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Our Time is Better Spent Influencing Future Disruption: A Call to End the Indiscriminate War Against Self-Help Legal Technology

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Cover Page Footnote

This article grew out of the author's interest in law and emerging technologies and her work with a legal technology company. The author is now a certified information privacy technologist at Cox Communications and is pursuing a J.D. at Georgia State University College of Law. She would like to thank Professor Yaniv Heled for his academic guidance and Edo Ohayon and Flashpoint@GeorgiaTech for stretching the boundaries of her perspective.

OUR TIME IS BETTER SPENT INFLUENCING FUTURE DISRUPTION: A CALL TO END THE INDISCRIMINATE WAR AGAINST SELF-HELP LEGAL TECHNOLOGY

Olivia Clark

Abstract

Under the guise of consumer protection, lawyers and bar associations have used disparate litigious mechanisms to thwart, inadvertently or not, the use of self-help legal technology. This paper will demonstrate that such adversity is not logical after a consideration of the technical functions that the software performs and unduly restricts underserved populations' access to the law because of the misapplication of policy to vaguely worded laws. This paper will provide a thorough analysis of legal action taken against the high-profile company LegalZoom under the theory of unauthorized practice of law provides direct support of this claim. Summary and critique of this litigation will demonstrate the real- world effects of the traditional legal industry's wielding of the weapon of unauthorized practice of law in order to resist disruptive legal technology. It will further consider whether the application of the unauthorized practice of law rules to legal technology logically align with policy reasons for the implementation of these rules.

Comparing these policies to the American Bar Association recommendations on unauthorized practice of law regulation, this paper will consider their validity in light of emerging views of the relationship between the professional rules and legal technology. I argue that that more permissive regulation of self-help legal technology is better for two reasons. First, anticipating the precise scope of the benefits of legal technology in the future is not possible due to the fast pace of improvements. And second, permissive rules leave space for experimentation and innovation, maximizing the number of people who have access to affordable legal services.

INTRODUCTION

Any bright line separating what the practice of law is from what it is not becomes dimmer with each subsequent advance in legal technology. This article questions the validity of lawyers' resistance to computer assisted, self-help legal software. In fields outside of law, non-cognitive artificial intelligence completes tasks that were originally thought to require human intelligence in order to complete.¹ LegalZoom's document drafting software uses decision tree software which operates on a series of rules

¹ Harry Surden, *Machine Learning and Law*, 89 Wash. L. Rev. 87, 87 (2014).

determined by programmers in order to produce a desired behavior.² Part I of this paper will pose some questions about the relationship between technology and law and introduce the technical terms that describe LegalZoom software.

Part II will consider the tension between traditional legal services and legal technology with a critical look into the LegalZoom lawsuits that accuse the company of unauthorized practice of law. In the past, the organized bar has used the unauthorized practice of law as a shield to ward off the "barbarians at the gate," or consumer-facing legal technologies that can cut the lawyer out of a deal for legal services.³ Are legal self-help technologies unwelcome because they are hurting consumers or merely because they are interfering with the monopoly lawyers have over legal services? Part III will examine policy behind the regulation of the practice of law to understand where and why the line is drawn.

Finally, Part IV will consider the future of self-help legal technology market and suggest a particular focus for practice of law rules and regulation.

I. LOGIC AS APPLIED TO COMPUTER ASSISTED, SELF-HELP LEGAL TECHNOLOGY AND THE LAW

Lawyers have been known for their aversion to technology for a long time, and have even pondered whether answering the telephone when a client called was ethical.⁴ If lawyers gained a better understanding of the technical functions of computer assisted self-help software, it would be easier to justifiably regulate the availability of these tools that assist laypeople without a lawyer guiding the process step by step.

For those readers unacquainted with technical terminology, these concepts will be simpler and more familiar than expected. These terms describe the most basic logical processes, and despite description within the context of computer science jargon, many similar definitions exist in legal jargon as well.⁵ What should lawyers make of this logical parallel between software and law? Lawyers should recognize that because the processes of both law and technology are strung together with logic, some synergy between the two is possible, and automating more pieces of the legal process as more tools become available is permissible, regardless of whether these tools are created to serve lawyers or laypeople.

In the LegalZoom litigation, several court opinions use different technical terms to describe LegalZoom's technology tool. The short list in Part A defines these terms, and Part B considers how these concepts relate to law and the practice of law:

² Catherine J. Lanctot, *Does Legalzoom have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 Temp. Pol. & Civ. Rts. L. Rev. 255, 255 (Spring 2011).

³ *Id.*

⁴ MICHAEL MILLS, *21st Century Technology & 19th Century Law*, available at http://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services.html.

⁵ For example, bifurcation indicates the splitting of loans in bankruptcy law and splitting of decision making in computing terms. *See infra* note 10.

A. *How Does Document Drafting Software Work?*

Document drafting software makes “decisions” through decision tree learning, a binary tree where every nonterminal node represents a decision, and every leaf node represents the outcome of taking the sequence of decisions given by nodes on the path from the root to the leaf, also called bifurcation.⁶ A decision tree graphically represents a decision table by classifying new data as a flowchart, and the software analyzes a set of conditions along with the action to be taken for each condition.⁷ The decision is the function that selects between alternative actions.⁸ The function that permits skipping from one question to the next is called branching technology.⁹ Where one of two or more alternative sets of program statements is selected for execution, a branch instruction breaks the normal sequential program flow.¹⁰ Other terms used to indicate this instruction is a jump instruction, if then statement, case statement, or GOTO statement.¹¹

Bifurcation, a splitting in two, is the generic name for a collection of algorithms which initially convert a decision table into a tree structure which can then be systematically encoded to produce a program. Generally, bifurcation points are points at which branches and therefore multiple solutions appear.¹² “If-then” instruction, described above, allows conditional execution of a single statement or group of statements.¹³ Alternatively, an “if-then-else” statement is the most basic conditional construct in a programming language, allowing selection between two alternatives, dependent on the truth or falsity of a given condition.¹⁴

Edward Hartman, co-founder and Chief Product Officer of LegalZoom, has also described LegalZoom as working like a “mailmerge” program in his affidavit for a case in South Carolina.¹⁵ Mailmerge refers to a technique whereby a list of names and addresses can be merged with a form letter to produce a set of personalized letters or a general technique that can be used wherever a list of items is to be printed or displayed in a number of different ways.¹⁶

B. *Considering These Technical Terms in a Legal Context*

⁶ OXFORD DICTIONARY OF COMPUTING 136 (6th Ed. 2008).

⁷ PRENTICE HALL’S ILLUSTRATED DICTIONARY OF COMPUTING 114 (1992).

⁸ OXFORD DICTIONARY OF COMPUTING at 136.

⁹ See e.g., *LegalZoom.com, Inc. v. North Carolina State Bar*, 11 CVS 15111, 2014 NCBC 9 at *5 (Superior Court of North Carolina, Wake County Business Court March 24, 2014), available at http://www.ncbusinesscourt.net/opinions/2015_NCBC_96.pdf.

¹⁰ OXFORD DICTIONARY OF COMPUTING at 55.

¹¹ *Id.*

¹² *Id.* at 42.

¹³ *Id.* at 244-245.

¹⁴ *Id.*

¹⁵ Report on Findings of Fact and Recommendation to Approve the Settlement Agreement, *Medlock v. LegalZoom*, No. 2012-208067 at 8 (Supreme Court of South Carolina October 18 2013), available at

http://www.nclta.org/sites/default/files/Elizabeth%20Harrison%20Legal%20Zoom%202014%20SC_Supreme_Court_report_findings_fact_and_settlement_agreement%20%20Sat.%20to%2010.00%20to%2010.30.pdf.

¹⁶ OXFORD DICTIONARY OF COMPUTING at 304-305.

The technology is relatively straightforward, a series of yes no decisions that may skip over certain question series when a particular answer is given. Is it logical for a court or a bar association to conclude that automation software for generating legal documentation consists of the practice of law? The fact that the software *assists* rather than requires the user to make each single determination may be considered impermissible. But this characterization seems unfair in light of its permissibility in other areas, e.g. using TurboTax to do taxes. Yes the software is *assisting*, but why should the layperson be required to resort to less efficient methods without the advantage of technology simply because a certified professional has the skills to similarly sift through the information without the assistance of technology? One compelling characterization of computing compares it to a filing system consisting of many extremely fast filing clerks “who are fairly dumb” and who follow necessarily simple instructions like the branching and decision tree mechanisms described above.¹⁷ The assistance is simple, but fast, allowing synthesis of much larger amounts of information in the same amount of time.

This “file clerk” analogy makes it easy to understand how software might impermissibly *assist* an individual with document preparation. The determining factor is understanding what function these *file clerks* perform. Is the work substantive or merely clerical? If the function is meant to sort and categorize information in order to alleviate a time consuming, tedious task for the individual, then these *file clerks* are not the creation of humans masquerading as lawyers or legal experts. They are simply performing tasks based on a rule set laid out in public, legal information. However, LegalZoom offers a “Peace of Mind Review” to customers.¹⁸ And this review does consist of human involvement.¹⁹ Characterized as “document scriveners” these people review the documents for correctness and completeness.²⁰ Currently permitted in every state besides Missouri, the role of these reviewers must be a second consideration in an analysis of the permissibility of this type of software.²¹

In contrast to some other professional fields, law is particularly concerned with social and ethical issues, but the contextual and the systematic intersect.²² While statutes and decisions are clear formal statements like: “In order to be guilty of first-degree murder, there must be premeditation;” and this simple logic constructs a systematic framework of law,²³ understanding terms like ‘premeditation,’ require contextual interpretation. Computer programs can make deductions from the formal structures but leave questions of context for interpretation by lawyers.²⁴ “The world determines what we can do and what we do

¹⁷ Richard Feynman, Lecture at the Idiosyncratic Thinking Workshop, YOUTUBE (September 25, 1985), <https://www.youtube.com/watch?v=EKWGGDXe5MA> (last visited May 12, 2015).

¹⁸ Peace of Mind Review, LEGALZOOM.COM <https://www.legalzoom.com/assets/modals/modal-legalzoom-peace-of-mind-review.html> (last visited May 23, 2015).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Terry Winograd, *Chapter 12: A Direction for Design*, UNDERSTANDING COMPUTERS AND COGNITION: A NEW FOUNDATION FOR DESIGN, 177.

²³ *Id.*

²⁴ *Id.*

determines our world.”²⁵ New technology can have far-reaching significance and can create a new framework for actions that would not have made sense at an earlier time.²⁶ To compare law to another field, systematic bookkeeping techniques changed how the entire financial activity of society worked within this new structure.²⁷ Now, after an introduction to the technical function of branching and decision tree software and a consideration of system versus context within the unauthorized practice of law, Part II will analyze the recent LegalZoom litigation.

II. LEGALZOOM LITIGATION: INHIBITING DISRUPTION THROUGH THE USE OF THE UNAUTHORIZED PRACTICE OF LAW TO BAR THE USE OF SELF-HELP LEGAL TECHNOLOGY

LegalZoom has faced litigation in several states related to the unauthorized practice of law. An analysis of this litigation shows that settlement is frequent, that courts often defer determination on what constitutes the unauthorized practice of law, and that there is little to no evidence of actual consumer injury.

A. Case Summaries

1. California

In recent California litigation, one plaintiff contended that she had to hire a lawyer due to a problem with the living will prepared by LegalZoom, and the state consolidated this case along with another class action against the company.²⁸ The plaintiffs appealed the superior court’s initial \$6.8 million settlement determination which included a consent decree over LegalZoom’s future conduct, characterizing the business as selling self-help legal documents.²⁹ When considering the main issue of whether the settlement was fair, the appeals court agreed with the superior court’s characterization that the case against LegalZoom was weak.³⁰

Both courts found “little evidence of consumer injury” despite the purported purpose of the class action as litigation to defend consumers.³¹ The appeals court referred to the superior court’s analysis that the crux of the claims allowed were not incompetence or negligence of the software, its developers, or document authors, but technical statutory violations.³² The statutory consumer protection violations essentially codify particularized unauthorized practice of law statutes by requiring “legal document assistants” to comply with certain advertising and procedural requirements.³³

²⁵ *Id.* at 178.

²⁶ *Id.*

²⁷ *Id.* at 177-178.

²⁸ *Webster v. LegalZoom.com, Inc.*, No. B240129, 2014 WL 4908639, at *1 (2d Dist. Cal. Ct. App. Division 1, 2014).

²⁹ *Id.*

³⁰ *Id.* at 4.

³¹ *Id.*

³² *Id.*

³³ CAL. BUS. & PROF. §6400 (West).

In fact, class members reported “entire consumer satisfaction” with LegalZoom.³⁴ This raises some important policy questions. The court determined that restitution was difficult to quantify in the settlement agreement because class members had successfully used their documents prepared by LegalZoom.³⁵ The record did not show bankruptcy courts rejecting LegalZoom filings, probate courts finding that their wills were leaving people intestate, or secretaries of state and departments of corporations rejected their corporation papers... in contrast, most consumers seemed happy with LegalZoom.³⁶

2. North Carolina

An eleven-year battle began in North Carolina when the North Carolina State Bar Association (“NCBA”) issued an investigation into LegalZoom’s document preparation services in March 2003.³⁷ This initial investigation ended that same year for lack of evidence that could support a violation North Carolina’s unauthorized practice of law rule.³⁸ Article 1 of Chapter 84 in the North Carolina General Statutes defines the qualifications of attorneys and the unauthorized practice of law.³⁹ Performing legal services “for any other person” is included in the “practice of law” definition, and the unauthorized practice of law statute creates a private cause of action for any person to recover damages and attorneys’ fees when damaged by a violation.⁴⁰ The NCBA commenced a second investigation in May 2008, and despite the fact that LegalZoom’s business model had not changed, the NCBA issued a cease and desist letter.⁴¹

The letter characterized LegalZoom’s conduct in North Carolina as being illegal.⁴² Specifically, the letter stated that LegalZoom should cease and desist the practices of offering or preparing legal documents for North Carolina residents or for use in North Carolina because those practices are illegal, even though legal advice was not provided.⁴³ The Committee further refused to characterize LegalZoom as a scrivener because the automated software was a result of legal judgments made by LegalZoom and not merely a result of copying dictated phrases.⁴⁴ The case that the Committee cited as authority for this statement, *In re Reynoso*, involved bankruptcy petition preparation software that chose exemptions for users and did not clearly distinguish its services from that of attorneys.⁴⁵ Further, the business in *Reynoso* advertised that its services took advantage of

³⁴ *Webster*, *supra* note 31, at *4.

³⁵ *Id.*

³⁶ *Id.* at *4.

³⁷ *LegalZoom.com, Inc. v. North Carolina State Bar*, 11 CVS 15111, 2012 NCBC 47, at *2 (Superior Court of North Carolina, Wake County, Business Court August 27, 2012), http://www.ncbusinesscourt.net/opinions/2012_ncbc_47.pdf.

³⁸ *Id.*

³⁹ N.C. Gen. Stat. Ann. §84-2 (Lexis).

⁴⁰ N.C. Gen. Stat. Ann. §84-2.1, §84-10.1 (Lexis).

⁴¹ *LegalZoom.com, Inc v. North Carolina State Bar* at 2.

⁴² *Id.*

⁴³ N.C. State Bar Authorized Practice Comm., Letter of Caution Cease and Desist Re: Allegation of Unauthorized Practice of Law, File No. 07AP0011, 1 (May 5, 2008), available at <http://www.directlaw.com/LegalZoom%2020080326%20LOC.pdf>.

⁴⁴ *Id.* at 2.

⁴⁵ *In re Reynoso*, 477 F.3d 1117, 1125 (9th Cir. 2007).

loopholes in the bankruptcy system, provided services comparable to those of a “top-notch bankruptcy attorney,” and functioned as more than just a “customized word processor.”⁴⁶ LegalZoom actually connects bankruptcy clients with local attorneys who file the petition.⁴⁷

The letter also described the NCBA’s intent to pursue a court order for an injunction, mentioning that unauthorized practice of law can be prosecuted as a misdemeanor offense in North Carolina.⁴⁸ The NCBA did not actually take such formal legal action against LegalZoom, but instead communicated to regulatory authorities in other states that LegalZoom was prohibited from operating there; , refusing to register LegalZoom’s legal services plans for years.⁴⁹ North Carolina’s Authorized Practice of Law Committee denied the registration for failing to include names, contact information, and notarized certification forms of North Carolina attorneys who agreed to participate in the plan and did not include marketing material for review.⁵⁰ The Committee determined that the 10% discount on prepaid legal services plan violated “the very essence of a prepaid legal services plan, which is that a North Carolina licensed attorney must provide the legal services,” but the Superior Court of North Carolina said the logic behind this statement was unclear.⁵¹

LegalZoom commenced a suit against the North Carolina Bar Association in 2011, asserting that the NCBA violated the Monopoly Clause of the state’s constitution, denial of equal protection, and commercial disparagement.⁵² All of LegalZoom’s claims presumed that the company was not engaged in the unauthorized practice of law.⁵³ The court instructed the NCBA to further respond to the complaint, and deferred ruling on unauthorized practice of law.⁵⁴ In the later 2014 opinion, the Superior Court of North Carolina considered pretrial motions surrounding the issue of whether the NCBA could refuse registration based on the assumption that the service constituted unauthorized practice of law.⁵⁵ LegalZoom and the NCBA disputed over whether branching technology was more like a scrivener or a practitioner: whether the software functions as a modern do-it-yourself kit or exercises professional judgment when selecting forms.⁵⁶ Again, the court deferred determination on the central issue of unauthorized practice of law because it did not feel equipped to determine the issue based on the facts available.⁵⁷

The case remains unresolved in the North Carolina Courts, but in the meantime, both

⁴⁶ *Id.* at 1125.

⁴⁷ Bankruptcy, LEGALZOOM.COM <https://www.legalzoom.com/bankruptcy/bankruptcy-overview.html> (last visited July 11, 2015).

⁴⁸ North Carolina State Bar letter, *supra* note 43 at 2.

⁴⁹ *LegalZoom.com, Inc. v. North Carolina State Bar*, Not Reported in S.E.2d, 2012 NCBC 47 at *5 (Superior Court of North Carolina, Wake County, Business Court August 27, 2012); Karen McMahan, *State Bar Claims LegalZoom Practices Law Without a License*, CAROLINA JOURNAL (21 November 2011), available at <https://www.carolinajournal.com/news-article/state-bar-claims-legalzoom-practices-law-without-a-license/>.

⁵⁰ *LegalZoom.com, Inc.*, *supra* note 41, at *4.

⁵¹ *Id.* at 5.

⁵² *Id.* at 3.

⁵³ *Id.*

⁵⁴ *Id.* at 4.

⁵⁵ *LegalZoom.com, Inc. v. North Carolina State Bar*, 11 CVS 15111, 2014 NCBC 9, at *1 (Superior

Court of North Carolina, Wake County, Business Court March 24, 2014) http://www.ncbusinesscourt.net/opinions/2014_9.pdf

⁵⁶ *Id.*

⁵⁷ *Id.* at 15.

parties participated in opposing amici briefs in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, considering whether non-dentists can whiten teeth.⁵⁸ The North Carolina State Board of Dental Examiners discovered that non-dentists were offering teeth whitening services for cheaper prices than dentists. The Board reacted similarly to the North Carolina State Bar in the LegalZoom case by issuing multiple cease and desist letters to these entities.⁵⁹ The North Carolina Dental Practice Act permits the board to regulate dentistry, but teeth whitening is not specified as the practice of dentistry within the statute.⁶⁰ The Dental Board tried to claim state-action immunity after the FTC complained that the Board's action to exclude non-dentists from teeth whitening services was anticompetitive under the Federal Trade Commission Act.⁶¹ However, the Administrative Law Judge determined that the Board could not claim such immunity without state supervision.⁶² When heard on the merits, the Administrative Law Judge held that the Board had unreasonably restrained trade in violation of anti-trust law, and both the 4th Circuit and the Supreme Court affirmed the decision.⁶³

The brief in which LegalZoom participated directly references its litigation with the North Carolina State Bar, citing the North Carolina Bar Association's contradictory actions between the 2003 and 2008 cease and desist letters.⁶⁴ The brief attributed the lack of explanation of the NCBA's actions to the self-governing regulatory structure that is not subject to state supervision, and thus does not comply with state policy.⁶⁵ In conclusion, the brief boldly concluded that financially self-interested market regulation counters logic, research, and experience by removing necessary monitoring of potential abuse.⁶⁶ In contrast, the North Carolina State Bar Association participated in a brief in support of the North Carolina State Board of Dental Examiners along with the West Virginia State Bar Association, the Nevada State Bar Association, and the Florida State Bar Association.⁶⁷ The brief described the claim of monopoly as central to all of the pending unauthorized practice of law cases.⁶⁸ These cases support their proposition that a decision for the FTC would incite litigation in federal court, making it more difficult and expensive for bar associations to protect the public.⁶⁹

⁵⁸ *N.C. State Bd. of Dental Exam'rs v. F.T.C.*, 135 S. Ct. 1101 (2015).

⁵⁹ *Id.*

⁶⁰ *Id.* at 4.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Brief Amica curiae of Legalzoom.com, Inc., et al. at 19-20, *N. C. State Bd. of Dental Exam'rs v. F.T.C.*, 135 S. Ct. 1101 (2015).

⁶⁵ *Id.* at 20.

⁶⁶ *Id.* at 24-25.

⁶⁷ Brief Amica curiae of The North Carolina State Bar, et al., *N.C. State Bd. of Dental Exam'rs v. F.T.C.*, 135 S. Ct. 135 (2015).

⁶⁸ *Id.* at 15.

⁶⁹ *Id.* at 16.

3. Washington

LegalZoom had previously settled litigation in the state of Washington after the Attorney General initiated an investigation into LegalZoom.⁷⁰ Like the previously discussed California litigation, this investigation relied on the concern of unauthorized practice of law as codified in consumer protection laws.⁷¹ The Attorney General deemed that certain LegalZoom practices constituted unfair or deceptive acts of unfair competition and required that LegalZoom refrain from various misrepresentations.⁷²

The terms of the Assurance of Discontinuance explicitly mentioned that LegalZoom must refrain from engaging in the unauthorized practice of law, “specifically by providing individualized legal advice about a self-help form to Washington consumers.”⁷³ The agreement required the company to stop comparing its services to those of licensed attorneys and to refrain from providing Washington consumers with individualized legal advice concerning a self-help form.⁷⁴ Provisions, specific to the nuances of Washington law, require information regarding community property be provided for will preparation and a Washington attorney’s review of all “self-help” estate planning forms offered to consumers.⁷⁵

4. Alabama

Subsequently in 2011, the state of Alabama dismissed an attorney’s unauthorized practice of law complaint against LegalZoom. The plaintiff reasoned that the legislature prohibits the unauthorized practice of law by “cyber-lawyers” like LegalZoom, the unlicensed practice of medicine, and the unlicensed dentistry because people could get hurt.⁷⁶ However, perhaps for lack of likelihood of success on the merits, the plaintiff voluntarily dismissed the claim just a few months later in January of 2011.⁷⁷

5. South Carolina

Another attorney filed a lawsuit against LegalZoom in 2012 in South Carolina.⁷⁸ Two

⁷⁰ Press Release, Washington Attorney General Zooms in on LegalZoom’s Claims (Sept. 16 2010) available at <http://www.atg.wa.gov/news/news-releases/washington-attorney-general-zooms-legalzoom-s-claims>.

⁷¹ *Id.*

⁷² Assurance of Discontinuance, *In Re the Matter of: LegalZoom.com, Inc., a Delaware Corp.* (Sept 15, 2010), available at http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2010/LegalZoomAOD.pdf.

⁷³ *Id.*

⁷⁴ Debra Cassens Weiss, *Wash. AG's Settlement with LegalZoom Bars Fee Comparisons Absent Disclosure*, A.B.A. J., (Sept. 21, 2010, 1:06PM)

http://www.abajournal.com/news/article/wash_ag_settlement_with_legalzoom_bars_fee_comparisons_absent_disclosure/comparisons_absent_disclosure/.

⁷⁵ *Id.*

⁷⁶ Pl.’s Pet. Writ of Mandamus, *Alabama vs. Legalzoom, Inc.*, No. 109717, CV 2009-076, 2010 WL 4234944 at *30 (DeKalb Circuit Court September 15, 2010).

⁷⁷ Martin Swant, *Alabama suit against LegalZoom dismissed*, http://blog.al.com/businessnews/2011/02/alabama_suit_against_legalzoom.html (last visited May 12,2015).

⁷⁸ Order, *Medlock v. LegalZoom*, No. 2012-208067, (S.C.

years later, the South Carolina Supreme Court issued an order settling the case and officially finding that LegalZoom was not engaged in the unauthorized practice of law.⁷⁹ A Supreme Court-Appointed Special Referee recommended approval of the settlement.⁸⁰ He reasoned that the court decides such issues on a case by case basis and cited precedent to support this conclusion that mentioned hesitation to strictly define the practice of law because it would not be reasonable to require a strict definition.⁸¹ What is and is not permissible conduct by non-attorneys is not always clear, and ambiguities exist between what is or is not the unauthorized practice of law.⁸²

This court logically distinguished LegalZoom from the defendant in *State v. Despain*, a case similar to *Reynoso*.⁸³ In *Despain*, the court concluded that the sale of software containing blank legal forms was not the practice of law, but the *Despain* defendant impermissibly used the software to prepare documents for others and provide legal advice on family law matters.⁸⁴ Further, the court characterized LegalZoom as a mailmerge system,⁸⁵ a scrivener rather than a practitioner because the company records verbatim the original customer input and transfers those words onto pre-existing forms.⁸⁶ In contrast to a situation where another person assists a customer in creating the documents, the customer's action, input, and discretion creates the documents offered by LegalZoom.⁸⁷

This determination fits with the South Carolina Supreme Court's previously recognized policy that the duty to regulate lawyers is expressly *not* to enforce a monopoly over the legal profession.⁸⁸ Instead, it is solely to protect the public from economic and emotional harm due to those untrained in law rendering illegitimate legal services.⁸⁹

6. Missouri

A 2011 Missouri opinion found that LegalZoom was functioning as more than just a scrivener and engaged in the unauthorized practice of law.⁹⁰ But the court could not rule on the disputed trademark and patent applications because the court did not have jurisdiction to make a determination based on federal law.⁹¹

2013), available at

http://www.ncsl.org/sites/default/files/Elizabeth%20Hanson%20Legal%20Zoom%202014%20SC_Supreme_Court_report_findings_fact_and_settlement_agreement%20%20Sat%201000%20to%201030.pdf

⁷⁹ Press Release, *South Carolina Supreme Court Approves LegalZoom Business Model* (April 22, 2014) <http://www.reuters.com/article/2014/04/22/idUSnGNX1hzWlp+1c4+GNW20140422> (last visited May 12, 2015).

⁸⁰ Order, *supra* note 78, at 9.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 10.

⁸⁴ *Id.*

⁸⁵ *Id.* at 16.

⁸⁶ *Id.* at 13.

⁸⁷ *Id.* at 16.

⁸⁸ *Id.* at 12.

⁸⁹ *Id.*

⁹⁰ *Janson v. LegalZoom.com Inc.*, 802 F.Supp.2d 1053, 1069 (W.D. Mo. 2011).

⁹¹ *Id.*

In order to reason through the decision, the opinion walks through the steps a user takes to create a document.⁹² Customers answer questions in a “fully automated” online questionnaire through LegalZoom’s “branching intake mechanism (or decision tree)” software.⁹³ The court considered the branching mechanism’s function of skipping inapplicable questions based on the customer’s previous answers.⁹⁴ While no LegalZoom employee gave personal guidance, a customer could view how most users answered a given question.⁹⁵ Further, the customer’s final document is subject to review for formatting and completeness, and neither the software nor a LegalZoom reviewer edits or selects specific entries by the customer.⁹⁶

From these facts, the court concluded that LegalZoom website gave more than general, permissible instruction.⁹⁷ The court reasoned that LegalZoom crossed the line because the company and not the purchaser prepared the documents.⁹⁸ The central concern was the chance of the public being served by incompetent people, the chief policy consideration for unauthorized practice of law statutes.⁹⁹

To defend against potential characterization of the opinion as anti-technology, the court said that the medium of the internet was not problematic and that selling blank forms accompanied by generalized instructions over the internet was permissible.¹⁰⁰ However, as defined previously, branching mechanisms use a set of generalized instructions with skipping function, and such skipping crossed the line.¹⁰¹ Under the Missouri interpretation, a user would need to read through lists of directions and then fill out a separate form based on those directions.

The software is created by a LegalZoom employee using Missouri law; human input creates the legal document; and thus there is “little or no difference” between this and a Missouri lawyer asking those questions of a client.¹⁰² The court also highlights that the Missouri statute says that legal advice *or* assisting with document preparation is included within the definition of the practice of law, so LegalZoom’s conduct was still at issue.¹⁰³ The case eventually settled after LegalZoom agreed to change some advertising language and to offer Missouri residents a thirty-minute consultation with a Missouri attorney as part of a free five-day trial of the Legal Advantage Plus Program. LegalZoom was also required to remove its “Peace of Mind Review” for Missouri users.¹⁰⁴ And despite the court’s characterization of LegalZoom’s automated document service as unauthorized practice of law, the business

⁹² *Id.* at 1055.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 1063.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1064.

¹⁰⁰ *Id.*

¹⁰¹ See discussion *supra* Part I. A.

¹⁰² *Janson v. LegalZoom.com Inc.*, 802 F.Supp.2d at 1065.

¹⁰³ *Id.*

¹⁰⁴ *Janson v. LegalZoom.com, Inc.*, No. 2:10-CV- 04018-NKL, 2012 U.S. Dist. LEXIS 60019 (W.D. Mo. Apr. 30, 2012).

continues to operate in Missouri today.

7. Arkansas

Later in 2013, the Arkansas Supreme Court decided to leave the issue of unauthorized practice of law to be decided in arbitration.¹⁰⁵ A discrepancy arose over whether the Arkansas Constitution gave the Arkansas Supreme Court the right to decide questions of the practice of law, and an entire law review article was written based on the assumption that the Arkansas Supreme Court was required to do so.¹⁰⁶ But the majority determined that because of the Supreme Court's interpretation of the Federal Arbitration Act, ruling on such would be impermissible.¹⁰⁷ The court made no ruling on the unauthorized practice of law, and both the Arkansas Supreme Court¹⁰⁸ and the U.S. Supreme Court denied certiorari to rehear the case.¹⁰⁹

8. Texas

A recent class action was dismissed in Texas for failure to show sufficient evidence to certify class for a national class action.¹¹⁰ This claim against LegalZoom is unique from the others presented because it was not related to the unauthorized practice of law, but the fact that LegalZoom overcharged for their trademark application services given the implementation of the Trademark Electronic Application Services Plus (TEAS Plus) software.¹¹¹

However, after encountering so many adversarial proceedings around this time, the question naturally arises: Why didn't the plaintiffs raise the issue of unauthorized practice of law? The answer is that the definition of the practice of law in Texas has specifically excluded software since a company successfully lobbied for the exception in 1999.¹¹²

In 1999, a Texas district court permanently enjoined Quicken Family Lawyer Software Version 8.0 and Quicken Family Lawyer '99, which provided users with forms and form filling instructions, from operating within the state of Texas.¹¹³ These products contained electronic forms similar to those offered by LegalZoom; the options included

¹⁰⁵ *LegalZoom, Inc. v. McIlwain*, 429 S.W.3d 261, 264 (S. Ct. Ark. 2013).

¹⁰⁶ See generally, Pierce G. Hunter, Note, *Constitutional Law- Unauthorized Practice of Law: Driving Legal Business Without a License, LegalZoom, Inc., and Campbell v. Asbury Automotive, Inc.*, 2011 Ark. 157, 381 S.W.3d 21, 36 U. Ark. Little Rock L. Rev. 201 (Winter 2014).

¹⁰⁷ *LegalZoom v. McIlwain*, at 265.

¹⁰⁸ See generally, *McIlwain v. LegalZoom*, 2013 Ark. 370 (Ark., 2013), reh'g denied.

¹⁰⁹ *McIlwain v. LegalZoom*, 134 S. Ct. 1563 (2014), cert. denied.

¹¹⁰ *Solotko v. LegalZoom*, No. 03-10-00755-CV, 2013 WL 3724770 at *1 (TX Ct. App. July 11, 2013).

¹¹¹ Id.

¹¹² E-mail from Leland C. de la Garza, Chairman of the Texas Bar Ass'n's UPL Comm., to Olivia Clark (May 4, 2015, 2:02 P.M. EST) (on file with author).

¹¹³ *UPLC v. Parsons Technology, Inc.*, No. Civ. A. 3:97CV-2859H, 1999 WL 47235 at *1 (N.D. TX Jan. 22, 1999).

wills, leasing, premarital, and employment agreements.¹¹⁴ The software company violated the definition of the practice of law in Texas at that time, which read:

... the “practice of law” means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.¹¹⁵

Based on previous precedent, Parsons was impermissibly practicing law because the service went beyond simple instruction on how to fill in a blank form.¹¹⁶ Parsons crossed the line into the unauthorized practice of law because it provided more than a simple form-book with instructions through the Quicken Family Lawyer software.¹¹⁷ Left to consider facts similar to the LegalZoom litigation discussed previously, the court similarly reasoned here that the software was impermissible in Texas because it adapted the form contents based on responses by the customer.¹¹⁸

Despite granting the Unauthorized Practice of Law Committee’s motion for summary judgment, the court did acknowledge that the statute was “not a model of clarity” in response to Parson’s argument that the statute was unconstitutionally vague.¹¹⁹ The court applied the standard that a statute is void if its prohibitions are not clearly defined to a person of ordinary intelligence.¹²⁰ It determined that the statute provided sufficient notice to Parsons because it conveyed that preparing wills, contracts, or other legal instruments could potentially be prohibited conduct.¹²¹

Subsequently, the Texas legislature implemented a new law after successful lobbying on the part of Parsons and other publishers.¹²² Supporters of Texas’ H.B. 1507 noted the lack of actual harm to consumers and likened computer programs to books as providing the same information “in a more user-friendly way.”¹²³

Further, supporters explained that the Unauthorized Practice of Law Committee would be ineffective at regulating such conduct given the reality that more and more technological self-help services were emerging.¹²⁴ Predicting the LegalZoom litigation, the supporters concluded that because of such ineffectiveness, only the most well-known

¹¹⁴ *Id.*

¹¹⁵ TEX. GOV’T. CODE. ANN. § 81.101(a) (West 1999).

¹¹⁶ Unauthorized Practice of Law Committee v. Parsons Technology, Inc., 179 F.3d 956, No. Civ.A.3:97:CV-2859H, 1999 WL 47235, at * 6 (N.D. Tex. Jan 22, 1999).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at *7.

¹¹⁹ *Id.* at 11 (qtg. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) “condemned to the use of words, we can never expect mathematical certainty from our language.”).

¹²⁰ *Id.* at 10.

¹²¹ *Id.* at 11.

¹²² Robert A. Brooks, *Cheaper by the Hour: Temporary Lawyers and the Deprofessionalization of the Law* at 178 (2011).

¹²³ H.B. 1507, 76th Leg. Reg. Sess. April 19 1999. (Tex. 1999) at 2.

¹²⁴ *Id.* at 3.

publishers would be unfairly singled out for litigation.¹²⁵ While supporters regarded consumers as having enough common sense to distinguish between software and a lawyer, opponents warned about the risk of these “cyber-lawyers.”¹²⁶ The opponents also warned that consumers would have no remedy for relying on inaccurate information provided by software, when in contrast, such a remedy is available for being harmed by an incompetent attorney.¹²⁷ The supporters won out, and the new law passed, adding the following to Texas’ definition of the practice of law:

In this chapter, the “practice of law” does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney. This subsection does not authorize the use of the products or similar media in violation of Chapter 83 and does not affect the applicability or enforceability of that chapter.¹²⁸

B. Critique

This collection of litigation demonstrates the unpredictable attacks on businesses offering self-help legal technology. These cases seem highly inequitable. The policy behind consumer protection statutes and unauthorized practice of law statutes is to protect the consumer from harm. And yet, LegalZoom still had to pay out to class members who were entirely satisfied with its services.¹²⁹

A bar association re-launched an investigation previously closed for lack of evidence when LegalZoom’s circumstances remained unchanged, and its practices were deemed illegal *even though it did not provide legal advice*. Moreover, a handful of judges merely punted the issue regarding the unauthorized practice of law. North Carolina’s use of *Reynoso* as support for the impermissibility of LegalZoom’s services demonstrates that the facts of the case were poorly analyzed because the services in *Reynoso* are highly distinguishable from those of LegalZoom.¹³⁰ Rather than characterizing its services as taking advantage of loopholes or replacing top-notch attorney services, LegalZoom actually connects bankruptcy clients to attorneys after some of the preliminary documentation is complete.¹³¹

These mistakes are a direct result of the effort to apply ambiguously worded unauthorized practice of law statutes, challenged for being unconstitutionally vague in at least one state, to the various facts and circumstances of the cases. The same problem resulting from ambiguous, broad language in the dental statute in the North Carolina case

¹²⁵ *Id.*

¹²⁶ *Id.* at 3-4.

¹²⁷ *Id.*

¹²⁸ TEX. GOV’T. CODE ANN. § 81.101(c) (West 1999).

¹²⁹ *Webster v. LegalZoom.com, Inc.*, No. B240129 WL 4908639 at *8 (Cal. Ct. App. Oct. 1, 2014), [review filed](#) (Nov. 12, 2014).

¹³⁰ Disclaimer, LEGALZOOM.COM <https://www.legalzoom.com>, (scroll to bottom of home page to find “Disclaimer”) (last visited May 11, 2015).

¹³¹ Bankruptcy, LEGALZOOM.COM. <https://www.legalzoom.com/personal/financial/bankruptcy-overview.html>.

is informative. Using that same logic, it follows that document automation does not constitute the practice of law because it is not in the statutory language, just as teeth whitening is not in North Carolina's dentistry statute. The Supreme Court's affirmation of the F.T.C.'s claims is ominous for bar associations who are arguably losing the unauthorized practice of law as a monopolistic tool.

Can software really count as a person preparing the document? Isn't it really just making form preparation faster and more efficient, like offloading arithmetic calculations to a calculator when creating a budget? Is reviewing a document for completeness and correct spelling really the type of work that is necessarily reserved for a lawyer? If self-help forms are permissible, then it is only LegalZoom's application of branching technology to those forms that makes them impermissible? This seems to certainly be restraining the application of technology to self-help legal services for the public.

III. ADVISORY RECONCILIATION OF SELF-HELP LEGAL TECHNOLOGY AND THE PRACTICE OF LAW

But what is the practice of law? Both the ABA and State Bar Associations have considered this question in depth.

A. *A Brief History of the Definition of the Practice of Law*

Defining the practice of law has been a constant struggle for lawyers in the U.S. The 1969 Model Code of Professional Responsibility described the practice of law as: relating to "the rendition of services for others that call for the professional judgment of a lawyer."¹³² The "essence" of such professional judgment is "his educated ability to relate the general body and philosophy of law to a specific legal problem of a client."¹³³

ABA President Alfred P. Carlton issued a "Challenge Statement" in 2002 to address the increasing commoditization of legal services offered by non-lawyers, charging the Task Force with creating a model definition of the practice of law.¹³⁴ Carlton further explained that it would be important to determine the difference between legal advice and legal information, the latter of which cannot be restricted to dissemination only by lawyers.¹³⁵ That same year, the Task Force put out this working definition:

A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another: (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others; (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person; (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or (4) Negotiating legal rights or responsibilities on behalf of a

¹³² Lancot, *supra* note 2 at 262.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Possible Anticompetitive Efforts to Restrict Competition on the Internet: Federal Trade Commission Public Workshop (Oct. 9, 2002)(statement of Alfred P. Carlton, American Bar Ass'n President). https://www.ftc.gov/sites/default/files/documents/public_events/public-workshop-possible-anticompetitive-efforts-restrict-competition-internet/021009antitrans.pdf.

person.¹³⁶
This restrictive definition experienced severe backlash from the Department of Justice and the Federal Trade Commission which regulates trade and enforce anti-trust laws.¹³⁷

The Federal Trade Commission and the Department of Justice sent a letter to the ABA, dated December 2002, expressing extreme discontent with the proposed rule.¹³⁸ The letter drew attention to the fact that technologies have multiplied the ways in which both legal information and legal advice may be disseminated.¹³⁹ The letter emphatically stated that the proposed rule presented no clear explanation of actual harms that the new definition addressed.¹⁴⁰ The F.T.C. and the D.O.J. recognized that consumers benefit from competition between lawyers and non-lawyers, and thus, the new rule would unduly restrict such competition and harm the public interest.¹⁴¹ It asserted that the proposed definition would unduly restrict interactive, automated document drafting software by equating such interactive functions with the provision of legal advice and unfairly “rising to the level of legal practice.”¹⁴² This position echoes reasoning behind the previous discussion of the South Carolina opinion and the Texas rule¹⁴³—that the practice of law is intended to regulate people and not to constrain the implementation of software in the legal field.

The D.O.J. and the F.T.C. acknowledged that consumers “plainly benefit” from the free advice and information on the law that advocacy organizations provide and similarly from legal form filling software that can be significantly less expensive than paying an attorney to draft such documents.¹⁴⁴ Likening the benefit of free information of advocacy services to LegalZoom-esque form-filling services supports the argument that sorting and categorizing information does not change the fundamental scope of the information, but merely increases efficiency and accessibility. Under the restrictive rule, consumers who do not want to hire a lawyer would be forced to do so, and to consequently pay inflated lawyers’ fees.¹⁴⁵ These cheaper, commoditized services often provide a consumer with services better tailored to a consumer’s needs.¹⁴⁶

The proposed rule would also negatively impact e-commerce.¹⁴⁷ It would eliminate direct benefits to consumers by removing provider incentive to experiment with developing legal services and prohibiting or increasing costs of electronic form-filler

¹³⁶ *Id.* at 263.

¹³⁷ Letter from the Federal Trade Comm’n to the American Bar Ass’n Re: Comments on the American Bar Ass’n’s Proposed Model Definition of the Practice of Law, (Dec. 20, 2002) <http://www.justice.gov/atr/public/comments/200604.htm>.

¹³⁸ *Id.*

¹³⁹ *Id.* at 2.

¹⁴⁰ *Id.* at 3.

¹⁴¹ *Id.* at 4.

¹⁴² *Id.* at 7-8.

¹⁴³ See discussion *supra* Parts I.A.2, II.A.5, II.A.8, and II.B.

¹⁴⁴ Letter, *supra* note 137 at 9-10.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 10-11.

¹⁴⁷ *Id.*

services.¹⁴⁸ The F.T.C. further provided its own description of automated form-filling software:

The forms and choices contained in the software are selected and programmed by the software companies. The consumer answers basic questions posed by the application, which then automatically completes a will or other basic legal document using standardized provisions that are based on the consumer's answers. The consumer essentially fills in electronic "blanks;" however, the application sometimes offers advice based on information provided by the consumer. Consumers may be advised to designate two trustees, in the event that one trustee dies.¹⁴⁹

The D.O.J. and the F.T.C. found no evidence of legal technology actually hurting consumers in 2002.¹⁵⁰ Were the D.O.J. and the F.T.C. too hasty in making such a determination without attempting to perceive future harm in light of the exponentially increasing complexities and capabilities of technology? The court cases and settlement agreements described show no change in the way the software functions, but rather characterize the implications of these functions as harmful.¹⁵¹ The F.T.C. submitted letters criticizing similarly restrictive rules proposed at the state level through 2009.¹⁵²

Currently, the ABA Model Rules of Professional Conduct explain only that "the practice of law varies from one jurisdiction to another."¹⁵³ However, echoing the interests of the D.O.J. and F.T.C., no matter how the practice of law is defined, the policy is to protect the public from unqualified persons posing as lawyers or purporting to have that expertise.¹⁵⁴

B. State Bar Associations' Advisory Opinions on Self-Help Legal Technology

A few state bar associations have issued advisory opinions specific to online legal services provided by non-lawyers. While advisory opinions are nonbinding, these opinions shed some further light on the concerns and attitudes of state bar associations in which high profile litigation on the issue has not yet occurred. The restrictive conclusions of these opinions negate LegalZoom's characterization of its services as those of a scrivener, yet the company still operates in these states today, several years since the opinions were issued.

¹⁴⁸ *Id.* at 11.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 11.

¹⁵¹ See discussion *supra* Part II.

¹⁵² See e.g., F.T.C. 2003 Letter to Indiana Supreme Court Re: Proposed New Definition of the Unauthorized Practice of Law

http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-indiana-state-bar-association-concerning-unauthorized-practice/uplindiana.pdf; FTC 2004 Letter to Massachusetts Bar Association Re: Proposed Definition of Law in Massachusetts

http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-task-force-define-practice-law-massachusetts-concerning-draft/041216massupltr.pdf.

¹⁵³ MODEL RULES OF PROF'L. CONDUCT R. 5.5 cmt. 2 (2013).

¹⁵⁴ Lanctot, *supra* note 2 at 262.

1. Ohio

The Board of the Unauthorized Practice of Law of the Supreme Court of Ohio rendered an opinion in 2008 limiting non-lawyer document preparation services to those of a scrivener.¹⁵⁵ While verbatim form filling by a non-lawyer was considered permissible, selecting the appropriate form for an individual to fill out crossed the line from scrivener to engaging in the unauthorized practice of law.¹⁵⁶ Further, Ohio considers it the unauthorized practice of law when non-lawyers offer assistance through review for correctness and completeness, general advice or consultation, and phone or chat features.¹⁵⁷ Because advice is inherently given through selection of forms or clauses, the only permissible way for a non-lawyer to provide forms in Ohio is to simply offer forms to consumers without any prompt or guidance for relevant information.¹⁵⁸

2. Connecticut

Also provided in 2008, a Connecticut Bar Association Opinion specifically addressed LegalZoom and We The People document preparation services.¹⁵⁹ The opinion concluded that the companies offer more than the services of a scrivener because document preparation is a result of “legal research and legal experience” to serve the needs of a given customer.¹⁶⁰ By parsing out the companies’ descriptions of their own services, the opinion reasoned that offering consultation during the document preparation process proves that the companies offer more than the permissible services.¹⁶¹ Even attorneys working through these companies, whether licensed in Connecticut or not, would be providing legal advice, and impermissibly assisting others in the unauthorized practice of law in Connecticut.¹⁶²

3. Pennsylvania

Two years later in 2010, Pennsylvania’s Unauthorized Practice of Law Committee issued an opinion also directed at LegalZoom and We The People.¹⁶³ The opinion cited the North Carolina cease and desist letter issued to LegalZoom in 2008 as well as the 2008 Connecticut and Ohio opinions.¹⁶⁴ Drawing from the Connecticut opinion, the Pennsylvania opinion reasoned that the clear purpose of these services is to affect the legal rights of the individual customer, and thus results in holding oneself out as a legal

¹⁵⁵ Board of the Unauthorized Practice of Law of the Supreme Court of Ohio Advisory Op. 2008-03 (December 12, 2008) at 1, available at http://www.supremecourt.ohio.gov/Boards/UPL/advisory_opinions/UPLAdvOp_08_03.pdf.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 3.

¹⁵⁸ *Id.*

¹⁵⁹ We The People and LegalZoom Document Preparation Services, Informal Opinion 2008-01 at 1, Conn. Bar Ass’n. Comm. on the Unauthorized Practice of Law (2008).

¹⁶⁰ *Id.* at 3.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See generally Legal Document Preparation by Online and In-Person Services, Formal Opinion 2010-01 (Penn. Bar Ass’n. Unauthorized Practice of Law Comm. Mar. 10, 2010), available at <http://www.pabar.org/public/committees/unautpra/Opinions/2010-01LglDocumentPreparation.pdf>.

¹⁶⁴ *Id.* at 1.

practitioner.¹⁶⁵

C. *The ABA On Self-Help Legal Technology*

In the midst of the seeming ineffectiveness of state bar action against legal document preparation services, the ABA has taken the initiative to rein technology into the profession beginning with the 20/20 Ethics Commission.¹⁶⁶ In 2009, the ABA President Carolyn B. Lamm established the Commission to review the rules specifically in the context of technological advances and globalization.¹⁶⁷ However, the 2012 publications from the Committee consider the use of technology and globalization within the legal profession, and do not address actual or perceived competition from drafting software like LegalZoom.¹⁶⁸ While the committee did redraft the unauthorized practice of law rule, the considerations mainly focus on the services that lawyers use to disaggregate their own legal tools.¹⁶⁹

The Commission Report mentioned how lawyers' outsourcing of legal work improves competition and "can improve access to justice by making legal services more affordable," but conspicuously absent is an analysis of those policy considerations as applied to technology like LegalZoom, outside of the lawyer/law firm microcosm.¹⁷⁰ The 20/20 Ethics Commission Introduction and Overview was a three-year study aimed to address how globalization and technology were changing the practice of law, and perhaps to restrict the vastness of the project, weighs these considerations only within the context of traditional law practice.¹⁷¹

The "Technology" section of the Introduction and Overview describes how technology has altered how lawyers find clients and how they deliver legal services, but does not address technology that displaces a lawyer's traditional role.¹⁷² This topic is similarly lacking on the page for the Standing Committee on the Delivery of Legal Services which again, addresses how lawyers can better use technology, but without consideration of non-lawyer competition.¹⁷³ The Committee held Technology Hearings in 2009, but the page does not contain a report or contact information, and has not been updated since 2009.¹⁷⁴ None of the goals of the Technology Hearings aim at non-lawyer

¹⁶⁵ *Id.* at 6.

¹⁶⁶ ETHICS 20/20 COMMISSION, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html.

¹⁶⁷ *Id.*

¹⁶⁸ *See generally, Introduction and Overview*, ETHICS 20/20 COMMISSION, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf.

¹⁶⁹ *See generally, Resolution and Report*, ETHICS 20/20 COMMISSION (May 7, 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c_filed_may_2012.authcheckdam.pdf.

¹⁷⁰ *Id.* at 2.

¹⁷¹ *Supra* note 172.

¹⁷² *Id.* at 4-5.

¹⁷³ COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, http://www.americanbar.org/groups/delivery_legal_services.html (last visited July 12 2015).

¹⁷⁴ TECHNOLOGY HEARINGS,

delivery of legal services.¹⁷⁵ Until 2014, it appeared that the ABA had left this issue for states to deal with.

The establishment of the Commission on the Future of Legal Services in 2014 gives some guidance.¹⁷⁶ The Commission acknowledges the good position of the ABA to lead efforts to improve delivery and access to legal services by inspiring innovation and encouraging new models for regulating legal services that lower prices for the public.¹⁷⁷ Rather than questioning how lawyers can use technology, the Commission explicitly recognizes that technology is central to meeting the underserved public's needs for the delivery of affordable legal services.

While the background of the Commission Report does not overtly address the provision of commoditized legal services by non-lawyers, one enumerated way to effectuate the Commission's goals is to "propose new approaches that are not constrained by traditional models for delivering legal services and are rooted in the essential values of protecting the public, enhancing diversity and inclusion, and pursuing justice for all."¹⁷⁸ This statement implies that lawyers compete with non-traditional legal services models, like LegalZoom, when implementing technology to enhance access to justice.

In a speech to the Commission, Stephanie Kimbro, a Fellow at Stanford Law School Center on the Legal Profession, describes that lawyers recognize that the legal marketplace has changed with the advent of new technologies.¹⁷⁹ For example, some lawyers use a document automation and assembly feature similar to LegalZoom's services, in addition to a portal that encrypts client to lawyer communication.¹⁸⁰ Other lawyers embrace commoditization by bundling stock forms comparable to LegalZoom with legal advice for a low price.¹⁸¹ But because public services like Access to Justice Author("A2J")¹⁸² do not have the budget of companies like LegalZoom, reaching out to consumers is more challenging.¹⁸³

So in light of the ABA's commitment to unbundling legal services, what is the outlook when non-lawyer companies provide commoditized document automation services

http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/technology_hearings.html
(last visited July 12, 2015).

¹⁷⁵ Id.

¹⁷⁶ COMMISSION ON THE FUTURE OF LEGAL SERVICES,

http://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services.html
(last visited July 12, 2015).

¹⁷⁷ Id.

¹⁷⁸ Id.

¹⁷⁹ STEPHANIE KIMBRO, *Gamification of Law*, available at

http://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services.html

¹⁸⁰ Id.

¹⁸¹ Richard Granat, *LegalZoom's Achilles' Heel: Free Legal Forms* (Aug. 4 2012)

<http://www.elawyerredux.com/2012/08/articles/free-law/legalzooms-achilles-heel-free-legal-forms/>.

¹⁸² ACCESS TO JUSTICE AUTHOR(A2J), <https://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology/a2j-author>.

¹⁸³ Kimbro, *supra* note 179.

for customers to fill out on their own?¹⁸⁴ Several organizations commented on the Issue Paper that the Commission released in November 2014 to solicit comments on topics like the delivery of legal services and access to justice.¹⁸⁵ One particularly compelling comment comes from Responsive Law, an organization dedicated to representing the consumer's voice in the legal system.¹⁸⁶ The comment proposes that Unauthorized Practice of Law causes of action should require a complaint from a consumer along with a showing of actual harm.¹⁸⁷ It further criticizes courts finding against LegalZoom for creating a "chilling effect on consumers" by restricting innovation in legal technology and availability of types of self-help resources.¹⁸⁸ As Michael Mills, programmer and J.D., described in his talk to the Commission, pro bono hours will never meet the demand for useful legal advice for people who need it and can't afford it.¹⁸⁹ He drew connections between law and coding as professions similarly driven by and based on rules.¹⁹⁰ By considering these similarities when within the unauthorized practice of law, he asserts that lawyers will understand to understand- "this is just how we think."¹⁹¹

Maybe this tradition of lawyers being Luddites, who debated for a long time whether it was ethical to answer the phone when a client called, is finally waning.¹⁹² Competing with non-lawyer legal services is more logical than hostile use of unauthorized practice of law statutes to squeeze them out. But states have restricted the availability of automated services provided by non-lawyers, and a clear path does not exist for new legal technology business entering the market. Ambiguously broad prohibitions on legal technology not controlled by lawyers do not align with the clear ABA initiative to unbundle legal services through competition rather prohibition.

IV. WHAT'S NEXT FOR THE SELF-HELP LEGAL TECHNOLOGY MARKET?

A. *Changing Consumer Behaviors*

With the advent of new technology, Richard Susskind, a scholar on the changing landscape of the legal market, predicts that clients will tend to pay for legal work from non-lawyers assisted by standardized processes and software.¹⁹³ Generally, consumers in the post-recession marketplace are increasingly demanding simplicity and are more willing to jump from one business to another in order to get the best deal.¹⁹⁴ Further,

¹⁸⁴ *Id.*

¹⁸⁵ Issue Paper from the Commission on the Future of Legal Services (November 3, 2014), available at http://www.americanbar.org/content/dam/aba/images/office_president/issues_paper.pdf.

¹⁸⁶ Comments on the Issue Paper from the Commission on the Future of Legal Services (December 10, 2014), available at http://www.americanbar.org/content/dam/aba/images/office_president/responsive_law.pdf.

¹⁸⁷ *Id.* at 5.

¹⁸⁸ *Id.* at 6.

¹⁸⁹ MICHAEL MILLS, *supra* note 8.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* 109 (2013).

¹⁹⁴ *See generally*; Paul Flatters & Michael Willmott, *Understanding the Post-Recession Consumer*, 87 HARV. BUS. REV., July-Aug. 2009, 109-112.

consumers are increasingly demanding ethical corporate governance, and have a declining respect for authority.¹⁹⁵ These trends are consistent with Chris Anderson's theory of the long tail that predicts the emergence of increased niche markets due to new technological development.¹⁹⁶ Technology permits profit from less common products because marketing and distribution costs are decreasing.¹⁹⁷ In an exclusively online context, the long tail considers the change in consumption pattern when consumers are selecting more niche products, showing that demand shifts over time from the hit products to the various niche products.¹⁹⁸

As applied to the legal market, easily commoditized services, like document automation and assembly, reach a large portion of the market that licensed lawyers cannot serve in a cost effective way.¹⁹⁹ Richard Granat, legal technology entrepreneur and CEO of DirectLaw, argues that when the legal profession cannot serve 80% of the consumers, it is important to permit experimentation with legal software to increase access to justice.²⁰⁰ And so the legal market is not immune to the broader long tail economic trend. Litigation over unauthorized practice of law statutes has not yet been able to stop the biggest disrupter, LegalZoom, from operating in those states. Technology companies will continue to emerge, offering legal services to previously unreached consumers either without the use of a lawyer's services or by displacing the lawyer's traditional role in delivering them.

B. A Suggestion for Shaping the Regulation of the Practice of Law in the Technological Age

As discussed in Part II, LegalZoom's products and services result in a high degree of customer satisfaction. This lack of harm should weigh in favor of the permissibility of a legal technology product. Unauthorized practice of law rules that do not account for the unexpected advent of new technologies do not regulate legal technology well. The same rules when applied at different points in time trigger different results, and the uncertainty left in the wake of the LegalZoom litigation is palpable.²⁰¹

When a self-regulated profession clashes with broader public opinion, the result can incentivize outsiders to interfere with that regulation.²⁰² And when laws systematically

¹⁹⁵ Id.

¹⁹⁶ Chris Anderson, *About Chris Anderson*, The Long Tail: Chris Anderson's blog, http://thelongtail.com/the_long_tail/about.html (last visited May 28, 2015).

¹⁹⁷ *Long Tail*, INVESTOPEDIA, <http://www.investopedia.com/terms/l/long-tail.asp> (last visited May 28, 2015).

¹⁹⁸ Wenjing Duan and Wenqi Zhou, *Online user reviews, product variety, and the long tail: An empirical investigation on online software downloads*, ELEC. COMMERCE RESEARCH AND APPLICATIONS 2012 11(3) 275, 275 (November 1, 2010), available at <https://ssrn.com/abstract=1742519>.

¹⁹⁹ Bill Henderson, *A Counterpoint to "The most robust legal market that ever existed in this country,"* THE LEGAL WHITEBOARD (Mar 17, 2014) <http://lawprofessors.typepad.com/legalwhiteboard/2014/03/a-counterpoint-to-the-most-robust-legal-market-the-ever-existed-in-this-country.html>.

²⁰⁰ Richard Granat *Software Eats the Legal Profession* (April 28, 2015) <http://www.elawyeringredux.com/2015/04/articles/competition/software-eats-the-legal-profession/>.

²⁰¹ Yochai Benkler, *The Wealth of Networks – How Social Production Transforms Markets and Freedom* 387 (2006).

²⁰² Eric C. Chaffee, *The Death and Rebirth of Codes of Legal Ethics: How Neuroscientific Evidence of*

and significantly reduce the number and variety of options open to people in the society for which the law is passed, autonomy becomes a concern.²⁰³ Hostile use of the unauthorized practice of law statutes limit consumer options and cause this type of concern more and more seriously as they collide with exponentially increasing capabilities

of technology. Consumers can be restricted to either using a lawyer when it is not cost effective or necessary, or alternatively, receive no help at all. By implementing both reason and consideration for changing intuitions of what justice is in the technological age, practice of law rules should permit non-human automation of computable legal tasks.²⁰⁴ Such rules would incentivize a freer flow of legal information to the public, bringing the legal field up to par with professions like the medical field, by logically considering the state of technology both today and in the future.

Automation services currently provided by non-lawyers are not deeply disruptive technologies because they only arguably displace the role of the lawyer and cannot completely eliminate the lawyer in complex situations. When crafting new rules, it would be beneficial to consider the potential for true disruption that could decentralize completely traditional authoritative roles of lawyers.²⁰⁵ For example, emerging, self-enforcing “smart” contracts may legally require memorialization in writing in order to make the contracts enforceable in a traditional court.²⁰⁶ However, one marketplace project, “OpenBazaar”, aims even to create a decentralized judicial system to avoid such problems.²⁰⁷ New “blockchain” technology could deeply disrupt hierarchical organizations that centralize decision-making, like bar associations and even courts.²⁰⁸ Further, it could raise legal and ethical questions about the fundamental tenets of law itself.²⁰⁹ Rather than continuing to position technology against lawyers in ineffective unauthorized practice of law litigation, considering this potential for a complete reshaping of legal services early on could avoid such costly hostility in the future.

CONCLUSION

Changes brought on by networked information will continue to disrupt the traditional way that the legal market has coexisted with lawyers.²¹⁰ These changes only increase opportunities for fusion of parts of the law with technology. Adaptation of lawyers, bar associations, and courts to this new reality is necessary to maintain a strategic advantage

Intuition and Emotion in Moral Decision Making Should Impact the Regulation of the Practice of Law, 28 GEO. J. LEGAL ETHICS 323, 358 (2015).

²⁰³ Benkler, *supra* note 201 at 150.

²⁰⁴ Reason and intuition idea adapted from neuroscientific discussion in Chaffee *supra* note 202.

²⁰⁵ Blockchain technology, for example, permits creation of self-enforcing digital contracts that rely on an algorithm rather than human intervention for execution. Without reliance on a third party, or the inherent ambiguity of language, parties to a contract can confirm that an event or condition has occurred. See Primavera De Filippi and Aaron Wright, *Decentralized Blockchain Technology and the Rise of Lex Cryptographia* 2, 10, 24 (March 10, 2015), available at <https://ssrn.com/abstract=2580664>.

²⁰⁶ *Id.* at 11.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 16.

²⁰⁹ *Id.* at 17.

²¹⁰ Benkler, *supra* note 201 at 1.

in the market.²¹¹ The unauthorized practice of law statutes should be adjusted to enable this advantage. High profile litigation against LegalZoom did not kill the company, and new companies will create more iterations of this type of legal technology and others that reshape the legal market. The overarching policy concern of consumer protection should be kept in mind as the main focus, but just how this policy applies will continue to change within the context of inevitable technological advancement. Lawyers' flexibility and adaptation to these changes is necessary to enable public access to the law to the greatest possible degree.

²¹¹ Benkler, *supra* note 201 at 127.