personnel from illegitimate pressures, such as by making the agency independent, with a director removable only for cause.

Closely tied to the separation-of-powers rationale for self-regulation is the contention that because lawyers are "officers of the court", the judicial branch must have the power to regulate its own "officers", otherwise "order in the court" would be threatened. Attempts by any other branch to regulate those "officers" is thus an encroachment on the courts' inherent powers to run its own house. The argument, however, is unpersuasive.

The bulk of what lawyers do takes place *outside* of the courtroom. Thus, even if courts need the power to regulate the in-court behavior of advocates, it by no means follows that they should regulate out-of-court issues. Yet, courts claim the exclusive power to regulate *everything* that even touches upon the practice of law. Besides, the concept of courts regulating their "officers" flies in the face of reality: judges (and lawyers) rarely report lawyer misconduct to discipline agencies. Trying to bolster total self-regulation with the notion that lawyers are somehow quasi-governmental officers just begs the question.

Aside from constitutional arguments about separation of powers, the profession also attempts to justify self-regulation on the presumption that, as a practical matter, only lawyers (and lawyer-judges) have the background and training necessary to detect misconduct and understand how lawyers should be regulated. Such a premise rests on the assumption that lawyer regulation involves the same knowledge and skills as the practice of law itself. It doesn't.
Lawyer discipline addresses questions such as "did the lawyer commit a crime?", "did the lawyer neglect a client's case?", and "did the lawyer screw-up?" Obviously, nonlawyers are perfectly capable of answering the first two kinds of questions. As for the third, this kind of question is now pursued in the form of malpractice cases which, if the defendant lawyer so chooses, a jury of *laypeople* may decide! In fact, our entire jury system rests on the notion that *non*experts can and should decide even the most complex cases.

Similarly, the "lawyers as experts" rationale doesn't support self-regulation in the licensing context. Lawyers typically justify the existence of unauthorized practice of law (UPL) rules on the the premise that only lawyers understand the practice of law, a contention easily rebutted by the hordes of nonlawyers, both the "already-there's" (e.g., architects, accountants, financial planners) and the "wanna-be's" (independent paralegals), who are already practicing. To the extent that UPL enforcement rests on the need to protect

the public, it is for the nonlawyer public to determine whether, as a matter of public policy, it wants the choice of nonlawyer services available, and what trade-offs consumers are willing to make between upfront costs and upfront assurances of competence. As for lawyer-dominated enforcement of UPL, the profession's economic interest in stifling its competitors makes it the best appropriate body to watchdog the public interest.

CONCLUSION

[Still quoting:]

Lawyers are indeed "important", but not because they play a vital role in upholding democracy or in smooth functioning of the courts. Primarily, they are important because they provide an important service: solving significant problems in people's everyday lives. As service providers no different from any other, they must be accountable to the legislative and executive branches who are responsible for safeguarding the public welfare. The fact that lawyers possess a monopoly over providing these services—lawyers alone now hold the keys to the legal system, and therefore, access to justice—makes independent regulation and public accountability all the more necessary. [End quoting.]

ATTORNEY DISCIPLINE

In an article titled *The Conflict-of-Interest In Lawyer Self-Regulation*, by Kay A. Ostberg, Deputy Director of HALT, we read [quoting, in part:]

Lawyer-run attorney discipline agencies increasingly are attacked by the public, the press and legislative bodies. The basis of these attacks is evidence of inordinate secrecy, delay, indefensibly lenient disciplinary decisions and an overall failure to provide consumers with adequate mechanisms to settle client-lawyer disputes.

The first problem is the narrow scope of the ethical rules disciplinary agencies enforce. These rules, which are adopted from the American Bar Association model, fail to deal adequately with the most common client problems, such as lack of communication, neglect, overcharging and incompetence. Moreover, the procedural rules agencies operate under fail to provide consumers with compensation for injury or help settling a dispute.

The legal profession defends these limitations by claiming the system is not a consumer protection system, but is set up to maintain "minimum licensing standards". At the same time, the legal profession has consistently resisted establishing new consumer protection forums precisely on the ground that such forums will duplicate or conflict with existing discipline mechanisms. In essence, self-regulation has led the profession to argue that "minimum" standards are enough to protect legal consumers.

Even if one accepts that the basic mission of the system should be to uphold "minimum licensing standards" rather than address consumer protection needs, the system fails because self-policing has led to an overprotectiveness of lawyers. This is manifested in a process that is secret, slow and lenient.

Processing complaints takes place in secret in all but one state. Secrecy is defended as necessary to

protect lawyers from the possible adverse publicity of frivolous complaints. In fact, secrecy also protects lawyers who are guilty of misconduct, prevents clients from learning about lawyers who are being investigated or who have had numerous complaints filed against them and denies the public the opportunity to evaluate whether the discipline system is functioning well.

Lengthy delays in processing complaints are also a serious problem. The time between filing a complaint and final decision can take up to five years. Unjust in itself, delay also compounds problems caused by the systems' secrecy, allowing incompetent and unethical lawyers to continue practicing and possibly injure more clients.

Disciplinary action is infrequent and lenient. Publicly-disciplined lawyers are usually thieves, felons or guilty of repeated misconduct. Further, agencies are willing to accept a wide range of "mitigating factors" to reduce discipline such as alcoholism, inexperience, or financial and emotional difficulties. In essence, agencies act only when the level of misconduct is critical enough to potentially attract adverse public attention while "lesser" complaints are largely ignored.

When faced with these criticisms, the legal profession contends that, with minor reforms, the system will work. Secrecy and lengthy processes are defended as necessary to protect the due process rights of lawyers. Leniency is denied or seen as justifiable "forgiveness" of misconduct and a reasonable willingness to give lawyers a second chance. While these defenses are understandable coming from a trade association, they reflect an inappropriate loyalty to the legal profession for an agency intended to serve the public.

The ideal consumer-oriented system wouldn't be a "discipline" system at all. Instead, it would be a consumer protection system with the responsibility to mediate disputes. However, until the conflict-of-interest in self-policing is acknowledged and consumer protection taken from the hands of lawyers, the discipline system will not serve consumers' needs and will fail even at the limited task of enforcing "minimum licensing standards". [End quoting.]

THE AMERICAN BAR ASSOCIATION

Again, quoting from Gerry Spence's *With Justice For None*:

The American Bar Association, its dominant membership in tune with the new conservative court, has provided little inspirational leadership for the nation's lawyers to fight for the rights of the individual. That is nothing new. Fifteen years earlier, Chief Justice Earl Warren castigated the ABA for its nonfeasance in the area of human rights: "In all candor, I cannot say that in my view the organized bar of the nation has, on the whole, discharged that obligation in praiseworthy fashion. Throughout the McCarthy era, and for years following that shameful period, while the federal courts were struggling to make the *Bill of Rights* and the *Civil War Amendments* meaningful in our society, the organized bar of the nation did precious little to assist. On the contrary, it occupied itself with trying to establish to the world that the Supreme Court of the United States was the handmaiden of Communism and the greatest friend the Soviets had in America." None of this must have surprised the good judge, assuming he had even a scant knowledge of the ABA's history.

Nearly from its inception, the American Bar Association has held affectionately to its pallid bosom its

favorite child, the wealthy white male Protestant from selected parentage. Blacks were not admitted to the organization until 1953. The ABA's Standing Committee on the Federal Judiciary, which passes judgment on all nominees to the federal bench, was, from its birth in 1946, restricted in membership, cloaked in class bias, and composed of lawyers from the "fast track"—the said "best and brightest" of the Anglo-Saxon elitist bar. More than half its membership came from the very corporate law firms that have perennially held the reins of the bar. None of the committee members in these crucial years specialized in criminal law or family law. For the two decades ending in 1967, not a single black person held membership on that committee. It was all-male and as pure white as a Wyoming snowstorm.

The ABA's approval of the first woman appointed to the Supreme Court was given with as much enthusiasm as that of a groom at a shotgun wedding. Yet except for gender, Justice Sandra O'Connor seemed identical to the American Bar Association's profile of a duly qualified judge. She was a graduate of Stanford Law School, a member of a prestigious law firm that represented the corporate sector, and she was conservative. She did not disappoint her mentors. By her third session, she was already standing as close to the archconservative of the court, Justice William Rehnquist, as would be proper for a robed woman. In twenty-nine of the cases decided by one-vote margins she had joined Justice Rehnquist in all but three.

The Judicature Society, devoted to the uplifting of the American judiciary, took pains to scrutinize the ABA's evaluation of judges. It concluded: "...the strongest possible relationship which emerged in our analysis was that between the American Bar Association rating [of nominated judges] and the candidates' white male status. Higher marks were bestowed on the judicial candidates who practiced predominantly before federal and appellate tribunals, those who practiced predominantly in civil litigation and in the traditional subject areas of the law; those who were born in the jurisdiction of their appointments; those who attended the elite law schools; those who at one time had achieved a prestigious legal clerkship, and those who earned relatively higher incomes than other candidates."

The study further revealed that the ABA had not taken into account the not-so-subtle political influences of the candidate toward his own appointment—such as his hefty financial contributions or those of his sponsors, or the ever-present cronyism, or the relationship of the candidate's firm to the members of the ABA committee or to the approving congressional committees, or to the president himself. Partners of senators and powerful congressmen are, with unusual predictability, endorsed by the ABA and appointed to the federal bench.

The Judicature Society reported that half of the male federal judges were active in party politics before their election to the bench. Some held high political office. Others had been advisers to prominent politicians. Almost every appointee had either directly or indirectly through his partners made substantial contributions to his political party, so that the clear margin between politics and judging became blurred. By the beginning of President Reagan's second term, the ABA, working overtime, had rated over half of Reagan's first-term nominees to the district court "exceptionally well qualified" or "well qualified". Given the foregoing, I should have thought those judicial nominees receiving the ABA's punctilious kiss of approval would have found the same as disquieting as being over-greeted by a whore in church.

These judges, many of whom have spent a majority of their years as corporation lawyers, are, upon ascending to the bench, just as much the corporate progeny as a skunk raised in a litter of kittens is still a

skunk. These judges will continue to make their decisions with the same mental apparatus that only a fortnight before they had called upon during an entire career to forward the interests of their corporate clients. Are we to suppose that such a judge, like a blacksmith who, for all of his life, has beaten swords from plowshares, will, merely because he has moved to a better address, beat plowshares from swords? Oliver Wendell Holmes and others debunked the orthodox doctrine that judges, despite the method of their selection, upon assuming the ermine would faithfully apply existing rules of common justice in deciding cases. These so-called "legal realists" argued the obvious, that judges actually decide cases according to their own political, ethnic, and moral preferences, and in payment of their political obligations. [End quoting.]

UNAUTHORIZED PRACTICE OF LAW

In another article from HALT titled, *Issue Brief: Challenging The Lawyers' Monopoly*, we read [quoting, in part:]
Lawyers in this country have a self-regulated monopoly over the provision of legal services. The ability to enforce the rules under which nonlawyers are prosecuted for practicing law without a license is the major way the profession preserves this monopoly. For consumers, the result is a lack of competition among legal-services providers that creates artificially high prices for legal services and, consequently, denies legal assistance to those who can't afford a lawyer.

Unauthorized practice of law (UPL) rules typically prohibit nonlawyers from practicing law but seldom specifically define what acts constitute "practicing law". A few states do list some of the acts prohibited (such as "representing litigants in court"), but even those usually end their list with a catch-all phrase such as "or any action taken for others in any matter connected with the law."

While UPL rules are of little help in understanding what "the practice of law" encompasses, case law is somewhat more helpful. An early landmark case involved a charge by the bar that the publication and sale of nonlawyer Norman Dacey's book, *How To Avoid Probate*, constituted UPL. The N.Y. Court of Appeals ruled against the bar in 1967. Since then, most state courts have ruled that the publication of self-help legal information and the sale of legal forms by nonlawyers is allowed, and most of these courts have also ruled that printed instructions are permitted.

The main prohibition remaining concerns oral instructions about how to fill out legal forms—crossing this line makes a nonlawyer guilty of UPL, in most states. Even the oral instruction standard, however, has many exceptions. In Arizona, for instance, a constitutional amendment allows real estate agents to complete any forms related to the sale of property. Since the amendment became law in 1962, "[t]here has been nothing to indicate any sustainable harm to the public." Other states have similar exceptions for certain professions or transactions, such as exceptions for nonlawyers practicing in administrative agency hearings. In July, 1987, the Florida Supreme Court approved a new rule that allows nonlawyers to advise their clients about "routine" details in preparing court-approved forms for such matters as divorces, adoptions and name changes.

In almost all states, prosecution of nonlawyers practicing law is carried out by UPL committees of the state bar associations. These committees are dominated by lawyers.

The committees have broad power to enforce UPL rules. Prosecutors (the committees) are required neither to allege nor prove any harm to clients to win a case against a nonlawyer practitioner. In almost all states, the committees can initiate an investigation of a nonlawyer without review by any outside agency such as a state or local prosecutor's office. In more than half the states, the committees have exclusive power to take action against a nonlawyer charged with UPL. These actions are usually designed to intimidate nonlawyers into limiting or closing down their businesses.

Lawyers usually talk about unauthorized practice in terms of the danger incompetent providers present to consumers. There is no evidence, however, to demonstrate either that nonlawyers are incompetent to provide routine services or that consumers are being harmed by nonlawyer practitioners.

In a 1976 comparison of uncontested divorce papers filed by lawyers and nonlawyers representing themselves, Stanford University law professor Deborah Rhode found that nonlawyers were fully capable of completing the paperwork correctly. In some cases, she even found that nonlawyers' files were more complete and filings more prompt than lawyers'.

A later study conducted by Prof. Rhode dispels the notion that nonlawyer practitioners pose a significant danger of harming consumers. In her 1981 study of 45 states, Rhode found that injured consumers filed only 2% of *all* UPL complaints, inquiries and investigations. Of the 84 published judicial decisions over a 10-year period, only 11% even alleged any consumer harm. in 1985, Florida's Rosemary Furman was forced out of business by the state bar, even though, in 13 years of "practice" not one of her customers complained.
Rather than prevention of consumer harm, then, evidence indicates that the bar's major interest in preventing nonlawyer legal assistance springs from the threat it presents to lawyers' business. Even the *ABA Commission on Professionalism's 1987 Report* acknowledged that, "[i]n the past, both the public and some segments of the Bar have viewed state bar unauthorized practice of law committees as existing to protect lawyers' economic interests."

Instead of protecting the public from harm, the current monopoly system has driven prices so high that many low-to-middle income citizens cannot afford a lawyer. **It has been estimated that 90 percent of the nation's lawyers serve 10 percent of the population.** The ABA has estimated that approximately 6 million low-income people will need a lawyer for a civil legal problem in a typical year, but that programs funded by the Legal Services Corporation can handle only 1.3 million cases yearly. It is difficult to see what "public good" is served by denying citizens affordable legal assistance, yet that denial is one of the major effects of UPL enforcement.

The legal services market should be opened up to competition for lay providers, especially for routine, uncontested matters. Today, consumers are allowed their choice of providers for many complicated tasks. When preparing their tax returns, for instance, consumers are free to choose whomever they wish to help them, whether that person is an accountant, a lawyer, or their next-door neighbor. Like some legal matters, tax preparation can be very complicated and mistakes can have serious consequences. Nonetheless, we assume consumers are capable of making the best choice for their situation. We should assume that consumers are capable of making the best choice for their situation. We should assume that consumers can make the correct choice when it comes to their legal affairs as well; the bar should give up the paternalistic notion that only lawyers can decide what level of expertise consumers need for their legal matters.

Consumers are not the only ones who recognize nonlawyers can perform many legal tasks; increasingly, lawyers are using paralegals to do a great deal of the work that is carried on in law offices. The demand for paralegal services is booming, such that the U.S. Department of Labor estimates that the number of paralegals in this country will have increased 166% between 1980 and 1990, making it the fastest growing occupation of this decade.

In light of the evidence that shows nonlawyers can perform many legal tasks as competently as lawyers and the lack of evidence that nonlawyers who perform these tasks present a serious threat to the public welfare, HALT maintains that the "practice of law" should be substantially deregulated so consumers can have more choices about the providers from whom they may buy legal services. [End quoting.]

CHAPTER 5

CALIFORNIA'S STATE BAR ASSOCIATION, PART V

by Rick Martin 2/20/96

ABA'S "MODEL RULES" & ETHICS AND MORE ON PARALEGALS

Part I of Rick's well-researched series on the U.S. legal system apppeared in the 1/23/96 issue of CONTACT *on page 8; Part II was in the 1/30/96* CONTACT *on p. 5; Part III was in the 2/6/96 issue on p. 9; Part IV was in the 2/13/96* CONTACT *on p. 10. We continue below with this exposé.*

Oftentimes it helps to review where we've been to gain some real perspective about where we are. With that in mind, in his now rare 1827 work, *Commentaries On American Law*, James Kent writes, [quoting:]

UNDERSTANDING THE LEGAL PROCESS OF THE LAW CONCERNING THE RIGHTS OF PERSONS

OF THE ABSOLUTE RIGHTS OF PERSONS

The rights of persons in private life are either absolute, being such as belong to individuals in a single, unconnected state; or relative, being those which arise from the civil and domestic relations.

The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent and unalienable. The effectual security and enjoyment of them depend upon the existence of civil liberties; and that consists in being protected and governedby laws made, or assented to, by the representatives of the people, and conducive to the general welfare. Right itself in civil society, is that which any man is entitled to have, or to do, or to require from others, within the limits prescribed by law. The history of our colonial governments bears constant marks of the vigilance of a free and intelligent people, who understood the best securities for political happiness, and the true foundation of the social ties. The inhabitants of the colonies of Plymouth and Massachusetts, in the infancy of their establishments, declared by law that the free enjoyment of the liberties which humanity, civility, and Christianity called for, was due to every man in his place and proportion, and ever had been, and ever would be, the tranquillity and stability of the commonwealth. They insisted that they brought with them into this country the privileges of English freemen; and they defined and declared those privileges with a caution, sagacity, and precision, that have not been surpassed by their descendants. Those rights were afterwards, in the year of 1692, on the receipt of their new charter, reasserted and declared. It was their fundamental doctrine, that no tax, aid, or imposition whatsoever, could rightfully be assessed or levied upon them, without the act and consent of their own legislature; and that justice ought to be equally, impartially, freely, and promptly administered. The right of trial by jury, and the

necessity of due proof preceding conviction, were claimed as undeniable rights; and it was further expressly ordained, that no person should suffer without express law, either in life, limb, liberty, good name, or estate; nor without being first brought to answer by due course and process of law.

The first act of the general assembly of the colony of Connecticut, in 1639, contained a declaration of rights in nearly the same language; and among the early resolutions of the general assembly of the colony of New York, in 1691 and 1708, we meet with similar proofs of an enlightened sense of the provisions requisite for civil security. It was declared by them, that the imprisonment of subjects without due commitment for legal cause, and proscribing and forcing them into banishment, and forcibly seizing their property, were illegal and arbitrary acts. It was held to be the unquestionable right of every freeman, to have a perfect and entire property in his goods and estate; and that no money could be imposed or levied, without the consent of the general assembly. The erection of any court of judicature without the like consent, and exactions upon the administration of justice, were declared to be grievances. Testimonies of the same honorable character are doubtless to be met with in the records of other colony legislatures. It was regarded and claimed by the general assemblies in all the colonies, as a branch of their sacred and indefeasible rights, that the exclusive power of taxation of the people of the colonies resided in their colonial legislatures, where representation of them only existed; and that the people were entitled to be secure in their persons, property, and privileges, and that they could not lawfully be disturbed or affected in the enjoyment of either, without due process of law, and the judgment of their peers. But we need not pursue our researches on this point, for the best evidence that can be produced of the deep and universal sense of the value of our natural rights, and of the energy of the principles of the common law, are the memories of the spirit which pervaded and animated every part of our country, after the peace of 1763, when the same parent power which had nourished and protected us, attempted to abridge our immunities, and retard the progress of our rising greatness.

The house of representatives in Massachusetts, the house of assembly in New York, and the house of burgesses in Virginia, took an early and distinguished part, upon the first promulgation of English measures of taxation, in the assertion of their rights as freeborn English subjects. The claim to common law rights soon became a topic of universal concern and national vindication. In October, 1765, a convention of delegates from nine colonies assembled in New York, and made and published a declaration of rights, in which they insisted that the people of the colonies were entitled to all the inherent rights and liberties of English subjects, of which the most essential were, the exclusive power to tax themselves, and the privilege of trial by jury. The sense of America was, however, more fully ascertained, and more explicitly and solemnly promulgated, in the memorable declaration of rights of the first continental congress, in October, 1774, and which was a representation of all the colonies except Georgia. That declaration contained the assertion of several great and fundamental principles of American liberty, and it constituted the basis of those subsequent bills of rights, which, under various modifications, pervaded all our *constitutional* charters. It was declared, "that the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English *constitution*, and their several charters or compacts, were entitled to life, liberty, and property; and that they had never ceded to any sovereign power whatever, a right to dispose of either, without their consent; that their ancestors, who first settled the colonies, were, at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural born subjects; and by such emigration they by no means forfeited, surrendered, or lost any of those rights;—that the foundation of English liberty, and of all free government, was the right of the people to participate in the legislative power, and they were entitled to a free and exclusive power of legislation, in all

matters of taxation and internal policy, in their several provincial legislatures, where their right of representation could alone be preserved;—that the respective colonies were entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law; that they were entitled to the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their several local and other circumstances; that they were likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.

Upon the formation of the several state constitutions, after the colonies had become independent states, it was in most instances thought proper to collect, digest, and declare, in a precise and definite manner, and in the shape of abstract propositions and elementary maxims, the most essential articles appertaining to civil liberty and the natural rights of mankind.

The precedent for these declaratory bills of rights was to be found, not only in the colonial annals to which I have alluded, but in the practice of the English nation, who had frequently been obliged to recover, by intrepid councils, or by force of arms, and then to proclaim, by the most solemn and positive enactments, their indefeasible rights as a barrier against the tyranny of the executive power. The establishment of *magna charta*, and its generous provision for all classes of freemen against the complicated oppressions of the feudal system; the *petition of right*, early in the reign of Charles I, asserting by statute the rights of the nation as contained in their ancient laws, and especially in "the great character of the liberties of England;" and the *bill of rights* at the revolution, in 1688, are illustrious examples of the intelligence and spirit of the English nation, and they form distinguished eras in their constitutional history. But the necessity, in our representative republics, of these declaratory codes, has been frequently questioned, inasmuch as the government, in all its parts, is the creature of the people, and every department of it is filled by their agents, duly chosen or appointed, according to their will, and made responsible for maladministration. It may be observed, on the one hand, that no gross violation of those absolute private rights, which are clearly understood and settled by the common reason of mankind, is to be apprehended in the ordinary course of public affairs; and as to extraordinary instances of faction and turbulence, and the corruption and violence which they necessarily engender, no parchment checks can be relied on as affording, under such circumstances, any effectual protection to public liberty. When the spirit of liberty has fled, and truth and justice are disregarded, private rights can easily be sacrificed under the forms of law. On the other hand, there is weight due to the consideration, that a bill of rights is of real efficacy in controlling the excesses of party spirit. It serves to guide and enlighten public opinion, and to render it more quick to detect, and more resolute to resist, attempts to disturb private right. It requires more than ordinary hardiness and audacity of character, to trample down principles which our ancestors cultivated with reverence; which we imbibed in our early eduction; which recommend themselves to the judgment of the world by their truth and simplicity; and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a *constitutional* sanction. *Bills of rights* are part of the muniments of freemen, showing their title to protection, and they become of increased value when placed under the protection of an independent judiciary, instituted as the appropriate guardian of private right. Care, however, is to be taken in the digest of these declaratory provisions, to confine the manual to a few plain and unexceptionable principles. We weaken greatly the force of them, if we encumber the *constitution*, and perhaps embarrass the future operations and more enlarged experience of the legislature, with a catalogue of ethical and political aphorisms, which, in some instances, may reasonably be questioned, and in others justly condemned. [End

quoting.]

And now, let us shift gears a bit and return to our earlier discussion of the Bar Association, and specifically, the California Bar Association.

After a recent telephone conversation with California Senator Quentin L. Kopp, he was kind enough to share one of his presentations. Senator Kopp's efforts resulted in the successful passage of (California) Senate Bill No. 60, which requires a vote by all members of the Bar Association (this year) inquiring of them whether they believe membership into the Bar should be voluntary. The Bar Board of Governors are required, under this bill, to report the results of the plebiscite to the Supreme Court, Governor, and Legislature by July 1, 1996. As you probably remember, under California's State Constitution, membership into the state Bar Association is mandatory for anyone practicing law within the state. Let's take a few moments and see what Senator Kopp has to say. [Quoting:]

CALIFORNIA'S BAR ASSOCIATION

WHY A VOLUNTARY STATE BAR ASSOCIATION
SERVES ALMOST EVERYONE'S INTEREST

It's about time lawyers were afforded the opportunity to decide whether or not they must belong to a closed shop. The question presented by the forthcoming plebiscite of some 140,000 active members of the State Bar of California.

Since I'm an author of SB 60, readers should know I was admitted to practice and, thus, rendered a mandatory member of the State Bar in January 1954, while still in the United States Air Force. I practiced from 1956 until 1959 with Pillsbury Madison & Sutro in San Francisco. Since April 1, 1959, I've practiced in my own law office, usually with a partner and associate. I started paying office rent at $65 per month in 1959 in San Francisco. State Bar dues were $25 per year. Today I pay considerably more rent, but I also pay $468 for compulsory membership in the State Bar.

I'm a past President of the Barristers' Club of San Francisco, past President of the California Young Lawyers Association, a one-time member of the Bar Association of San Francisco board of directors, a past member of the American Bar Association House of Delegates and the promulgator of an annual Continuing Education of the Bar credit course at the State Bar convention, entitled "How To Make It In The Practice Of Law". I like membership in the State Bar. At my panel (and in other forums) I entreat lawyers to participate in affairs of the organized bar. Lawyers comprise the most exciting segment of society. I enjoy their company. The organized bar offers not only the pleasure of their company, but also large scale educational, training and intellectual opportunities. I belong even to a repugnantly liberal Bar Association of San Francisco whose policies often agitate me. I could quit, but I don't—because it's part of my professional life.

Having (I hope) established organized bar credentials, I now declare my independence and allegiance to abolition of the closed shop. For those who [***] it, mandatory membership may be invigorating. (It's not hyperbolic to characterize mandatory membership like a closed union shop in other occupations.) For many other California lawyers, however, it's dispiriting, particularly for a profession of individuals, who

invariably advocate individual rights. They can't practice what they preach to judges and juries. They can't make individual decisions for themselves about membership in an organization which, increasingly, despite modern communication, seems more distant and irrelevant to its conscripted members.
The debate began even before 1927, the year the Legislature enacted the oddly called "Self-Governing Bar Bill", Business and Professions Code, Section 6000 et. seq. Our association of lawyers (the "California State Bar Association") began with a meeting at the San Francisco Chamber of Commerce on July 11, 1889. The initiation fee was $5, dues were $10 per annum. Beginning in 1923, the statewide voluntary association promoted the notion of a "self-governing bar". In 1926, a special committee reported: "Our profession was one of the first to realize that substantial and lasting progress cannot be brought about by punitive measures alone...the real purpose of this meeting is to secure a speedy and efficient administration of justice and to that end raise the standards of both the bench and bar, and simplify and make modern and efficient the methods by which the business of the courts is conducted." Has the 1927 bar unification enlisted the entire profession in improving the administration of justice, as such report propagates? It has not. Instead, we now pay tribute to an organization with an annual budget of approximately $68,000,000 [68 million], caused by the highest annual dues to any bar organization in the country.

Before 1927, lawyers were admitted to practice and disciplined by the California Supreme Court, acting upon recommendation of the various local bar associations. Do many lawyers today understand that the State Bar is not the repository of such power, that the California Supreme Court still possesses ultimate jurisdiction over admission to, and termination of, practice privileges? The Court merely delegated much of that responsibility, particularly admission to practice, to the State Bar.

Can anyone reasonably deny that the reputation of lawyers before 1927 in California was at least as pristine as now? As stated in the 1992 "Minority Position Re: Bar Structure" of the so-called "State Bar Futures Commission", the present structure, while designed to serve the public interest and the legal profession, "has served neither well...and the result has been damaging to the public interest and to both the reputation and the interest of California lawyers." The public distrusts "the present disciplinary system administered by the State Bar" and "that distrust, if not eliminated, will continue to erode public confidence in our legal system." Moreover, as the same report informs us, "there is widespread dissatisfaction with, and opposition to, the mandatory state bar..." among California attorneys, because:

* "Bar dues are too high because (a) the Bar has become a bloated, inefficient bureaucracy, and (b) the Bar spends money on activities most members do not either need or support;
* The Bar is unresponsive to its members' concerns and often treats its members in a high-handed manner.
* The Bar unfairly and disproportionately prosecutes attorneys practicing law alone or in small firms.
* The Bar does not provide satisfactory value to its members.
* The Bar is politically shackled and cannot speak out forcefully on some issues important to its members; and when it does speak out, the Bar often takes a position contrary to the beliefs of its members.
* The Bar's professional staff, not the Bar's members or even the Bar's board of governors, directly or indirectly sets the priorities for the Bar and determines what is accomplished."

For those who raise the specter of life without mandatory membership as tantamount to "deregulation" of California lawyers, is it apostasy to remind them that other states with numerous lawyers utilize voluntariness, rather than ukase, as the regulatory mode? Illinois operates a Registration and Discipline Committee as an

arm of the Illinois Supreme Court to investigate, prosecute and adjudicate complaints of attorney misconduct. Lawyers pay nothing the first year, $70 for the second and third years and $140 annually thereafter to such committee. The fees haven't been raised since 1988. Illinois Bar Association dues range from $40 to $220 annually, depending upon the number of years of practice. The association provides a monthly magazine, a newsletter, counseling on unethical issues, lectures on legal issues, placement on the association's attorney referral listing and legislative advocacy in behalf of the members.
A vexatious State Bar problem is continuing dispute over that amount of annual dues attributable to political and ideological activities [See *Keller v. State Bar of California* (1990) 496 U.S.1]. Because of its mandatoriness, the State Bar is still subjected to litigation by critics who invoke *Keller* (See, e.g., *Brosterhaus v. State Bar of California* (1994) 29 Cal ap 4 963, petition for review granted by California Supreme Court, February 23, 1995. A voluntary association could lobby with impunity; abolishing compulsory membership eliminates not only litigation, but the ill-will of numerous lawyers towards the State Bar. The statutory and regulatory requirements respecting lawyers (admission, discipline, continuing education, lawyers' trust funds) would not end; as in 18 other states, an office of the Judicial Council or the California Supreme Court itself could execute those duties.

As the "Minority Position Re: Bar Structure" report observes, a voluntary bar "would not suffer from the aforementioned restrictions imposed by the Legislature and *Keller* and the concomitant drain on the Bar's energy and resources...a voluntary Bar would have to be responsive to its members and give the members true value for their dues and their support. An example of such a large, voluntary association is the American Bar Association. That which is virtuous and worthy of preservation in the present mandatory State Bar will presumably be found to be virtuous and preserved in a voluntary Bar." Approximately 75 percent of present State Bar members belong to a voluntary local Bar association. Why wouldn't such lawyers join a voluntary statewide Bar association? I would. Additionally, the 17 existing sections of the State Bar, comprising approximately 50,000 California lawyers, would complement the voluntary statewide association. Advantages to such structure include "freedom from *Keller* restrictions and sometimes competing interests of the board [of governors]".

SB 60's genesis was a recommendation by United States Court of Appeals Judge Arthur Alarcon that annual dues be reduced $78. The larger question is democracy for State Bar members. It's odd that the State Bar opposes a plebiscite. Perhaps the best advertising for a "yes" vote on the plebiscite was President Jim Towery's statement in the August *California Bar Journal*, declaring that he didn't "see any groundswell of request from our rank-and-file that the State Bar go through an extraordinary effort to conduct a plebiscite about its own existence." That generated more letters to me than any event in the lengthy effort to enact SB 60. In the words of the "Minority Position Re: Bar Structure",..."because of the present State Bar's size and vested interest in the status quo, the present State Bar is incapable of substantively reforming itself." Bold action is needed from without. Voting "yes" on the plebiscite will compel that bold action, for the benefit of the public and the profession. State Senator Quentin L. Kopp of the San Francisco Bar. [End quoting.] As mentioned previously, the Bill passed and the plebiscite, or vote by state Bar members, will take place concerning a voluntary Bar.

JUDGES' NEW CODE OF ETHICS

In the January 31, 1996 edition of Sacramento, California's *The Daily Recorder*, syndicated columnist Thomas D. Elias writes an article titled, "Judges' New Code of Ethics: Are They Serious?" [Quoting:]

California judges have a freshly toughened code of ethics this year, one demanded by voters dissatisfied with decades of judicial self-regulation. The new code is the direct result of the 1994 Proposition 190, which required the state Supreme Court to adopt mandatory rules for judges at all levels.

The question: Do the judges and the Supreme Court justices really intend to enforce and live by their high-sounding new rules?

Besides the usual rules requiring them to recuse themselves when cases present obvious conflicts of interest, judges are no longer allowed to accept gifts from lawyers or others likely to appear before them. They are required to make broad disclosures of all their friendships with attorneys and others involved in cases they might hear. And they are forbidden to join clubs that discriminate on the basis of race, gender and religion. The ban on memberships in organizations that discriminate specifically exempts the Boy Scouts of America and other non-profit youth, religious and military groups that discriminate against homosexuals.

These rules sound like a great improvement over a system that has long allowed judges to preside over cases involving their best friends and classmates, without having to disclose those relationships.

But almost as soon as it issued the new code, the Supreme Court provided cause for questioning whether it will be taken seriously.

That question arose when the justices unanimously revoked a public censure that had been imposed on a Santa Barbara Superior Court judge by the state Commission on Judicial Performance. Short of removal from the bench, censure is the strongest measure that can be taken against a sitting judge.

Judge Bruce W. Dodds had gotten the severe rebuke because of charges that he impeded investigation of another Santa Barbara judge who deflated the tire of a van parked in his courthouse slot in April 1993. Dodds, who witnessed the vandalism, did nothing to stop his colleague and did not report having seen the act in progress even after he learned that his colleague had denied it. The van belonged to a disabled person.

Not only did Dodds at first refuse to discuss the incident with a detective, but he suggested to his court staff members that they also clam up. He told what he saw only after his colleague confessed and was publicly reproved by the judicial watchdog commission.

Dodds was also accused of making an anti-Semitic remark to visitors in his chambers in 1987 after a contentious court session involving two Jewish lawyers.

The Supreme Court said it could not punish Dodds for that comment because the statute of limitations on it had expired. And the justices said he did not deserve to be censured for failing to cooperate initially in the police investigation of the tire-deflating episode.

Those rulings, ironically, came on the very same day the court issued its new code of ethics. The effect of the actions was essentially to tell judges that they can't join organizations that discriminate against Jews and other minorities, but that their private words won't be punished unless they explicitly violate the letter of some law.

The justices also seemed to indicate that all the good words in the code about avoiding conflicts of interest may not mean much in real life. For if Dodds couldn't even be censured when he refused to cooperate in the investigation of a friend and colleague whose vandalism he had witnessed, why would anyone believe any judges will ever be penalized for failing to disclose friendships or other links to attorneys practicing before them?

Judicial codes of ethics exist less to actually police judges than to instill faith in the public that judges are honest beyond corruptibility. If the Supreme Court looks for ways to exempt judges from its new code—and that's what it seemed to do in the Dodds case—how long will it take public and lawyers to realize that judges are not serious about changing the unspoken rules of their profession. [End quoting.]

In Part IV of this series, appearing in the February 13 (Vol. 12, #3) edition of *CONTACT*, we reviewed the American Bar Association's old code of ethics for lawyers, the *Code of Professional Responsibility*. **Now let's take a look at portions from the <u>current</u> America Bar Association [ABA] Code, which is called *Model Rules of Professional Conduct*.** For those of you who still believe that everything you tell your attorney falls under "attorney-client privilege" and is, therefore, totally confidential—read on. [Quoting:]

<u>ABA—MODEL RULES</u>
<u>OF PROFESSIONAL CONDUCT</u>

<u>Rule 1.6 Confidentiality Of Information</u>

(A) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (B).

(B) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

[Still quoting:]

<u>Comment</u>

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[5] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the presentation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

[7] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse To Client

[9] The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[10] Several situations must be distinguished.

[11] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(B). Similarly, a lawyer has a duty under Rule 3.3(A)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(B) to avoid assisting a client in criminal or fraudulent conduct.

[12] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(B), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[13] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (B)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

[14] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (B)(1) does not violate this Rule.

[Still quoting:]

Rule 1.7 Conflict Of Interest: General Rule

(A) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(B) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

[Still quoting:]

Comment: Loyalty To A Client

[1] Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(C). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[3] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (A) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (A) applies only when the representation of one client would be directly adverse to the other.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (B) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclosure courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

[Still quoting the ABA's Rules:]

Rule 1.8 Conflict Of Interest:
Prohibited Transactions

(A) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(B) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(C) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(D) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(E) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(F) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(G) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(H) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(I) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a

representation directly adverse to a person whom the lawyers knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(J) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case. [End quoting.]

CALIFORNIA'S JUDICIAL REFORM ACT OF 1996

A Statewide Proposition Amendment to the California Constitution

The climate of judicial frustration among many of California's population has reached such proportions that a legislative proposition is being put forth called *The Judicial Reform Act Of 1996*. Without endorsing OR criticizing the proposition, let's see what it has to say. [Quoting:]

The Problem

"Confidence in Court System Dips", reads a headline in the 12/11/92 *LOS ANGELES TIMES*. "Nearly half of the Californians questioned in a far-ranging new poll said they have less confidence in the court system...52% had a *poor* or *only fair* overall opinion of the state judiciary. The survey was released by the [Judicial] council, the policy-making arm of the judiciary, at a symposium on the future of the California courts. The results of the questioning caused concern among officials. "When 52% of Californians do not think highly of the courts, that tells me we have to come up with [a] program to give people a better understanding of the system," said Robert R. Dockson, chairman emeritus of CalFed and Chairman of the Commission on the Future of the Courts."

This public negative perception of our judiciary has continually sunk to an all-time low under the current Commission on Judicial Performance which hears complaints against judges. We are told in a 5/18/94 *LOS ANGELES TIMES* article, "The commission...operates largely in secret...[and that t]he agency's annual report indicates that out of the more than 900 complaints it receives annually, no more than 10 cases are ever taken to the formal hearing stage." A 12/17/93 *LOS ANGELES DAILY JOURNAL* article states, "The commission's mandate is to insure public confidence in the courts. Everyone agrees that this is a vitally important mission. The commission has dismally failed to carry out that mission." Statistics show complaints to the Commission have steadily increased in the past thirteen years by an alarming 365%.

Truly, we are in an epidemic of judicial corruption and misconduct. "Judges Flout Law" reads one headline, "Senator Wants To Crack Down On Courts", reads another. "State Sen. Charles Calderon believes the public's image of the courts must be improved."—*SAN GABRIEL VALLEY NEWS*, 5/6/94. "Our Legal System Is Out Of Control," said CURBB (Citizens United To Reform Bench & Bar), a citizens'

rights group directed by attorneys. Yes, most everyone experienced with the courts has a similar story to tell. It is a cry for judicial accountability.

[Still quoting from Judicial Reform Act of 1996:]

THE PROPOSITION

(a) The People of the State of California find that the doctrine of judicial immunity, originally intended to protect judges from frivolous and harassing lawsuits, has been greatly abused and expanded in practice to extend to every kind of judicial misconduct; that such judicial misconduct is perceived to continue unabated without accountability. As a result, confidence in our judiciary has sunk to an all-time low. It is therefore our desire to build confidence in our judicial system by restoring a perception of justice and judicial accountability. This shall be known as *The Judicial Reform Act of 1996.*

(b) Notwithstanding common law or any other provision to the contrary, no immunities shall be extended to any member of the judiciary of this State except as is specifically set forth in this Act. For purposes of this Act, members of the judiciary shall include, but not be limited to, justices, judges, commissioners, judges pro tem, private judges and arbitrators, hereinafter referred to as "judges".

(c) Preserving the original intent of protecting judges from frivolous and harassing actions, no immunity shielding a judge shall be construed to extend to any clear violation of the *Constitutions* of the United States or California, deliberate violation of law, fraud, conspiracy, intentional violation of due process of law, deliberate disregard of material facts, judicial acts without jurisdiction, and blocking (this includes unreasonable delay) of a lawful conclusion of a case. For purposes of this Act, "blocking" shall mean any act or series of acts that impedes the lawful conclusion of a case.

(d) There are hereby created within this State three twenty-five member Special Grand Juries within statewide jurisdiction having power to judge both law and fact. As used in this Act, "Juror" shall mean a Special Grand Juror. Their sole responsibility shall be to determine, on an objective standard, whether a civil suit against a judge would be frivolous and harassing, or fall within the exclusions of immunity as set forth herein, and whether there is the appearance of criminal conduct by the judge complained of. The Special Grand Juries shall choose as many special non-government advisors as necessary to serve no more than one year, after which term said counsel shall be ineligible.

(e) Within ninety days following enactment of this Act, the Legislature shall establish a "seat" or principal base for each Special Grand Jury, such seats to be reasonably evenly distributed geographically throughout the State.

(f) Each Special Grand Jury shall immediately assign a docket number to each complaint brought before it, unless such case is transferred to another Special Grand Jury to achieve caseload balance. A transfer shall not prejudice a docketing deadline. The Special Grand Jury first docketing a complaint shall have sole jurisdiction of the case. No complaint shall be considered by any Special Grand Jury unless the complain-

ant shall have first attempted to exhaust all judicial remedies available in this State within the immediately preceding six-month period. Such six-month period, however, shall not apply in cases of blocking of a lawful conclusion, which provision is intended to be applied remedially. Should the complainant opt to proceed to the United States Supreme Court, such six-month period shall commence upon the disposition of that court.

(g) The Jurors shall serve without compulsion and shall be drawn by public lot by the Secretary of State from the broadest base of available Citizens of this State of the age of eighteen years and over, excluding elected and appointed officials, prosecutors, members of the State Bar, judges, and judicial and law enforcement personnel, without other exclusion except previous adjudication of mental incapacity, imprisonment, or parole from a conviction of a felonious violent crime against person(s). Excluding the establishment of the initial Special Grand Juries, each Juror shall serve one year. No Juror shall serve more than once in five years. On the first day of each month, two persons shall be rotated off each Special Grand Jury and new Citizens' names drawn, except in January it shall be three. Vacancies shall be filled on the first of the following month in addition to the Jurors regularly rotated, and the Juror chosen to fill a vacancy shall complete only the remainder of the term of the Juror replaced. A simple majority shall determine any matter. Special Grand Jury files shall always remain public record. Each Juror shall receive a salary commensurate to a Superior Court judge prorated according to the number of days actually in session. In addition, each Special Grand Jury shall have an annual operational budget commensurate to the Commission on Judicial Performance, or its equivalent, or a sum equal to the combined salaries of twenty-five Jurors serving full time, whichever is highest. Should the three Special Grand Juries concur that additional interim operational funds are required for their effectiveness, they may present their agreed sum specific to the California Legislature, which shall give high priority to their instant requisition.

(h) The Special Grand Jury shall serve a copy of the complaint upon the judge with notice to the complainant. The judge shall have twenty days to serve and file an answer. The complainant shall have a further ten days, excluding weekends and holidays, to reply to the judge's answer. The Special Grand Jury shall have power to subpoena witnesses, documents, and other tangible evidence, and to examine witnesses under oath. Each Special Grand Jury shall determine the causes properly before it with their reasoned findings in writing within 120 calendar days, serving on all parties their decision on whether immunity shall be barred as a defense to any civil action that may thereafter be pursued against the judge. A rehearing may be requested within fifteen days by service upon the other side, with fifteen days by service upon the other side, with fifteen days to reply thereto. Thereafter, the Special Grand Jury shall render final determination within twenty days. All allegations of the complaint shall be liberally construed in favor of the complainant. The Jurors shall keep in mind, in making their decisions, that they are entrusted by the people of this State with the duty of restoring a perception of justice and accountability of the judiciary, and are not to be swayed by artful presentation by the judge. They shall avoid all influence by judicial and government entities. The statute of limitations on any action involving the compliant to the Special Grand Jury against a State judge shall not commence until the rendering of their final decision.

(i) Whenever any judge shall have received three strikes, a strike being an adverse immunity decision, the judge shall be permanently removed from judicial office. Judicial retirement for such removed judge shall not exceed one-half of the benefits to which such person would have otherwise been entitled.

(j) Should the Special Grand Jury also find probable cause of criminal conduct on the part of any State

judge against whom a complaint is docketed, it shall indict such judge except where double-jeopardy attaches. The Special Grand Jury shall, without *voir dire*, impanel twelve special trial jurors, plus alternates, which trial jurors shall be instructed that they have power to judge both law and fact. The Special Grand Jury shall also select a non-government special prosecutor and a judge with no more than four years on the bench from a county other than that of the defendant judge. The trial jury shall be selected from the same pool of jury candidates as any regular jury. The special prosecutor shall thereafter prosecute the cause to conclusion, having all the powers of any other prosecutor within this State. Upon conviction, the special trial jury shall have exclusive power of sentencing (limited to incarceration, fines and/or community service), which shall be derived by average of the sentences of the trial jurors.

[Portions of this document along the outer margin are cut off on my copy. I will indicate those by ***.]

(k) No judge indicted for criminal conduct [***] sued civilly by a complainant pursuant to this [***] shall be defended at public expense or by an elected or appointed public counsel.

(l) No person exercising strict enforcement [***] the findings of a Special Grand Jury shall be held liable civilly, criminally, or in contempt.

(m) Preeminence shall be given to this Act [***] any case of conflicts of statute, law, or constitutional provision, and the foreperson of each Special Grand Jury shall read, or cause to be read, this [***] bi-annually to the respective Jurors during the final business week of the months of January and July.
(n) The provisions and procedures herein [***] in addition to other redress that may exist and [***] not exclusive.

(o) Should the whole or any part of this proposition come under constitutional challenge, such challenge shall not be adjudicated by any judicial officer potentially affected by the outcome. Should any part of this proposition be found unconstitutional, the remainder shall remain in full force and effect as though no challenge thereto existed. (The Judicial Reform Act of 1996—Tel. 818-386-5804.) [End quoting.]

PARALEGALS

In an article appearing in the March 1991 edition of *ABA Journal*, written by Deborah Chalfie, we read [quoting:]

Paralegals
Should legal technicians be allowed to practice independently?

The debate to permit non-lawyers to provide legal services heated up in California last July with the release of a report by a bar association commission that recommended the licensing of legal technicians to assist in landlord-tenant disputes, simple divorces and bankruptcies.

More recently, legislation was introduced in the California Assembly that would permit paralegals to practice law independently in a broader range of areas and would require licensing only if irreparable harm would result from malpractice.

Sponsoring the bill is Help Abolish Legal Tyranny, a consumer rights organization headquartered in Washington, D.C. Deborah Chalfie, HALT's legislative director, argues here that the bill is a long-overdue remedy to the crisis in legal services.

Texas Bar Association President James N. Parson disagrees. He believes that allowing paralegals to practice independently ultimately shortchanges consumers.

[Still quoting:]

Yes: Consumer Power

Letting independent paralegals serve the public will greatly improve access to legal services.

Everyone—including the ABA—agrees there's a national crisis in access to legal services. Study after study shows that even middle-income consumers can't get affordable legal help. The problem is worse for the indigent: 80 percent of low-income people's legal needs go unmet because they can't afford lawyers. People face evictions, cut-offs in government benefits, consumer disputes, and child support problems without legal assistance. We now have a two-tiered system of justice, with the vast majority shut out.

It should be no surprise that this overwhelming, unmet need has spawned an "underground" independent paralegal industry. Despite a nationwide ban on unauthorized practice of law, more than 3,000 independent paralegals—2,000 in California—are already in business providing high-quality, low-cost legal help with numerous legal matters.

One study has estimated that consumers could save more than $1.3 billion annually by using paralegals for just four routine tasks—uncomplicated divorces, wills, bankruptcies and business incorporations. Besides improving access to justice, letting consumers get help from paralegals gives consumers the right to choose, just as they do for tax preparation, based on the service and expertise they need, want and can afford.

Many of the lawyers who claim that everyday legal matters are too complex for paralegals already delegate much of the work involved in divorces, probate, bankruptcies and public benefits cases to their paralegals and legal secretaries, with little to no supervision.

[Still quoting:]

Almost No Complaints

Despite the bar's speculations about public harm, experience shows there is little evidence of it. The California Department of Consumer Affairs reports that, in the nearly 20 years paralegals have been in business there, complaints about them have been "almost nonexistent."

A California bar survey found 76 percent of pro se litigants who used an independent paralegal were satisfied and would use one again; only 64 percent of those who had used lawyers were satisfied. Stanford Law Professor Deborah Rhode's study found the same relative absence of consumer complaints nationwide: less than 2 percent of all unauthorized practice of law cases even alleged consumer harm.

Contrast these statistics with the nearly 100,000 complaints filed against lawyers in 1989. Obviously, there is no "public protection" guarantee provided by lawyers' exclusive license to practice law. Blanket prohibitions against "unauthorized practice" can and should be replaced by less restrictive, more effective means of protecting consumers—balancing the interest in affordable access with that of meaningful public protection.

Traditional solutions such as increasing funding to legal aid programs or increasing pro bono assistance can barely make a dent in meeting the poor's needs, let alone the needs of those with moderate incomes. Legal aid programs account for only one-third of the few cases in which low-income people actually get legal assistance.

Fewer than 20 percent of all attorneys participate in voluntary pro bono efforts, and the bar has repeatedly rejected mandatory pro bono. And, in the current economic climate, neither program is likely to see substantial increases in resources.

While the importance of these programs shouldn't be minimized, neither should their potential to solve the legal services crisis be overestimated.

charts on paralegals 2 pages

No single reform is a panacea. But, "Boardwalk or nothing" is no longer an option; while lawyers play "monopoly", the public is left out of the game. [End quoting.]

And now for the other side of the coin, James N. Parson responds in the same edition of *ABA Journal.* [Quoting:]

No: Caveat Emptor

No final and comprehensive national or local solution has been found for the problem of providing legal services for the poor. One answer, born in frustration and naivete, has been proposed in California. Its effect will be to provide poor service to poor people. This solution authorizes the practice of law by a lesser qualified group whose lack of qualifications would ostensibly be overcome by zeal and dedication.

It's a kamikaze approach to a problem requiring, not ignorance and zeal, but legal expertise and governance. California may have tendered a proposal, but it needs to reprint—in large letters—the old maxim, "Buyer Beware."

The underlying question is whether society has a duty to ensure the competency of professional practitioners. It's fundamentally a matter of who's qualified, who cares, and who's watching.

One school of thought holds that if a person can cure cancer, whether a licensed physician or not, let him do it. But providers of professional services must be able to perform what they promise.

Professional services require more than an air of knowledge and ability—they require professional ability, grounded in education and steeped in competence.

California's response to the issue of education and competence is the requirement of a high school diploma or GED certificate. Issues of bankruptcy, family law, immigration, and wills and trust law require more than a GED certificate. We're not licensing bus drivers; we're attempting to solve, mediate and dispose of serious legal problems.

Just as allied health providers must be able to distinguish between a cold and pneumonia, proposed allied legal providers must be able to identify the nuances of marital property rights, debtor alternatives, and real estate titles. Even the most basic understanding of the legal issues cannot be founded upon a GED-certified mind.

[Still quoting:]

Questionable Competency

Qualifications and oversight of providers of legal services is not a new issue. Those outside the profession accuse us of exclusivity in our dedication to competence. They want in, even if they lack basic qualifications. Their proffered ticket for admission is cheaper legal services. This ignores the fact that issues of excellence, competence and over-sight are not economic in nature.

Allowing non-lawyers to practice law, under the guise of limited authority, and then disciplining the providers under the legislative branch, destroys the constitutional concept of the separation of powers. The judicial branch has the authority to regulate the practice of law. Call it what you may, but these proposed providers of legal services will be practicing law.

HALT and California's proposal [remember this was published back in 1991] would transfer the disciplining of these practitioners of law to a consumer agency of the state, funded and regulated by the legislature. Expediency would rule; excellence and supervision would suffer.

Let's talk barratry [Webster's: *1. buying or selling of...civil positions. 2. habitual bringing about of quarrels or lawsuits.*]. Once adopted, there would be established on every street corner an "independent paralegal". Free of the constraints of professionalism and effective discipline, each would be susceptible to becoming a free-lance runner for unethical lawyers. The lawyer could accomplish indirectly what he is prohibited from doing directly.

Lawyers in every state believe in the need for expanded legal services to the poor. Each is addressing the issue with success. State-funded IOLTA programs will this year collectively spend $142,581,898 for legal services to the poor. We need to re-double our efforts to address the legal needs of the poor. Poor legal services to poor people is not the answer. As Herbert wrote over three centuries ago, "Ill ware is never cheap." [End quoting.]

PERSECUTED PARALEGAL

In an article from the October-December 1994 edition of HALT's publication *THE LEGAL REFORMER*, we read [quoting:]

The following is an interview with Robin S. Smith, Director of the People's Paralegal Service, Inc. Ms. Smith has been charged with the unauthorized practice of law (UPL) by the Oregon State Bar.

HALT: What kind of services do you provide?

R.S.: We type legal documents and sell self-help law books. We cover areas such as divorce, wills, bankruptcies, living trusts, incorporation, and step-parent adoption.

HALT: We understand a UPL charge has been filed against you. Why do you think this happened after being in business so long?

R.S.: I don't really know why, at that particular moment, the Oregon State Bar decided to go ahead and sue me and my company, People's Paralegal Service, Inc. Really, no customer has ever filed a complaint with me or with the Attorney General's Office, or the State Bar. No customer has ever sued me. No one has ever been so dissatisfied with something that we couldn't resolve whatever was going on that they felt they had to take that step. Yet, the Bar, after seven years of my being in business and the two of us working together to a certain extent—I have testified in front of ABA hearings and Oregon State Bar hearings on the need of non-lawyers—sues me. We thought we were going in the direction of coming up with a joint proposal to take to the legislature and instead, BAM, here's this.

HALT: Did you find it difficult finding a lawyer to represent you?

R.S.: Yes, I spend a lot of time on the phone and came up with an attorney to represent me, but then I did some further digging into my professional liability insurance policy and discovered that it would cover my legal costs on this. They get to name the attorney. I have yet to meet him, but I think he's going to be fine. My insurance policy does say that they are not required to appeal, that it's up to them to decide, so at that point I may be on my own as far as legal costs go. Every paralegal ought to run out and get insurance, professional liability insurance.

HALT: What can you tell us about your defense strategy?

R.S.: It's hard to say because at this point literally all we've done is file an extension for another 30 days. I haven't even met with my attorney to discus strategy. I believe that flat out what we're going to be doing is just denying the UPL charges. The selection of documents is where the UPL issue spins. One of the provisions of UPL in Oregon, is that it violates UPL to select the document or form for a customer. I maintain that I didn't select anything because in this particular situation I typed every document that there was for that particular case. We have a case here called *Oregon State Bar v. Gilcrest* from 1972. It decided that as long as you did not talk to people and all you did is sell them books and forms and type their papers for them, then you weren't practicing law. We do intend to address the issue of *First Amendment* rights. I have a constitutional right to free speech but the Oregon State Bar is trying to enjoin my right to free speech, by preventing me from sharing knowledge, information and forms that I have with people who don't have any other alternatives. Free speech is pretty absolute.

HALT: Do you have any advice for any other independent paralegals who might find themselves in a similar situation?

R.S.: It can happen to anybody. The most important thing people can do is organize in their state. Part of the reason that this happened when it did is really we haven't been very vocal in the last six months. The Task Force Hearings are over and the ABA hearings are over and so there really isn't anything going on at the moment. There is a lull in public support and opinion and money. Oregon State Bar took advantage of that lull. You can fight back on the basis of *First Amendment* Rights if you have the resources and energy to fight, which I do. I intend to fight this to the bitter end. [End quoting.]

Next week we will take a much closer look at Admiralty Law and what, exactly, that means.

CHAPTER 6

GERRY SPENCE

In his book, *With Justice For None*, Gerry Spence states:

"Clarence Darrow was right. Justice cannot be defined. And to the same extent that justice cannot be defined, neither can it be realized. Yet is not our great challenge to form a system that harmonizes such noble ideals as forgiveness with such a human impulse as revenge? At the heart of justice is a divine spirit. It sprouts from the same seeds as life itself. And although we can define neither life nor justice, we are able to recognize injustice, the supreme form of which is to surrender to the status quo and to sanctify the myths and fantasies that breed it, among which is the national legend that in America there is liberty and justice for all."

ADMIRALTY LAW

Everything You Ever Wanted To Know
About Admiralty—And Then Some

Admiralty Court Defined By *Black's Law*

In *Black's Law Dictionary—6th Edition*, under admiralty court, we read: "A court exercising jurisdiction over all maritime contracts, torts, injuries, or offenses. Federal district courts have jurisdiction over admiralty and maritime actions. *28 U.S.C.A. Sec. 1333.* Procedure in such actions is governed by the Fed. R. Civil P. and Supp. Admiralty Rules. *See also* Saving to suitors clause with respect to admiralty actions in state courts."

Also in *Black's Law Dictionary*, under Saving to suitors clause, we read: "That provision in 28 U.S.C.A. Sec. 1333(1) which gives the U.S. District Courts original jurisdiction, 'exclusive of the courts of the state' of any civil case of admiralty or maritime jurisdiction, 'saving to suitors in all cases all other remedies to which they are otherwise entitled.' The 'saving to suitors' clause of the section of the Judiciary Act implementing *constitutional* provision extending federal judicial powers to cases of admiralty and maritime jurisdiction means that a suitor asserting an *in personam* admiralty claim may elect to sue in a 'common law' state court through an ordinary civil action, and in such actions, the state courts must apply the same substantive law as would be applied had the suit been instituted in admiralty in a federal court." *Shannon v. City of Anchorage*, Alaska 478 P.2d 815, 818.

THE LAW OF ADMIRALTY

A brief prelude comment: The section you are about to read is as clear a commentary as you will see anywhere about Admiralty Law. The subject, by its very nature, is very technical and, for most, dry reading. I am compelled to include it in this series because it underlies much of the judicial process in this country at this time. Without knowing what these terms actually mean, how can we ever hope to truly understand? So please, with that in mind, I will now offer a portion on Admiralty taken from many diverse

and often difficult-to-locate sources.

In the book *The Law Of Admiralty*, we read [quoting:]

The law of admiralty, or maritime law, may tentatively be defined as a corpus of rules, concepts, and legal practices governing certain centrally important concerns of the business of carrying goods and passengers by water. Insofar as the reference is to substantive law, the terms "admiralty" and "maritime law" are virtually synonymous in this country today, although the first derives from the connection of our modern law with the system administered in a single English court, while the second makes a wider and more descriptive reference. The subject comprises the most important part of the private law that deals with the shipping industry, although, for historical and to some extent practical reasons, its coverage is by no means coextensive with the whole reach of that industry's legal concerns; in some modern cases it has even been held to cover some matters quite unconnected with shipping (though the Supreme Court has recently cut back sharply on this development). Its tie with a single industry, and its separate, long-continued and international traditions and history mark it off quite distinctly from the relatively interpermeating branches of shoregoing law—with which, nonetheless, it has numerous relations. Substantively, in the United States, it is federal law, and jurisdiction to administer it is vested in the federal courts, though not to the entire exclusion of the courts of the states. Because of its special history, and its special-industry linkage, one cannot move about in it with any sureness without some knowledge both of its past and of the nature of the business it polices and serves.

...it is indispensable to note at the outset a recent change as regards the formal separateness of the "admiralty jurisdiction". Until 1966, each federal district court had an admiralty "side", with a separate docket, and rules of procedure peculiar to admiralty cases. In 1966 the separate "sides" were merged, the admiralty "suit" became a regular "civil action", and the Federal Rules of Civil Procedure were made generally applicable, with some special rules for certain cases heard under the "admiralty" jurisdictional grant. Despite this "unification", the admiralty power remains a separate and independent *ground of jurisdiction*, both *constitutional* and statutory.

Right now we are interested in the affirmative effect of the language just preceding the "saving clause". This is that, from the organization of the federal judiciary down to the present, the federal courts have taken jurisdiction (without reference to amount in controversy, diversity of citizenship, or the presence of any other "federal question") of all causes of action arising under the maritime law.

Just what cases are these? The answer to this will always be a little vague at the borderline, no matter how long the process of judicial inclusion and exclusion goes on, and there were large doubts indeed, in the early days of the Republic, as to the extent of the power conferred. In the leading early case, *DeLovio v. Boit*, an opinion by Story suggests several possible ways for defining the category. The words might have been intended to refer to the practice of the British Court of Admiralty during early colonial times or at the American Revolution, but Story believed (and the belief gained nearly uncontradicted generality) that the restrictions that hampered that court were enforced by writs of prohibition based on statutes not applicable to the colonies; it would thus have seemed gratuitous as well as crippling to accept its limits as those of the newly constituted American admiralty tribunals. This test was accordingly rejected, in *DeLovio v. Boit* and generally in our early precedents, though it cannot be said to have left no trace at all. Another possible reference might be to the jurisdiction of the colonial courts of vice-admiralty; still another might (especially

in view of the use of the word "maritime") be to the jurisdiction of maritime courts throughout the shipping world. Story suggested in *DeLovio* that these two tests came down to much the same thing, since he believed that the colonial admiralty courts, like the seacourts of other nations, enjoyed a wide jurisdiction over maritime affairs, uncircumscribed by the narrowly literal "locality test" that had confined the English Court of Admiralty. *DeLovio v. Boit* concludes with a formulation that is imprecise, as was unavoidable, but that has, in the end, set the style for later courts: the jurisdiction, says Story, "comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea..."

[Still quoting:]

CONSEQUENCES OF ADMIRALTY JURISDICTION

So far we have dealt with the question, "What cases are within the admiralty jurisdiction?" Though in the given instance the answer may be so obvious as to be almost automatic, each case, to stay in court and to be dealt with as a case heard under the admiralty grant of jurisdiction, must pass this test. If the answer as to the given case is "No", the court cannot proceed with the case as an "admiralty" case; if no other ground of federal jurisdiction appears, the case must be dismissed. If the answer is "Yes", what are the consequences?

Briefly, if the admiralty jurisdiction is invoked in a civil complaint, and if a court holds this invocation well-founded, the case will in appropriate instances receive the special procedural treatment provided by the Rules, but will in general proceed as an ordinary civil action. ...however, the older cases, understanding of which is indispensable, were decided at a time when the admiralty docket was separate. Not, then, for antiquarian reasons, but so as to be able to understand cases still of authority, the student must be taken through a brief account of the position as it stood before 1966.

Admiralty cases were formerly docketed and heard on a separate "side" of the federal district court, where a special terminology and procedure were used; these were in part traditional and in part prescribed by the Admiralty Rules promulgated by the Supreme Court and by the rules of the lower courts for admiralty cases. Some of the terminology may be gotten at by simple equivalences with code-procedure terms: the "complaint" was called the "libel"; the "plaintiff" was called the "libellant"; the "defendant" was the "respondent". Admiralty lawyers were "proctors".

Trial, following the civil-law tradition with which the maritime law is closely connected, was to the judge rather than to a jury, and procedure was rather non-technical and simple, though perhaps no more so than under any modern code. Depositions were frequently taken and used, for witnesses were likely to be long gone before a suit could be reached on the docket. Thus far, the differences from short-going procedure are easily comprehensible and (except for the absence of the jury) rather minor.

There was one peculiarity, however, which is of great intrinsic importance, and which must be taken up at this time because some understanding of it is still prerequisite to comprehension of the jurisdictional allocation between state and federal courts. To it we now turn.

Admiralty libels were of two sorts: *in personam* and *in rem.* The *in personam* suit is unproblematical to the shore lawyer; it is a suit against a named natural or corporate person, asserting a personal liability. The *in rem* suit is virtually unknown outside the admiralty court, and understanding of its nature is not to be approximated without some conception of the substantive concept that underlies it: the "maritime lien". In American admiralty law, the maritime lien is a necessary condition for success in the suit *in rem*.

Upon the occurrence of certain mishaps or the non-fulfillment of certain obligations arising out of contract or status, the maritime law gives to the party aggrieved a right conceived of as a property interest in the tangible thing involved (usually but not always a ship) in the (often as yet unascertained) amount of the accrued liability. This right is called a maritime lien.
[Still quoting:]

THE "SAVING CLAUSE"

The Judiciary Act of 1789, it will be recalled, while bestowing "exclusive" admiralty jurisdiction on the District Courts, saved "to suitors, in all cases, the right of a common law remedy where the common law is competent to give it." Obviously, the "exclusivity" and the "saving" are pretty much correlatives. What is "exclusive" and what is "saved"?

Summarily, the result of the cases is that a suitor who holds an *in personam* claim, which might be enforced by suit *in personam* in admiralty, may also bring suit, at his election, in the "common law" court—that is, by ordinary civil action in state court, or in federal court without interference to "admiralty", given diversity of citizenship and the requisite jurisdictional amount.

It has been decided by the Supreme Court that he may *not* sue in federal court, *absent* diversity, on the theory that a maritime claim "arises under" the laws of the United States.

Where, on the other hand, the claim asserted is in the nature of a maritime lien, enforceable "in admiralty" by *in rem* process, *only* the federal court as a court of admiralty may take jurisdiction. Thus, in the leading case of *The Moses Taylor*, a California statute, conferring on the state courts power to administer *in rem* proceedings against vessels, was struck down, and in *The Hine v. Trevor*, decided later in the same term of court, it is made explicit that the right to proceed *in rem* in any other court than the "court of admiralty" cannot be saved to suitors by the saving clause, for such a proceeding is not a "common law remedy" at all. Where, on the other hand, a state court merely enforces or secures enforcement of its judgment by levy on or attachment of a vessel as part of the defendant's good, with a view to compelling appearance or to subjecting *the defendant's interest* therein to sale to satisfy the judgment, this proceeding lacks the distinctive character of the proceeding *in rem*, is one known to the common law and is hence saved to suitors under the saving clause. [If that last paragraph confused you, you're normal.]

The exclusion of the state courts from the *in rem* proceeding is pretty definitely based, in the cases, on the belief that such a proceeding is not a "common law remedy". It may be puzzling, therefore, to find that state courts have not been excluded from exercising jurisdiction in proceedings of an *equitable* nature, dealing with maritime subject-matters. Such proceedings are certainly not "common law remedies" *stricto sensu*. Perhaps such cases can be harmonized with the above-discussed construction of the saving clause

by reference to the fact that the admiralty court itself has been thought not to possess the powers of the courts of equity, so that cases of this sort are not within the admiralty jurisdiction at all, and hence, *a fortiori*, not within the exclusive jurisdiction. Or the term "common law" may be taken in its widest intendment, to include all legal, equitable and statutory rights and remedies, other than the distinctive admiralty *in rem* proceeding.

In any event, perhaps attempting to codify these cases, the Revisers of the Judiciary Code in 1948 (with a slight further amendment in 1949) changed the wording of the saving clause, which now reads:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

"(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

Obviously, this quite unnecessary change in phraseology, apparently motivated in part by a stylistic preference, might imperil those decisions which, like *The Moses Taylor* and *The Hine v. Trevor*, exclude state courts from entertaining *in rem* proceedings, though empowered by state statute to do so, on the square and sole ground that such proceedings are not "common law remedies". They certainly are "any other remedies"; whether one is "otherwise entitled" to them (taking "otherwise" as the mere automatic-writing surplusage it appears to be and thus sidestepping the vortex "other-wise that what?") is the very question that has to be decided all over again without the aid of the wording on the sole basis of which it was decided under the saving clause, old style. A subsequent Supreme Court case intimates that, by main force, the new language will be taken to mean the same thing as the old.

On the assumption, nowhere contradicted, that this is the right view, we can summarize as follows:

Where the suit is *in personam*, it may be brought *either* in federal court under the admiralty jurisdiction (which must in that case either be specially invoked by the plaintiff or visibly be the only ground of federal jurisdiction) *or*, under the saving clause, in an appropriate non-maritime court, by ordinary civil action. Where the suit is *in rem*, only the federal court, acting under its admiralty power, has jurisdiction. The distinction is not always easy. In the case of *Madruga v. The Superior Court of California*, the Supreme Court was asked to decide whether the partition suit of a part owner of a vessel could be brought in state court under the saving clause. Such a suit certainly deals primarily with the thing, but the majority of the Court considered it as not possessing the characteristics of the admiralty suit *in rem*, and allowed it to proceed. The decisive distinction seems to have been that the California court was acting only on the interest of the defendant—that its judicial scale, if the case went that far, would not convey a good title against the world, or extinguish interests of those not parties to the suit.

One very important caution must be added at this point. The allocation of jurisdiction just sketched is the one that has been derived from construction of the section of the Judiciary Act dealing *generally* with admiralty cases; it is a correct picture only for cases not otherwise provided for by statute. A proceeding to foreclose a preferred ship mortgage, for example, cannot be brought in state court under the saving clause, for the federal statute creating such mortgages prescribes that the federal court shall be the exclusive forum in which they can be foreclosed. [End quoting.]

SUPREME COURT RULING—
DELOVIO V. BOIT (1815)

In an 1815 decision written by Justice Story, [*DeLovio v. Boit, et al.* Case No. 3.776 (2 Gall.398) Circuit Court D. Mass. Oct. Term (1815)] the Supreme Court ruled, [quoting:]

The admiralty from the highest antiquity, has exercised a very extensive criminal jurisdiction, and punished offenses by fine and imprisonment. The celebrated inquisition at Queensborough, in the reign of Edward III, would alone be decisive. And even at common law it had been adjudged, that the admiralty might fine for contempt.

[A]ppeal, and not a writ of error, lies from its decrees...

Yet it is conceded on all sides, that of maritime hypothecations the admiralty has jurisdiction.

The jurisdiction of the admiralty depends, or ought to depend, as to contracts upon the subject matter, i.e., whether maritime or not: and as to torts, upon locality...

Neither the judicial act nor the *constitution*, which it follows, limit the admiralty jurisdiction of the District Court in any respect to place. It is bounded only by the nature of the cause over which it is to decide.

On the whole, I am, without the slightest hesitation, ready to pronounce, that the delegation of cognizance of "all civil cases of admiralty and maritime jurisdiction" to the Courts of the United States comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea.

The next inquiry is, what are properly to be deemed "maritime contracts." Happily in this particular there is little room for controversy. All civilians and jurists agree that in this appellation are concluded, among other things, marine hypothecations...and what is more material to our present purpose, policies of insurance.

My judgement accordingly is that policies of insurance are within (though not exclusively within) the admiralty and maritime jurisdiction of the United States. [End quoting.]

SUPREME COURT RULING—
THE GENESSEE CHIEF (1851)
[*The Propeller Genessee Chief, et al.*
v. Fitzhugh, et al. 12 How. 443. 452-3.]
[Quoting:]

And if the admiralty jurisdiction, in matters of contract and tort which the courts of the United States may lawfully exercise on the high seas, can be extended to the lakes under the power to regulate commerce, it can with the same propriety and upon the same construction, be extended to contracts and torts on land when the commerce is between different States. And it may embrace also the vehicles and persons

engaged in carrying it on. It would be in the power of Congress to confer admiralty jurisdiction upon its courts, over the cars engaged in transporting passengers or merchandise from one State to another, and over the persons engaged in conducting them, and deny to the parties the trial by jury. Now the judicial power in cases of admiralty and maritime jurisdiction has never been supposed to extend to contract made on land and to be executed on land. **But if the power of regulating commerce can be made the foundation of jurisdiction in its courts, and a new and extended admiralty jurisdiction beyond its heretofore known and admitted limits, may be created on water under that authority, the same reason would justify the same exercise of power on land.** [End quoting.]

CURRENT CODE—
28 USCS Sec. 1333(1)

[Quoting:]

I. Admiralty Jurisdiction In General

1. Generally

Admiralty and maritime jurisdiction of United States was not limited either by restraining statutes or judicial prohibitions of England. *Waring v. Clarke* (1847) 46 US 441, 12 L Ed 226; *Jackson v. The S.B. Magnolia* (1858) 61 US 296, 15 L Ed 909; *Insurance Co. v. Dunham* (1871) 78 US 1, 20 L Ed 90; *Atlantic Transport Co. v. Imbrovek* (1914) 234 US 52, 58 L Ed 1208, 34 S Ct 733.

Jurisdiction included all cases of admiralty and maritime character as were cognizable in admiralty courts of states at time *Constitution* was adopted. *The Belfast (*1869) 74 US 624, 19 L Ed 266.

Admiralty jurisdiction of federal courts embraces two principal subjects, maritime contracts and maritime torts. *Berwind-White Coal Mining Co. v. New York* (1943, CA2 NY) 135 F2d 443.

Since federal maritime claim may be asserted in Federal District Court based on 28 USCS Sec. 1333, or, in consequence of "saving to suitors" clause of that section, based on diversity of citizenship, where defendant admitted facts showing diversity jurisdiction, it was unnecessary to address question whether court was correct in determining that it had jurisdiction under 28 USCS Sec. 1333. *Pryor v. American President Lines* (1975, CA4 Md) 520 F2d 974, cert den 423 US 1055, 46 L Ed 2d 644, 96 S Ct 787.

[Still quoting, skipping large portions:]

JURISDICTION

Whenever there is any doubt about what a word or term means, in the legal sense, the very best resource right-off-the-top, is *Black's Law Dictionary*. Therefore, let's see what *Black's (6th Edition)* has to say about the subject of jurisdiction. [Quoting:]

A term of comprehensive import embracing every kind of judicial action. *Federal Land Bank of Louisville, KY v. Crombie*, 258 Ky. 383, 80 S.W.2d 39, 40. It is the power of the court to decide

a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties. *Pinner v. Pinner*, 33 N.C.App. 204, 234 S.E.2d 633. Jurisdiction defines the powers of courts to inquire into facts, apply the law, make decisions, and declare judgment. *Police Com'r of Boston v. Municipal Court of Dorchester Dist.*, 374 Mass. 640, 374 N.E.2d 272, 285. The legal right by which judges exercise their authority. *Max Arms, Inc. v. Barker*, 293 Ky. 698, 170 S.W.2d 45, 48. It exists when court has cognizance of class of cases involved, proper parties are present, and point to be decided is within powers of court. *United Cemeteries Co. v. Strother*, 342 Mo. 1155, 119 S.W.2d 762, 765. Power and authority of a court to hear and determine a judicial proceeding; and power to render particular judgment in question. In *re De Camillis' Este*, 66 Misc.2d 882, 322 N.Y.S.2d 551, 556. The right and power of a court to adjudicate concerning the subject matter in a given case. *Biddinger v. Fletcher*, 224 Ga. 501, 162 S.E.2d 414, 416. The term may have different meanings in different contexts. *Martin v. Luther*, C.A.Ill., 689 F.2d 109, 114.

Areas of authority; the geographical area in which a court has power or types of cases it has power to hear.

Scope and extent of jurisdiction of federal courts is governed by 28 U.S.C.A. Sec. 1251 et seq. [End quoting.]

CAUSE OF ACTION

Black's Law Dictionary defines "cause of action"—a critical point for anyone even considering entering into any kind of "legal action"—as, [quoting:]

The fact or facts which give a person a right to judicial redress or relief against another. The legal effect of an occurrence in terms of redress to a party to the occurrence. A situation or state of facts which would entitle party to sustain action and give him right to seek a judicial remedy in his behalf. *Thompson v. Zurich, Inc. Co.*, D.C. Minn., 309 F.Supp. 1178, 1181. Fact, or a state of facts, to which law sought to be enforced against a person or thing applies. Facts which give rise to one or more relations of right-duty between two or more persons. Failure to perform legal obligation to do, or refrain from performance of, some act. Matter for which action may be maintained. Unlawful violation or invasion of right. The right which a party has to institute a judicial proceeding. *See also* Case; Claim...etc.

Case: A general term for an action, cause, suit, controversy, at law or in equity; a question of contesting before a court of justice; an aggregate of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice. A judicial proceeding for the determination of a controversy between parties where rights are enforced or protected, or wrongs are prevented or redressed; any proceeding judicial in its nature.

Criminal act requiring investigation by police. Disease or injury requiring treatment by physician.

Surveillance or inspection of residence, business, etc. by potential burglar or robber.

The word "case" may include applications for divorce, applications for the establishment of highways,

applications for orders of support of relatives, and other special proceedings unknown to the common law. *S.D. Warren Co. v. Fritz*, 138 Me. 279, 25 A.2d 645, 648.

In ordinary usage, the word "case" means "event", "happening", "situation", "circumstance".

A statement of facts involved in a transaction or series of transactions, or occurrence, or other matter in dispute, drawn up in writing in a technical form, for submission to a court or judge for decision or opinion. *See Cause of Action.*

Claim: To demand as one's own or as one's right; to assert; to urge; to insist. A cause of action. Means by or through which claimant obtains possession or enjoyment of privilege or thing. Demand for money or property as of right, e.g., insurance claim. *U.S. v. Tieger*, D.C.N.J., 138 F.Supp. 709, 710.

With respect to claims to a negotiable instrument of which a holder in due course takes free, the term "claim" means any interest or remedy recognized in law or equity that creates in the claimant a right to the interest or its proceeds.

Right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. *Bankruptcy Code* Sec. 101.

In conflicts of law, a receiver may be appointed in any state which has jurisdiction over the defendant who owes a claim. Restatement, Second, Conflicts, Sec. 369.

In patent law, a claim is an assertion of what the invention purports to accomplish, and claims of a patent define the invention and the extent of the grant; any feature of an invention not stated in the claim is beyond the scope of patent protection. *Smith v. ACME General Corp.*, C.A.Ohio, 614 F.2d 1086, 1088. [End quoting.]

Quoting from R. Randall Kelso's *Studying Law: An Introduction of Law*:

A *cause of action* is an aggregate of facts that gives plaintiff the right to a favorable judgment. A rule of law providing that certain kinds of facts in the aggregate constitute a cause of action creates or recognizes a cause of action.

Causes of action initially created by the common law courts of England are called *actions at law* or *common law actions*. In common law action, the usual judgment for plaintiff is that defendant must pay damages to plaintiff, i.e., an amount of money needed to compensate plaintiff for the injuries, expenses and loss caused by defendant.

Causes of action initially created by the equity courts of England are called *actions* (or suits) *in equity*. The usual judgment (order or decree) in an equity action is that the defendant must do or not do something other than or in addition to paying damages to the plaintiff. In most states, all questions in an equity action

are decided by the judge; neither part has the right to a jury trial. Of course, courts and legislatures in this country have created actions at law and in equity that were unknown to the English courts.

The concept of "cause of action" is very useful. A rule of law providing that certain facts constitute a cause of action enables judges and lawyers quickly to determine what facts give rise to a right and impose a duty; what is a breach of duty and an interference with a right; and what may be a plaintiff's remedy and a defendant's liability.

In modern procedure, the phrase "claim for relief" may have the same meaning as "cause of action."

Facts which in the aggregate constitute a cause of action (or a claim for relief) often are grouped into *elements* for convenience. Many causes of action have distinctive names which help bring their elements to mind. For example, Trespass is a cause of action...[End quoting.]

LEGAL "SELF-HELP"

For those of you wanting to initiate some sort of legal action, there are many (printed) resources available, at your disposal.

Two that I particularly recommend are:

Nolo Press—Phone: (510) 548-5902
Represent Yourself In Court—How to Prepare & Try A Winning Case ($29.95 plus shipping)
(Ask for their catalog—they have a wide variety of legal self-help books covering everything from personal finances to divorce.)

HALT (Help Abolish Legal Tyranny)
Phone: (202) 347-9600)
1319 "F" St. NW, #300
Washington, D.C. 20004
(Request their list of available publications.)

CHAPTER 7

JUDICIAL MONOPOLY
THE FINAL CHAPTER, PART VII

by Rick Martin 3/8/96

BECOMING EDUCATED ABOUT *"THE SYSTEM"*
ONLY WAY TO EFFECT CHANGE

Part I of Rick's well-researched series on the U.S. legal system apppeared in the 1/23/96 issue of CONTACT *on page 8; Part II was in the 1/30/96* CONTACT *on p. 5; Part III was in the 2/6/96 issue on p. 9; Part IV was in the 2/13/96* CONTACT *on p. 10; Part V was in the 2/27/96 issue on p. 8; Part VI was in the 3/5/96 issue on p. 4. We continue below with the conclusion of this exposé.*

In the series thus far, I realize the range of legal groundwork which has been covered is extensive, and even at that, I don't claim to have even scratched the surface. In this final chapter I will bring in several other articles for your consideration, and then, with luck and a prayer, perhaps some lucid closing comments about this thing we call "our" judicial system.

Gerry Spence wrote, in *With Justice For None*, "Many lawyers and some judges refuse to acknowledge that ordinary people can grasp the law, but the problem has never been the intelligence of jurors, but of lawyers and judges who have not yet learned to speak plainly and precisely to ordinary people."

CALIFORNIA JUDGES ASSOCIATION

In follow up to last week's article Why A Voluntary State Bar Association Serves Almost Everyone's Interest and the upcoming plebiscite of the state's lawyers, in the Feb. 14, 1996 edition of Sacramento, California's *The Daily Recorder*, we find an article written by Charley Roberts. [Quoting:]

CALIFORNIA JUDGES ASSOCIATION
VOTES TO SUPPORT STATE BAR

LOS ANGELES—Taking sides in the upcoming plebiscite of the state's lawyers, the California Judges Association's Executive Board has voted against attempts to abolish the State Bar.

California attorneys are set to cast an advisory vote in May on the future of the unified bar. If the Legislature then decides to disband the bar, another body would regulate the profession and some or all of its other activities would be taken over by voluntary bar associations.

By a unanimous vote Saturday, the CJA [California Judges Association] board took the position that "the existence of the unified bar is critical to efforts to improve the administration of justice."

The board had been asked by the Coalition to Save the Unified Bar to take a stand against dismantling the

unified bar. To be fair to both sides, however, the CJA board had asked leaders of the movement to break up the bar to submit an opposing request. But none was received.

Critics have long complained about the high cost of State Bar dues, which fund the $56 million annual budget, as well as the use of those dues to finance lobbying on issues that are at odds with those of many members, and about unhappiness with the discipline system.

The Legislature ordered the plebiscite by enacting Senate Bill 60 by state Sen. Quentin Kopp, I-San Francisco.

* The CJA board voted unanimously to vigorously oppose a new version of Canon 5, proposed as part of a wholesale revision of the Code of Judicial Conduct. The proposed version would extend the current ban on endorsements by judges of nonjudicial candidates for office to include candidates for judicial offices. CJA President Paul Boland, a Los Angeles Superior Court judge, said board members had been deluged with comments from judges around the state and every one of them opposed this change. However, he said that despite such widespread opposition, the California Supreme Court may still approve the change.

The board members articulated several reasons for opposing the proposed change. One is that the new canon would be inconsistent with other provisions of the code that permit judges to participate in other aspects of the political process, such as making campaign contributions to candidates or soliciting donations for other judges on the ballot.

Another reason given is that endorsements by judges provide valuable information to voters, who look upon such endorsements as a reliable indicator of a candidate's competence.

Judicial endorsements are also a safeguard of judicial independence, board members said. Without them, judges may rely more on endorsements by lawyers and other special interests.

Other arguments raised against the new canon are that it would deprive judges of a *First Amendment* right, and that there is no demonstrated need for the change.

"At this point," Boland said Monday, "California requires judges to participate in the political process to retain their office and the political process triggers many problems, such as alliances with political organizations, fund-raising and campaigning while carrying a full case-load. The code made allowances so as not to penalize judges in contested elections. In our view, the least offensive element of election campaigns involves endorsements by judges who are in a superior position to evaluate the competence of judicial candidates, both incumbents and challengers."

* The CJA board considered asking the U.S. Supreme Court to grant formal review of a widely watched judicial elections case, *Lopez v. Monterey County*, C-91-205590RMW, and rule that judges in states such as California, **where most judges are appointed, are beyond the scope of the federal Voting Rights Act.** [For those of you who have been following Gary Wean's writing, take note of that last sentence. And for everyone else, please go back and reread that last sentence.]

In the Lopez case, the Supreme Court blocked an order by a three-judge U.S. District Court panel that

Monterey County Municipal Court judges run in a special county-wide, at-large election on March 26. The high court action on Feb. 1 set aside the order while it considers whether to grant review in the case.

The board decided to defer action because of confusion about this complex area of the law and because the issue has pitted one set of judges in Monterey County against another set.

However, the issue is likely to come up again because of concern about the potential, demonstrated by this case, for disruption of the court system.

"The judges in Monterey County have already been put through one election and until the stay was entered were about to be forced to undergo a second election thereby prejudicing the administration of justice," wrote Justice Paul Turner of the 2nd District Court of Appeal in a memorandum to the CJA board. "The California Judges Association should act aggressively and judiciously to keep this from ever happening to them again or ever to any of us."

The district court order had been issued last November, just months after Monterey County had conducted a special election by districts, under a previous order by the same three-judge panel. That vote resulted in the first election of Hispanics to the Monterey County bench in 145 years. Under the November order, judges elected last June would have to run again in March.

Both orders were interim steps while the district court was waiting for the county to come up with a permanent election scheme that would satisfy both the state *Constitution* and the Voting Rights Act. The county is still at work on such a scheme, but the state is contesting the court's effort.

In ordering an at-large election, the three-judge panel concluded that district elections conflict with a recent ruling forbidding racial gerrymanders. *Miller v. Johnson*, 115 S.Ct. 2475 (1995).

Turner argued, however, that *Chisom v. Roemer*, 510 U.S. 380 (1991), "drew a distinction between an appointive system, which is the sole method by which most of California's judges are selected, and a pure electoral selection process such as existed in *Chisom* for the election of Louisiana Supreme Court justices" who must seek office in contested elections.

He asserted that in the Monterey County case, the three-judge panel erroneously assumed that the Voting Rights Act applied even to a judicial election system such as California's. [End quoting. Thank you, Mr. Roberts.]

Continuing with this California judicial theme,

JUDGES

In Gerry Spence's *With Justice For None*, we read [quoting:]

We must draft our judges. We have no other choice. Were we to install such a procedure today, the judges assigned to hear our cases would not, of course, reflect a true cross section of the population. However, as the New Law Schools begin to recruit a more representative body of students, so gradually

will those who are drafted as judges become more reflective of the people they judge. But were we to begin drafting our judges now, even from our present imperfect fund of lawyers, we would enjoy astounding benefits. Immediately we would be relieved of those who arrogantly, uncaringly judge us from the safety of life tenure. Many who rule against us out of blind allegiance to Power would be out. Those who seek judgeships to exert their own personal power would never get in, except by chance, and then their rule would be quickly over. Although the redistribution of judicial power would not be complete or yet fully representative, the drafting of judges would at once sever the judiciary from its indecent umbilical connection to Power.

But wouldn't this process permit the unethical, the lowbrow, the ambulance chaser, the near idiot, to take the bench? Yes, of course, depending upon the requirements we set for those we draft. But the mischief is for that one case only, which hopefully can be corrected on appeal. And who argues that this kind does not already fill certain slots on the judiciary—for life? It is only more difficult to identify the crooked judge or rid ourselves of the incompetent. Who really believes that the average intelligence of the bench as a whole is better than that of the bar? One might wager in the opposite direction, for our best and brightest do not usually serve as judges. Drafting our judges from the total trial bar, including the best and the worst among us, could only improve the overall quality of the judiciary. [End quoting.]

Let's change focus for a moment and cover a few more thoughts on Maritime Law. Please remember, in a series such as this one, I can only offer you pieces to the overall puzzle—ultimately it is up to you to put those pieces to good use by following up with additional research, etc. To distill this material down from massive numbers of volumes is no small task. If I were to include all the information I have obtained just, say, on Admiralty Law, there would be nothing else included in this series. Rome was not built in a day. Neither was an education of value obtained over short duration. I encourage you to research each and every aspect of this series because there is literally so much valuable information available that you have to see it to believe it. But if you don't seek, you surely won't find. With that said, let me step down off this box and we'll continue our discussion.

MORE ON MARITIME LAW

Whether or not you agree with what he has to say, in his book *America Wake Up,* Ruddy Botty makes some interesting observations concerning Maritime Law [quoting:]

Maritime law has been recognized by countries as the "Law of the Sea". For centuries, sea routes and naval regulations applicable to ships and ports were firmly established in order to facilitate international trade and commerce between nations. The common law is applicable on land, lakes, and rivers (fresh water). The law of the sea is applicable on sea water (salt water). Salt water and fresh water cannot be mixed, as salt water is not potable. There lies the basic contradiction between the law of the land and the law of the sea, as a citizen under maritime law is a subject, and common law arguments are not valid in a maritime court and vice-versa. Where the salt water meets the fresh water, it is called the "BAR". Lawyers are trained in maritime law and are members of the America Bar Association which must answer to the International Bar. A lawyer cannot represent a member of the sovereignty synonymous with *We-the-People*, but he can represent freight, cargo, merchandise, corporations, insurance companies, and subjects under maritime law such as a person as defined under the Social Security Act of 1935. There are five Biblical references about lawyers, and they are all on the negative. Lawyers do hold the key of knowl-

edge. They know the difference between a member of the sovereignty and a subject. Their peculiar existence depends upon the masses being ignorant subjects.

Maritime law came up our rivers and lakes and then eventually to our roads and highways. Terms like port of entry, island, terminal, oasis, shipping, log-book (for truck drivers), and truck's manifest are all naval terms applicable to ships at sea. International law with its naval codes have incongruously penetrated and conquered the land without the people's knowledge nor their consent. The people are trained that the law is the law. They are not trained to differentiate laws of the land and laws of the sea. As a result, the masses are obeying laws thinking they are the laws of the land, when they are abiding the laws of the sea.

A seaman on a ship does not have rights; he has privileges. In modern time, a person is on ship usually under an enlistment and/or a contract. In ancient time, he was often on the vessel as a slave or through fraud and trickery. A passenger is on board voluntarily after the purchase of a permit (license), or if he is there forcibly he has been kidnapped. Neither a seaman nor a passenger may claim allodial rights to a cabin nor may they set-up business within the vessel without the captain's permission. They are on the ship under grants and conditions, subject to naval statutes or by legal definition "in purview".

In order to enforce maritime laws and contracts upon the people, they must have become "maritime citizens" or "subjects" to it. The pre-Civil War amendments, the *Bill of Rights*, are common law amendments reserved for the sovereignty, as ordained and established for themselves and their posterity. The Civil War was called "civil" for good reason. The war brought the Roman Civil Law under maritime jurisprudence upon the states. [End quoting.]

For those of you out there who think, "what can one man do, it's hopeless?" Let's shift gears once again and see what Gerry Spence has to say on that subject.

CAN ONE PERSON MAKE A DIFFERENCE?

Again, quoting from Gerry Spence's *With Justice For None*:

Can a single man still make a difference in America? What about Ralph Nader, a quiet, dedicated man who dresses no better than my father did when he got ready for church. He still lives in a small studio apartment, and after all these years of service to the public, he draws a salary smaller than I pay some of my beginning clerks. The *New Republic* says there is no one living today who is responsible for "more concrete improvement" in the lives of Americans. Two decades ago, Nader's book *Unsafe At Any Speed*, a surprise best-seller, led to federal legislation that has saved untold lives and given rise to a new era of consumerism. We wouldn't have such standard safety features in our automobiles as seat belts, padded dashboards, collapsible steering wheels, and shatter-resistant glass if it weren't for Nader. Today, if your airline is overbooked despite your reservation, you won't lose your seat and receive only the airline's apologies. The airline will get you a seat even if it has to buy it at a dear price from another passenger. Ralph Nader forced into American law the idea that airlines that take the risk of overbooking must pay the price of making it right with their passengers if they lose, and it was also Nader who was responsible for the no-smoking sections in today's planes.

Nader learned early on what it's like to fight the big corporation. When, in *Unsafe At Any Speed*, he attacked General Motors' Corvair, an engineering catastrophe that put chrome and company profits ahead of safety and human life, GM decided to defend itself, not by correcting the fatal defects in its car, but by smearing Nader. A Senate subcommittee documented how GM hired detectives to dig up dirt about Nader's private life, but to GM's embarrassment, its sleazy attempt was discovered and exposed, and later the company was required to publicly apologize.

Here is a lawyer who, almost single-handedly, made us aware of our rights in a society that had accepted a jaded business morality, one that held it was permissible to exploit the nearly helpless consumer with dangerous products and unjust practices. Today, he and his young, idealistic "Raiders", most of them lawyers, fight the insurance industry's counterfeit "lawsuit crisis" engineered to cause the people to give up more of their rights for promised lower premiums that are never delivered. He supports organizations that expose and struggle against corporate crime, and he has launched a new campaign to preserve the American jury. He is one lawyer—*one*. Across the land, there are thousands of other lawyers who are often poorly trained and poorly paid for such great battles as they carry on at terrible odds, wars they wage on behalf of the people whose cases we will never hear of. We owe our freedom to these anonymous champions.

But despite some advances, justice, whatever it is, has, like our lawyers, too often come to reflect our modern mores, to become a *commodity*—something bought and sold in the marketplace. Too often it is a luxury item—that is a central theme in this book—and lawyers are changed in the process, for in such a milieu they become mere hawkers and merchants seeking customers who will pay the price of their wares. Like the great tree that has been felled and its finest heart timber fashioned into expensive violins, as soon as justice becomes a *thing for sale*, its features and its availability are also changed. Once the tree stood strong and sturdy to shade and shelter everyone, but the violins made of it were procurable only by those who possessed the price. As peddlers peddle their expensive fiddles to the monied, so lawyers most often sell justice. But most of the people never hear the music.

And one thing more: The scoundrel in Shakespeare's *King Henry VI* who made the remark about killing all the lawyers had revolution in his mind. He knew that no government could be overthrown without first ridding the kingdom of lawyers, for at that time the profession was a bulwark for law and order and the protector of the rights and privileges of the people. Such was then and has always been the highest calling of the profession. [End quoting.]

REGULATING LAWYERS

And now, turning to an article written by Deborah Chalfie of the Washington, D.C. based organization HALT [Help Abolish Legal Tyranny]. (I'd like to thank HALT for providing this, and material used earlier in the series, for our use.) In this article, titled *Dumping Discipline: A Consumer Protection Model For Regulating Lawyers*, we read [quoting sections:]

Lawyer's ethical rules, contained in codes of professional responsibility, appear to be of two main types: *ethical* norms and *professional* norms. The ethical norms condemn behavior that indicates bad moral character, and consist largely of norms against crime—felonies of any sort, fraud, theft, and other acts of "moral turpitude"—committed against clients and others. Professional norms, though couched in ethical

terms, condemn behaviors that compromise the profession's prestige, privilege, and insulation from competition. Examples include prohibitions on unauthorized practice of law and many kinds of advertising. Although both kinds of rules are traditionally justified on public-protect grounds, the ethical norms amount to little more than proscriptions against crime, and the professional norms have consistently been criticized by consumers and others as protecting the profession at the *expense* of the public.

Of course, the rule of professional responsibility also contains some provisions concerning the treatment of clients. Lawyers are supposed to be loyal to their clients and zealously represent their interests. Lawyers are not supposed to neglect cases, perform incompetently, or overcharge their clients. However, because these rules contain no meaningful standards, they have no discernible content, and are therefore of little discernible effect. To rise to the occasion of a disciplinary violation, the neglect must be repeated or willful, the overcharge must be unconscionable, and the negligence must be gross. As a consequence, complaints under such provisions are routinely trivialized and discredited by discipline agencies as mere "communications" problems.

Consumers complain when a lawyer bills more per hour than the client makes in a day or even a week, and then simply doesn't do the work. Then the client has to find and pay another lawyer to do the same preparatory work the first one was already paid to do. Consumers complain when a lawyer never calls to update them on the case, and then repeatedly failed to return their calls or is too busy to meet about it. Consumers complain when they are socked with a final bill of 50-500% more than the original estimate. Consumers complain when they learn only at trial that the lawyer failed to follow up on the client's suggestions for sources of relevant evidence. Consumers complain when the lawyer keeps asking for continuances and never seems prepared to move forward.

If your car mechanic did the equivalent of any of these things—took your money without fixing the car, charged you five times more than the original estimate, wouldn't call to let you know when the car was ready and wouldn't return your phone calls, kept delaying the time when the car would be ready for pick-up, or didn't repair the car correctly—you, the consumer, would not consider such problems as a mere "breakdown in communications." These complaints go to the essence of the buyer-seller contract.

The key problem here is that, although the objective of the discipline model—to keep the profession "ethical" in some lofty sense—may arguably be a worthwhile one, it is one that's practically irrelevant to consumers' needs in the context of the lawyer-client relationship. Clients understandably but mistakenly think "ethical" means treating clients well. When the rules about how to treat clients are trivialized and not enforced, however, the only operative parts of the code left are the parts that protect the profession's respectability, prestige, and income. It may be comforting to know that your lawyer doesn't have a police record, but it's even more comforting to know that your lawyer will complete the work she or he was hired to do competently, promptly, and economically.

[Still quoting, later in the article:]

THE ALTERNATIVE: A CONSUMER PROTECTION MODEL

There is no question, from the consumers' point of view, that "discipline" must be scrapped, and that a

consumer protection system must take its place. Under what HALT calls a "consumer protection" model, the regulatory objectives, response, and process would be radically different.

The fact that shutting down a lawyer's ability to practice may continue to be a part of this new system in no way detracts from this necessity: unfair business practices injunctions and similar legal strategies are wholly compatible with enforcement of consumer protection laws, yet carry none of the conceptual or operational baggage of "discipline." Obviously, pro-consumer laws against any form of theft, fraud, or misrepresentation are possible without a code of professional responsibility. Similarly, anything else of value to consumers in lawyers' ethical code can be preserved, and even strengthened, without reference to "ethics". After all, consumers are able to secure important rights in their transactions with banks and auto mechanics without any ethical code at all. [Still quoting, later portions in the article:]

DIFFERENT REGULATORY SCHEME, DIFFERENT RULES

The first key step in creating this new system for lawyer regulation is to create a new lawyer regulation agency. Because of lawyers' conflict of interest, neither bar associations nor the state supreme courts are appropriate regulators in the public interest. Instead, the same kinds of agencies or officials who now regulate auto mechanics, such as state consumer protection agencies and state attorneys general, ought to be put in charge of lawyer regulation, with the same, if not more, powers than they now have under their existing enabling legislation.

In many cases, existing consumer protection statutes could simply be applied or extended to cover legal services. State "unfair and deceptive acts and practices (UDAP)" laws already cover a multitude of unfair advertising, contract, and other practices in other settings. To the extent that such laws are not adequate to cover the full range of client expectations and complaints, the agency could adopt specific regulations or, if necessary, new, specially-tailored provisions could be added to these laws. In any case, new rules for defining the lawyer-client relationship are definitely in order.

First, as in other consumer transactions, consumers should be entitled by law to receive accurate and full disclosure of pertinent information *in advance* of making the "bargain". Consumers cannot be expected to make intelligent hiring decisions or strategic decisions about their cases unless they know all the facts up-front. Thus, they first need easy access to information, both from the consumer protection agency and from the lawyer on request, about the qualifications of the various lawyers they are considering hiring. In addition to information about education and years in practice, consumers should be able to get information about attorneys' areas of concentration and the amount of experience they have in handling cases such as those of the client's.

Key facts lawyers should be required to disclose to *potential* clients would include: the price of an initial consultation; a summary of the client's legal options for attaining her or his objectives and their pros and cons, including the chances of success, time and cost associated with each; the lawyer's best estimate of the time and cost involved in the client's chosen course of action; how fees and other costs are to be calculated; who will actually perform the various tasks involved; the specific services to be performed and the level of service quality to be provided; and how changes in circumstances and disputes are to be handled. To reduce confusion and disputes, these disclosures and decisions should be incorporated into a plain-language, written contract very soon after the client decides to retain the attorney. Speaking of

disputes, lawyers should also be required to provide clients with information about how and where they can register a complaint.

Further, the customer should have and be made aware of their rights to control the terms of the bargain. For instance, consumers should have: the right to make all important decisions about the case (importance should be determined by what a reasonable client would consider important); the right to set parameters on time, cost, and courses of conduct (which would require the attorney to obtain the client's permission before exceeding them); and the right to fire an attorney or to file a complaint without intimidation or other undue adverse action (e.g., withholding of client files).

These rights, whether enacted into law or adopted by administrative rulemaking, should also include provisions for consumer disclosure, so that consumers are aware of and can exercise their rights. It is not unusual for service providers to be required to give customers important disclosures about their rights. For example, airlines must notify customers about their rights in the event of overbooking, and credit card companies must notify customers of the process for disputing a charge. There is no reason why lawyers couldn't also be required to make disclosures about important consumer rights to their clients. Thus, for example, lawyers should not only be required to provide itemized billings of time and expenses (so that the consumer can in fact control costs), they should also be required to inform their clients of their *right* to control costs.

In addition to protecting consumer rights to information and control, the law should also address attentiveness and quality of service. For instance, the consumer should have the right to receive regular progress reports, and even the right to have phone calls returned within a reasonable time. Certain kinds of neglect, such as missing a filing deadline, should constitute a *per se* violation of the law. However, less blatant forms of neglect, such as taking too long to probate an estate or asking for too many continuances due to an excessive caseload, should also be proscribed.

Proscriptions against negligent and incompetent service, in particular, would be a boon for consumers. However, to be meaningful and helpful to consumers, the "standard of care" to which lawyers are held accountable would have to be redefined. This is because the standard of care now applicable in legal malpractice actions is chiefly concerned with whether a lawyer has deviated from professional customs and norms, and because there are no objective, specifically-articulated standards of competence.

Thus, the first step in holding lawyers to a pro-consumer standard of competent performance is to redefine it from the "reasonable" client's perspective instead of from the "reasonable" lawyer's. The standard would thus, become, "what would the reasonable client under these circumstances have a legitimate right to expect?" Deviance from consumer expectations about quality, instead of deviance from prevailing lawyer practice, would become the touchstone. If the courts can posit how the reasonable attorney exercising due care should act, we should also be able to posit the expectations of a reasonable client.

The expectations of a reasonable client is a beginning toward giving content to the new standard, but it is not the end. Still to be determined is whether there should be a "uniform" standard, one which assesses quality of performance regardless of the identity and background of the service provider, or many standards, which take into account specialty, the type of service provider involved, or even the contract itself. Client complaints about negligence and incompetence made to disciplinary agencies might prove to be a

fertile starting place for defining the standard. In any case, whatever standards are developed could be further defined through adjudication of complaints.

[Still quoting, she later closes with:]

Allowing lawyers to be in charge of consumer protection functions is how we ended up in this mess in the first place. Instead, discipline itself—its objectives, rules, enforcement patterns, remedies, and procedures—as well as lawyer self-regulation, must be dumped and replaced with consumer protection performed by an independent agency. Unless and until this happens, it is inevitable that clients will continue getting the short end of the stick, and as long as that happens, consumer advocates and the organized bar are doomed to dance in circles. [End quoting.]

SOME CLOSING THOUGHTS

Our modern society has created a legal system deeply entrenched in procedures which were mostly established long ago. What was not put into place long ago has been legislated into place, and thus, ultimately creating a seemingly impenetrable fortress from which *the people* are locked out and only the robed judges and barristers are allowed keys to this kingdom.

Justice is a word seldom heard in the halls of today's court houses. But justice is an idea that lives, that burns within the heart of each man; and man knows when justice is being sacrificed at the altar while deals are quietly and privately being made at exclusive private clubs, with the recipient of such clandestine activities ultimately being you, *the people*! But over the last several decades there seems to be an increased awareness of the system's flaws. Yes, it is true, many grand juries do function as a "rubber-stamp" for local prosecutors, but there are those that do not. And the grand jury system certainly does have, built within it, a means whereby justice may well be served by those willing to serve.

The legal system is massive, complex, bureaucratic and codified. The average person can't help just shakinghis head at the whole thing. The O.J. Simpson trial "turned a lot of people off" to American jurisprudence, for whatever reasons. Lawyers, of course, will tell you that you must have a lawyer to navigate your way through unchartered waters. Few will be honest about the ultimate financial cost of such a decision.

The facts are that those who are thoroughly in power positions, as judges, want to keep their power. So, understandably, they balk at judicial reform—take the opening article in this final CHAPTER as one such example.

Juries' legs have been cut off at the knees when it comes to being instructed to "vote their conscience" (or judge the law itself). Some jurors who are "fully informed" do make it through in the present system, but for the most part jurors do their duty in earnestness and, generally, that means obeying each instruction by the judge. The *Constitution*, fairness, or common sense have little or nothing to do with our present legal system, in truth.

I have chosen to focus somewhat on California's judicial issues because "as goes California, so goes the nation" when it comes to "model legislation".

It, obviously, takes involved participation at every level of the process to initiate change—IF change is the desired outcome. The Judicial Reform Act of 1996 goes a long way toward correcting many issues which simply haven't gone away. Will it pass? Who knows.

The chains that bind each citizen from effective resolution of legal issues may be unlocked through one single key—education—*self*-education. It is continually astounding to me to see how much information is truly out there.

If you have been physically harmed and you can't afford a lawyer, there are a wide range of other options available to you. There are legal self-help clinics, there are paralegal services, there are publications available that will literally walk you through a lawsuit beginning-to-end. So, if you have a case, and you know if you do, what is to stop you from filing it yourself? The only thing to lose, really, is the time involved in reading and finding out how. Public libraries and law libraries are wonderful places with some very helpful people. If you don't know, ASK. It's an adventure.

We, as a culture, have continually given our power away to the power brokers, the medical monopoly, the judicial monopoly, etc. Isn't it time for individual responsibility, in a world gone mad? Am I saying to go out and sue everybody you can think of? Absolutely not, because if it's one thing I've learned, nobody ever really wins these things—the toll is heavy for all. But on occasion, where an injustice has gone unfettered, there can be resolution which allows, then, life to go on. By turning over the power and the money to an attorney who has 50 or 100 or 500 other cases staring him in the face, you are just another client, and remember one thing—the lawyer's first responsibility is as an officer of the court.

You know your situation, your case, your cause-of-action, better than anyone else. Who better to "plead" it?

It is abundantly clear in reading the writings of some great judicial minds over the last 200 years, that our Founding Fathers had tremendous insight into the nature of man and the nature of political structures generally. They very specifically separated the powers of government so that each would be a "checks and balances" for the other. Ah, but, beginning with the removal of the legitimate *13th Amendment* to the *Constitution* barring titles of nobility (i.e., esquire/lawyers) from government service, the usurpation of our government at all levels by attorneys became a *quid pro quo*. And, obviously they, being the ones in power, don't want to give away the keys to their kingdom. And so additional legislative measures are continually passed, year after year, further locking away the *Constitution*, far from the reach of man.