
Note

Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources

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In July 2004, Ernest Chavis drafted a will at the request of his 91-year-old former neighbor, Annie Belle Weiss.¹ Chavis used a “Quicken lawyer disk” to generate the document on his computer, filled in the blanks, and brought the will to Ms. Weiss to sign.² After Ms. Weiss’s death, Chavis was sued by Ms. Weiss’s family members who alleged Chavis had “engaged in the unauthorized practice of law” in violation of a South Carolina statute.³ In January 2007, the Supreme Court of South Carolina agreed with Ms. Weiss’s family, and found that Chavis had engaged in the unauthorized practice of law.⁴ Interestingly, the court raised no objections to the document itself, nor did the court deny that the document likely effectuated Ms.

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1. *Franklin v. Chavis*, 640 S.E.2d 873, 875 (S.C. 2007).

2. *Id.*

3. *Id.*; *see id.* at 876 (explaining that under South Carolina law, “even the preparation of standard forms that require no creative drafting may constitute the practice of law” and “the purpose of prohibiting the unauthorized practice of law is to protect the public”); S.C. RULES OF PROF’L CONDUCT R. 5.5 (b)(2) (2012) (“A lawyer who is not admitted to practice in this jurisdiction shall not: hold out to the public . . . that the lawyer is admitted to practice law in this jurisdiction.”); ABA MODEL RULES OF PROF’L CONDUCT R. 5.5 (b)(2) (2012) (same).

4. *Chavis*, 640 S.E.2d at 876.

Weiss's intent.⁵ Though Chavis used the Internet to create inexpensive and accurate documents that memorialized the will of his elderly neighbor, the court formalistically applied the unauthorized practice of law rules of South Carolina and found Chavis in violation of state law.

The formalistic application of unauthorized practice rules is not limited to the state of South Carolina. Case law from many jurisdictions holds that the generation of legal documents by lay people—whether over the Internet or in person—constitutes the unauthorized practice of law.⁶ This strict application of unauthorized practice statutes is also not isolated to individuals; Internet legal providers (ILPs) have recently encountered other direct legal assaults. On August 22, 2011, around 15,000 litigants settled a class action suit against Internet legal forms provider LegalZoom.com, Inc.⁷ The suit, which alleged violations of the Missouri unauthorized practice of law statute,⁸ is only one example of recent legal action against ILPs.⁹

The emergence of ILPs, and litigation involving them, exposes a largely unsettled legal terrain.¹⁰ State legislatures drafted most unauthorized practice statutes prior to the emer-

5. See *id.* at 877. The South Carolina Supreme Court did not nullify the will, stating “it should not be invalidated simply because it was drafted by a nonlawyer.” *Id.* (citing Peterson v. Howland (*In re Peterson's Estate*), 42 N.W.2d 59, 66 (Minn. 1950)).

6. See Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 836–49 (2002) (discussing a Texas court decision to enjoin the sale of a CD-ROM that provided advice on how to fill out legal forms, and a series of federal bankruptcy court decisions to enjoin lay people from advising debtors through the preparation of legal forms).

7. Nathan Koppel, *Seller of Online Legal Forms Settles Unauthorized Practice of Law Suit*, WALL ST. J.L. BLOG (Aug. 23, 2011, 11:47 AM), <http://blogs.wsj.com/law/2011/08/23/seller-of-online-legal-forms-settles-unauthorized-practiced-of-law-suit/>.

8. *Janson v. LegalZoom.com, Inc.*, 271 F.R.D. 506, 508 (W.D. Mo. 2010).

9. See, e.g., *Frankfort Digital Servs. v. Kistler (In re Reynoso)*, 477 F.3d 1117, 1126 (9th Cir. 2007) (finding that the website, owned by a non-lawyer, that “offer[ed] legal advice and projected an aura of expertise concerning bankruptcy petitions,” constituted unauthorized practice of law); *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956, 956 (5th Cir. 1999) (vacating an order to enjoin a company from selling legal software because the Texas Legislature had enacted a statute specifying that the sale of computer software did not constitute the practice of law).

10. See Melissa Blades & Sarah Vermylen, *Virtual Ethics for a New Age: The Internet and the Ethical Lawyer*, 17 GEO. J. LEGAL ETHICS 637, 651 (2004) (stating that case law on the topic of ILPs is “sparse”).

gence of the Internet or without any focus on recent advancements in computer research capabilities.¹¹ For that reason, these statutes lack clarity and their application to ILPs is outdated and forced. In addition, ILPs inherently exist in a multi-jurisdictional setting, the Internet, which is unlike the traditional localized legal practices these statutes anticipated. There are potentially fifty different legal structures which govern ILPs,¹² creating myriad and inconsistent regulation of Internet legal space.

Advances in computer technology are effectively commoditizing the law and revolutionizing the ways in which individuals seek and receive legal services.¹³ ILPs present tremendous potential for increased access to legal services.¹⁴ Efficient and low-cost legal information is vital to an increasing number of unrepresented litigants¹⁵ and to combat the shrinking amounts of legal aid available to them.¹⁶ Technology has the potential to benefit a court system significantly burdened by unprepared and uninformed litigants.¹⁷ Seen in this light, the vague and

11. See generally Steve French, *When Public Policies Collide . . . Legal "Self-Help" Software and the Unauthorized Practice of Law*, 27 RUTGERS COMPUTER & TECH. L.J. 93, 95–101, 120 (2001) (providing a thorough discussion of the historical development of state specific practice of law definitions, and noting "that existing definitions and analytical approaches to the unauthorized practice of law simply fail in the computer age"). For further discussion on the development of the unauthorized practice of law rules in the context of self-help, see Julee C. Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 123–48 (2000).

12. Compare, e.g., TEX. GOV'T CODE ANN. § 81.101(c) (West 2005) ("[T]he '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 . . . computer software, or similar products . . ."), with *Kistler*, 477 F.3d at 1126 (finding that the practice of law does include operating a website that offers automated counsel in bankruptcy matters).

13. See Chris Johnson, *Leveraging Technology to Deliver Legal Services*, 23 HARV. J.L. & TECH. 259, 262–66 (2009) (discussing the business models of three online legal service providers).

14. See *id.* at 279–81 (arguing that consumers stand to benefit from the availability of affordable legal services).

15. See generally Richard W. Painter, *Symposium on Ethical Issues and Trends in Family Law: Pro Se Litigation in Times of Financial Hardship—A Legal Crisis and its Solutions*, 45 FAM. L.Q. 45 (2011) (arguing that affordable legal services are especially important in times of financial hardship in light of research characterizing the poor quality of pro se litigation).

16. See, e.g., Johnson, *supra* note 13, at 280–81 (citing the revenue from interest on lawyers' trust accounts as an important and declining source of legal aid funds).

17. See Painter, *supra* note 15, at 45 ("[L]itigants are generally doing a poor job of representing themselves and are burdening the courts." (citing ABA

outmoded language of the unauthorized practice statutes, and their uneven application, is a more serious problem than ever before. It decreases confidence in the legal system, and prevents millions of potential users who stand to benefit significantly from the growth of ILPs.

This Note offers solutions to anachronistic and inconsistent unauthorized practice of law statutes as they relate to non-attorney ILPs, while also recognizing that some regulation of ILPs is needed. Part I of this Note examines the development of the unauthorized practice statutes, the emergence of ILPs, and their conflicting interests. Part II argues that unauthorized practice statutes stifle the potential benefits of access to ILPs, and that the potential benefit of increased access to ILPs outweighs the historic rationale behind strict unauthorized practice statutes. Part III advocates for the implementation of a two-part solution: (1) states should adopt a new ABA Model Rule that relaxes regulation of personalized and advanced features of ILPs, and (2) ILPs should be required to comply with reasonable state disclosure and accreditation requirements. Implementing this solution will remove the stifling barriers to valuable legal technology, and in turn, dramatically increase access to quality legal services.

I. SQUARE PEG IN A ROUND HOLE: A BRIEF HISTORY OF NON-ATTORNEY INTERNET LEGAL RESOURCES AND THE UNAUTHORIZED PRACTICE OF LAW

Information technology is advancing faster than the slow-to-adapt, precedent-based U.S. legal system can regulate it.¹⁸ This trend is especially pronounced in the case of the Internet, which rapidly revolutionized the mechanisms and substance of communication, and permeates into nearly “every facet of society.”¹⁹ The history of regulating the practice of law, and the more recent emergence of ILPs, illustrates two phenomena on a collision course; the outcome of which will determine how, and ultimately which, individuals receive legal services.

COAL. FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS (2010)).

18. See Fischer, *supra* note 11, at 123 (“The explosion of information technology is growing faster than it can be regulated. Technology has outpaced the states’ capacity to develop rules for providing legal services electronically.”).

19. See Shari Claire Lewis & Dylan Braverman, *The Internet “Big Bang” Unauthorized Practice of Law in the Cyber Age*, FOR THE DEF., Oct. 2007, 26, 26.

A. WHAT IS THE UNAUTHORIZED PRACTICE OF LAW?

Under principles of federalism, defining and regulating the practice of law is traditionally a function of individual states.²⁰ Rules governing the unauthorized practice of law restrict the conduct of both lawyers and non-lawyers, while state legislatures and state courts promulgate those rules.²¹

1. The Development of Unauthorized Practice of Law Structures

Prior to the twentieth century, a non-lawyer violated the unauthorized practice of law rules only by representing another individual in court.²² State administration was straightforward because those who appeared before the court were easily identifiable.²³ With the creation of bar associations in the early twentieth century, sophisticated regulations for the practice of law began and many bar associations adopted objectives “to condition bar membership upon various educational requirements.”²⁴ The New York County Lawyers Association appointed the first committee on unauthorized practice of law in 1914 in response to a growing business industry and its overlapping legal work.²⁵

Until the 1930s, state bar associations focused primarily on “nonlawyer appearances in court” and largely ignored the significant public danger that broader unauthorized practice of law creates.²⁶ “In the wake of the Depression,” however, numerous states’ bar associations formed unauthorized practice

20. See French, *supra* note 11, at 95; Christina L. Underwood, *Balancing Consumer Interests in a Digital Age: A New Approach to Regulating the Unauthorized Practice of Law*, 79 WASH. L. REV. 437, 439 (2004).

21. La Tanya James & Siyeon Lee, *Adapting the Unauthorized Practice of Law Provisions to Modern Legal Practice*, 14 GEO. J. LEGAL ETHICS 1135, 1137 (2001) (“Rules governing the unauthorized practice of law are usually state-specific legislative or court measures. Rules that prohibit the unauthorized practice of law restrict the conduct of both lawyers and non-lawyers.”).

22. Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 721 (2007).

23. *Id.*

24. See ABA COMM’N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS 16 (Aug. 1995), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/Non_Lawyer_Activity_authcheckdam.pdf.

25. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 7 (1981).

26. See *id.*

committees and many states “enacted or broadened unauthorized practice statutes.”²⁷ The American Bar Association (ABA) created its committee on unauthorized practice in 1930, and by 1938, over 400 unauthorized practice committees were established.²⁸ In the latter half of the twentieth century, unauthorized practice rules became more uniform as state courts implemented versions of the Model Rules of Professional Conduct (Model Rules), promulgated by the ABA.²⁹

Today, a majority of states empower committees to investigate and enforce unauthorized practice of law violations.³⁰ In many jurisdictions, the state supreme court creates and supervises these committees.³¹ In other jurisdictions, local bar associations create unauthorized practice committees, though they are still subject to state supreme court oversight.³²

2. The Purpose of Prohibiting the Unauthorized Practice of Law

The primary rationale offered for unauthorized practice of law regulation is to protect the public from the consequences of ineffectual legal services.³³ According to the ABA Model Rules,

27. *See id.* at 8–9.

28. *Id.* at 8; *see also* French, *supra* note 11, at 97–98.

29. *See* Charles W. Wolfram, *Expanding State Jurisdiction to Regulate Out-of-State Lawyers*, 30 HOFSTRA L. REV. 1015, 1046 n.136 (2002).

30. *See* French, *supra* note 11, at 98.

31. *E.g.*, N.J. CT. R. 1:22-1 (West 2012) (“The Supreme Court shall appoint a committee on the unauthorized practice of law consisting of 21 attorneys of this State and four lay members.”); *see* French, *supra* note 11, at 98.

32. *See* French, *supra* note 11, at 98; *e.g.*, RULES REGULATING THE FLORIDA BAR: CH. 10. RULES GOVERNING THE INVESTIGATION AND PROSECUTION OF THE UNLICENSED PRACTICE OF LAW, RULE 10-1.1 (July 1, 2012), *available at* [http://www.floridabar.org/TFB/TFBResources.nsf/0/6141E3A803F2F87C85256B29004BEB60/\\$FILE/RRFTFB%20CHAPTER%202010.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/0/6141E3A803F2F87C85256B29004BEB60/$FILE/RRFTFB%20CHAPTER%202010.pdf?OpenElement) (“The Florida Bar, as an official arm of the court, is charged with the duty of considering, investigating, and seeking the prohibition of matters pertaining to the unlicensed practice of law and the prosecution of alleged offenders.”).

33. *See* James I. Averitt, *Legal Ethics and the Internet: Defining a Lawyer’s Professional Responsibility in a New Frontier*, 29 J. LEGAL PROF. 171, 173 (2004–2005) (quoting TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 5.5 cmt. 1 (Vernon 2005)) (“Comment 1 to Rule 5.05 of the Texas Disciplinary Rules of Professional Conduct describes the rationale for prohibiting non-lawyers from practicing law: ‘Courts generally have prohibited the unauthorized practice of law . . . to protect . . . the public . . . from the mistakes of the untrained’”); French, *supra* note 11, at 96 (“The principal justification offered for unauthorized practice of law prohibitions is ‘to protect the public from the consequences of ineffectual legal services.’” (quoting MODEL RULES OF PROF’L CONDUCT Ann. R. 5.5 cmt. (1996))).

“[l]imiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.”³⁴ This assumed justification has gone largely unchallenged for over one hundred years.³⁵

Asserting public welfare as justification, attorneys, bar associations, and unauthorized practice committees have highlighted alleged problems arising from non-lawyers practicing law. Untrained individuals can seriously harm a client with advice on multifaceted legal issues without understanding the complexities involved.³⁶ Inaccurate advice can prejudice a client’s case or lead to further expenses and litigation.³⁷ Clients may also have false expectations as to the scope and expertise of the non-lawyer, as consumers are likely to expect legal service providers to have legal training.³⁸ Additionally, and perhaps most relevant to Internet practice, clients of non-lawyers practicing law waive the protections provided by state rules governing confidentiality,³⁹ conflicts of interest,⁴⁰ and attorney-client privileges.⁴¹

Finally, the legal profession is a very big business.⁴² Unauthorized practice statutes unquestionably shield the profession from most external competition.⁴³ While the economic motivations of the bar are beyond the scope of this Note, it is clear from empirical study that public policy concerns were not the

34. MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 1 (1995).

35. See Fischer, *supra* note 11, at 139.

36. See Underwood *supra* note 20, at 440.

37. *Id.*

38. *Id.*

39. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 16 (2002) (requiring lawyers to take “reasonable precautions to prevent . . . information from coming into the hands of unintended recipients”).

40. See MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(1) (2002) (stating that conflict of interest is created when lawyers represent clients with directly adverse interests).

41. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 (2000) (affirming that “[p]rivileged persons . . . are the client[,] . . . the client’s lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation”). For a discussion of the regulation of the unauthorized practice of law, see generally *id.* § 4.

42. See Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1232 (1995) (proposing a new paradigm, “the practice of law is a business,” to explain the state of legal professionalism).

43. See RICHARD L. ABEL, *Ch. 5 Restrictive Practices: Controlling Production by Producers*, in AMERICAN LAWYERS 112, 112–26 (1991).

only driving forces behind the expansion and strengthening of unauthorized practice of law statutes.⁴⁴

3. Methods of Enforcement

Each state's highest court has the inherent power to regulate the practice of law within the state.⁴⁵ This authority is typically delegated to state bar associations or unauthorized practice committees, who act as the primary interpretive, investigative, and enforcement mechanisms in most jurisdictions.⁴⁶ In some jurisdictions, multiple authorities enforce unauthorized practice rules, including state attorneys general, private individuals, state bar committees, supreme court committees, and local county attorneys.⁴⁷ States have implemented a variety of sanctions and strategies to enforce unauthorized practice regulations. The most common include civil injunctions,⁴⁸ restitution,⁴⁹ disbarment,⁵⁰ suspension, criminal and

44. See generally Rhode, *supra* note 25, at 3–42 (discussing the historical development of unauthorized practice of law rules and conducting an empirical analysis of contemporary unauthorized practice of law enforcement activity).

45. See CHARLES W. WOLFRAM, *Regulation of Lawyers and the Legal Profession: Inherent Powers of Courts to Regulate Lawyers*, in MODERN LEGAL ETHICS 22–24 (West 1986) (explaining that courts have chosen to regulate the legal profession on a theory of inherent power, and through the “negative inherent powers doctrine [most courts] assert[] that only the courts, and not the legislative or executive branches of government, may regulate the practice of law”).

46. See, e.g., TEX. GOV'T ANN. CODE §§ 81.101-04 (West 2005) (defining the “practice of law,” establishing that the Unauthorized Practice of Law Committee (UPLC) is comprised of “nine persons appointed by the supreme court,” consisting of at least three lay citizens, and that the UPLC is responsible for enforcing Texas' unauthorized practice of law statute); see also *supra* Part I.A.1.

47. See ABA Standing Comm. on Client Prot., ABA Ctr. for Prof'l Responsibility, 2004 Survey of Unlicensed Practice of Law Committees (Dec. 2004), available at <http://www.abanet.org/cpr/clientpro/2004INTRO.DOC> (comparing regulation of the unauthorized practice of law in thirty-six U.S. states).

48. See, e.g., ARK. CODE R. § 16-22-208(b) (LexisNexis 1999); Unauthorized Practice of Law Comm. of the Supreme Court of Colo. v. Prog, 761 P.2d 1111, 1116 (Colo. 1988); Bray v. Brooks, 41 S.W.3d 7, 14–15 (Mo. Ct. App. 2001).

49. See, e.g., *Birbrower, Montalbano, Condon & Frank, P.C., v. Super. Ct.*, 949 P.2d 1, 13 (Cal. 1998); *State v. Hillbrant*, No. A05-820, 2006 WL 2052872, at *6 (Minn. Ct. App. July 25, 2006).

50. See, e.g., *In re Szuba*, 896 So.2d 976, 982 (La. 2005) (suspending an attorney for 1 year); *In re Caver*, 841 So.2d 770, 772 (La. 2003) (disbarring attorney). Note, however, that such a sanction may do little to dissuade a non-lawyer not admitted to the bar in the first place.

civil contempt,⁵¹ sanctions in the current legal proceedings,⁵² private cause of action,⁵³ and criminal prosecutions.⁵⁴ Although a number of remedies are available, states vary dramatically in method and vigor of unauthorized practice enforcement

4. Defining the Practice of Law

Despite the extensive history of unauthorized practice committees and their enforcement mechanisms, the unauthorized practice of law lacks a precise definition, and is ambiguous as to whom it applies.⁵⁵ As a result, it is difficult for courts and legislatures to determine what activity by non-lawyers constitutes the unauthorized practice of law.⁵⁶ Yet there is cross-jurisdictional agreement that legal practice extends beyond representation in court,⁵⁷ and can include giving legal advice, holding oneself out as an attorney, and preparing legal documents.⁵⁸ Some states also include preparation of pleadings and

51. See, e.g., *In re Banks*, 805 A.2d 990, 998–1003 (D.C. 2002).

52. See, e.g., *Grenga v. Bank One, N.A.*, No. 04 MA 94, 2005 WL 2065117, at *4 (Ohio Ct. App. Aug. 26 2005) (unpublished).

53. See, e.g., *Fogarty v. Parker*, 961 So.2d 784, 790–91 (Ala. 2006) (recognizing a private cause of action for unauthorized practice of law in Alabama); *Touchy v. Houston Legal Found.*, 432 S.W.2d 690, 694 (Tex. 1968) (“Recognizing the right of private attorneys to institute an action . . . to enjoin the unauthorized practice of law . . . which is demeaning the legal profession and harmful to the plaintiffs.”).

54. See, e.g., ALA. CODE § 34-3-7 (LexisNexis 2012) (“Any person, firm or corporation who is not a regularly licensed attorney who does an act defined in this article to be an act of practicing law is guilty of a misdemeanor . . .”); IND. CODE ANN. § 33-43-2-1 (LexisNexis 2012) (providing that a person who engages in the authorized practice of law “[c]ommits a Class B misdemeanor”); see also Hoppock, *supra* note 22, at 730 n.85 (“As of 2004, twenty-five jurisdictions reported to impose criminal fines. Of those, twenty-two imposed prison sentences.” (citations omitted)).

55. See Joyce Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says “Cease Fire!”*, 31 CONN. L. REV. 423, 450 (1999) (“The unauthorized practice of law is not precisely defined.”).

56. See Underwood, *supra* note 20, at 444.

57. E.g., *Ostrovsky v. Monroe (In re Ellingson)*, 230 B.R. 427, 434 (Bankr. D. Mo. 1999) (“Montana follows the majority view that preparation or filling in of blanks on preprinted forms constitutes the practice of law.”).

58. See Erika C. Birg, *Lawyers on the Road: The Unauthorized Practice of Law and the 2004 Presidential Election*, 9 TEX. REV. L. & POL. 305, 309–15 (2005) (comparing Alabama’s narrow definition of “practicing law” to the broader definitions of the ABA and other states such as Georgia, where “giving legal advice” constitutes the practice of law); Blades & Vermylen, *supra* note 10, at 638 (“Generally, the practice of law includes rendering legal advice, preparation of legal documents, and holding oneself out as engaged in the preparation of legal instruments.” (footnote omitted)).

provision of any service that necessitates the use of legal skill or knowledge to constitute the practice of law.⁵⁹ Relevant to Internet legal services, a majority of jurisdictions require “some type of *personalized* contact between the attorney and client,” to constitute the practice of law,⁶⁰ while a minority of jurisdictions uphold broader restrictions that do not require personalized contact.⁶¹

Nonetheless, significant confusion persists because individual states define the practice of law differently. State definitions themselves are also “consistently vague,”⁶² and as the Supreme Court of Arizona has proclaimed, “[i]n the light of the historical development of the lawyer’s functions, it is impossible to lay down an exhaustive definition”⁶³ The ABA Model Rules, which many states have adopted,⁶⁴ also fail to provide a clear definition of the practice of law. In September of 2002, in response to wide-ranging critiques, the ABA attempted to draft a clearer model definition.⁶⁵ Instead of revising the language, the ABA concluded that a model definition was not feasible, and issued a general report recommending that all states adopt individualized definitions.⁶⁶ Most states, however, have refused to change the vague and broad language of the ABA Model Rules.⁶⁷

Justice Potter Stewart’s threshold test, “I know it when I see it,” famously used to characterize pornography, seems all too appropriate to describe modern regulation of the practice of law.⁶⁸ As ILP technology advances, vague and inconsistent unauthorized practice statutes cloud the legality of important ILP

59. See, e.g., Blades & Vermylen, *supra* note 10, at 638 (citing Joel Michael Schwarz, *Practicing Law over the Internet: Sometimes Practice Doesn’t Make Perfect*, 14 HARV. J.L. & TECH. 657, 660 (2001)).

60. *Id.* at 651.

61. *Id.*

62. See Lewis & Braverman, *supra* note 19, at 27.

63. State Bar of Ariz. v. Ariz. Land Title & Trust Co., 366 P.2d 1, 8–9 (Ariz. 1961).

64. See Wolfram, *supra* note 29, at 1046 n.136 (“It took more than ABA action . . . to make the lawyer codes . . . regulatory. That was accomplished in the great majority of states by persuading the state’s highest court . . . to adopt a version of the ABA model lawyer code as local law.”).

65. See Underwood, *supra* note 20, at 449.

66. *Id.*

67. Wolfram, *supra* note 29, at 1046.

68. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

services, and may significantly affect its potential for widespread public use.

B. THE EMERGENCE OF INTERNET LEGAL SERVICE TECHNOLOGY

Online legal service technologies first appeared in the mid-1990s, shortly after the creation of the World Wide Web.⁶⁹ Initially, these websites were comprised of basic legal information databases that displayed text-based explanations of the law and individual rights.⁷⁰ The web pages had no document-drafting capabilities and provided relatively minimal benefit to low-income individuals in need of legal services.⁷¹ At the turn of the millennium, a select few companies began to offer pre-prepared documents through their websites.⁷² Advances in Internet technology prompted companies to incorporate more intuitive and user-friendly designs, expand the number of available services,⁷³ and encouraged dozens of new entrants to the increasingly profitable field.⁷⁴ Mylawyer.com, Inc., one of the earliest providers of online legal document preparation, saw 100% revenue growth in 2003.⁷⁵ Perpetuated by growth and competition, availability of certain legal document and information services grew dramatically while costs to consumers shrank.

Since 2007, ILPs have become progressively larger and more sophisticated. Significantly, many ILPs have made advancements from standardized forms to automated document assembly.⁷⁶ Instead of providing pro-forma documents in a printable format, users can now enter relevant information in intuitive and user-friendly prompts, and the Internet software converts user submissions into court-ready documents. Web

69. Johnson, *supra* note 13, at 260.

70. *Id.*

71. *Id.*

72. *Id.* at 261.

73. *Id.*

74. See, e.g., COMPLETE CASE, <http://www.completecase.com> (last visited Oct. 31, 2012) (online divorce); LEGALZOOM INC., <http://www.legalzoom.com> (last visited Oct. 31, 2012) (online wills, divorce, incorporations); SMARTLEGALFORMS, <http://www.smartlegalforms.com> (last visited Oct. 31, 2012) (online divorce, bankruptcy, incorporations, wills).

75. Richard S. Granat, On-Line Legal Services for Low and Moderate Income Clients: Private Market Solutions to Meeting Legal Needs 3 (June 19, 2003) (unpublished manuscript), available at http://www.ilagnet.org/conference/general2003/papers/richard_granat.pdf.

76. See, e.g., RAPIDOCs, <http://www.epoq.co.uk/document-automation/> (last visited Oct. 31, 2012).

companies like Nolo and Rocket Lawyer generate hundreds of thousands of these prepared documents for consumers every year.⁷⁷ LegalZoom claims to have prepared a million wills since its founding.⁷⁸

Beyond document preparation, companies such as “Total Attorneys” are establishing virtual law offices on the Internet.⁷⁹ These websites facilitate attorney-client interactions to create and modify documents, share calendars, and monitor billing.⁸⁰ Other sites, such as JustAnswer⁸¹ and LawGuru,⁸² allow users to ask a legal question, and get an answer, (sometimes) from a lawyer.⁸³ As the ILP industry has grown, so too have its profits; LegalZoom is estimated to have earned \$250 million in revenue in 2011.⁸⁴ Consumers are benefiting as well, using these products as affordable alternatives to hiring an attorney.⁸⁵

As the number of people using the Internet to transact business increases, so too does the demand for online legal services. In January 2009 alone, an estimated 4.5 million individuals used an Internet legal webpage for advice and solutions.⁸⁶ Although the precise demand is unknown, the trend towards

77. Laurel S. Terry, *The Legal World Is Flat: Globalization and Its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 NW. J. INT'L L. & BUS. 527, 538 (2008) (noting that Nolo's and Quicken Willmaker Plus's sales increased nearly thirty-three percent in 2006 and that LegalZoom has served 500,000 people since 2000).

78. Richard S. Granat, President, DirectLaw, Inc., Co-Chair, ABA's eLawyering Task Force, Address at the American Bar Association Commission on Ethics 20/20, Online Legal Services: The Future of the Legal Profession 18 (Feb. 5, 2010), available at <http://www.abanet.org/ethics2020/submissions.pdf>.

79. See, e.g., TOTAL ATTORNEYS, <http://www.totalattorneys.com/> (last visited Oct. 31, 2012); LEGAL ACCESS MGMT. GROUP, <http://www.virtuallawoffice.net> (last visited Oct. 31, 2012).

80. See TOTAL ATTORNEYS, *supra* note 79.

81. JUST ANSWER, <http://www.justanswer.com/> (last visited Oct. 31, 2012).

82. LAW GURU, <http://www.lawguru.com/> (last visited Oct. 31, 2012).

83. Attorneys participate in this arena to exhibit proficiency and presumably to find clients. William Hornsby, *Challenging the Legal Academy to a Dual (Perspective): The Need to Embrace Lawyering for Personal Legal Services*, 70 MD. L. REV. 420, 428 (2011).

84. *The 100 Most Valuable Startups in the World, Revamped and Revised*, BUS. INSIDER (Oct. 7, 2011), <http://www.businessinsider.com/2011-digital-100>.

85. See, e.g., BY THE PEOPLE SAN LEANDRO, <http://www.bythepeoplesl.com> (last visited Oct. 31, 2012) (advertising savings of fifty-seventy percent over in-person attorney's fees).

86. Stephanie L. Kimbro, Esq., Owner, Kimbro Legal Services, LLC, Co-founder, Virtual Law Office Technology, LLC, Technology Evangelist, Total Attorneys, Address at the American Bar Association Commission on Ethics 20/20, Virtual Law Practice: Taking All or a Portion of Your Practice Online 24 (Feb. 5, 2010), available at <http://www.aba.net.org/ethics2020/submissions.pdf>.

ILPs is taking place within the increased size and scope of modern web-based technology more generally.⁸⁷ By some counts, there are roughly 1.25 billion unique Internet users who have access to more than 600 billion distinct webpages (there were fewer than 40 million Internet users in 1996).⁸⁸ Today's consumers use the Internet for medical diagnoses,⁸⁹ to order prescription medications,⁹⁰ conduct business,⁹¹ perform stock trades,⁹² or close on a loan or mortgage.⁹³ As one author notes, "[s]oftware and Internet services are eroding the territory that was once the exclusive domain of many professionals, including physicians, accountants, bankers, and brokers."⁹⁴ Attorneys are notably omitted from this list.

Unfortunately, significant demand for legal services by low and middle-income individuals continues to go unmet despite the emergence of ILPs.⁹⁵ The situation has worsened in the wake of the recession beginning in 2008, which reduced legal aid in many states.⁹⁶

C. THE INTERACTION BETWEEN UNAUTHORIZED PRACTICE RULES AND ILPS

The growth in ILPs poses a significant challenge to the local nature of legal practice regulation. Constitutionally, the federal government has authority under the Commerce Clause to regulate the Internet, which presumptively includes ILPs.⁹⁷

87. Fischer, *supra* note 11, at 123.

88. RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 19 (2008).

89. See, e.g., Stephanie Clifford, *Two Online Health Site Operators to Announce a Merger*, N.Y. TIMES, Oct. 3, 2008, at C2, available at <http://www.nytimes.com/2008/10/03/business/03deal.html?ref=webmdhealthcorporation>.

90. See Greg Miller, *A Turf War of Professionals vs. Software*, L.A. TIMES, (Oct. 21, 1998), <http://articles.latimes.com/1998/oct/21/news/mn-34752>.

91. *Id.*

92. See, e.g., E-TRADE, www.etrade.com (last visited Oct. 31, 2012).

93. See Miller, *supra* note 90.

94. Fischer, *supra* note 11, at 123.

95. Ashby Jones, *Lean Times at Legal Aid*, WALL ST. J. L. BLOG (Jan 7, 2011, 9:33 AM), <http://blogs.wsj.com/law/2011/01/07/lean-times-at-legal-aid/>.

96. See *id.*; see also Painter, *supra* note 15, at 45 (citing ABA Coal. for Justice Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in Courts, <http://www.americanbar.org/content/dam/aba/migrated/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.authcheckdam.pdf>) (stating that unrepresented litigants have increased, which has negatively affected the outcomes of their litigation).

97. U.S. CONST. art. 1, § 8, cl. 3. For a general discussion of exclusive federal government regulation of the Internet under the commerce clause, see

Yet this federal power invariably conflicts with traditional state regulation of the unauthorized practice of law. Practically, territorial limits of unauthorized practice statutes clash with increased demands for business mobility and the multi-jurisdictional nature of Internet legal resources.⁹⁸ These challenges have led many state bar associations to resist the expansion of ILPs through lawsuits and strengthened unauthorized practice of law statutes.⁹⁹

Confrontation between legal self-help mechanisms and practice of law regulation traces its roots to self-help books and legal kits, which gained popularity in the 1960s and 1970s.¹⁰⁰ After decades of controversy and contradictory court opinions, a majority of jurisdictions today do not classify the use of self-help kits as the practice of law.¹⁰¹ To determine whether the practice of law exists, these jurisdictions focus on the existence of a personal relationship and if the consumer receives tailored information.¹⁰² Though courts have found that books and kits lack these elements, they are not so obviously absent in online legal software.¹⁰³ As a result, and considering the popularity and potential benefits of Internet legal resources, regulation of legal self-help mechanisms have attracted the attention of courts and scholars.

As ILPs are relatively new, there is little case law on unauthorized practice statutes application to Internet legal resources.¹⁰⁴ Indeed, most instances of unauthorized practice enforcement against ILPs have resulted in settlements.¹⁰⁵ In the

Dan L. Burk, *How State Regulation of the Internet Violates the Commerce Clause*, 17 CATO J., no. 2, 1997 at 147, 153–60 (1997), available at <http://www.cato.org/pubs/journal/cj17n2/cj17n2-2.pdf>.

98. See Lewis & Braverman, *supra* note 19, at 26.

99. See *e.g.*, Fischer, *supra* note 11, at 130 (“A leading method of keeping a check on this rapidly-evolving market is heightened enforcement of regulations against the unauthorized practice of law.”).

100. For a history on legal self-help books, do-it-yourself kits and the unauthorized practice of law, see French, *supra* note 11, at 101–07.

101. See Blades & Vermynen, *supra* note 10, at 651 (stating that use of self-help kits does not meet the “personalized contact” requirement to qualify as the practice of law in a majority of jurisdictions).

102. See *supra* Part I.A.4.

103. French, *supra* note 11, at 115.

104. Blades & Vermynen, *supra* note 10, at 651.

105. See, *e.g.*, *Janson v. LegalZoom.com, Inc.*, 271 F.R.D. 506, 510 (W.D. Mo. 2010) (discussing a class action lawsuit involving 14,000 litigants which resulted in settlement); see also Carrie Weimar, *DIY Stores Walk Fine Line Between Law Help, Outlaw*, ST. PETERSBURG TIMES, Mar. 19, 2007, http://www.sptimes.com/2007/03/19/Southpinellas/DIY_legal_stores_walk.shtml

leading court test of ILPs, the Texas Bar's unauthorized practice of law committee filed suit in U.S. District Court in Texas alleging that Parson Technology, Inc., owner of the product Quicken Family Lawyer, engaged in the unauthorized practice of law by providing software that generated legal documents.¹⁰⁶ The court ruled for the petitioner bar association, characterizing the software as a "cyberlawyer," and enjoined its sale in Texas.¹⁰⁷ Before the case was heard on appeal, the Texas legislature changed the definition of unauthorized practice of law to state: "[T]he practice of law does not include the design, creation, publication, distribution, display, or sale . . . [of] 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."¹⁰⁸ The Texas Legislature's action may reveal broader attitudes that align ILP regulation with that of permissible self-help kits.¹⁰⁹

Nevertheless, numerous practice-of-law committees continue to claim that ILPs are significantly different than books and kits, and find that the more interactive ILPs amount to the practice of law.¹¹⁰ One author argues that the "[a]pplication of . . . [traditional] tests would, under traditional [unauthorized practice of law (UPL)] concepts, result in a ban on interactive

(discussing a 2006 settlement for \$90,000 between "We The People" and the State of Tennessee for alleged violations of the unauthorized practice of law). *But see, e.g.*, Ohio State Bar Ass'n v. Martin, 886 N.E.2d 827, 835 (Ohio 2008) (issuing an injunction and imposing civil penalties against "We The People" for engaging in authorized practice of law).

106. Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999).

107. *Id.*

108. Texas H.R. 1507, 1999 Leg., 76th Sess. (Tex. 1999).

109. *See* Palomar, *supra* note 55, at 431 (pointing out that "[s]everal state courts and legislatures, as well as both the Federal Trade Commission and the United States Department of Justice, have declined to accept mere assumptions as grounds for permitting unauthorized practice laws to restrict lay providers' right to pursue their occupations and the public's right to choose" (citation omitted)).

110. *See, e.g.*, Douglas S. Malan, *Picking a Fight Against Online Competition*, 35 CONN. L. TRIB., no. 50, Dec. 14, 2009, at 5 (quoting Louis Pepe, Chair of the Connecticut Bar Association Task Force, who believes that LegalZoom and "[similar] websites are breaking the law by providing legal services in a state in which they are not licensed to practice"). In late 2009, the Connecticut Bar Association lobbied the state judiciary committee on a proposed bill that would make the unauthorized practice of law a felony rather than a misdemeanor. *Id.*

legal software.”¹¹¹ ILPs, specifically LegalZoom, share this concern, which often settles unauthorized practice claims to avoid adverse case law that could potentially eliminate its industry.¹¹² Significantly, these fears may prevent investment which can move the industry forward,¹¹³ and provide the innovation and utility which exists in other online industries.

II. OUTDATED UNAUTHORIZED PRACTICE STATUTES STIFLE THE IMPORTANT GROWTH OF ILPS

Harm resulting from the unauthorized practice of law is historically overstated.¹¹⁴ Parallel advancements in information technology and consumer sophistication make prospective injury even more remote today.¹¹⁵ Ultimately, stifled ILP innovation is a troubling consequence of preserving outdated unauthorized practice rules.¹¹⁶ Today, ILPs lag behind other industries’ online proficiencies and underutilize technology’s potential to increase access and efficiency in the justice system.

A. SHAKY FOUNDATION: PRESERVING UNAUTHORIZED PRACTICE OF LAW STATUTES WITH OUTDATED RATIONALES

Despite the legal profession’s trepidation over non-lawyer products and services,¹¹⁷ there is little evidence that unauthorized practice poses a significant danger to consumers.¹¹⁸ A study of 144 reported unauthorized practice cases from 1908 to 1969 concluded that only twelve involved “specific injury.”¹¹⁹ Bar committees initiate a vast majority of unauthorized practice ac-

111. Cynthia L. Fountaine, *When is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment*, 71 U. CIN. L. REV. 147, 151 (2002).

112. Cf. Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 250 (2000) (discussing a Merrill Lynch settlement for “twice the amount of the federal tax liability dispute” to avoid adverse Tax Court precedent).

113. See Granat, *supra* note 78, at 12.

114. See Fischer, *supra* note 11, at 139 (stating “there is strikingly little case law involving injury to individuals from unauthorized practice [of law]”).

115. See *id.* at 144–45.

116. See Granat, *supra* note 78, at 13 (stating that “the threat of a charge of [unauthorized practice of law] can chill innovation”).

117. See *supra* Part I.A.2.

118. See Hoppock, *supra* note 22, at 725–26.

119. Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 203 n.235 (1980).

tions to investigate *potential* injuries, as opposed to individuals alleging concrete harm.¹²⁰ In fact, one study found that only two percent of unauthorized practice inquiries, investigations, and complaints arise from consumer complaints.¹²¹ The same study concluded that only eleven percent of reported unauthorized practice cases involving laypersons followed from any injury at all.¹²² Evidence regarding harmful effects of laypersons utilizing ILPs is equally sparse.¹²³ Recent cases involving TurboTax¹²⁴ and LegalZoom¹²⁵ further this claim, as petitioners in both cases relied almost exclusively on unauthorized practice of law regulations for their respective causes of action. This fact alone is not dispositive, though the conspicuous lack of alleged harms strongly suggests that the often repeated traditional consumer protection rationale may be misplaced.

In addition, traditional unauthorized practice justifications are ill-adapted for contemporary consumers, who can instantaneously access information on virtually any topic. Though this information may not be comprehensive, the ability to obtain vast quantities of information with unprecedented ease certainly improves consumer savvy.¹²⁶ Unauthorized practice statutes assume a pre-Internet level of naivety that simply no longer exists for growing numbers of sophisticated computer users. Individuals seeking legal services can benefit from the experience of past purchasers. Reputation systems allow buyers to leave comments on websites grading the service they received or stating their level of product approval.¹²⁷ “AngiesList.com” for home services and “Superlawyers.com” for attorneys are examples of profitable reputation systems modeled on reliable and unadul-

120. *Id.* at 203; *see also* ABA Standing Comm. on Client Prot., *supra* note 47, at 1–2.

121. Rhode, *supra* note 25, at 43.

122. *Id.*

123. Blades & Vermylen, *supra* note 10, at 651; *see* Fischer, *supra* note 11, at 140.

124. Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956, 956 (5th Cir. 1999).

125. Janson v. LegalZoom.com, Inc., 271 F.R.D. 506, 508 (W.D. Mo. 2010).

126. Stefanie Olsen, *Intelligence in the Internet Age*, CNET NEWS (Sept. 19, 2005, 4:00 AM), http://news.cnet.com/Intelligence-in-the-Internet-age/2100-11395_3-5869719.html (“What’s undeniable is the Internet’s democratization of information. It’s providing instant access to information and, in a sense, improving the practical application of intelligence for everyone.”).

127. *See, e.g.*, ANGIE’S LIST, <http://www.angieslist.com/howitworks.aspx> (last visited Oct. 31, 2012).

terated consumer reviews.¹²⁸ The success of these companies suggests that a similar reputation and rating system would likely develop for advanced ILPs. These reputation and rating systems would direct consumers to reliable legal resources and provide important information to create knowledgeable, capable, and savvy consumers of ILPs. As the ABA itself has recognized: “[W]hen consumers know the pros and cons of the choices of assistance, they will make reasonable ones with which government need not unduly interfere.”¹²⁹

Moreover, market forces create strong incentives for ILPs to create reliable, cost-efficient and non-harmful products. A fundamental justification for strict unauthorized practice statutes is that low-cost, non-attorney services will be inherently low quality.¹³⁰ Yet there is evidence that in many settings, non-attorney resources can provide legal services as effectively, if not more effectively, than lawyers.¹³¹ Economic theory also indicates that increased competition in the online legal market would create “better quality services at lower cost.”¹³² Companies must innovate and increase value to maintain customers, which includes continued implementation of consumer safeguards. A prominent example of this phenomenon is the financial industry, where banks continue to spend millions to add layers of authentication and “toughen encryption schemes.”¹³³ Increasing safety is not merely ethical for these companies, it’s good business. Similar strong market incentives would likely apply to ILPs as well.

Furthermore, outlets for consumer safety already exist within the law. Aggrieved consumers have remedies through

128. *Id.*; SUPERLAWYERS MAG., www.superlawyers.com (last visited Oct. 31, 2012). Superlawyers further the reputation model with independent research, peer nominations, and peer evaluations. *Id.*

129. ABA COMM. ON NONLAWYER PRACTICE, *supra* note 24, at 133.

130. See Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15, 34 (1998).

131. See generally HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK (1998) (studying four different legal settings: unemployment compensation claims appeals, Social Security disability appeals, state tax appeals, and labor grievance arbitrations, and finding that nonlawyers can be effective advocates, in some situations more effective than lawyers).

132. See Pearce, *supra* note 42, at 1273.

133. *Why Customer Authentication Needs to go Straight to the Source*, TRUSTID (Sept. 5, 2012), <http://www.trustid.com/blog/tag/customer-authentication/>; *Visa Unveils Next Step in Authentication Strategy*, CSPNET.COM (Aug. 21, 2012), www.cspnet.com/news/technology/articles/visa-unveils-next-step-authentication-strategy.

malpractice actions grounded in tort,¹³⁴ contract,¹³⁵ and consumer protection laws.¹³⁶ Malpractice remedies already serve as a strong deterrent against unreliable legal advice.¹³⁷ Seen from this perspective, unauthorized practice mechanisms as consumer protection remedies are redundant; existing market forces already incentivize consumer protection, while a variety of legal actions provide significant tools for redress.

The need to regulate ILPs becomes even more problematic when looking at analogous developments in other sectors of our economy that have safely adapted information technology to aid consumers. In this regard, medicine serves as a good example. Over the past decade, the Internet has changed the face of healthcare.¹³⁸ Health-related sites provide highly specific and practical advice on caring for “every imaginable condition from the most routine to the most deadly and complex.”¹³⁹ These sites provide conventional medical advice as well as alternative methods, and provide access to vast medical resources including journals, presentations, and research tools that would otherwise be unclear or difficult to find.¹⁴⁰

134. Hoppock, *supra* note 22, at 727.

135. *Id.*

136. Fischer, *supra* note 11, at 145.

137. See generally Tom W. Bell, *Limits on the Privity and Assignment of Legal Malpractice Claims*, 59 U. CHI. L. REV. 1533, 1534–45 (1992).

138. Pam R. Rajendran, *The Internet: Ushering in a New Era of Medicine*, 285 MS JAMA 804, 804 (2001), available at <http://jama.jamanetwork.com/data/Journals/JAMA/4771/JMS0214.pdf>.

139. Michael S. Goldstein, *The Persistence and Resurgence of Medical Pluralism*, 29 J. HEALTH POL. POL'Y & L. 925, 936 (2004); see also P. Greg Gulick, *E-Health and the Future of Medicine: The Economic, Legal, Regulatory, Cultural, and Organizational Obstacles Facing Telemedicine and Cybermedicine Programs*, 12 ALB. L.J. SCI. & TECH. 351, 355–56 (2002) (describing the emerging “e-health” industry and the increasing use of the Internet by patients to consult medical information and advice). See generally Barbara J. Williams, *Virtual Web Wave of the Future: Integration of Healthcare Systems on the Internet*, 76 N.D. L. REV. 365 (2000) (exploring the rise of the medical community’s use of computer information systems).

140. Goldstein, *supra* note 139, at 936. An enormous volume of users visit these sites; statistics show that up to 55 percent of all Internet users access online health information. See Matthew Breckons et al., *What Do Evaluation Instruments Tell Us About the Quality of Complementary Medicine Information on the Internet?*, 10 J. MED. INTERNET RES. e3 (2008), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2483844>. As a result, the industry is growing. WebMD claimed more than \$570 million in revenue for 2010. See YAHOO FIN. WEBMD HEALTH CORP., <http://finance.yahoo.com/q/ks?s=WBMD> (last visited Oct. 31, 2012). Within the past year, researchers at Mayo Clinic and I.B.M. launched a website for collaboration in the tools used for searching records and data stores of all kinds in medicine. See Steve Lohr,

Many believe online healthcare technology has revolutionized the industry for the better. Personalized Internet medical services such as “telemedicine,” where a doctor receives patient information and disburses medical advice online, have been tremendously successful.¹⁴¹ A number of scholars point out that telemedicine plays an instrumental role in alleviating current health care crises in the United States.¹⁴² Scholars also consider web-based diagnostic services an important medical advancement. The *New York Times Magazine* review of the Mayo Clinic’s online “Symptom Checker” stated, “[w]hat you’ll get is: No hysteria. No drug peddling. Good Medicine. Good ideas.”¹⁴³ Furthermore, experts have conducted significant research on the reliability of these websites¹⁴⁴ and numerous non-profit foundations and agencies monitor online medical advice, and provide analytics and advice for consumers.¹⁴⁵ Though there are certainly concerns about medical advice on the Internet, there is a general consensus that the benefits of online medical resources outweigh the risks.¹⁴⁶ It is thus especially interesting that the capabilities of these on-line medical systems are well beyond those of existing ILPs, in quality, depth, and personalized service.

As in law, the online delivery of medical advice and financial services has significant potential for abuse. Why then are consumers permitted to entrust their health and wealth to the Internet, yet when it comes to drafting an uncontested divorce, the risk is simply too great? Diagnostic legal websites, which are currently illegal in every state, would presumably operate and function similarly to their medical counterparts. Advanced

Health Care Industry Moves Slowly onto the Internet, N.Y. TIMES BLOG (Apr. 5, 2009, 1:35 PM), <http://bits.blogs.nytimes.com/2009/04/05/health-care-industry-moves-slowly-onto-the-internet>.

141. See Amar Gupta & Deth Sao, *The Constitutionality of Current Legal Barriers to Telemedicine in the United States: Analysis and Future Directions of Its Relationship to National and International Health Care Reform*, 21 HEALTH MATRIX: J. LAW-MED. 385, 389 (2011).

142. See *id.*

143. Virginia Heffernan, *A Prescription for Fear*, N.Y. TIMES MAG. (Feb. 4, 2011), <http://www.nytimes.com/2011/02/06/magazine/06FOB-Medium-t.html>.

144. See, e.g., *id.*

145. E.g., HEALTH ON NET FOUND., <http://www.hon.ch/> (last visited Oct. 31, 2012); MED. LIBR. ASS’N, <http://mlanet.org/> (last visited Oct. 31, 2012); NAT’L LIBR. MED., <http://www.nlm.nih.gov/medlineplus/webeval/webeval.html> (last visited Oct. 31, 2012).

146. See Gupta & Sao, *supra* note 141, at 386–88; see also Susan E. Volkert, *Telemedicine: Rx for the Future of Health Care*, 6 MICH. TELECOMM. & TECH. L. REV. 147, 153 (2000).

ILPs would apply facts to the law; suggest legal precedents, statutes, available legal actions and attorneys. Consumers would see such material as background information and *suggestive* action. Indeed, individuals do not reflexively transport themselves to an operating table simply because a website told them they have serious heart disease. The information triggers a process, and empowers the consumer to seek remedies or professionals if necessary. Ultimately, there is little market evidence that online legal resources pose a significant danger to consumers. Individuals receive protection through unprecedented access to information, redress through malpractice actions, and market forces which promote creating and maintaining safe and reliable products.

B. UNAUTHORIZED PRACTICE OF LAW STATUTES INHIBIT ILP INNOVATION

The legal bar's general concern with "public interest" neglects other important public priorities such as freedom of choice, encouraging market-based innovations, and more widely available legal services.¹⁴⁷ Current legislative pressures to create new regulatory measures for the Internet also inhibit important investment in, and development of, advanced Internet resources.¹⁴⁸ Consequently, bar associations and legislatures defend themselves from new advances with strict unauthorized practice rules, rather than embrace them with innovative ways to deliver legal services.¹⁴⁹

As technology advances, some experts envision cutting-edge online systems which can diagnose and analyze legal issues, provide basic advice and information, and generate relevant court-ready documents.¹⁵⁰ The development of such valuable systems is capital intensive, and large investments of this type typically come from non-attorney businesses.¹⁵¹ Penetrating consumer legal markets likely requires collaboration with professionals in marketing, finance, system engineering and project management.¹⁵² Yet as one ABA journalist comments:

147. See Christensen, *supra* note 119, at 201–02.

148. See Fischer, *supra* note 11, at 148.

149. See SUSSKIND, *supra* note 88, at 99.

150. See Granat, *supra* note 78, at 12; see also Johnson, *supra* note 13, at 278–79.

151. See Granat, *supra* note 78, at 12.

152. William D. Henderson & Rachel M. Zahorsky, *Paradigm Shift*, A.B.A. J., no. 7, 2011 40, 45–47.

“Few lawyers have the time, financial wherewithal or risk tolerance to play in this league.”¹⁵³ Attorneys are simply unwilling, or unable, to invest the necessary resources to create the type of advanced systems to succeed in the consumer-driven Internet market.¹⁵⁴ As a result, advanced ILPs by non-attorney corporations, who are more familiar with this type of risky investment and specialized entrepreneurship, are likely to produce such services.¹⁵⁵

Nevertheless, unclear and inconsistent unauthorized practice rules create confusion among attorneys, individuals, and businesses alike. Historically, legal uncertainty affects investors’ willingness to invest in any industry.¹⁵⁶ The potential for regulation from fifty fluctuating sets of rules thus discourages investors interested in online legal space.¹⁵⁷ One entrepreneur familiar with venture investment in online legal resources stated that vague unauthorized practice rules were the “single most debilitating factor” for the efficient creation of online legal resources.¹⁵⁸ That same entrepreneur argued that adjustments made to act in accordance with these rules “decreased the utility of the product significantly.”¹⁵⁹

Indeed, judicial decisions or legislative resolutions may be necessary “to clear the Internet’s murky waters” before companies engage in the research and development essential to create

153. See *id.*; see also SUSSKIND, *supra* note 88, at 254 (“Just as librarians did not create Google, lawyers may not create tomorrow’s innovations in legal practice.”).

154. See Henderson & Zahorsky, *supra* note 152 (arguing that the traditional law firm billing structure prevents the risk-taking and experimentation that is necessary for innovation).

155. See *supra* Part I.A.4.

156. See generally Sophie Manigart et al., *Determinants of Required Return in Venture Capital Investments: A Five-Country Study*, 17 J. BUS. VENTURING 291, 298 (2002), available at <http://www.sciencedirect.com/science/article/pii/S0883902600000677> (“Differences in the institutional, legal and cultural environment, and in dominant corporate governance systems may significantly influence the conduct of business.” (citation omitted)).

157. See, e.g., Skype Interview with Tanner Doe, Entrepreneur (Nov. 17, 2011) (on file with author) (stating in reference to online legal space that “many people [are] waiting on the sidelines before they dive in”) [hereinafter Interview with Tanner Doe]; see also Skype Interview with Erin Doe, Entrepreneur (Nov. 16, 2011) (on file with author) (discussing roadblocks to entrepreneurs interested in providing online legal services). Both individuals wished to remain anonymous due to the current nature of their employment. Each individual receives a pseudonym here.

158. Interview with Tanner Doe, *supra* note 157, at 13:12.

159. *Id.* at 11:34.

advanced ILP services.¹⁶⁰ Yet state legislatures and courts alike have been reluctant to promulgate explicit rules regarding the unauthorized practice of law.¹⁶¹ Fears of adverse precedent motivate industry players to work against definitive decisions as well. Since their emergence, ILPs have preferred settlements over potentially clarifying adjudications.¹⁶² The cyclical result perpetuates ambiguity, which in turn inhibits new investment in more advanced systems.¹⁶³

Additionally, unauthorized practice rules divert ILP development away from those who most need it. ILPs spend significant resources to defend unauthorized practice lawsuits, which focuses their resources away from investment.¹⁶⁴ More specifically, the current legal landscape largely tolerates existing ILP document preparation services, such as wills and incorporation documents, as well as lawyer referral networks.¹⁶⁵ Yet the bulk of those who need legal assistance, and cannot afford it, require legal diagnostic systems and responsive legal information, not forms for wills and business incorporation documents.¹⁶⁶ Unfortunately, further development of existing services fails to ad-

160. Marc L. Caden & Stephanie E. Lucas, *Accidents on the Information Superhighway: On-Line Liability and Regulation*, 2 RICH. J.L. & TECH. 3, 101 (1996).

161. One exception is the Texas state legislature. See TEX GOV'T CODE ANN. § 81.101 (West 2005).

162. See, e.g., *Janson v. LegalZoom.com, Inc.*, 271 F.R.D. 506, 510–11 (W.D. Mo. 2010) (class action lawsuit involving 14,000 litigants which resulted in settlement); see also *Weimar*, *supra* note 105 (discussing a 2006 settlement for \$90,000 between Internet legal services provider “We The People” and the State of Tennessee regarding allegations of unauthorized practice of law). *But see*, e.g., *Ohio State Bar Ass'n v. Martin*, 886 N.E.2d 827, 835 (Ohio 2008) (issuing an injunction and imposing civil penalties against “We The People” for engaging in unauthorized practice of law).

163. See generally *Manigart et al.*, *supra* note 156 (discussing the reasons behind venture capitalist investment).

164. See, e.g., *Janson*, 271 F.R.D. at 508; see also *Painter*, *supra* note 15, at 55–56 (“Several state bar associations, including Connecticut’s, have begun investigations of online providers of legal documents.”).

165. Some document preparation services have successfully litigated against unauthorized practice regulation. As a result, a majority of current ILPs focus their products in this arena. See *supra* Part I.B–C.

166. Ronald W. Staudt, *Technology, the Courts and Self-represented Litigants* (June 18, 2003) (unpublished manuscript), available at <http://ilganet.org/conference/general2003/papers/staudt.pdf> (arguing that serving self-represented litigants requires “reengineering, total quality management, personalized segments of one, supply side value chains and net communities”). The unaddressed needs discussed by Mr. Staudt are strikingly similar to those of individual healthcare. The online medical industry increasingly meets such needs. See discussion *supra* Part II.A.

dress these significant needs. In the end, unauthorized practice rules deter vital corporate investment in ILP systems, and inhibit the potential for ILPs to aid all actors in the legal system.

C. THE BENEFITS OF INTERNET LEGAL RESOURCE ADVANCEMENT

ILP advancement is likely to help consumers, underprivileged litigants, courts, and attorneys. ILPs will likely accomplish this with two broad categories of innovation: commoditization of legal services and unbundling of legal services.¹⁶⁷ The commoditization of legal services homogenizes easily replicated legal tasks, and packages these tasks for quick and inexpensive delivery to customers.¹⁶⁸ Routine output of legal documents and information lowers production costs as it is unnecessary to retain a new billing attorney for every unique matter. Advanced diagnostic systems analyze similar situations and issues, and can disseminate information for nearly every fact pattern. The unbundling of legal services separates the historically comprehensive legal package into distinct sections.¹⁶⁹ The consumer is then capable of purchasing only those services that he or she needs.¹⁷⁰ This process has the potential to eliminate retainers, lower fees, and give consumers more control to determine exactly what they need from a legal services provider.¹⁷¹

With these innovations in mind, ILPs lower legal costs and increase access to legal services for all consumers. There are a number of situations where the lives of most non-lawyers would benefit from legal assistance.¹⁷² Nevertheless, getting legal advice today seems “too costly, excessively time consuming, too cumbersome and convoluted, or just plain scary.”¹⁷³ ILPs’ abilities to address these issues, by efficiently and cheaply delivering legal guidance via the Internet may change this mentali-

167. See Johnson, *supra* note 13, at 262–63.

168. See *id.* at 262.

169. See Forrest S. Mosten, Unbundle Your Practice, GPSOLO, no. 18, 2001, 22, 22–23.

170. See *id.*

171. See *id.* at 26–27. The unbundled service allows clients to control their legal work on a pay-as-you-go basis, potentially eliminating expensive retainers. See *id.* at 26.

172. Consider fender-benders, drafting a will, petty crimes or getting a divorce. In Connecticut, “80 to 85 percent of divorces have a self-represented party, because most families can’t afford to hire one lawyer, let alone two.” Henderson & Zahorksy, *supra* note 152, at 42 (quoting another source).

173. SUSSKIND, *supra* note 88, at 234.

ty.¹⁷⁴ Furthermore, traditional legal service is reactive in nature—people seek out lawyers to respond to situations around them. Yet most individuals would certainly choose to avoid legal issues rather than resolve them through attorneys and the justice system. As on scholar aptly stated, “most people would surely prefer a fence at the top of the cliff rather than an ambulance at the bottom.”¹⁷⁵ To the extent that ILPs can provide access to inexpensive and extensive legal guidance, before an attorney is traditionally required, ILPs create a new *preventative* market for consumer driven legal services.¹⁷⁶ In this way, ILPs should create a “more just society in the same way that immunization leads to a healthier community.”¹⁷⁷ Presumably, attorneys employ similar knowledge on a daily basis to avoid disputes. As such, ILPs have the potential to democratize legal prevention by distributing legal guidance traditionally reserved for trained attorneys with vast resources.

In addition, ILP development is especially significant for individuals who cannot afford legal assistance under the traditional face-to-face model.¹⁷⁸ This population includes the lower middle class earn enough money to be disqualified from public aid but who cannot afford an attorney. According to a 2009 ABA committee report, sixty-two percent of surveyed U.S. judges said the lack of legal representation harmed parties before them and that litigants are “generally doing a poor job of representing themselves.”¹⁷⁹ Though there is not yet substantial empirical evidence that advanced ILPs would comprehensively fix this problem, some legal help for this population is surely better than none. ILPs provide convenient low cost legal advice and help fill the gap left by overworked and reduced legal aid

174. *See id.* (“[T]his market will be liberated by the availability of straightforward, no-nonsense, online . . . systems . . . [that] will provide affordable, easy access to legal guidance.”).

175. *Id.* at 231.

176. *See id.* at 231–32.

177. *Id.* at 231.

178. *See Painter, supra* note 15, at 54; *see also* Erik Eckholm, *Interest Rate Drop Has Dire Results for Legal Aid*, N.Y. TIMES, Jan. 18, 2009, <http://www.nytimes.com/2009/01/19/us/19legal.html?pagewanted=all> (“[R]equests for [legal aid group] services have risen by 30 percent or more.”).

179. Painter, *supra* note 15, at 45. Professor Painter based this opinion on a 2010 ABA report in which sixty-two percent of judges agreed that a lack of representation generally results in worse outcomes. *See* LINDA KLEIN, ABA COAL. FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS 3 (2010).

services.¹⁸⁰ Individuals who live in isolated areas or who have restricted mobility can also use ILP services. The availability of legal services, without engaging an attorney, may encourage individuals to seek legal guidance who would otherwise be afraid to seek such advice in person.¹⁸¹

ILP advancement can also aid the overburdened court system. The 2010 ABA report by the ABA Coalition for Justice found that seventy-eight percent of judges believe a lack of representation to these parties negatively impacts the court system,¹⁸² Ninety percent of those judges said that court procedures slow, and seventy-one percent of judges said that pro se litigants use more staff time for assistance.¹⁸³ Addressing this problem, scholar Robert Staudt concluded that “[m]any of the information processing and customer relationship management tools of modern business could be applied to the challenges courts face as they struggle to improve customer service to self-represented litigants.”¹⁸⁴ To the extent that ILPs provide inexpensive resources and a wealth of individualized information, the court administration will see litigants who are more prepared.

Though the legal profession generally greeted ILPs with a hostile reception, there is reason to believe that the new technology can aid attorneys as well. First, law firms and solo practitioners can utilize ILPs to aid their practice. In document-heavy practice areas, for example, new technology may reduce unit cost and profit per document, but it could dramatically increase volume, leading to higher profitability.¹⁸⁵ Attorneys could save time and resources by allowing ILPs to apply unique client information to pro forma documents. Second, automating tasks allows attorneys to focus on more challenging and multifaceted issues.¹⁸⁶ Third, ILPs have the potential to introduce new consumers into the legal system.¹⁸⁷ In this way, ILPs likely supplement the legal market for attorney services, not supplant

180. See Jones, *supra* note 95.

181. See Blades & Vermylen, *supra* note 10, at 653. This is especially important considering the broad mistrust of the legal profession. See, e.g., Granat, *supra* note 78, at 2.

182. See KLEIN, *supra* note 179, at 4.

183. See *id.*

184. Staudt, *supra* note 166, at 5.

185. See SUSSKIND, *supra* note 88, at 36.

186. See Johnson, *supra* note 13, at 282.

187. See *id.* at 279–82.

it.¹⁸⁸ Many ILPs will likely continue to refer clients to attorneys for specific, more complex matters.¹⁸⁹ ILPs may also lower the attorney intimidation factor, and increase consumer interest in legal remedies for their daily problems.¹⁹⁰ Regardless of these potential benefits, ILPs, even in their most advanced form, are unlikely to replace many of the more profitable legal services such as complex corporate transactions and factually complex litigation.¹⁹¹ Like good doctors, there will always be a market for skilled attorneys.¹⁹²

Despite these strong justifications for eliminating current unauthorized practice rules, some regulation of online legal resources is still necessary. Some commentators argue that the Internet actually increases the potential harm from unauthorized practice of law because the new medium exposes a larger audience to a wider variety of potential abuses.¹⁹³ Inaccurate legal advice delivered over the Internet can indeed seriously harm consumers.¹⁹⁴ Widespread Internet use and minimal transparency only intensifies this concern. Furthermore, because existing state rules of professional conduct generally only regulate attorneys, ILPs carry no protection against conflicts of interest and breaches of confidentiality by non-attorney ILPs.¹⁹⁵ For example, courts could force non-lawyers to testify about potentially sensitive communications between ILPs and consum-

188. See *id.* at 282 (“To the extent that [ILPs] bring [new] consumers into the legal system, they expand the market rather than shift it away from attorneys.”).

189. See, e.g., *id.* at 283 (discussing several ILPs that have implemented attorney referral services).

190. See *id.* at 268–69 (arguing that ILPs will allow consumers to overcome their fear and mistrust of lawyers, and “gain comfort with legal assistance at their own pace”).

191. See *id.* at 282 (“Large firms that handle complex corporate matters will not be seriously affected by [ILPs].”); SUSSKIND, *supra* note 88, at 88 (“[I]n the future, legal service that requires considerable expertise or an ongoing personal touch will still be in demand in the traditional way . . .”).

192. Advanced health websites have not eliminated the need for doctors, but it may have changed some of their traditional functions. See Anna Wilde Mathews, *The Doctor Will Text You Now*, WALL ST. J. (July 9, 2009), <http://online.wsj.com/article/SB10001424052970203872404574257900513900382.html>.

193. See, e.g., Miller, *supra* note 90.

194. See discussion *supra* Part I.A.2.

195. See Underwood, *supra* note 20, at 440 (“[C]lients of nonlawyers practicing law forgo the protection afforded by state rules of professional conduct . . .”).

ers.¹⁹⁶ Adherence to state licensing rules is also not currently required of ILPs.¹⁹⁷ For these reasons, there should be some balanced regulation addressing consumer protection concerns regarding ILPs.

Ultimately, potential benefits to consumers, unprivileged litigants, courts, and even attorneys outweigh even the most serious risks associated with relaxed regulation of ILPs. Important legal services are beyond the financial reach of millions of low-income and middle-income Americans. Harnessing the power of the Internet through ILPs has the power to alleviate this epidemic. Existing market forces, including malpractice actions, corporate success, and modified regulation provide robust alternatives to the outdated and stifling unauthorized practice regime.

III. PROPOSED SOLUTIONS

Fundamental changes are needed to create safe and valuable ILP alternatives to insufficient and inadequate traditional legal services. However, an outright elimination of unauthorized practice statutes is neither a prudent nor a likely solution. Instead, a two-part proposal should be implemented which requires action by the ABA, states, and ILPs: (a) states should adopt a new ABA Model Rule that relaxes unnecessary regulation and advances free-market principles; and (b) ILPs should be required to comply with reasonable state licensing, disclosure, and accreditation requirements.

A. STATES SHOULD ADOPT AN ABA MODEL RULE THAT RELAXES UNNECESSARY REGULATION AND ADVANCES FREE MARKET PRINCIPLES

The ABA should create a new model rule defining the practice of law over the Internet.¹⁹⁸ The rule should, first and fore-

196. *Cf.* *Hunt v. Maricopa Cnty. Emp. Merit Sys. Comm'n*, 619 P.2d 1036, 1041 (Ariz. 1980) (“[T]here is no statutory privilege to protect the confidentiality of communications between an employee and his non-lawyer representative.”).

197. Granat, *supra* note 78, at 12. However, malpractice actions might enforce accountability. *See* John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 105 (1995) (“The time has come to consider legal malpractice law as part of the system of lawyer regulation.”).

198. Indeed, the ABA undertook a similar task in 2002 by attempting to revise the unauthorized practice rule, yet failed to do so. *See* Underwood, *supra* note 20, at 449–50.

most, separate the jurisdictional regulation of attorneys¹⁹⁹ from the regulation of multi-jurisdictional ILPs. Establishing specific rules for ILPs will eliminate confusion for attorneys, consumers, and courts, and provide incentives for investment by companies currently reluctant to invest in this highly uncertain legal terrain.²⁰⁰ Specifically, the new ABA rule should legalize document preparation, diagnostic mechanisms, and reactive legal information provided by ILPs, assuming those ILPs comply with reasonable state accreditation and licensure requirements.²⁰¹ Authorizing the sale of non-personalized ILP products, as is now permitted in Texas, is an important first step to achieve this clarity.²⁰² The current reality of allowing these products is that while many providers can sell legal software, they cannot instruct the consumer on how to use it most effectively.²⁰³ New ABA unauthorized practice provisions should thus relax restrictions on personalized features of ILPs as well. For example, diagnostic structures that apply facts to law serve as a linchpin between the individual and Internet legal resources. As in medicine, this feature is critically important to enable consumers to direct intelligibly their research. A relaxed rule will likely spur innovation, creating more advanced, interactive, consumer-friendly systems. This cascading phenomenon is exemplified in the online healthcare industry, where personalized information already helps large numbers of consumers, which in turn spurs more investment.²⁰⁴ There is strong reason to believe this would also take place with free market ILPs, as companies will increasingly enter the legal market “where value is being counted in billions and the current working practices seem antiquated or inefficient.”²⁰⁵ Allowing the market to drive innovation will also balance these services in many respects, as useful products thrive while ineffective or harmful providers wither.

199. MODEL RULES OF PROF'L CONDUCT R. 5.5(a)–(b) (2012).

200. See discussion *supra* Part II.B.

201. See discussion *infra* Part III.B.

202. See TEX GOV'T CODE ANN. § 81.101 (West 2005) (“[T]he ‘practice of law’ does not include the design, creation, publication, distribution, display, or sale . . . [of] 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.”).

203. See Painter, *supra* note 15, at 57.

204. See *supra* Part II.A. and accompanying text.

205. SUSSKIND, *supra* note 88, at 253.

States should adopt a new ABA Model Rule that embraces the potential of the Internet to increase accessibility of legal services. Adoption of the ABA Model Rules of professional conduct is already widespread. To date, California is the only state not to adopt professional conduct rules that follow the format of the ABA Model Rule.²⁰⁶ To be sure, states will have legitimate concerns before they adopt relaxed regulations, especially given the speed and efficiency of the Internet and the potential for significant abuse.²⁰⁷ Advertising and advanced web design can create an impression of reliability, while masking unqualified and potentially harmful legal advice.²⁰⁸ For this reason, and to reduce likely resistance from certain sectors of the organized bar, relaxed regulation of ILPs must be accompanied by meaningful oversight through state licensing and accreditation requirements.

B. ILPs SHOULD BE REQUIRED TO COMPLY WITH REASONABLE STATE LICENSING, DISCLOSURE, AND ACCREDITATION REQUIREMENTS

State licensure and regulation of ILPs is necessary to alleviate the most significant concerns of legal malpractice over the Internet. In order to receive a license, ILPs should be required to comply with reasonable regulations that include a variety of consumer protection standards. For example, disclosure rules could require ILPs to state when a service is not comprehensive. Such disclosure would inform clients about the limitations of ILPs up front, including a warning about the potential harm that often results from misapplied legal advice. For more complicated facts, ILPs should provide background information, while certain facts trigger attorney referrals and more information about ILP limitations. If personalized service by an ILP employee is required, the entity should be required to disclose these individuals to the client. Disclosure of whether lawyers or non-lawyers provided services, and other qualifications of these

206. *Alphabetical List of States Adopting Model Rules*, ABA, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Oct. 31, 2012).

207. See *In re Bernales*, 345 B.R. 206, 219, 226 (Bankr. C.D. Cal. 2006) (concluding that a bankruptcy petition preparer, operating through a website, failed to disclose his limitations as an attorney and gave improper legal advice, resulting in missed court deadlines and “potentially harmful consequences . . .”).

208. See Miller, *supra* note 90.

employees, also should be required. A system of accreditation would oversee compliance and issue licenses. Existing accreditation systems for web-based post-secondary schools,²⁰⁹ which operate in conjunction with the United States Department of Education,²¹⁰ could serve as a potential framework for such Internet oversight.

Accreditation requirements also should include specific protections designed to prevent disclosure of confidential information. This would include advanced scanning systems to prevent malware, and network backup mechanisms. Governing bodies could mandate certain communication rules. For example, customer service agents could be restricted to helping individuals navigate their product, and prohibited from providing specific advice. Regulation also should require ILP employment of a licensed supervising attorney in each jurisdiction in which the ILP sells its product—potentially resulting in numerous supervising attorneys. These individuals would be responsible for providing accurate and up-to-date legal information. Minimum competency requirements, similar to state continuing legal education standards for attorneys,²¹¹ also could be required for non-attorney creators of legal content. ILPs should design these licensure and accreditation requirements to ensure a minimum level of accuracy and accountability.

There is legitimate apprehension that a majority of states may not adopt these proposals; for this reason, some advocate for a national rule to create the uniformity and clarity necessary to effectuate ILP advancement.²¹² A federal statute in particular would create much-needed nationwide uniformity for

209. See, e.g., *Accreditations and Licensures*, U. PHX., http://www.Phoenix.edu/about_us/accreditation.html (last visited Oct. 31, 2012); HIGHER LEARNING COMMISSION, <http://www.ncahlc.org/#ncahlc.org> (last visited Oct. 31, 2012).

210. See *Secretary's Recognition Procedures for State Agencies*, 34 C.F.R. § 603 (2011); *The Database of Accredited Postsecondary Institutions and Programs*, U.S. DEPARTMENT EDUC., <http://ope.ed.gov/accreditation/> (last visited March 8, 2012).

211. See, e.g., *Rules of the Minnesota State Board of Continuing Legal Education*, MINN. BOARD CONTINUING LEGAL EDUC., <http://www.mbcle.state.mn.us/mbcle/pages/rules.asp#rule1> (last visited Oct. 31, 2012).

212. See, e.g., Peter Krakaur, *Internet Advertising: States of Disarray? Are Uniform Rules a More Practical Solution?*, N.Y.L.J., Sept. 15, 1997, at S14 (“Uniform rules would level the field for all lawyers, and provide clear guidance on how to disseminate information to the public.”).

ILP regulations and promote investment in ILP innovation.²¹³ But the regulation of lawyers for generations has been a state function, and federal legislation preempting state law in this arena is unlikely.²¹⁴ State bar associations also would likely resist such federal legislation.²¹⁵ Although a uniform standard is ideal for many reasons, state adoption of an ABA Model Rule establishes a more practical mechanism by which to facilitate much-needed change.

CONCLUSION

A fundamental premise of this Note is that states, lawyers, and the ABA must trust consumers to use legal information safely. Certainly, the speed and wide-spread use of ILPs presents a challenge to the legal profession, which regulates the practice of law to protect the public from the hazards of unqualified legal advice. Yet restricting the delivery of legal services to bar members only is an outdated quality control instrument, creating an unnecessary and harmful scarcity of legal services. Bar associations and state legislatures should not be so entrenched in local conventions as to disregard the clear benefits to the public of increased access to legal services. Democratization of information, which is a fundamental characteristic of the Internet, will over time curb potential injury from unauthorized practice actions. Market forces can drive businesses to create increasingly more reliable and effective legal resources. Malpractice actions will continue to provide meaningful consumer protection in many cases. And reasonable state disclosure and license requirements will serve as an important quality check on the market-driven development of ILPs.

The legal profession is not—and should not be—immune from technology that is transforming all of us in innumerable ways. The legal community, the unauthorized practice commit-

213. Federal regulation would be exercised under Commerce clause power. U.S. CONST. art. 1, § 8, cl. 3. This would preempt inconsistent state law under the Supremacy Clause. U.S. CONST. art. VI., cl. 2. *See also* Burk, *supra* note 97, at 147–60.

214. *See* Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L.J. 969, 969 (1992).

215. State bar associations are very influential in some jurisdictions. *See, e.g.*, Malan, *supra* note 110, at 5 (discussing a report by a Connecticut Bar task force alleging that twenty websites violated Connecticut law by providing legal services without state licensure). Due to this strong influence, relying on states alone will unlikely create the broad, consistent regulation needed to spur innovation.

tees, and state judiciaries should embrace significant advances in ILP technology, and adopt relaxed regulatory schemes with baseline disclosure and accreditation safeguards. By implementing proper safety mechanisms to protect consumers, without substantially limiting the capacity of ILPs to improve delivery of legal services, millions of Americans will, for the first time, be able to enjoy, safely and efficiently, meaningful access to the judicial system.