

## Review Essay

### ***Reforming the Legal Profession: Implications for Law Librarianship***\*

Luis M. Acosta\*\*

*Deborah L. Rhode has proposed reforms to the regulation of the legal services and information marketplace in her book, In the Interests of Justice: Reforming the Legal Profession. Mr. Acosta summarizes Rhode's evaluation of the marketplace and proposed reforms for the legal profession and considers their implications for law librarianship.*

¶1 Lawyers have the highest rate of depression of any occupational group and are four times more likely to suffer depression than the public at large. About one-fifth of attorneys have a substance abuse problem, twice the rate of Americans as a whole. A majority of lawyers report high levels of job stress, and one-third say their job damages their physical and emotional well-being. Lawyers as a group are among both the highest paid people in the United States and the least happy. At the same time, most Americans who need legal services cannot afford them.

¶2 These facts and characterizations about lawyers are to be found in the recent Oxford University Press book *In the Interests of Justice: Reforming the Legal Profession*<sup>1</sup> by Deborah L. Rhode, Stanford law professor and former president of the Association of American Law Schools. In this provocative book, Rhode proposes that these bleak circumstances are not inevitable. Thus, after enumerating a multitude of problems facing the bar, she prescribes wide-ranging and bold alternatives to the status quo. Given the central role lawyers play in our economic and political institutions, Rhode's book deserves a wide readership. And, given the significance of her proposed reforms to legal information professionals, Rhode's book deserves the attention of law librarians in particular.

¶3 Rhode's central premise is that "the public's interest has played too little part in determining professional responsibilities. Too much regulation of lawyers has been designed by and for lawyers."<sup>2</sup> Because attorneys have served as "the custodians of American political, social, and economic institutions," the regulation of the legal profession should not be left to lawyers, bar counsel, and ethics experts,

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\*\* Reference Librarian, Howard University Law Library, Washington, D.C.

1. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000).

2. *Id.* at 2.

but should be recognized and treated as a matter of broad social and democratic concern.<sup>3</sup>

¶4 Part one of this review essay summarizes Rhode's criticisms of the current legal services and information marketplace. Part two discusses Rhode's proposed reforms to the mechanisms that regulate this marketplace. Part three examines the implications of Rhode's proposed reforms for law librarianship.

## The Unsatisfactory Status Quo

### *Harm to Producers and Consumers*

¶5 Within the legal profession, professional malaise is rampant: a majority of lawyers would choose another career if they could, and three-quarters of lawyers do not want their children to become attorneys.<sup>4</sup> Rates of depression and substance abuse in the legal profession dwarf those in the population at large.<sup>5</sup> While lawyers widely perceive that the culture of law practice has declined in recent decades, and a majority of lawyers feel that the profession fails to live up to the ideals that led them to become lawyers, the bar is passive and pessimistic in the face of these problems.<sup>6</sup> Many recognize the system is irrational, but few acknowledge their complicity.

¶6 Rhode traces lawyers' collective inability to improve their own working conditions partly to a professional culture that relies on the acquisition of external displays of wealth as a means to signal success. Concomitantly, large law firms focus on where they stand on published lists of firm size, per-partner profit rankings, and associate compensation as evidence of success. This focus results in the pyramidal hierarchy of firm organization, increased firm size, bureaucratization within the firm, and attorney alienation.<sup>7</sup> While lawyers' incomes have increased, subjective contentment has eroded. This is not surprising, given the extensive social science literature showing that preoccupation with external rewards is counterproductive to individuals' emotional well-being.<sup>8</sup>

¶7 Entrants to the profession often are attracted to law school with hopes of pursuing the public interest, but once the substantial costs associated with law school have been incurred, financial imperatives severely curtail graduates' options. Meanwhile, the institutional self-interest of law schools favors recruiting students over disabusing them of their romanticized view of law practice.<sup>9</sup> Rhode's second chapter, titled "Lawyers and Their Discontent,"<sup>10</sup> is an excellent corrective

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3. *Id.* at 3.

4. *Id.* at 8.

5. *Id.*

6. *Id.* at 36.

7. *Id.* at 33–34.

8. *Id.* at 31–32 (citing, inter alia, JULIET B. SCHOR, *THE OVERSPENT AMERICAN* (1998)).

9. *Id.* at 27.

10. *Id.* at 23–48.

to this romanticized perspective and should be required reading for all prelaw students.

¶8 The status quo fails not only lawyers, but the public as well. While overzealous representation of corporate interests may endanger the public's health and safety, excessive costs prevent low- and middle-income persons from obtaining representation. Despite the publicity generated by the occasional large tort verdict, most Americans lack the information or resources to assert legitimate claims. Only a small percentage of accident victims make claims or file lawsuits. Rhode cites studies showing that 80% of the civil legal problems of low-income households and 60% of those of moderate-income families are not addressed by the legal system.<sup>11</sup>

### *Regulatory and Market Failures*

¶9 Rhode argues that lawyers' near-monopolization of the provision of legal services and legal information leads to their maldistribution. In other countries, nonlawyers are permitted to give legal advice on routine matters, like divorces, landlord-tenant disputes, bankruptcy, immigration, and welfare claims, while in the United States provision of legal advice by nonlawyers on such matters often is prohibited as the "unauthorized practice of law."<sup>12</sup> Likewise, while other Western nations generally permit nonlawyers to form partnerships with lawyers, in the United States such multidisciplinary partnerships are prohibited in almost all jurisdictions. Government-subsidized legal aid and voluntary pro bono contributions are worthy goals, but Rhode indicates they cannot suffice to meet the needs of low- and moderate-income persons.<sup>13</sup>

¶10 Barriers to entry into the legal profession purportedly are intended to protect consumers. But bar exams are both over- and under-inclusive as screening devices—they exclude individuals with sufficient experience and practice skills to offer assistance for routine needs in specific fields, while providing no assurance that those who pass the exam are actually competent to practice law.<sup>14</sup> Similar problems plague the system of legal education as a means of quality control. The accreditation standards<sup>15</sup> of the American Bar Association (ABA) attempt to ensure quality of educational outputs by detailed regulation of educational inputs, such as facilities, resources, and faculty-student contact, but there is little evidence that these factors are correlated with the quality of educational outputs. While most states only admit lawyers who graduated from ABA-accredited schools, this is a poor means of quality control, because the consumers directly served by law

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11. *Id.* at 124.

12. *Id.* at 136–37.

13. *Id.* at 141.

14. *Id.* at 150–52.

15. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS (2000), available at <http://www.abanet.org/legaled/standards/standards.html> (updated Aug. 2001) [hereinafter ABA STANDARDS].

schools—students—have interests that are inconsistent with those of the ultimate consumers of legal services—clients and the public.<sup>16</sup>

¶11 The structure of legal education in the United States is by no means natural or necessary, rather it is very much a historical, political, and cultural construct. As Rhode observes: “America offers the world’s most expensive system of legal education, yet fails to address routine legal problems at a price most low- and middle-income Americans can afford.”<sup>17</sup> Graduates of American law schools are both underprepared and overprepared to meet societal needs—they are overqualified to offer routine assistance at affordable costs but underqualified in practical skills in areas like finance, management, and counseling.<sup>18</sup> At the same time, law students are subjected to negative and unproductive stress: 20% to 40% of graduates leave law school with some psychological dysfunction, such as depression or substance abuse.<sup>19</sup>

¶12 In addition to barriers to entry into the legal profession, Rhode critiques lawyers’ self-regulation: “No matter how well intentioned, lawyers and former lawyers who regulate other lawyers cannot escape the economic, psychological, and political constraints of their position.”<sup>20</sup> Less than 2% of complaints to bar disciplinary agencies result in public sanctions. Such agencies typically are underfunded and understaffed, and they must rely on good relations with the profession, which controls their budgets.<sup>21</sup>

¶13 The tort system, through the threat of legal malpractice, is another means by which the profession is regulated, but Rhode identifies problems here also. In order for a plaintiff to make a malpractice case, he or she not only must show negligence, but also that an injury resulted from it. Defined in litigation malpractice cases as a likelihood of prevailing on the merits in the underlying action, this often requires an expensive “trial within a trial.”<sup>22</sup> Moreover, it can be hard to show that a lawyer’s negligence fell below prevailing practices in the community, in part because while generally it is easy to find defense experts for legal malpractice, there is little reliable evidence for plaintiffs’ experts to use to establish prevailing standards on many legal tasks.<sup>23</sup> To add insult to injury, a third of attorneys have no malpractice insurance; such attorneys often are effectively judgment-proof.<sup>24</sup>

¶14 In sum, each of the primary forms of regulation of the legal services marketplace—barriers to entry, legal ethics and disciplinary bodies, and the tort system—is seriously flawed as a means of protecting the public.

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16. RHODE, *supra* note 1, at 187–88.

17. *Id.* at 185.

18. *Id.* at 189–90.

19. *Id.* at 197.

20. *Id.* at 143–44.

21. *Id.* at 160.

22. *Id.* at 166.

23. *Id.* at 165.

24. *Id.* at 167.

### Rhode's Proposed Reforms

¶15 Rhode seeks to craft an alternate vision for the profession to remedy these problems. Her proposed reforms can be divided into four overlapping categories: (1) improved ethical regulation and management within the profession, (2) changes in legal education, (3) increased options for legal consumers, and (4) improved public accountability and external regulation of the legal profession.

#### *Reform within the Profession*

¶16 Rhode calls for changes in ethical standards and improved management within the profession. With respect to ethics, Rhode argues that professional responsibility standards should shift to a model that would “require lawyers to accept personal responsibility for the moral consequences of their professional actions . . . in light of all the societal interests at issue in particular practice contexts.”<sup>25</sup> Instead of premising ethical rules on an idealized model of adversarial and legislative processes—what Rhode calls the bar’s “one-size-fits-all” approach to ethical standards<sup>26</sup>—lawyers should “assess their actions against a realistic backdrop, in which wealth, power, and information are unequally distributed, not all interests are adequately represented, and most matters will never reach a neutral tribunal.”<sup>27</sup> Thus lawyers should be willing to refuse assistance for ethical reasons to some potential clients and should no longer “invoke their obligations to the poor and oppressed as rationalizations for defending clients who are anything but, such as tobacco companies . . . .”<sup>28</sup> Rhode further argues that ethical codes that give high priority to client confidences at the expense of other values should be reconsidered. Bar authorities should allow lawyers to disclose activity reasonably believed to be illegal or against public policy in circumstances where the significance of the harms from nondisclosure outweigh the societal interest in preserving the lawyer-client relationship.<sup>29</sup>

¶17 Rhode also argues that better management techniques within law firms could improve not only the well-being of lawyers but also that of firms’ clients. Attorneys who hold managerial positions should learn effective business management strategies. In structuring workplaces, law firms should better accommodate work and family commitments, and lawyers should be given the opportunity to take leave or have reduced schedules without paying a permanent career price.<sup>30</sup> As to small firms, Rhode suggests that the bar, working with law schools and public interest organizations, should help practitioners develop both improvements to the

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25. *Id.* at 66–67.

26. *Id.* at 20.

27. *Id.* at 67.

28. *Id.* at 60.

29. *Id.* at 106–15.

30. *Id.* at 46.

quality of professional life and financially viable ways to meet the needs of underserved communities.<sup>31</sup>

### *Changes in Legal Education*

¶18 Rhode believes that extensive changes to the way law is taught in the United States could improve the way legal services and information are delivered.

¶19 Rhode criticizes the current law school accreditation framework as inappropriate and harmful to consumers. She argues that accreditation standards should recognize that law practice is becoming increasingly specialized and should permit law schools to experiment with alternative forms of programs and curriculum, such as shortened degree programs that might be suitable for individuals who would be licensed to practice law in limited fields. Disruption to existing law schools from such changes could be mitigated if they were allowed and encouraged to supplement their standard curriculum with courses for paralegals, undergraduates, and professionals in law-related occupations.<sup>32</sup>

¶20 Rhode also criticizes the prevailing curriculum and pedagogy at law schools. She favors increased pragmatic interdisciplinarity in the curriculum, such as the teaching of problem solving, risk analysis, and organizational behavior. Students planning to specialize in corporate law might receive increased instruction in economics and finance; future family law attorneys might be trained in psychology and counseling, and so on. Rhode opines that all law students could benefit from instruction in such topics as information technology, alternative dispute resolution, social science research methodology, and management.<sup>33</sup> In addition, she argues that professional responsibility, rather than being a separate course taught in the second or third year of law school, should be integrated throughout the law school curriculum.<sup>34</sup>

### *Increased Options for Legal Consumers*

¶21 Given the significant unmet needs for legal services, Rhode advocates increased options for consumers of legal services in the form of greater access to information concerning legal rights, alternative procedures for enforcing these rights, and alternative forms of legal representation.

¶22 Rhode argues that there should be more opportunities for self-representation in routine legal matters such as uncontested divorces, probate, and landlord-tenant disputes through provision of improved information, simplified forms, and streamlined procedures. Information could be distributed through free or low-cost workshops, hotlines, courthouse advisors, and walk-in centers.<sup>35</sup> Rhode also favors

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31. *Id.* at 47.

32. *Id.* at 190–91.

33. *Id.* at 198–99.

34. *Id.* at 200–03.

35. *Id.* at 140.

increased alternative dispute resolution choices for consumers, together with expanded information about the effectiveness of such procedures, to enable individuals to meet more of their own needs directly, without representation.<sup>36</sup>

¶23 Rhode also advocates partially dismantling the bar's monopoly on the provision of legal information and services. She argues that nonlawyers, subject to appropriate regulation, should be allowed to provide certain types of legal assistance. For example, accountants or real estate brokers who are already licensed by the state should be allowed to provide limited legal assistance related to their specialties.<sup>37</sup> Increased competition between lawyers and nonlawyers likely would result in lower prices and increased consumer satisfaction.<sup>38</sup> Rhode further favors modes of attorney regulation that would increase consumer awareness, such as certification of attorneys in particular specialties.<sup>39</sup>

¶24 Rhode favors expansion of opportunities for multidisciplinary practice, with suitable regulation and ethical standards.<sup>40</sup> Similarly, she advocates expansion of "unbundled" legal services as a means of serving potential consumers who are priced out of the market for traditional legal services. Lawyers should be permitted to provide "limited low-cost assistance that does not involve full representation: advice about legal options; evaluation of proposed settlements; development of negotiating strategies; and referrals to other service providers such as accountants, mediators, and health professionals."<sup>41</sup>

#### *Increased Public Accountability*

¶25 Rhode proposes reforms to the attorney disciplinary system. Disciplinary proceedings should be open to the public.<sup>42</sup> Resources for investigations and enforcement proceedings should be increased, and options for sanctions—both of individual attorneys and of law firms that allow attorney malfeasance—should be expanded. Rhode argues that the development and enforcement of ethical standards should be placed in a regulatory commission independent of the bar, with members selected from diverse constituencies.<sup>43</sup>

¶26 Rhode suggests that "best practice standards" for law firms could be compiled by voluntary organizations, which then could certify firms that comply with such standards.<sup>44</sup> Likewise, information to consumers could be enhanced by the development of a national information bank containing disciplinary and malprac-

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36. *Id.* at 210.

37. *Id.* at 137.

38. *Id.* at 138.

39. *Id.* at 158.

40. *Id.* at 139–40.

41. *Id.* at 141.

42. *Id.* at 211.

43. *Id.* at 212.

44. *Id.* at 95.

tice records of attorneys, similar to that which already exists for doctors. The data bank could disclose these records and provide advice about consumer remedies.<sup>45</sup>

¶27 With respect to regulation of the legal profession through the tort liability system, Rhode advocates allowing a legal malpractice plaintiff to meet the damages element of his case by showing the defendant's negligence deprived him of a substantial possibility of recovery, rather than that the negligence was the sole cause of his losses.<sup>46</sup> Rhode also argues that privity requirements should be relaxed so that third parties would be able to recover except where recovery demonstrably would run counter to specific and legitimate client interests.<sup>47</sup> Lastly, Rhode argues that attorneys should be required to carry malpractice insurance as a condition of licensing.<sup>48</sup>

### Implications of Rhode's Reforms for Law Librarianship

¶28 Broadly speaking, Rhode's reforms address the political economy of the legal information and legal services marketplace. Rhode proposes a paradigm shift in the regulation of this market to a model in which consumer well-being would be paramount. Given that the current regulatory regime provides the backdrop against which law librarians practice their profession, changes of the type that Rhode advocates necessarily would impact law librarianship.

¶29 The question of whether law librarians should support such reforms highlights the potentially awkward conflict that exists between the stated ideals of the law librarian profession and the economic interests of individual librarians. On the one hand, the ideals of the profession celebrate the value of wide public access to legal information. The American Association of Law Libraries supports promotion of "open and effective access to legal and related information,"<sup>49</sup> and maintains that "the availability of legal information to all people is a necessary requirement for a just and democratic society."<sup>50</sup> On the other hand, most law librarians work for organizations that benefit from the current regime of control over the legal marketplace, such as law firms that profit from the existing restrictions on entry into the profession, or law schools that are both protected from competition and required to meet expensive library standards<sup>51</sup> under the ABA accreditation

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45. *Id.* at 163.

46. *Id.* at 166–67.

47. *Id.*

48. *Id.* at 167–68.

49. AM. ASS'N OF LAW LIBRARIES., ETHICAL PRINCIPLES (1999), reprinted in AALL DIRECTORY & HANDBOOK 2001–2002, at 412, 412 (41st ed. 2001), available at [http://www.aallnet.org/about/policy\\_ethics.asp](http://www.aallnet.org/about/policy_ethics.asp).

50. AM. ASS'N OF LAW LIBRARIES, AALL 2000–2005 STRATEGIC PLAN: LEADERSHIP FOR THE 21ST CENTURY: NEW REALITIES, CHANGING ROLES (2000), reprinted in AALL DIRECTORY & HANDBOOK 2001–2002, at 429, 429 (41st ed. 2001), available at [http://www.aallnet.org/about/strategic\\_plan.asp#mission](http://www.aallnet.org/about/strategic_plan.asp#mission).

51. ABA STANDARDS, *supra* note 15, at 59–63 (standards 601–606 cover library and information resources).

process. Law librarians as a group thus have some stake in the status quo, albeit a comparatively modest one, given their undercompensation relative to other legal professionals.<sup>52</sup>

¶30 Although Rhode does not address the role of law librarians in the reforms she advocates, her proposals rest largely on a restructuring of the legal information marketplace, and an impact on information professionals therefore is implicit in her analysis. While implementation of Rhode's proposed changes would challenge the economic dominance of incumbents in the legal information marketplace, these changes would not necessarily be detrimental to the law librarian community. In fact, law librarians could benefit from these reforms by embracing an enhanced role in the new framework Rhode envisions. More important, Rhode's proposed reforms could enhance realization of the stated ideals of the profession to promote public access to information.

¶31 The structural changes in the delivery of legal services proposed by Rhode include the partial dismantling of the bar's monopoly on the communication of legal information.<sup>53</sup> Among other significant implications of this proposed reform, freeing librarians from the specter of being charged with the "unauthorized practice of law" for sharing legal information<sup>54</sup> would enable librarians to provide legal information to consumers more efficiently than in the current system, in which legal information generally must be filtered through attorneys before it reaches end users.

¶32 Rhode's proposal to "unbundle" legal services, allowing discrete tasks short of complete legal representation to be provided legal consumers at lower cost,<sup>55</sup> is also significant to the law librarian community. One form that such unbundling could take would be the development of legal research businesses separate from law firms. Law librarians could serve a heightened role in firms specializing in legal research, or indeed could own and run such businesses. Similarly, Rhode advocates the development of multidisciplinary practices, in which single

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52. See Bob Berring, *Thinkable Thoughts: Show Us the Money!*, LAW LIBR. NEW MILLENNIUM, Fall 2000, at 2-3.

53. See *supra* ¶ 23. Other explorations of this theme include Marcus J. Lock, *Increasing Access To Justice: Expanding the Role of Nonlawyers in the Delivery of Legal Services to Low-Income Coloradans*, 72 U. COLO. L. REV. 459 (2001) (favoring nonlawyer practice as a means of increasing legal services to low-income persons); Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15 (1998) (advocating limited legal practice by social workers).

54. *But see* Paul D. Healey, *In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron*, 90 LAW LIBR. J. 129, 138-42 (1998) (arguing that engaging in unauthorized practice of law during a reference interaction may be a technical possibility but not a practical one). Healey believes that "no librarian will ever be prosecuted for unauthorized practice of law while engaging in normal reference activities." Paul D. Healey, *Pro Se Users, Reference Liability, and the Unauthorized Practice of Law: Twenty-Five Selected Readings*, 94 LAW LIBR. J. 133, 134, 2002 LAW LIBR. J. 8, ¶ 3.

55. See *supra* ¶ 24. For a detailed consideration of unbundled legal services in the context of legal services for low income persons, see Mary Helen McNeal, *Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance*, 67 FORDHAM L. REV. 2617 (1999).

firms provide not just traditional legal services but other forms of consulting services as well.<sup>56</sup> In a regime in which such practices are permitted, law librarians could be instrumental in developing ancillary legal research units of multidisciplinary firms. Both the unbundled legal services model and the multidisciplinary practices model could provide environments in which legal research could be performed efficiently by well-qualified research specialists rather than by expensive attorney associates.

¶33 Rhode's call for changes in the educational methods and priorities in law schools, such as shifting the emphasis from doctrinal analysis to practical and interdisciplinary lawyering skills,<sup>57</sup> suggests another means by which the role of academic law librarians could be enhanced. Legal research skills are among the types of practical skills that could receive heightened attention were law school curriculum reform to be seriously pursued.<sup>58</sup> Rhode also proposes a liberalization of the law school accreditation process to allow law schools to develop alternative programs in which law schools could, among other things, increase their participation in training nonlawyer professionals about the law.<sup>59</sup> The curricular innovations Rhode favors could provide an opening for law librarians to play an increased role in legal education.

¶34 Rhode also favors measures to assist consumers in evaluating markets for legal services, for example, by increasing the delivery of information on the disciplinary and malpractice records of attorneys, and by compiling best practices standards.<sup>60</sup> Similarly, Rhode proposes to enhance laypersons' opportunities for self-representation in routine legal matters by providing more widely distributed information and simplified forms and procedures.<sup>61</sup> As experts in organizing information in a manner that enhances its communicative value, law librarians could play a significant role in designing means to distribute information to consumers and to those interested in self-representation.

## Conclusion

¶35 Deborah Rhode's wide-ranging critique of the status quo in the market for legal services and information makes a strong case for a shift in the regulation of this

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56. See *supra* note 40. See also John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83 (2000) (advocating integration of multidisciplinary practice into the American legal profession, with regulation by the bar).

57. See *supra* ¶ 20.

58. See, e.g., Peter C. Schanck, *Mandatory Advanced Legal Research: A Viable Program for Law Schools?*, 92 LAW LIBR. J. 295, 2000 LAW LIBR. J. 26 (describing adoption of a mandatory advanced legal research requirement for law students at Marquette University).

59. See *supra* ¶ 19. Additional discussion of the impact of the ABA accreditation process on innovation in law school curricula is set forth in George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2182-84 (1998).

60. See *supra* ¶ 26.

61. See *supra* ¶ 22.

market to a paradigm that would be consciously designed to enhance consumers' interests. Her proposed changes not only would be consistent with the values of the law librarian profession, but also would provide opportunities for law librarians to develop new roles in the delivery of information services. The community of legal information professionals should be attentive to opportunities to promote Rhode's proposed reforms.