The Public's Interest in the Ethics of the Public Interest Lawyer

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High ethical standards have traditionally guided the conduct of members of the legal profession. These ethical standards, now codified in the *Code of Professional Responsibility*,[1] govern the practice of law because of the customary classification of law as a profession rather than as a mere commercial enterprise.[2] The characteristic of the legal profession which distinguishes it from the pursuit of a commercial business is that law exists as a necessary blend of both public and private service. On the one hand, a lawyer is an advocate who resolves his client's legal problems. On the other hand, since the principal forum for resolving legal controversies—the judicial process—is an arm of the government, a lawyer has always been considered an officer of the court.[3] Consequently, the lawyer bestrides private and public concerns each time he utilizes the courts to resolve his clients' grievances. It is the public aspect of the legal practice which requires lawyers to maintain a high concern for the public interest. Consequently, in addition to relying on the lawyer's personal sense of ethical conscience, the courts have sought to insure compliance with ethical standards of conduct through legal sanctions.

Legal ethics are inextricably linked to society's interest in requiring lawyers to reciprocate for the privilege of being granted an economic

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1. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1970) [hereinafter cited as ABA CODE]. The *ABA Code* is divided into *Canons, Ethical Considerations* [hereinafter cited as EC], and *Disciplinary Rules* [hereinafter cited as DR]. The *Canons* are those general axiomatic norms from which the *Ethical Considerations* and *Disciplinary Rules* are deduced. While the *Ethical Considerations* constitute the ideal standards toward which all lawyers should aspire, the *Disciplinary Rules* are mandatory, setting forth the minimum requirements for ethical conduct. *See id., Preliminary Statement* at 1.

2. A profession is distinguished from a business in that while the goal of a business is to realize profit, a profession primarily aspires to serve the public. A profession is said to embody three general characteristics: advanced learning as a requirement for entry into the profession, the existence of an organized, self-disciplined body, and a dedication to public service. Wade, *Public Responsibilities of the Learned Professions*, 21 LA. L. REV. 130, 131 (1960).

3. Cohen v. Hurley, 366 U.S. 117, 124 (1961) (dictum).

monopoly. In many ways, the right to practice law is "in the nature of a franchise from the state."[4] Once admitted to the bar, a lawyer possesses the exclusive right to hold himself out as a lawyer, advise clients in legal matters and appear in court on their behalf.[5] Society, however, does not grant these privileges without qualification: Mr. Justice Cardozo once observed that "[m]embership in the bar is a privilege burdened with conditions."[6] This restatement of the age-old concept of *noblesse oblige*[7] requires that those who receive privileges are in turn required to exercise those privileges in a responsible manner. In return for the lawyer's franchise to practice law, society demands that he maintain the standards of competence and service to the public required by the *Code of Professional Responsibility*.[8]

In addition to requiring that the lawyer refrain from violating a public trust, society demands that his conduct be exemplary. A government of law can function only so long as the public maintains respect for the legal system.[9] By adhering to ethical standards, it is argued, lawyers enhance the image of the legal profession, thereby promoting confidence and trust in the legal system.[10]

Ethical considerations become even more significant in the context of public interest law. The very use of the term "public interest" implies a recognition of the responsibility of the legal profession to the general community. Since public interest lawyers are committed to this same goal by their very membership in the legal profession, it would appear that they should necessarily possess a more sensitive appreciation of both the desirability and the necessity of maintaining the image of the profession.

Lawyers interested in dedicating their skills to the pursuit of work *pro bono publico* are increasingly considering the feasibility of the public interest law firm as one vehicle for maintaining the commitment of the profession to social change through law. Inherent in the operation of such an enterprise is the troublesome debate over the most effective manner in which to promote such change. It can be argued that such firms should advocate only those issues which its lawyers believe to be in the public interest. The lawyers would make this determination through exhaustive studies of socio-economic data in close collaboration with spe-

4. *In re* Co-operative Law Co., 198 N.Y. 479, 483, 92 N.E. 15, 16 (1910).
5. H. DRINKER, LEGAL ETHICS 59 (1953).
6. People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 470, 162 N.E. 487, 489 (1928); *In re* Rouss, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917).
7. "Every one to whom much is given, of him will much be required; and of him to whom men commit much they will demand the more." *Luke* 12:48.
8. *In re* Rothman, 12 N.Y. 528, 548, 97 A.2d 621, 632 (1953).
9. "Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system." ABA CODE, EC 9-1 (footnotes omitted).
10. *See generally In re* Nevius, 174 Ohio St. 560, 191 N.E.2d 166 (1963); Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43, 188 N.Y.S.2d 491 (1959).

cialists from other disciplines. After careful study, they would be able to reach an educated opinion of what is best for the public. On the other hand, it might be argued that the true public interest lies in providing advocates for those underrepresented persons who, either because of ignorance or poverty, have been denied equal access to the decision-making processes of government and industry. Whatever the view taken, there are a host of practices inherent in public interest work which generate grave ethical considerations.

One ethical problem revolves about the need for public interest law firms to advertise in order to make the public aware of the availability of their services. This practice appears to be in direct conflict with the traditional ethical ban against advertising and solicitation by lawyers.

In all probability, public interest law firms will be funded by persons other than their clients. In addition, it is hoped that these firms will be comprised of lawyers who will work closely with non-legal experts such as economists, sociologists, and urban planners. This close association and collaboration with nonlawyers will have to be harmonized with the ethical ban against allowing lawyers to be controlled by laymen.

The great volume of public interest legal work to be done and the relative scarcity of lawyers interested in pursuing it will undoubtedly necessitate the widespread use of subprofessional technicians. The use of these paralawyers will have to be reconciled with the ethical obligation to combat the unauthorized practice of law.

The ostensible goal of these firms is the furtherance of the public interest. There is a distinct possibility, however, that this broader interest may conflict with the best interests of the individual client. In many ways, a predominant concern with the best interests of the public may be inimical to the adversary system, which contemplates a lawyer's undivided loyalty to his individual client. This service-law reform dichotomy may very well be inconsistent with the ethical requirement that a lawyer give his first allegiance to his client.

It is the purpose of this note to examine the impact of these ethical problems on the effective operation of a public interest law firm. An attempt will be made to demonstrate that compliance with legal ethics need not be irreconcilable with the pursuit of public interest law.

SOLICITATION OF CLIENTS

Soliciting and advertising by lawyers have traditionally been condemned as being unprofessional. Rules prohibiting legal solicitation originated as standards of etiquette, designed more to maintain the congeniality of the small, elite group of legal practitioners than to serve the public interest.[11] Even after this rationale lost its validity, the prohibition against

11. H. DRINKER, LEGAL ETHICS 210-12 (1953).

solicitation continued because of the fear that unbridled advertising would generate needless and time-consuming litigation. That 14th century England chose to make the "stirring up" of litigation a crime is some indication of the historical importance of the ban against solicitation.[12]

Whatever the historical reasons behind the prohibition against advertising, it is still generally considered undignified and unprofessional for a lawyer to advertise his services.[13] The Code of Professional Responsibility maintains that this ban is rooted in the public interest:

> Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman. Furthermore, it would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such advertisements of professional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deceptions. History has demonstrated that public confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising.[14]

Because of its possible adverse effects, the traditional proscription against solicitation has not gone unchallenged. One effect of the enforcement of the prohibition has been an unequal access to the legal sys-

12. Fomenting litigation was probably made a crime because the courts of that time were easily corrupted. Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674, 675 (1958). It should be pointed out, however, that "[m]alicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation." NAACP v. Button, 371 U.S. 415, 439 (1963).

Needless to say, since it is not likely that courts today are so easily corrupted, the "stirring up of litigation" rationale is considerably weakened. The argument is further weakened by the contravening public policy of settling all valid claims.

But see Int. Rev. News Release No. 1078, CCH 1970 STAND. FED. TAX REP. ¶ 6943G at 71,940 [hereinafter cited as IRS News Release No. 1078], which establishes guidelines for the activities of a public interest law firm seeking an exemption as a charitable organization. These guidelines tend to limit the activities of such a firm to litigation alone. Guideline 8, which is almost identical to the wording of INT. REV. CODE OF 1954, § 501(c)(3), provides that the public interest law firm

> may not participate in, or intervene in, any political campaign on behalf of any candidate for public office . . . and no substantial part of its activities may consist of 'carrying on propaganda, or otherwise attempting, to influence legislation.'

Nevertheless, while it is arguable that such a restriction forces the public interest lawyer to litigate his issues, it is not evident that this limitation would cause him to abuse the judicial process, or otherwise "stir up" controversies. It should also be pointed out that unethical conduct on the part of public interest lawyers is a ground for the firm losing its tax exemption. *See* Note, *The IRS Man Cometh: Public Interest Law Firms Meet the Tax Collector*, 13 ARIZ. L. REV. 857, 872, 879 (1971); IRS News Release No. 1078, Guideline 3, *supra*; note 54 *infra*.

13. *See* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 179 (1938) [hereinafter cited as ABA OPINIONS] (solicitation of professional employment by or for a particular lawyer has a tendency to injure the public and degrade the profession). A bar association, however, may advertise the desirability of drafting a will as long as no reference is made to individual lawyers. *See also* ABA CODE, EC 2-9, 2-10.

14. ABA CODE, EC 2-9 (footnotes omitted).

tem.[15] For example, it is well documented that a large number of Americans, most notably the poor, have trouble recognizing their legal problems and thus lack the motivation to participate in the legal process.[16] This situation only serves to diminish what little faith the underrepresented might still possess in the legal system as an effective vehicle for the resolution of their grievances.[17]

Moreover, it is apparent that the ban against solicitation has not always succeeded in curbing unprofessional conduct. One striking illustration of this was a survey of personal injury cases in the Chicago area, which revealed that as many as 95 percent of the clients studied were actively solicited in one form or another.[18] Furthermore, it appears that the frequency of violations of the prohibition is inversely related to the income of the lawyers involved. In short, such violations are commonplace in the lower economic echelons of the bar.[19]

An additional argument against the solicitation ban finds its support in the United States Constitution. Authority exists for the proposition that since there is a first amendment right to petition the government for redress of grievances[20] and since litigation is a form of political expression,[21] there is a constitutionally protected right to litigate. In addition, the first amendment right to receive and distribute information[22] may provide a constitutional base for the right to advertise in order to make the public aware both of basic constitutional rights and of the right to preserve these rights through litigation.

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15. Comment, *Controlling Lawyers By Bar Associations and Courts*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 301, 351 (1970).

16. *Id.* at nn.251-53. "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries . . . ." Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1, 7 (1964).

17. Shriver, *The OEO and Legal Services*, 51 A.B.A.J. 1064 (1965).

18. Comment, *Settlement of Personal Injury Cases in the Chicago Area*, 47 NW. U.L. REV. 895, 899 (1953).

19. CARLIN, LAWYERS' ETHICS 11-37, 41-61 (1966).

20. "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I.

21. NAACP v. Button, 371 U.S. 415, 429 (1963). In *Button*, the attorneys for the NAACP openly solicited Negroes at various meetings in an attempt to institute suits to challenge racial discrimination in the South. Finding that "litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances," the Court found that association for purposes of litigation is a protected form of political expression. *Id.* at 430. *Accord*, United Mine Workers v. Illinois State Bar, 389 U.S. 217, 223 (1967) (civil as well as political litigation protected by the first amendment).

22. "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the *right to distribute*, the *right to receive*, the right to read (Martin v. Struthers, 319 U.S. 141, 143) and freedom of inquiry, freedom of thought, and freedom to teach. . . ." Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (dictum) (emphasis added); *accord*, Stanley v. Georgia, 394 U.S. 557, 564 (1969) (the right to receive information is now well established). *See generally* Comment, *Private Morality and the Right to be Free: The Thrust of Stanley v. Georgia*, 11 ARIZ. L. REV. 731 (1969).

The solicitation prohibition, however, has never been considered absolute. For example, advertising and solicitation have been permitted where necessary to insure the exercise of first amendment rights. As a general rule, first amendment rights can be curtailed only if the state can demonstrate a "compelling state interest" in limiting them.[23] Since the first amendment guarantee of freedom of association has been held to extend to persons who associate to provide group legal assistance,[24] a state may not interfere with the right to associate for legal protection,[25] absent a compelling and immediate state interest. In addition, it has clearly been held that a state may not "under the guise of prohibiting professional misconduct,"[26] forbid unsolicited advice by lawyers motivated by a desire to enable others to organize for purposes of asserting constitutional rights through litigation. Similarly, when the motivation for solicitation is noncommercial and is induced by the lawyer's ethical obligation to make legal counsel more readily available,[27] advertising has been permitted.[28]

The *Code of Professional Responsibility* specifically recognizes the importance of insuring that "every person in our society should have ready access to the independent professional services of a lawyer."[29] The Code also requires that lawyers support programs which permit persons who cannot afford legal services to obtain legal assistance.[30] This duty, how-

23. Kovacs v. Cooper, 336 U.S. 77 (1949) (the compelling state interest of preserving order may permit a government to regulate the use of sound trucks). *See also* Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969) (a school may forbid the wearing of black armbands to express political views only for the compelling state interest of maintaining order at a school). First amendment rights can also be limited if their exercise leads to a "clear and present danger." Dennis v. United States, 341 U.S. 494 (1951) (teaching and advocating the overthrow of the government found to create a "clear and present danger" to the national security).

24. United Mine Workers v. Illinois State Bar, 389 U.S. 217 (1967) (workers may associate through a union to hire a lawyer to represent union members in processing workmen's compensation claims); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964) (a state may not forbid a union from either advising members and their dependents to obtain legal assistance for personal injuries or recommending specific lawyers to handle their claims); NAACP v. Button, 371 U.S. 415 (1963) (Negroes may associate to institute litigation to challenge racial discrimination in the South).

25. NAACP v. Button, 371 U.S. 415, 439 (1963). Following this argument to its logical conclusion, lawyers may also be deemed to have the right to associate in order to aid others in the exercise of first amendment rights.

26. *Id.*

27. "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." ABA CODE, CANON No. 2.

28. NAACP v. Button, 371 U.S. 415, 443 (1963) (lawyers may participate in soliciting plaintiffs to challenge racial discrimination practices in the South since it is for a nonprofit cause); Gunnels v. Atlanta Bar Ass'n, 191 Ga. 366, 12 S.E.2d 602 (1940) (Atlanta Bar permitted to advertise an offer to represent any person, free of charge, to defend against usurious lending agencies). *See* ABA OPINIONS, No. 148 (1935), which held that a legal assistance association could ethically advertise free legal services to anyone who wished to litigate the constitutionality of New Deal legislation.

See generally Padnos, *Legal Aid and Legal Ethics*, 5 GA. ST. B.J. 347 (1969), which examines the right of bar associations to advertise the availability of free legal services.

29. ABA CODE, EC 1-1.

30. "[P]ersons unable to pay all or a portion of a reasonable fee should be able

ever, not only requires a lawyer to devote a portion of his time to the representation of those who lack sufficient resources to avail themselves of the judicial process, but also implies an obligation on the part of the bar to inform the public of the need and desirability of legal services.[31] In the language of the Code, the public must be educated "to recognize their legal problems."[32] This education can take the form of educating the lay public as to the availability and importance of legal services,[33] informing the public of the importance of obtaining legal advice when drafting a will,[34] and advertising lawyer referral plans.[35] In all cases, however, these forms of advertising are permitted only if "motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers."[36] It must be remembered that the ban on solicitation is "aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest."[37]

The Code specifically permits a lawyer who participates in educational advertising with a legal aid organization to accept employment from solicited laymen.[38] By implication, a lawyer engaged in similar ef-

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to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective." *Id.* EC 2-16 (footnotes omitted). "Those persons unable to pay for legal services should be provided needed services." *Id.* EC 8-3.

31. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A.L. REV. 438 (1965); Rochelle & Payne, *The Struggle for Public Understanding*, 25 TEX. B.J. 109 (1962). In the latter the authors advocate that the bar should pursue a significant amount of public relations work in order to assuage the average citizen's fear of unreasonably high fees and unscrupulous lawyers.

32. ABA CODE, EC 2-1. "The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers acting under proper auspices should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise." *Id.* EC 2-2 (footnotes omitted).

33. *Id.* EC 2-2. Other examples of permissible activities "include preparation of institutional advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs." *Id.* (footnotes omitted).

34. ABA OPINIONS, No. 307 (1962).

35. ABA OPINIONS, No. 227 (1941).

36. ABA CODE, EC 2-2. Motivation, of course, is highly subjective. One manner in which motivation can be judged is to determine whether the advertising lawyer receives an economic benefit as a result. "[T]he motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result." *Id.* EC 2-4 (footnotes omitted). There is a vast difference between "teaching the lay public the importance of securing legal services . . . and the solicitation of professional employment by or for a particular lawyer." ABA OPINIONS, No. 179 (1938).

37. NAACP v. Button, 371 U.S. 415, 440 (1963). The theory is that when "no monetary stakes are involved . . . there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself." *Id.* at 443.

38. "A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D)(1) through (5)." ABA CODE, DR 2-104(A)(2). Provided that his independent professional judgment is exercised on behalf of his client without interference, a lawyer "may cooperate in a dignified manner with the legal service

forts as a member of a public interest law firm would be equally free to accept employment from solicited clients. It seems reasonable to assume that the term " 'legal aid office' clearly contemplates the broad category of public interest law firms that provide services that would not otherwise be available through the private bar."[39]

A recent decision of the District of Columbia Bar Association Committee on Legal Ethics and Grievances in regard to the advertising of a public interest law firm best illustrates the application of the general law on noncommercial advertising and solicitation.[40] The Stern Community Law Firm placed in various Washington newspapers an advertisement which was addressed to "any D.C. Resident Who Wishes to Adopt a Child."[41] It purported to be a "public interest legal opinion," the essence of which was to advise that persons who were denied the right to adopt children should contact the firm to receive free legal assistance in that regard. The address given was the following:

MONROE H. FREEDMAN, ESQUIRE
Stern Community Law Firm
2005 L. Street, N.W.
Washington, D.C. 20036
Telephone: 659-8132

The advertisement was read over the radio and an article concerning the firm's activities appeared in a local newspaper.[42]

The committee found that this practice did not constitute a violation of the Code. It determined that the goals both of this practice and of the firm were "in keeping with the highest responsibilities of the legal profession."[43] It expressed only two objections to the advertisements: that the names of the individual attorneys should not have appeared in the ad-

activities of . . . [a] legal aid office." *Id.* DR 2-103(D)(1). *See also* Freedman, *Solicitation of Clients: For the Poor not the Privileged,* JURIS DOCTOR, April 1971, at 12.

39. Freedman, *supra* note 38, at 12.

40. The decision concerned the activities of the Stern Community Law Firm, a public interest law firm organized under a grant from the Stern Family Foundation. The grant is administered through the United Church of Christ, which exercises close control and supervision over the firm. The church not only suggested the name of the firm, but also dictates the scope of the litigation the firm is allowed to pursue. *See* Report of the Committee on Legal Ethics and Grievance of the Bar Association of the District of Columbia, *In re* Advertising conducted by Monroe H. Freedman and the Stern Community Law Firm, January 26, 1971, at 4 [hereinafter cited as D.C. Bar Report] [copy on file in the offices of the ARIZONA LAW REVIEW].

41. *Id.* at 1.

42. Washington Post, Sept. 25, 1970, § B (City Life), at 1, col. 1. Mr. Freedman, the director of the Stern Community Law Firm, indicated in the article that the advertisement was "not in violation of the code [of Professional Responsibility] since the firm . . . does not plan to take money from clients." *Id.* He also stated that poor people would not have access to lawyers unless lawyers are allowed to advertise. In a letter to the editor five days later, Mr. Freedman reiterated his offer to persons to contact his firm for free legal advice. Washington Post, Sept. 30, 1970, at 19, col. 1. *See also* N.Y. Times, March 10, 1971, at 25, col. 6 (similar account of the firm's activities); note 72 *infra.*

43. D.C. Bar Report, *supra* note 40, at 14.

vertisements,[44] and that assertions that existing laws are invalid or invalidity administered should have included language such as "in our opinion."[45] The mandate promulgated by this prestigious bar is clear—law firms which operate in the public interest and do not charge fees may advertise as long as their advertisements are "within the bounds of dignity and good taste."[46]

It is imperative that public interest law firms be allowed to advertise their services. It has already been indicated that those who most need the services of such a firm are undoubtedly the same persons who are most ignorant of their availability.[47] Unless the public interest law firm is allowed to advertise its services, the legal system will remain practically irrelevant for that large segment of the public currently lacking the financial and educational resources necessary to avail itself of these benefits. Common sense itself would dictate that if lawyers operating in the public interest are aware of a recurring problem affecting the entire community, it is utterly impractical to require them to wait for a "suitable plaintiff to appear unsolicited"[48] before they can act to remedy the injustice.

It is equally clear, however, that the solution to the ethical problem of advertising does not lie in the promotion of unbridled solicitation. The public interest lawyer's right to solicit must be subordinated to the overriding policy of legal ethics: the furtherance of the public interest.

The most obvious disadvantage of unlimited advertising centers around the ethical problems inherent in the service-law reform controversy. This ethical dilemma originates in situations in which the firm's concern with long-range law reform is inconsistent with the immediate needs of the individual client.[49] The problem is further compounded in situations in which the firm advertises its readiness to provide individual legal aid when, in fact, it is more concerned with the pursuit of more far-reaching reform. Such advertising is arguably deceptive. Because of the

44. *Id.* The committee believed that the element of "personal touting" is all too present when the individual attorney's name is used, especially if his reputation is likely to be enhanced. *Id.* at 15. *See also* ABA CODE, DR 2-101(A) which requires a lawyer to shun the publicity of self-laudatory statements, and *id.* EC 2-2 which requires the lawyer to "shun personal publicity."

45. D.C. Bar Report, *supra* note 40, at 14. The committee felt "that the lawyer's duty to be truthful to the public requires" that the lawyer indicate the possibility that his legal position may be erroneous. *Id.* at 16.

46. *Id.* at 17. *See also* STATE BAR OF ARIZONA, COMMITTEE ON RULES OF PROFESSIONAL CONDUCT, OPINIONS NO. 71-29 (1971) [hereinafter cited as ARIZ. OPINIONS], which approved the contents and the distribution of a circular designed by the Coconino County Legal Aid Office to advise public housing tenants of their rights provided by law. Although the committee found the circular to be dignified and informative, it indicated that it probably would not have approved were it designed to "stir up" litigation.

47. *See* text accompanying notes 15-17 *supra.*

48. Comment, *The New Public Interest Lawyers,* 79 YALE L.J. 1069, 1132 (1970).

49. *See* text accompanying notes 99-104 *infra.*

ethical obligation of the lawyer to refrain from misleading the layman,[50] such deceptive advertising would be similarly unethical.

Another potential problem with unlimited advertising arises when individual lawyers who are not directly associated with a public interest law firm advertise their readiness to handle legal problems affecting the public interest. Certainly, their manner of solicitation cannot be permitted to be as broad in scope as that of a public interest law firm. Unlike the situation of the Stern Community Law Firm in which the public interest law firm was permitted to advertise only its name, a private practitioner who mentions his name—or that of his firm—in the media would certainly violate the lawyer's ethical obligation to "shun personal publicity."[51]

A possible solution to the problem of advertising by the sole practitioner would be to allow only the placing of his telephone number or mailing address in the advertisement. Perhaps a better solution, however, would be for the local lawyer referral service to advertise the availability of anonymous public-spirited lawyers who would be willing to devote their efforts to public interest causes without charge.[52]

A further problem related to unregulated advertising concerns the temptation for the lawyer to engage in publicity-seeking for his cause, either in regard to a problem that has not yet reached the litigation stage or after the case is set for trial. A lawyer might often be prone to utilize the news media either to make the bureaucracy more sensitive to his case,[53] to pressure agencies into a settlement, or merely to dramatize his issue in order to educate the public. Indeed, such a lawyer may be motivated by a strong loyalty to his client, or by a sincere desire to pursue every possible avenue of redress before resorting to litigation.

The Code leaves no doubt as to the unethical nature of this mode of advertising after a case is either set for trial or while it is being litigated:

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50. The traditional rationale underlying the ban against advertising is the fear that such a practice would "mislead the layman . . . produce unrealistic expectations . . . and bring about distrust of the law and lawyers." ABA CODE, EC 2-9 (footnotes omitted). Deceptive advertising would tend to make this fear a reality.

51. *Id.* EC 2-2. A lawyer may advise a layman that he should take legal action, but this "advice is improper if motivated by a desire to . . . secure personal publicity." *Id.* EC 2-3. *See* text accompanying note 44 *supra.*

52. "Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel." *Id.* EC 2-15.

53. Direct lobbying—or even excessive news releases—may result in a public interest law firm losing its tax-exempt status as a charitable organization. The Internal Revenue Service guidelines, under which public interest law firms are entitled to the exemption, specify that "no substantial part of . . . [the firm's] activities may consist of carrying on propaganda, or otherwise attempting, to influence legislation." IRS News Release No. 1078, *supra* note 12, Guideline 8. For example, the Sierra Club's exempt status was revoked because of press releases urging citizens to write their Congressmen to protest pending legislation to build dams on the Colorado River. *See generally,* Note, *Problems and Procedures* in *Revoking the Eligibility of Charitable Organizations to Receive Deductible Contributions Because of Lobbying Activities,* 55 CALIF. L. REV. 618 (1967); Note, *supra* note 12.

> A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. . . . The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal.[54]

Further, it states that whether it be a civil action or an administrative proceeding, "a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that . . . relates to . . . [a]ny . . . matter reasonably likely to interfere with a fair hearing."[55] In a situation in which a lawyer seeks publicity in regard to a problem that has not yet reached the litigation stage, however, its propriety should be judged in accordance with the same standards by which other noncommercial advertising is measured.[56]

Commercial advertising may well be contrary to the public interest since it results in the public viewing the lawyer as one interested only in financial gain. Such an impression of the profession would necessarily result in scorn for the entire legal system. In contrast, advertising generated by nonprofit motives and for causes which are in the public interest would not have the same result.

Through public interest advertising, citizens will be able to recognize their legal problems and become aware of the existence of lawyers who are willing to litigate their claims without exacting fees. By this process more citizens will be able to fully participate in the legal process.

If there exists one reason for the bar being held in disrepute, it has been its lack of social consciousness. Advertising the public interest lawyer's willingness to pursue work *pro bono publico* at no cost can only enhance the community's image of the legal profession.

LAY CONTROL OF LAWYERS

One prime objective of legal ethics has been to maintain a bar which is free from the command of laymen. The fear of lay control is grounded in the rationale that laymen, because they are not bound by the ethical mandates of the *Code of Professional Responsibility*, might seek to further their interests over those of the client. This would inevitably in-

54. ABA CODE, EC 7-33 (footnotes omitted). Unethical conduct by a public interest law firm can disqualify it from a tax exemption as a charitable organization. "[The firm] may not attempt to achieve its objectives through a program of disruption of the judicial system, illegal activity, or violation of applicable canons of ethics." IRS News Release No. 1078, *supra* note 12, Guideline 3.

55. ABA CODE, DR 7-107(H)(5) (administrative hearing). *See also id.* DR 7-107(G) (similar standard in civil actions); *id.* DR 7-107(D) (similar standard in a criminal proceeding).

56. *See* text accompanying notes 28 & 46 *supra.*

jure the best interests of the client and jeopardize the attorney-client relationship.

It is a cardinal principle of ethical responsibility that the most solemn duty of a lawyer, "both to his client and to the legal system, is to represent his client zealously within the bounds of the law."[57] This duty involves more than the lawyer merely acting in the capacity of an advisor to his client. The lawyer owes to his client "absolute candor, unswerving fidelity, and undivided allegiance."[58] If the lawyer were controlled, or even significantly influenced, by a layman, this fidelity would be illusory. The lawyer would be breaching his obligation to "exercise independent professional judgment on behalf of a client."[59]

Public interest law firms will undoubtedly be structured in such a way as to create significant ethical problems for the lawyer who wishes to remain independent from lay control. For instance, public interest law firms will surely be funded by parties other than the clients they represent.[60] The problems associated with lay control manifest themselves most acutely in such situations.[61]

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57. ABA CODE, EC 7-1 (footnotes omitted). In addition to representing his client zealously, the lawyer must also represent his client competently. *Id.*, CANON No. 6.

58. H. DRINKER, LEGAL ETHICS 6 (1963).

59. ABA CODE, CANON No. 5. "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." *Id.* EC 5-1 (foontotes omitted). Grievance Comm. v. Rottner, 152 Conn. 59, 65, 203 A.2d 82, 84 (1964) (a client must be able to depend on the lawyer's undivided loyalty). *See also* Smoot v. Lund, 13 Utah 2d 168, 172, 369 P.2d 933, 936 (1962) (a lawyer must not represent interests adverse to those of his client).

60. This is necessitated by the client's inability to pay for the legal services he receives. *See generally* Sitkin & Kline, *Financing Public Interest Litigation*, 13 ARIZ. L. REV. 823 (1971); Comment, *Federal Funds for Public Interest Law: Plausibility, Politics and Past History, id.* at 932; note 40 *supra.*

61. *See, e.g.*, People *ex rel.* Courtney v. Association of Real Estate Taxpayers, 354 Ill. 102, 109, 187 N.E. 823, 826 (1933) (trade associations employing lawyers may interfere with the attorney-client relationship); *In re* Co-operative Law Co., 198 N.Y. 479, 483, 92 N.E. 15, 16 (1910) (fear of division of loyalties between client and corporation); Richmond Ass'n of Credit Men v. Bar Ass'n, 167 Va. 327, 339, 189 S.E. 153, 159 (1937) (lawyers closely associated with trade associations may be influenced to the detriment of the client).

The fear that third parties will seek to control the lawyer's judgment has been felt most intensely in the controversy surrounding professional legal corporations. Since these corporations cannot take an attorney's oath, it has been feared that they cannot be held to ethical standards. *See, e.g., In re* Co-operative Law Co., *supra.* The professional corporation, however, frequently offers many tax advantages and thus may be a desirable financial arrangement. Ethical dilemmas have been resolved by the American Bar Association, which has approved the corporate practice of law with the provision that there be no lay ownership and that the individual lawyers within the corporation remain personally responsible to the client after having made a full disclosure to the client of the nature of the law firm. ABA OPINIONS, No. 303 (1961). ABA CODE, DR 5-107(C), however, forbids the operation of a professional corporation for profit if:

(1) A non-lawyer owns any interest therein . . . .
(2) A non-lawyer is a corporate director or officer thereof; or
(3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

Furthermore, public interest law firms which seek to take advantage of the Internal Revenue Service's tax exemption for charitable organizations will find that they must be administered in part by non-lawyers if they are to retain their tax-exempt status.[62] In this regard, guideline 5 for determining the tax-exempt status of a public interest law firm requires that

> [t]he policies and programs of the organization . . . [be] the responsibility of a board or committee representative of the public interest, which is not controlled by employees or persons who litigate on behalf of the organization . . . .[63]

This indicates that lawyers who are employed by such an organization will be partially responsible to persons other than the individuals they represent.

The *Code of Professional Responsibility* warns the lawyer of the danger of allowing third persons to direct or influence his judgment:

> The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer.[64]

It is not unreasonable to suppose that "if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client."[65] Consequently, the public interest lawyer may encounter strong pressures which tend to impair his independent judgment.[66]

The Code, however, does not absolutely prohibit the lawyer from receiving recompense from a third party. A lawyer may accept such com-

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Arizona permits the corporate practice of law under similar conditions. ARIZ. REV. STAT. ANN. §§ 10-901 *et seq.* (Supp. 1971). *See also* ARIZ. OPINIONS, No. 100 (1962) which upheld the ethical propriety of a professional corporation as long as its lawyers recognize that they are still bound by ethical norms. *See generally* ARIZ. OPINIONS, No. 71-2 (1971) for a more recent statement of this principle.

For the interesting question of whether the corporate law firm itself can be disciplined, *compare* WYO. SUP. CT. R. 21(L) (a professional corporation which does not comply with standards of professional conduct may have its right to practice law terminated by the State Supreme Court), *with* ARIZ. OPINIONS, No. 257 (1968) (a professional corporation does not hold a license to practice law, and thus cannot be disciplined by a court).

62. *See* IRS News Release No. 1078, *supra* note 12; Note, *supra* note 12, at 874. *See also* notes 53-54, *supra.*

63. IRS News Release No. 1078, *supra* note 12.

64. ABA CODE, EC 5-21 (footnotes omitted).

65. *Id.* EC 5-22.

66. *Id.* EC 5-23 warns:

> A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. . . . Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom. [Footnotes omitted.]

pensation if, after full disclosure to his client, the latter consents.[67] Even in cases where this type of activity is permitted, the lawyer must not, under any circumstances, permit a third party "to direct or regulate his professional judgment in rendering such legal services."[68] As long as a client possesses the final voice in the disposition of his case, and the third party does not exercise influence over the lawyer's representation in a manner inconsistent with the best interests of the client, lay control is not necessarily inconsistent with professional ethics.[69]

Those courts that have permitted limited lay control have often looked to the nonprofit character of the lawyer's services as additional justification. Not unlike the problems concerning advertising and solicitation, the prohibition against lay control has been enforced less stringently in situations involving legal services directed toward nonprofit ends: "Objection to the intervention of a lay intermediary, who may control litigation or otherwise interfere with the rendering of legal services in a confidential relationship, also derives from the element of pecuniary gain."[70]

The receipt of funds by public interest law firms from third parties, however, may present an even more subtle problem with regard to lay control of the attorneys' activities. When financial support derives from such a source, the possibility of that source placing restrictions on the use of its monies is enhanced. For example, the benefactor may require that the public interest firm deal only in certain kinds of problems and represent only a limited number of specified clients,[71] withholding financial sup-

67. *Id.* DR 5-107(A) provides:

> Except with the *consent* of his client after *full disclosure*, a lawyer shall not:
>
> (1) Accept compensation for his legal services from one other than his client. [Emphasis added.]

68. *Id.* DR 5-107(B) (footnotes omitted).

69. This problem was discussed in the opinion by the Legal Ethics and Grievance Committee of the District of Columbia in the controversy surrounding the activities of the Stern Community Law Firm, text accompanying note 40 *supra*, and was decided in a similar manner. *See also* ABA OPINIONS, No. 324 (1970), which permits the governing board of a legal aid society to establish and enforce broad goals and policy regarding the agency's operations, as long as the board does not unreasonably interfere with the handling of specific cases or the representation of specific clients by staff attorneys.

70. NAACP v. Button, 371 U.S. 415, 441 (1963), *discussed*, note 21 *supra*. *See also* United Mine Workers v. Illinois State Bar, 389 U.S. 217, 225 (1967) (union permitted to hire attorneys to represent union members in processing workmen's compensation claims as long as the attorneys viewed the individual worker, rather than the union, as their client).

71. In the case of the Stern Community Law Firm, text accompanying note 40 *supra*, the United Church of Christ has an ultimate veto power over any case the firm decides to accept. D.C. Bar Report, *supra* note 40, at 5. Once a particular client is approved, however, there is no interference with the traditional attorney-client relation. *Id.* at 6. The public interest law firm concept was accepted by the Legal Ethics and Grievance Committee of the District of Columbia Bar Association on the condition "that once an attorney-client relationship is established, the client has the same right of final decision and control of his case as in the ordinary case. . . . [and that] the attorneys will serve the clients' interests exclusively, as legal ethics require." *Id.* at 14; *accord*, ABA OPINIONS, No. 324 (1970).

That a third party determines the type of cases the attorneys should handle

port if the firm undertakes a cause with which the benefactor is not in sympathy.

Problems of lay control also may arise in those public interest law firms utilizing interdisciplinary teams of lawyers, sociologists, economists, urban planners and other nonlegal experts. It is not difficult to imagine situations in which the professional and personal interests of such experts might depart drastically from the lawyer's commitment to his client. Additionally, the lawyer's opinions concerning a particular case might very well be influenced by the judgment of his interdisciplinary team. Yet this additional dimension to the problem of lay control must ultimately conform to the analysis of the foregoing discussion: the lawyer must continue to exercise independent professional judgment on behalf of his client. Obtaining supplementary advice from other specialists is objectionable only if the lawyer is guided by majority rule rather than by the best interests of his client.

Whatever the effect on economy and efficiency, the ethical obligation of the lawyer is clear: "a lawyer must decline to accept direction of his professional judgment from any layman."[72] The *Code of Professional Responsibility* promulgates some guidelines applicable to situations in which lawyers and laymen share administrative control of a "legal aid" type of organization:

> A lawyer should not accept employment from such an organization unless the board [of directors] sets only broad policies and there is *no interference in the relationship of the lawyer and the individual client he serves* . . . . Although other innovations in the means of supplying legal counsel may develop,

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does not, in itself, raise an ethical objection. Since "[a] lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client," ABA CODE, EC 2-26, it is not unduly burdensome for a third party benefactor to be equally selective. For example, the OEO Legal Services Program does not allocate funds or personnel "for the defense of any person indicted . . . for the commission of a crime" except in extraordinary circumstances. 42 U.S.C. § 2809(a)(3) (1970). Of course, a benefactor's selectivity may be motivated by a desire to refrain from handling politically controversial cases. *See, e.g.*, NEWSWEEK, Jan. 18, 1971, at 18, for an account of the political pressures exerted by Governor Reagan on the California Rural Legal Assistance Program, which had been successfully litigating 80 percent of its cases. There can be little doubt that such pressure tends to have a "chilling effect" both on the lawyer's ethical obligation to represent his client zealously, and on the program director's desire to further poverty law reform work.

72. ABA CODE, EC 5-24. *See also* 42 U.S.C. § 2809(a)(3) (1970), which requires the OEO Legal Services Program to "be carried on in a way that assures maintenance of a lawyer-client relationship consistent with the best standards of the legal profession." The conflicting interests of client, cause and benefactor are indicated by one description of the Stern Community Law Firm:

> Freedman's new 5-man law firm concentrates on broad-ranging litigation aimed at 'reform, not relief.' . . . The firm's governing board has a majority of members from Channing Phillips' Lincoln Temple church community, which makes it the only 'community controlled' public interest center in the city. In announcing formation of the firm, Freedman said, 'Our mandate is to make waves and rock boats.'

Riley, *Objection! The Washington Legal Antiestablishment*, THE WASHINGTONIAN, Nov. 1970, at 53, 84. *See* text & notes 40-46 *supra*.

> the responsibility of the lawyer to maintain his professional independence remains constant, and *the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.*[73] [Emphasis added.]

Hence, whether the public interest lawyer receives funds from third parties or whether he receives interdisciplinary assistance, his decisions regarding a particular case must remain independent.

UTILIZATION OF PARAPROFESSIONALS

As a corollary to the state grant to lawyers of the exclusive privilege to practice law within its jurisdiction, the state maintains lawyers in this privilege by enacting regulations designed to prohibit the unauthorized practice of law. The ostensible purpose of these regulations is to protect the public from the activities of persons who are incompetent to render legal services because of their lack of adequate legal training.[74] Additionally, since laymen are not governed by the same ethical norms that govern the conduct of lawyers,[75] there is no assurance that they will conduct their affairs in accordance with the best interests of the public. Furthermore, a person who employs a non-lawyer for assistance in legal matters is not protected by the attorney-client evidentiary privilege.[76] The conclusion, then, is that persons who engage in the unauthorized practice of law do not perform a worthwhile service to the public. It is, therefore, an ethical duty of the lawyer to do his utmost to "assist in preventing the unauthorized practice of law."[77]

It is becoming increasingly apparent, however, that the antiquated notion that only lawyers are competent to solve legal problems should be reexamined. The vast increase in the number of persons who require legal services,[78] and the rising costs of these services, make it more and more difficult for the limited number of lawyers to provide these services

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73. ABA CODE, EC 5-24; *accord*, ABA OPINIONS, No. 324 (1970).

74. "Competent professional judgment is the product of a trained familiarity with the law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment." ABA CODE, EC 3-2.

75. *Id.*, EC 3-3: "The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment."

76. *Id.* The client who engages a non-lawyer is not protected by the broader ethical obligation of lawyers to "hold inviolate the confidences and secrets of his client." *Id.*

77. *Id.* CANON 3. "A lawyer shall not aid a non-lawyer in the unauthorized practice of law." *Id.* DR 3-101(A) (footnotes omitted).

78. *See* Cheatham, *supra* note 31, at 440, in which the author attributes this rise in the number of persons who need lawyers to increased urbanization and population. The need for legal assistance arises not only after a person encounters a grievance, but in a preventative context as well. It is both desirable and economical to anticipate legal problems before they become critical. One way to accomplish this is to inform individuals of their rights. *See generally* Wexler, *Practicing Law For Poor People*, 79 YALE L.J. 1049, 1056 (1970).

effectively.[79] There is a growing realization that lawyers must rely to a greater extent upon trained legal technicians to aid them in reducing their work load. Moreover, there is an increasing awareness that the lawyer must look to specialists in other social disciplines such as sociology, psychology and economics in order to provide the broad understanding necessary to arrive at enlightened decisions.[80]

Currently, there exists a rapidly increasing conviction adverse to the "closed-shop philosophy" which has historically prevailed within the legal profession.[81] The widespread use of subprofessional technicians in the teaching and medical professions[82] casts serious doubt upon the viability of the theory that law should only be practiced by an elite profession. Certainly, if the medical attention of a physician is not required for the treatment of every physical injury, the expertise of a lawyer is not essential to the solution of all legal problems.[83]

The benefits which would undoubtedly accrue to the legal profession as a result of the utilization of paraprofessionals in administering "legal first-aid" cannot be overemphasized. By employing such personnel, the lawyer would be freed of the routine tasks that arise in the day-to-day practice of law,[84] thereby allowing him more time to direct his professional

79. *See, e.g.*, Hackin v. Arizona, 389 U.S. 143, 146 (1967) (Douglas, J., dissenting) (outside the area of criminal proceedings, "there is a dearth of lawyers who are willing, voluntarily, to take on unprofitable and unpopular causes"). *See also* NAACP v. Button, 371 U.S. 415, 443 (1963).

80. In this regard, ABA CODE, EC 6-3, provides that "[p]roper preparation and representation may require the association by the lawyer of professionals in other disciplines." *See also* Comment, *Interdisciplinary Collaboration in Public Interest Law*, 13 ARIZ. L. REV. 909, 915 (1971).

81. *See, e.g.*, Johnson v. Avery, 393 U.S. 483, 491 (1969) (Douglas, J., concurring) (there is much legal work that could be done without having a law degree). *See also* Hackin v. Arizona, 389 U.S. 143 (1967) (dissenting opinion) (if indigents cannot afford a lawyer, they should be able to turn to skilled laymen for assistance if they so desire). In the field of medicine, for example, medical technicians have been increasing in number at a faster rate than that of doctors and account, in part, for the increased productivity of physicians. *See* DeForest, *Do Doctors Have the Answers to Lawyers' Economic Problems?*, 48 A.B.A.J. 442 (1962).

82. *See* N.Y. Times, Oct. 5, 1970, at 85, col. 6.

83. *But see* N.Y. Times, May 31, 1971, at 6, col. 6, in which it was reported that there were many educators who fear the paralawyer proposal for the reason that (1) it will lower the quality of the law schools and (2) it will put blacks and other less educated groups in an "inferior status" if they act as paralawyers. Incredible as it may seem, the latter issue actually did arise in the Columbia Law School program to train paralawyers. Students in the program threatened to bring suit against the law faculty if they were not granted full law degrees upon completion of their 8-week training course, since they believed that they would be put in the inferior status of "mere technicians" as opposed to that of fully qualified lawyers. *Id.*

84. Nonprofessional lawyer aides could function in capacities such as informal advocate, technician, counselor, investigator or form writer. *See, e.g.*, Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927, 934 (1966). The paralawyer could also perform such routine functions as shepardizing, preliminary research and negotiating with welfare caseworkers. Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1019 (1970). A state such as Arizona, which permits limited third-year practice by law students, could utilize this large

skills toward the pursuit of the long-range goals of social and legal reform.[85]

The advantages to the recipient of legal services would be equally great if the use of paralawyers were to become more prevalent. The poor, those persons who "suffer discrimination in housing and employment, are victimized by shady consumer sales practices, evicted from their homes at the whim of the landlord, denied welfare payments, and endure domestic strife without hope of the legal remedies of divorce, maintenance, or child custody decrees,"[86] would find it easier and more economical to obtain legal assistance. In addition, the underrepresented segment of society would benefit by receiving assistance in the resolution of minor legal problems that they otherwise could not afford to confront. Assistance with household budgets, bill collectors, negotiations with merchants for credit, and appearances before school boards are examples of the kind of small scale problems that could be effectively dealt with by legal technicians.[87]

Realistically, the lawyer's ethical duty to combat unauthorized practice is dependent upon the definition of the practice of law, itself a question that is independently determined by each state.[88] While the *Code of Professional Responsibility* does not attempt a precise definition, it does offer some guidelines:

> Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is

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reservoir of manpower in aiding the public interest lawyer. *See* ARIZ. SUP. CT. RULE 28(e).

85. The use of paralawyers has been extremely successful in the Dixwell Legal Rights Association, Inc., New Haven, Connecticut. Its "basic premise is that certain quasi-legal functions can be performed by community residents trained in the areas of legal rights knowledge and lay advocacy." Letter from Ruth O. Robinson to the *Arizona Law Review*, September 27, 1971, on file in its offices.

These non-legal workers advise members of the community as to their rights in consumer law, medical assistance, the exercise of the franchise, landlord-tenant problems, and the food-stamp program in Connecticut. The workers also participate in welfare hearings, interview clients, negotiate with landlords and credit agencies and prepare case reports. DIXWELL LEGAL RIGHTS ASSOCIATION, INC., COMMUNITY WORKERS: A MANUAL FOR LAWYERS (1971) [hereinafter cited as MANUAL].

86. Hackin v. Arizona, 389 U.S. 143, 145 (1967).

87. Wexler, *supra* note 78, at 1057. These paralawyers, if they come from the same socio-economic class as the client, would also be beneficial in bridging the intellectual and cultural gap between the client and the lawyer, thus improving communications. *See* MANUAL, *supra* note 85, at § 1(C).

88. Arkansas establishes an "incidental test" for the unauthorized practice of law, permitting legal advice if the work done is incident to a regular course of business. Creekmore v. Izard, 236 Ark. 558, 367 S.W.2d 419 (1963). Kentucky permits lay activity in rendering legal advice insofar as it is not compensated. Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397 (1960).

Rather than attempt to give an exhaustive definition for unauthorized practice, Arizona views the practice of law as those acts which lawyers customarily have carried on from day to day through the centuries. State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 87, 366 P.2d 1, 9 (1961).

> his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment.[89]

The Code, however, does allow certain qualified persons to pursue various legal tasks which do not require the exercise of professional legal judgment. When professional judgment is not involved, "non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas."[90] Hence, it would appear that the lawyer would be under no ethical obligation to prevent paralegal practice so long as the persons pursuing such work are knowledgeable in their specialty and are not permitted to function in situations requiring professional judgment. Should the lawyer choose to employ such personnel, it is not unreasonable to require him to closely supervise their activities,[91] nor is it excessively burdensome to hold the lawyer professionally responsible for their conduct.[92]

Since the prohibition against the practice of law by laymen is grounded in the public interest,[93] it is that same public interest, rather than the economic interests of the bar, that should guide a lawyer's ethical conscience.[94] If a public interest law firm utilizes paralawyers for a non-profit community service, and if the client is made fully aware of the scope of the technicians' training, an argument that the public interest is not being served by the use of such lay personnel seems unimpressive.

THE SERVICE-LAW REFORM CONTROVERSY

Ideally, a public interest law firm advocates those issues which it deems to be in the public interest. While difficult to define, the public interest may be viewed either subjectively or objectively. The subjective view would permit a public interest law firm to define its own conception of the public interest as the realization of certain goals which it considers important to the public at that point in time. The objective approach, on the other hand, would define the public interest as those objectives which would benefit the greatest number of people. Inherent in either approach lies the danger that the immediate interests of the individual client will be sacrificed for the long-range law reform objectives of the lawyer. Ethical

89. ABA CODE, EC 3-5.
90. *Id.*
91. This is a requirement imposed by *id.* EC 3-6.
92. *See generally* ABA OPINIONS, No. 85 (1932), which authorized law students to work under the supervision of a lawyer, provided that the lawyer fully recognized that the students were acting as his agents. Similarly, see Johnson v. Davidson, 54 Cal. App. 251, 202 P. 159 (1921) (activities of a law clerk do not constitute the practice of law). *See also* MANUAL, *supra* note 85, at § 3(D).
93. *See, e.g.*, ABA CODE, EC 3-1, 3-3, 3-4, 3-5.
94. *See generally* Johnstone, *The Unauthorized Practice Controversy: A Struggle Among Power Groups*, 4 KAN. L. REV. 1 (1955).

predicaments encountered by lawyers when third parties attempt to control their independent judgment become more acute when that third party is the "public interest."

A fundamental principle of ethical responsibility is that the lawyer's allegiance to his client should be second only to his devotion to the law.[95] The lawyer violates a sacred ethical duty if he fails to make every lawful effort to further the best interests of his client.[96] The *Code of Professional Responsibility* views the role of a lawyer as that of a partisan. The lawyer is neither a mediator, an amicus curiae,[97] nor an umpire.[98]

Nevertheless, there has been a tendency on the part of lawyers engaged in work *pro bono publico* to give more importance to causes than to clients.[99] All too frequently such lawyers regard their client as a technical necessity—someone they must have before they can file a complaint—rather than a person whose welfare is at stake.[100] For example, the American Civil Liberties Union has unabashedly asserted that "[o]ur real client is the Bill of Rights."[101] William Kunstler was once quoted as saying that he would defend only those whose goals he shares, and that he would dedicate his efforts only to those causes with which he is in sympathy.[102]

There is little doubt that a "cause-oriented" lawyer may, at times, sacrifice the immediate interests of his client for the furtherance of his cause. This problem most frequently arises when the lawyer refuses to settle his client's claim out of court in the hope of successfully litigating a test case.[103] If such a practice were proven to exist, the perpetrating

95. *See generally* text accompanying notes 57-59 *supra*. Of course, this allegiance to the client is not absolute. A lawyer should not assert a legal position that is frivolous. ABA CODE, EC 7-4. Certainly, a lawyer should not advise his client as to methods of circumventing the law. *Id.*, EC 7-5. In addition, a lawyer should not suborn perjury. *Id.*, EC 7-26.

96. Thode, *The Ethical Standard for the Advocate*, 39 TEXAS L. REV. 575, 584 (1961).

97. Anders v. California, 386 U.S. 738, 744 (1967).

98. ABA OPINIONS, No. 280 (1949) (although a lawyer is not an umpire, he should advise the court of decisions adverse to his case).

99. *See* N.Y. Times, Oct. 4, 1970, at 54, col. 1, in which former United States Supreme Court Justice Abe Fortas was quoted as saying that lawyers should serve more as "agents and not as principals." In essence, he emphasized the traditional "hired-gun" approach—a "professional neutrality"—that would encourage lawyers to take cases regardless of their personal ideology. The danger of this, of course, is that the lawyer is subject to criticism as an "economic prostitute." NEWSWEEK, Jan. 19, 1970, at 55.

100. See Fortas, *Thurman Arnold and the Theatre of the Law*, 79 YALE L.J. 988, 995 (1970). Believing that everyone is entitled to a lawyer's services, Fortas chides the young lawyer who finds nothing objectionable in his firm representing a criminal, but whose public interest conscience is shocked if the firm represents a manufacturer of napalm or a cigarette company. *Id.* at 996.

101. Melvin Wulf, Director of ACLU, *quoted in* Comment, *supra* note 48, at 1092.

102. *See generally* Navasky, *Right On! With Lawyer William Kunstler*, N.Y. Times, Apr. 19, 1970, § 6, at 92.

103. Generally, this concerns the problem of mootness. Courts make judicial determinations only if a "case or controversy" is presented. Muskrat v. United States, 219 U.S. 346 (1911). A controversy does not exist after a case has become

lawyer would be violating his duty to avoid unnecessary litigation by settling cases out of court.[104] This situation is further complicated, though, when the client himself approves of the law reform action and refuses to accept a settlement.

It may very well be that the client is exercising a voluntary and informed choice in refusing a settlement. To be sure, there will be times when the client may understand the broader social significance of his case. It is more likely, however, that the client will be unduly influenced by his attorney. The very nature of the usual public interest client—one likely to be poor or uneducated[105]—makes it probable that he is overly susceptible to his lawyer's manipulation. The lawyer's personal desire to effectuate social change may inadvertently, or even intentionally, operate to manipulate the personal decisions of his client.[106] While it might be argued that a client who is receiving free legal services is better off with a "cause-oriented" lawyer than with no lawyer at all, this is not to say that he would not be in an even more advantageous position with a lawyer more concerned with his immediate needs.

In spite of such ethical considerations, there is much to be said in support of the "test case" concept. When an entire class of people is adversely affected by a recurring problem, it may well be in the public interest to pursue a judicial determination that will permanently settle the issue. In such situations, defendants may tend to render a case moot by offering to settle rather than risk upsetting the status quo by litigating the issue. When this happens, the public interest lawyer may be forced to solve all similar subsequent problems by piecemeal litigation rather than by obtaining a judicial precedent to finally resolve the recurring problem. The additional difficulty in finding the appropriate plaintiff with the requisite standing to sue adds force to the contention that problems of the underrepresented must be solved in terms of long-range results rather than by a case-by-case approach.

Nevertheless, the arguments in favor of the test case fail to take into account several important considerations. First of all, an excessive preoccupation with law reform is inimical to the true purpose of the public interest law firm. Under the present system of democratic government, it

moot because of intervening circumstances. *See* Parker v. Ellis, 362 U.S. 574 (1960) (appeal questioning the validity of a criminal conviction was considered moot because the petitioner had been released after serving his sentence).

Governor Reagan of California has often accused OEO lawyers in that state of refusing to settle cases out of court in order to win test cases. *See* N.Y. Times, May 2, 1971, at 45, col. 1.

104. H. DRINKER, LEGAL ETHICS 101 (1953).

105. See text accompanying notes 15-17 *supra.*

106. This problem might be alleviated if lawyers were to seek the impartial advice of other lawyers who possess no interest in the outcome of the litigation. In addition, the problem of mootness may be somewhat alleviated by bringing a class action, which would allow the continuation of a settled case as long as there was at least one plaintiff.

is the majority who must make objective determinations of the public interest and public policy through the legislative process. It would seem, therefore, that rather than arriving at public policy determinations itself, the public interest law firm should seek to provide the public with the representation necessary to enable it to better articulate its own wishes.[107]

The public interest lies in insuring the viability of the adversary process, particularly in providing representation for the heretofore "underrepresented" mass of people who have been denied equal access to the legal process. The public interest lies in encouraging these people to work within the system by advocating those views that might not otherwise be heard. Once the public interest lawyer understands this as his task, he is less likely to presumptuously proclaim himself as an independent arbiter of the general welfare.

Finally, and most crucially, the philosophy which permits a lawyer to sacrifice an individual's interest for the "larger good" is inimical to our deep-rooted concept of ordered liberty. The American system of law, as exemplified in the Bill of Rights, implicitly recognizes the importance of the individual. Overemphasis on the "larger good" may very well contradict this basic concept.

CONCLUSION

The primary concern of lawyers involved in public interest advocacy need not be inconsistent with the goal sought to be achieved by the *Code of Professional Responsibility*—to best serve the public interest. Advertising by public interest law firms is ethically acceptable as long as it is dignified, nondeceptive and impersonal. Third-party funding and professional interaction with non-legal experts need not create ethical problems so long as the lawyer maintains his independent judgment for the sole benefit of his client. The use of paralegal technicians should pose no dilemma, provided the lawyer remains professionally responsible for their actions.

A public interest lawyer who views himself as a champion of justice rather than a determined advocate for the socially deprived, however, will find it difficult to coexist with traditional legal ethics. A lawyer who ardently sacrifices the immediate interests of his client if they conflict with his concept of the "larger good" lacks professional responsibility.

In order to be most effective, public interest lawyers must have that "quickened sense of injustice"[108] required of all idealistic lawyers. On the

107. The public interest law firm's work in this area may be seriously hampered, though, by the Internal Revenue Service guidelines for the determination of the tax-exempt status of these firms. The guidelines purport to withhold an organization's tax-exempt status if the organization engages in activities which tend to influence legislation. *See generally* note 53 *supra.*

108. Shriver, note 17 *supra,* at 1066.

other hand, they must not lose sight of the potential injustice they may create by allowing their own priorities to operate at the expense of their clients' immediate concerns. The lawyer who sacrifices the integrity of the individual client to the "larger good" violates more than a time-honored norm of professional ethics. He is also violating an ethical norm that underlies our very system of government: that the inherent worth of each individual exceeds that of expediency.