# POLICING THE SELF-HELP LEGAL MARKET: CONSUMER PROTECTION OR PROTECTION OF THE LEGAL CARTEL?

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## INTRODUCTION

The emergence of information technology in the legal field is spearheading new approaches to the practice of law, but the legal community is questioning whether the new technology may be a double-edged sword. The Information Revolution is reshaping traditional lawyer functions, forcing innovations in everything from research and document management to marketing and client communications. Yet, just as technology drives change inside law firms, consumers too are seizing the knowledge that is increasingly at their fingertips.

The market is flourishing for self-help legal counsel. An increasing array of Internet Web sites often dispense legal advice and information free of charge. This advice ranges from estate planning and contract issues to custody battles and torts. Further, the legal industry is witness to the advent of do-it-yourself legal software packages marketed directly to consumers. Innovative? Yes. Easier? Certainly. But to what extent is this a blessing or a curse, both to lawyers and consumers?[1]

Self-help law can be defined as "any activity by a person in pursuit of a legal goal or the completion of a legal task that [does not] involve legal advice or representation by a lawyer."[2] Consumers participating in the self-help market are typically driven by factors such as relative cost, self-reliance, necessity, and distrust of lawyers.[3] Clearly, such products offer the public up-front benefits of convenience and availability. Nevertheless, larger issues arise concerning who is responsible for the advice and whether it is dispensed by lawyers. Moreover, because rules for professional responsibility vary from state to state, a lawyer giving advice via the Internet across state lines may be violating local rules of marketing and solicitation.

Further uncertainties concern attorneys who field questions from users in states where that attorney is not licensed, as well as non-attorneys acting on behalf of companies that provide legal advice. These acts could violate rules prohibiting the unauthorized practice of law. In addition, when, if at all, is an

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1. "At the dawn of the Renaissance, Europe was so excited by the arrival of sailing ships with exotic goods from the Orient that no one noticed that the ships carried rats, fleas, and the Black Death." James Johnston, *Is E-Law a Blessing or a Curse for Practitioners?*, TEX. LAW., Nov. 9, 1998, at 36. This article also states that lawyers may be so "eager to embrace the Internet that they do not see the impending threat to their livelihood." *Id.*

2. Steve Elias & Catherine Jermany-Elias, *Self-Help Law: What It Is and Why It's Safe, at* http://www.nolo.com/Texas/selfhelp.html (last visited July 31, 2000) (on file with the author).

3. *See id.*

attorney-client relationship created?[4] Whether the bar associations or some other regulatory bodies are best situated to govern these questions is undetermined. Will consumer interests be adequately protected, or are their interests best served by *caveat emptor* and the ideals of free enterprise? The common theme underlying these queries is whether the legal community truly seeks to protect consumers or its own cartel in an effort to preserve its monopoly.

To address these issues, Part I of this Note will first touch on the evolution of the self-help legal market and the corresponding implications within our modern legal framework. The discussion will address the legal community's reaction to self-help via heightened enforcement of regulations against the unauthorized practice of law, both by non-lawyers providing legal advice through software or the Internet, and lawyers counseling clients in jurisdictions where they are unlicensed.[5] This section will then consider how technology is blurring state lines. First, it examines the issue of jurisdiction and the confusion caused by evolving technology. Second, the discussion turns to how the Internet can increase attorneys' risk of violating rules against advertising and solicitation in various jurisdictions. Finally, this section addresses the leading cases to date concerning self-help and the unauthorized practice of law.

Part II of this Note will address the public policy issues that frame the debate over regulation of the practice of self-help law. The discussion will focus on consumer protection, including the arguments for and against increased regulation, and consider the legal industry's monopoly over the allowable practice of law and whether the merits of this longstanding system justify its continuation. This analysis will question whether the legal monopoly exists to truly protect consumers, or if this premise underestimates the intelligence of people to make sound decisions regarding legal counsel. The section will also consider the lack of access to affordable legal counsel in the United States and the extent to which self-help can rectify this policy concern.

Finally, Part III will address the various solutions to the perplexities posed by self-help law. First, it will evaluate the feasibility of regulation and whether the American Bar Association (ABA) is best situated to make these decisions. Then, it will discuss the use of disclaimers and whether they provide sufficient

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4. Analysis of modern case law reveals that on-line exchanges resulting in specific legal advice will likely be viewed as creating attorney-client relationships. This triggers traditional duties among lawyers including confidentiality, competence, and loyalty. For an excellent treatment of this topic, see Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147 (1999).

5. A relevant issue, though beyond the scope of this Note, is the extent to which Internet access providers can be held liable for transmissions facilitated through their networks that amount to unauthorized legal practice. *See generally* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991) (holding that an on-line news distributor is a passive receptacle for information and will not be held liable in absence of actual knowledge, where a special interest forum carried false and defamatory statements); *cf.* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (holding that an on-line provider exercised sufficient editorial control over its computer bulletin boards to incur liability as a publisher).

protection for consumers. Part III will also consider possible solutions that attempt to strike a balance between consumer interests and the legal industry.

## I. THE SELF-HELP LEGAL MARKET AND THE MODERN FRAMEWORK

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.[6] In spite of this regulatory lapse, a viable and growing market of self-help legal products has emerged. For consumers, it seems that the benefits of self-help, namely convenience and affordability, outweigh the potential costs of creating ineffective legal instruments. The demand for self-help legal products has steadily increased, and the legal community is not turning a blind eye to this phenomenon.

Without a doubt, computer technology and the Information Revolution are setting the economic stage for lawyers in the new millennium. The Internet has redefined the parameters of business and society in general. An estimated thirty-five million households, comprising over ninety-seven million people, have Internet access in the United States—a forty-three percent increase between 1998 and 1999.[7] As of early 2000, the number of Internet users surpassed 170 million.[8] In fact, the number of Internet users worldwide is expected to reach an estimated 320 million by 2001 and 720 million by 2006.[9]

The modern electronic landscape is growing not just in size, but scope. Today's consumers turn to the Internet to secure medical diagnoses[10] and prescription medications,[11] to transact business,[12] to perform stock trades (with or without brokers), or even to secure a mortgage.[13] Indeed, software and Internet services are eroding the territory that was once the exclusive domain of many professionals, including physicians, accountants, bankers, and brokers.[14]

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6. *See* Wendy R. Liebowitz, *Lawyers, $15.95 a Box*, NAT'L L.J., Feb. 22, 1999, at A18.

7. *See* Alan R. Nye, *Ten Things Maine Lawyers Should Know About the Internet*, 14 ME. B.J. 196, 196 (1999).

8. *See* Max Baucus, *International Trade Aspects of E-Commerce*, 17 ARIZ. J. INT'L & COMP. L. 205, 206 (2000).

9. *See* Shahram A. Shayesteh, *High-Speed Chase on the Information Superhighway: The Evolution of Criminal Liability for Internet Piracy*, 33 LOY. L.A. L. REV. 183, 183 (1999).

10. *See, e.g.*, Jamie Talan, *On the Net, Be Wary of What Dr. Orders*, NEWSDAY, Oct. 21, 1998, at A19 (warning that physicians must be wary of whether advice given via the Internet may run afoul of regulations for informed-patient consent).

11. *See* Greg Miller, *A Turf War of Professionals vs. Software*, L.A. TIMES, Oct. 21, 1998, at A1.

12. *See* Jonathan D. Bick, *Why Should the Internet Be Any Different?* 19 PACE L. REV. 41, 44-45 (1998). The validity of contracts created via the Internet continues to be analyzed, particularly with respect to which laws, and whose laws, are applicable. *See id.*

13. *See* Miller, *supra* note 11, at A1.

14. *See id.*

For lawyers, the story is no different. A flourishing legal software market offers a myriad of products that generate legal instruments, including wills, residential leases, articles of incorporation and contractual agreements.[15] In addition, an increasing number of consumers are turning to the Internet for legal counsel instead of calling their lawyers.[16] Popular Web sites dispense legal advice and documents at little or no cost.[17] According to one commentator, "[s]ince Shakespeare, people have looked for ways to do away with their lawyers. Now, the Internet may do the trick."[18]

Internet sites such as FreeAdvice.com and LawGuru offer free consultation to help consumers assess their rights.[19] Further, the site for FindLaw.com has an on-line library equivalent to major law schools. Lectlaw.com offers legal advice on "practically every imaginable legal topic," including numerous legal documents that can be downloaded for free or at a minimal cost.[20] These sites, which encourage laypeople to post legal questions and state of residence, suggest that lawyers who are licensed in those states post responses.[21]

A more direct approach is taken by Nolo.com, whose Web site displays an advice columnist who will "tell you what to do about your legal woes and how to do it—in language you can understand."[22] At Nolo.com, users can also download basic legal documents (such as wills) and complaint letter forms on various topics.[23] For example, one form letter regarding sexual harassment in schools informs school officials that their failure to act may violate a recent Supreme Court decision.[24] Soon, "*Nolo.com* will offer scores of legal documents you can customize on your home PC for a modest fee. Someday, users may be

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15. *See* Nye, *supra* note 7, at 197.

16. *See* Miller, *supra* note 11, at A1.

17. For examples of Internet-based advice and forms for wills, trusts and related documents, see Dennis Toman, *The Estate Planning Links Website*, *at* http://www.estateplanninglinks.com (last visited Aug. 22, 2000) (on file with author) and R. Daniel Brady, *Memorandum to Our Clients and Friends About Estate and Gift Taxes*, *at* http://www.danbrady.com/concepts.htm (last visited Aug. 22, 2000) (on file with author). For an example of a site related to family law issues, see Michael J. Duncan, *Law Office of Michael J. Duncan*, *at* http://www.bristlecone.com/mduncan/familylaw.htm (last visited July 31, 2000) (on file with author).

18. Richard B. Schmitt, *More People Consult the Firm of Cyber, Web & Dot-com*, WALL ST. J., Aug. 2, 1999, at B1.

19. *See id.* Most of these Web sites are for-profit and funded through paid advertisements, such as for expert witnesses.

20. Nye, *supra* note 7, at 197.

21. *See* Lanctot, *supra* note 4, at 152.

22. Schmitt, *supra* note 18, at B1. For an example of a question-answer session on Nolo.com, a consumer asked about the validity of a prenuptial agreement signed within forty-eight hours of a wedding. Answer: "You can relax and enjoy your newly wedded bliss. . . . Generally, prenuptial agreements are legal if both parties are fully informed about the underlying facts of the agreement and what it means." *Id.*

23. *See id.*

24. *See id.* at B4.

even be able to file such documents in court electronically."[25] Nolo.com's predecessor, Nolo Press, launched the self-help law movement in the 1970s with books instructing people how to file for bankruptcy protection.[26] According to Ralph Warner, founder of Nolo.com, "[w]e have done cars . . . insurance . . . [and] investments. Why not law?"[27]

Consumers' demand for self-help legal products is understandable considering that free advice and low-cost legal documents are an attractive alternative to high-priced attorneys. With self-help there is "no need to make an appointment with a lawyer, take time off work, fight traffic or pay high legal fees."[28] In essence, the technological revolution is "democratizing the practice of law."[29] Consumers can service their legal needs from the comfort of their homes by creating legal documents with mass-marketed computer software or by tapping into the Internet for real-time question and answer sessions on legal Web sites.

Consider the success of the personal tax software "Turbotax." Turbotax revolutionized the business of tax preparation by marketing a CD-ROM with the tax expertise comparable to an accountant, but at a considerably lower price.[30] Turbotax is interactive; it interviews the user as a CPA might and uses the responses to prepare the tax return.[31] Another example of self-help software is "WillMaker." It functions like a lawyer by asking questions and using the answers to "tailor a will for the client by selecting and modifying standard clauses" according to user responses.[32]

In addition to personal software products, interactive documents are available on-line from such federal agencies as the U.S. Trademark Office and the Federal Communications Commission that offer immediate application forms on their sites.[33] These products demonstrate how professional services can be turned into commodities. Consumers are likely to spend at least $10 million each year on self-help legal software alone.[34] Perhaps more poignant, an increasing number of consumers are relying on these products as the answer to their legal needs.

### *A. The Evolution of the Self-Help Legal Market*

Technology has catapulted the self-help legal market, but it is not solely responsible for its creation. In fact, the tradition of Layman's Law dates back to

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25. *Id*. at B1.
26. *See id.*
27. *Id*.
28. Nye, *supra* note 7, at 197.
29. Schmitt, *supra* note 18, at B1 (quoting Ralph Warner, founder of Nolo.com).
30. *See* Johnston, *supra* note 1, at 36 (Turbotax is produced by Intuit Corporation).
31. *See id.*
32. *Id*.
33. *See id.*
34. *See* Miller, *supra* note 11, at A1.

colonial times.[35] As early as the Eighteenth Century, John Wells published *Every Man His Own Lawyer*.[36] This book offered a "complete guide in all matters of law and business negotiations for every State of the Union. With legal forms for drawing the necessary papers, and full instructions for proceeding, without legal assistance, in suits and business transactions of every description."[37] The public demand for this book was evident from the introduction to the 100th Anniversary Edition, which states that the original was "received with great favor, attaining a larger scale, it is believed, than any work published within its time."[38]

The self-help legal market has grown and evolved through the years. Today, many bookstores devote entire sections to the topic, including books on wills, living trusts, default divorces, stepparent adoptions, name changes, simple Chapter 7 bankruptcies, and business contracts, as well as patent, trademark and copyright transactions.[39] Moreover, self-help legal products are steadily emerging and improving.[40] Computer-assisted filings of negotiable instruments and government applications and filings are clearly feasible.[41] Despite the potential liabilities, electronic bulletin boards for the exchange of legal information "are spreading like wildfire throughout the on-line world."[42]

Significant challenges to the legal profession will arise as additional services traditionally provided by attorneys are instead conveniently provided in consumers' homes by non-lawyers.[43] According to one legal commentator, "[t]he cost of legal services and diminished public opinion toward lawyers . . . while not exclusive causes, will contribute to this trend."[44] Whether this bodes well for e-consumers logically depends upon the quality and accountability of these legal services.[45] The primary vehicle for upholding professional standards is

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35. *See* Mort Rieber, *300 Years of Self-Help Law Books*, *at* http://www.nolo.com/Texas/History.html (last visited July 31, 2000) (on file with author) (citing Eldon Revare James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801* ("All of the books within this period . . . were for the use of laymen.")).

36. *See id*.; *see also* JOHN G. WELLS, EVERY MAN HIS OWN LAWYER AND BUSINESS FORM BOOK (R. Macoy ed., New York 1880).

37. Rieber, *supra* note 35 (quoting John G. Wells).

38. *Self-Help Law Books and Software: Why the First Amendment Protects Your Right to Use Them*, *at* http://www.nolo.com/Texas/rights.html (last visited Aug. 25, 2000) (on file with author) [hereinafter *Self-Help Law Books and Software*].

39. *See id.*

40. *See id*.

41. *See* Schmitt, *supra* note 18, at B1.

42. Rosalind Resnick, *A Shingle in Cyberspace: Lawyers Online Find Clients—And Some Risks*, NAT'L L.J., Sept. 27, 1993, at 1.

43. *See* Joe Crostwait, *Landscape of Law to Change with Evolving Technology*, J. REC., Jan. 8, 1998, at 2.

44. *Id*.

45. For example, assume a consumer uses a software package to produce a landlord-tenant agreement for a small rental unit she owns. If the agreement is never called into question, the consumer will likely be pleased that the program saved money and time. However, if the document

regulation of the unauthorized practice of law.

### *B. Regulating the Unauthorized Practice of Law*

Given the advent of modern technology, lawyers can easily communicate virtually anywhere via the Internet. However, it would be logistically impossible for lawyers to be licensed in all of those places. The unauthorized practice of law is of "growing concern to plugged-in lawyers, as automated legal forms blossom on the Internet and as legal questions are posed in chat rooms and on e-mail discussion lists or arrive unsolicited in attorneys' electronic 'in-boxes.'"[46] Practicing the law outside an attorney's jurisdiction is a particular danger in the electronic age, and laws vary greatly.[47] Thus, as a framework for discussion of unauthorized practice within the self-help legal market, this analysis will first briefly address the underlying role that jurisdiction and varying state laws play in the technological realm.

*1. The Technological Blurring of State Lines: Jurisdiction.*[48]—The

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turns out to be legally flawed to the landlord's detriment, where would she turn for a remedy? Did she assume the risk by purchasing a self-help program? Did she do so with full knowledge? The problem is that very little case law exists to guide consumers before they enter into such transactions.

46. Liebowitz, *supra* note 6, at A18.

47. *See id.* (citing Peter Krakaur, president of San Francisco's Internet Legal Services).

48. Jurisdictional issues are an important component of technology and the practice of law. Traditionally, the propriety of a court's exercise of personal jurisdiction has been determined by 1) whether the person's contacts with the forum state satisfy the requirements of that state's long-arm statute (for jurisdiction over non-residents), and 2) whether the exercise of such jurisdiction would satisfy traditional notions of fair play and substantial justice, as required by the U.S. Constitution. *See generally* John F. Delaney et al., *The Law of the Internet: A Summary of U.S. Internet Caselaw and Legal Developments*, *in* PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROPERTY COURSE HANDBOOK SERIES (Practicing Law Inst., Jan. 1999). *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). Central to this analysis is the extent to which a person could reasonably anticipate being hailed into a court in a forum state. *See id.*

For recent findings where jurisdiction was proper, see Delaney et al., *supra*, referencing *CompuServe Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (finding that knowing efforts to market a product in other states as sufficient); *Inset Systems v. Instruction Set Inc*., 937 F. Supp. 161 (D. Conn. 1996) (finding Internet advertising sufficient where defendant purposefully directed site advertising to at least 10,000 connected Internet users on a regular basis); *Heroes, Inc. v. Heroes Foundation*, 958 F. Supp. 1 (D.D.C. 1996) (finding that a Web site operator purposefully availed itself of the privilege of conducting activities in the forum); *Resuscitation Technologies, Inc. v. Continental Health Care Corp*., No. IP96-1457-C-M/S, 1997 WL 148567 (S.D. Ind. Mar. 24, 1997) (holding that contacts by fax and e-mail sufficient).

For recent dismissals for lack of jurisdiction, see *Transcraft Corp. v. Doonan Trailer Corp.*, No. 97C9943, 1997 U.S. Dist. LEXIS 18687, at *1 (N.D. Ill. Nov. 21, 1997) (holding a Web site was likened to a national advertisement, which would not confer jurisdiction in Illinois, absent a showing that defendant intended it to reach the forum state); *Bensusan Restaurant Corp. v. King*,

expansion of computer technology enhances our ability to communicate and the speed with which we do it. In essence, it knocks down the barriers between persons, states, and even countries. As the U.S. Supreme Court noted, "[t]he Internet is a unique and wholly new medium of worldwide human communication."[49] The Internet, with its global reach, is challenging the widely-held assumption that jurisdiction rightfully belongs where an act took place, physically or geographically.[50] Since the World Wide Web stretches across virtually every jurisdictional boundary, the operation of a Web site in a particular state or country could arguably subject that operator to suit nationwide.[51] A definitive answer has yet to emerge on the appropriate jurisdictional framework for this new medium.[52] For example, certain courts have concluded that the act of posting a Web site does not confer personal jurisdiction,[53] unless it is clearly being used to solicit business.[54]

*2. State Ethics, Advertising and Solicitation Rules*.—In addition to the blurring of jurisdictional lines, the technological tidal wave also obscures the applicability of statutory regulations. The ethical issues associated with attorney Web sites include compliance with state bar restrictions on advertising, avoidance of prohibited solicitations, and preventing the unauthorized practice

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937 F. Supp. 295 (S.D.N.Y. 1996) (holding operation of Web site did not constitute an offer to sell a product in New York; hence, there was no activity directed toward forum).

49. Reno v. ACLU, 521 U.S. 844, 850 (1997) (internal citation omitted).

50. *See* Lorelie S. Masters, *Professionals Online: Advice for Travels on the Information Superhighway*, COMPUTER LAW., Mar. 1999, at 1.

51. *See* Delaney et al., *supra* note 48, at 184.

52. *See id*. Given the expanded accessibility of the Internet, courts must consider the extent to which "electronic contacts" should count in establishing a defendant's contacts with a forum state. Courts have been reasonably uniform in treating three general categories: 1) persons doing business over the Internet in the forum state where they reside or have a principal place of business (where jurisdiction is typically found to be proper), 2) users in the forum state that exchange information with a site from another jurisdiction (where jurisdiction has been determined by the level of interactivity and the commercial nature of the exchange on the Web site), and 3) posting information or advertisements on a Web site that is accessible to users both inside and outside the forum state (where courts have not typically found jurisdiction to be proper). *See id*.

Often, courts have required a showing that the operator or owner of a Web site intentionally pursued contacts with the jurisdiction. *See* Masters, *supra* note 50, at 5. "[S]ome commentators have argued persuasively for law recognizing cyberspace as an independent jurisdiction." *Id.* at n.30 (citing Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT'L LAW 1167, 1171 (1998); David R. Johnson & David G. Post, *The Rise of Law on the Global Network*, *in* BORDERS IN CYBERSPACE 13 (1997)).

53. *See* Masters, *supra* note 50, at 5; *see also* Hearst Corp. v. Goldberger, No. 96-Civ.-3620, 1997 WL 97097, at *1 (S.D.N.Y. Feb. 26, 1997); Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996).

54. *See, e.g.*, CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996); EDIAS Software Int'l v. BASIS Int'l, 947 F. Supp. 413 (D. Ariz. 1996).

of law in states where an attorney is not licensed.[55] While the Internet has become a viable tool for legal services, this same technology collides with state-by-state regulation of the legal profession.[56]

Consider an attorney licensed in a particular state and familiar with that state's statutory regulations pertaining to ethics and client solicitation. In the course of communicating electronically, that attorney may come in contact with numerous individuals from different states, each with different rules governing solicitation. Even though the attorney may comply with rules from his or her state, the same may not be true in other states. Thus, one challenge lies in the spontaneous and anonymous nature of the Internet. The speed of communications may render it impractical to assess the applicable body of law in a state before the lawyer responds, especially if the communication is "real time," as with chat rooms and on-line communication. Further, attorneys may not have knowledge of the domicile of on-line clients, and hence, under whose jurisdiction they are subject.

In general, ethical implications for lawyers fall into six categories: advertising and solicitation, unauthorized practice of law, confidentiality, competence, conflicts of interest, and contact with represented parties.[57] Although the vast majority of states have adopted the ABA's Model Rules of Professional Conduct, many have customized provisions, including greater restraints on direct mail solicitations of potential clients, labeling, use of disclaimers and time delays in delivery of material.[58] "Not only has this resulted in a patchwork of rules, but the practical application of those rules to client development on the Internet is sometimes questionable. No set of state rules governing lawyer advertising and the communication of legal services has been promulgated with an understanding of current technology."[59]

Some states have begun to address this issue through ethics opinions.[60] A handful of state bar opinions have reached varying conclusions about whether providing legal advice on-line creates an attorney-client relationship, but none of these opinions has included a detailed analysis.[61] In addition, scant analysis

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55. *See* John B. Kennedy, *Legal Advertising and Ethics on the World Wide Web*, N.Y. L.J., Jan. 27, 1997, at S1.

56. *See* William E. Hornsby, Jr., *Technology Collides with Regulations*, N.Y. L.J., June 30, 1997, at S4.

57. *See* Dean R. Dietrich, *Venturing Onto the World Wide Web: Ethics Implications for Lawyers*, WIS. LAW., Feb. 1999, at 10.

58. *See* Hornsby, *supra* note 56, at S4.

59. *Id*.

60. *See id*. These opinions (Arizona, Illinois, Iowa, Michigan, New York, Pennsylvania and South Carolina) tend to agree on certain fundamentals: A law firm's Web site amounts to lawyer advertising and, therefore, subjects the attorney to the rules.

61. *See* Lanctot, *supra* note 4, at n.28 (citing State Bar of Ariz. Comm. on Rules of Prof'l Conduct, Op. 97-04 (1997) ("recommending that lawyers should 'probably not' answer questions raised in chat rooms online")); Ill. St. Bar Ass'n, Op. 96-10 (1997) (stating that lawyers participating in chat-groups or on-line services that could involve offering personalized legal advice

exists on whether disclaimers would be effective against a malpractice claim.[62] The ABA has considered whether a new set of model rules should be promulgated to address ethics rules in light of new technology.[63] Though no conclusions have been drawn so far, the ABA recommends that state bar associations critically evaluate their own regulatory policies.[64]

On-line legal practice is challenged by questions of jurisdiction and varying state regulations. These issues no doubt lend confusion to the policing of the self-help legal market. A leading method of keeping a check on this rapidly-evolving market is heightened enforcement of regulations against the unauthorized practice of law.

*3. Unauthorized Practice of Law*.—The issue of unauthorized legal practice has been thrust into the limelight with the development of the self-help legal market. The ABA has long regulated the unauthorized practice of law, under the auspices of protection of the public interest and welfare.[65] According to ABA Model Rules of Professional Conduct (MRPC), "[a] lawyer shall not (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."[66] The comment to MRPC 5.5 states: "The definition of the practice of law is established by law and varies from one jurisdiction to another. . . . [L]imiting the practice of law to members of the bar protects the public against the rendition of legal services by unqualified persons."[67] Model rules and most statutes today preclude persons not licensed by a state from practicing law in that state.[68]

Whether consumers agree that they need such a high degree of protection is debatable. According to a 1974 ABA survey of the public's legal needs, "[eighty-two percent] of respondents agreed that 'many things that lawyers handle—for example, tax matters or estate planning—can be done as well and less expensively by nonlawyers.'"[69] Some critics view these regulations as methods for lawyers to protect their lucrative privileges from competitors.[70]

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to anyone connected to the service should be mindful that the recipients of such advice are the lawyer's clients, with the benefits and burdens of that relationship).

62. *See* Lanctot, *supra* note 4, at 159-60.

63. *See* AMERICAN BAR ASSOCIATION, CENTER FOR PROFESSIONAL RESPONSIBILITY, ETHICS 2000—COMMISSION ON THE EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT (2000), *available at* http://www.abanet.org/cpr/ethics2k/html (on file with author).

64. *See* Press Release, American Bar Association, ABA Commission Explores Policies for Lawyer Internet Advertising (May 19, 1998) (on file with author).

65. *See* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3 (1981).

66. MODEL RULES OF PROF'L CONDUCT R. 5.5 (1995).

67. *Id.* at cmt. 1.

68. *See* AMERICAN BAR ASSOCIATION & BUREAU OF NATIONAL AFFAIRS, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, § 81:568 (1996) [hereinafter LAWYERS' MANUAL].

69. Rhode, *supra* note 65, at 3.

70. *See* RICHARD L. ABEL, AMERICAN LAWYERS (Oxford Univ. Press 1989).

Moreover, consumers who rely on bad advice from authorized lawyers are often able to pursue a remedy through a malpractice action. They can also seek redress through the bar association to which the lawyers are accountable by filing grievances or pursuing disbarment. However, the same remedies may not be available for the consumer that detrimentally relies on legal advice from self-help sources. Statutes that proscribe the unauthorized practice of law are notoriously vague[71] and have been labeled both conclusory and circular.[72] What protection is afforded to consumers who help themselves?

Although self-help regulation is in its infancy, Texas is one jurisdiction that is paving the road through litigation for unauthorized legal practice by "do-it-yourself" legal publishers. The focus is whether these activities by non-lawyers or lawyers unlicensed in the applicable jurisdiction constitute the practice of law.

In *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*,[73] a Texas district court enjoined the makers of a consumer software package called "Quicken Family Lawyer" after determining that the product constituted the unauthorized practice of law.[74] The program offered over 100 different legal forms, along with instructions to complete the forms.[75] The package label claims the product is "valid in 49 states including the District of Columbia" and is "developed and reviewed by expert attorneys."[76] Despite the fact that the program contains a disclaimer,[77] the court found that such marketing language "creates an air of reliability about the documents which increases the likelihood that an individual user will be misled into relying on them."[78]

The *Parsons* court relied on two Texas Court of Appeals cases, *Palmer v. Unauthorized Practice of Law Committee*,[79] which held that the sale of consumer forms for wills constituted unlicensed practice, and *Fadia v. Unauthorized Practice of Law Committee*,[80] which held that a manual for "do-it-yourself" wills

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71. *See* William H. Brown, *Legal Software and the Unauthorized Practice of Law*, 36 CAL. W. L. REV. 157, 165 (1999).

72. *See* Rhode, *supra* note 65, at 97.

73. Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. CIV.A.3:97 C-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999).

74. *See id.* at *11.

75. *See id*. at *1.

76. *Id.*

77. *See id*. The disclaimer reads:

> This program provides forms and information about the law. We cannot and do not provide specific information for your exact situation. For example, we can provide a form for a lease, along with information on state law and issues frequently addressed in leases. But we cannot decide that our program's lease is appropriate for you. Because we cannot decide which forms are best for your individual situation, you must use your own judgment and, to the extent you believe appropriate, the assistance of a lawyer.

*Id*. at *2.

78. *Id*. at *6.

79. 438 S.W.2d 374, 377 (Tex. App. 1969).

80. 830 S.W.2d 162, 166 (Tex. App. 1992).

constituted unauthorized practice, despite defendant's reliance on state court decisions which required some personal relationship between the alleged unauthorized lawyer and the client in order to be deemed the unauthorized practice of law.

Although *Parsons* was factually and procedurally similar to the previous cases, the appellate court was ultimately forced to vacate the district court's decision[81] when the Texas legislature enacted an emergency amendment to the statute on unauthorized practice.[82] In response to pressure from technology industry lobbyists,[83] the amendment provided that the "practice of law does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if [they] clearly and conspicuously state that the products are not a substitute for the advice of an attorney."[84]

Thus, in the eyes of the Texas legislature, an adequate disclaimer will sufficiently protect consumers against the harms of unauthorized legal practice. However, in *dicta*, the *Parsons* court was not so convinced of a disclaimer's prophylactic effects. The district court emphasized that "the disclaimer does not appear anywhere on [Quicken Family Lawyer's] packaging[, nor] on subsequent uses of the program unless the user actively accesses the 'Help' pull-down menu at the top of the screen and then selects 'Disclaimer.'"[85]

There are other instances where the Texas Unauthorized Practice of Law Committee (UPLC) has taken on publishers of self-help legal software. For example, in 1998, the UPLC took issue with Nolo Press, Inc., publisher of "Living Trust Maker" software and the accompanying user's guide.[86] UPLC charged that Nolo's program, which assists users in preparing their own living trusts, constituted the unauthorized practice of law.[87] Living Trust Maker software includes "briefcase icons" designed to tell the user when the situation

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

82. *See* H.R. 1507, 1999 Leg., 76th Sess (Tex. 1999).

83. The legislative bailout in *Parsons* can be attributed in no small part to lobbying efforts of the technology industry. For a discussion of the legislative developments, see John Council, *Legal Self-Help Publisher Seeks Lawmakers' Help*, TEX. LAW., Feb. 22, 1999, at 1. Senior Judge Barefoot Sanders instructed Parsons Technology that if it had a problem with his ruling to take it to the legislature. They did just that, and it worked. The now-enrolled legislation effectively prevents the Texas UPLC from taking action against self-help legal publishers. *See id.*

84. *Parsons*, 179 F.3d 956. *See* Texas H.R. 1507, 1999 Leg., 76th Sess. (Tex. 1999). Sponsors behind the bill explained their support of the legislation under the auspices of the First Amendment: "They denied the public's right to read about the law either in self-help books or self-help software." Council, *supra* note 83, at 1 (quoting Rep. Steven D. Wolens, the legislator that filed the bill).

85. Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. CIV.A.3:97 C-2859H, 1999 WL 47235, at *2 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999).

86. *See In re* Nolo Press, 991 S.W.2d 768 (Tex. 1999). Nolo Press has published a variety of legal self-help materials for nearly thirty years. *See id.*

87. *See id.* at 769.

might be beyond self-help; thus, if this icon appears when consumers use the program, it suggests that they consult a lawyer.[88]

During the investigation, the UPLC asked Nolo to provide the names, addresses and states of licensure of any attorneys who contributed to those products.[89] The company appealed directly to the Texas Supreme Court for a writ of mandamus to block the UPLC's requests for sensitive documents and information.[90] Ultimately, the court denied that it had jurisdiction to issue the writ and compelled Nolo to produce the information requested.[91]

According to Nolo, their target audience was not consumers requiring sophisticated, individualized counsel, but rather the "lowest common denominator" among the population of legal consumers.[92] In fact, the product's money-back guarantee is designed to allow people to return the products if they decide to consult a lawyer.[93] At the time of writing this Note, the UPLC's investigation continues and no formal charges for the unauthorized practice of law have been filed.[94]

Perhaps unsurprisingly, the Texas initiative to enforce unauthorized practice has received criticism from lawyers in Texas and other states. "No [other] state . . . has had the difficulty of understanding the difference between publishing a form book with instructions and information, and meeting with someone and counseling them on the law."[95] However, Mark A. Ticer, attorney for the Texas UPLC, responds that Texas is merely the first state to make such a move.[96] "Implicit legal advice cloaked in the robes of simplicity is very, very dangerous."[97] According to Ticer, "[w]e can either wait until the damage is done [and people get ripped off], or move to prevent damage now."[98]

"All states prohibit the unauthorized practice of law, but Nolo says Texas is the only one that applies its ban to publishers."[99] In addition, Nolo claims that

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88. *See* Janet Elliot, *Who Polices the Practice Police?*, TEX. LAW., Apr. 6, 1998, at 1.

89. *See In re Nolo Press*, 991 S.W.2d at 773.

90. *See id*. at 769.

91. *See id*. at 779.

92. Elliot, *supra* note 88 (quoting Steve Elias, attorney for Nolo Press, Inc.).

93. *See id*.

94. Interestingly, Nolo Press books are mandated by consent decree to be stocked in an Orange County Jail Facility so that inmates may "enjoy their constitutional right of access to the courts." Griffith v. Fontenot, No. CIV.A.1:93C0192, 1994 WL 738984, at *2 (E.D. Tex. Dec. 14, 1994) (citing specific publications including *Legal Research: How to Find and Understand the Law*; *Prisoner's Self-Help Litigation Manual*; *Post Conviction Remedies*; and *Inmate Legal Handbook*).

95. Liebowitz, *supra* note 6, at A18 (quoting Peter D. Kennedy, a commercial litigator who represents Parsons and Nolo).

96. *See id*.

97. Miller, *supra* note 11, at 1 (quoting Mark A. Ticer).

98. Liebowitz, *supra* note 6, at A18.

99. Associated Press, *Publisher Faces Ire of Texas State Bar over Law-Advice Books* (Oct. 19, 1998), *available at* http://www.cnn.com/books/news/9810/19/law.publisher.ap/.

this "system shields lawyers from free competition, subjects the public to higher prices and sacrifices free speech."[100] Attorney Stephen Elias, the company's associate publisher, states, "[I]t frightens us that the lawyers in a state can decide that the people in a state aren't going to get the information they need to do their own law."[101] Nolo enlisted the help of the American Association of Law Libraries, which said "self-help legal materials are necessary to help consumers maneuver through the legal quagmire for many simple, day-to-day issues."[102] Nolo claims that the publication, distribution, and sale of their materials lack the essential element of the practice of law: a client.[103]

Nolo acknowledges that software is no substitute for a legal advocate in the courtroom,[104] and UPLC's charges have been criticized as a "naked attempt to shield the state's lawyers—who charge as much as $400 an hour for such fill-in-the-blanks legal services as drawing up standard wills or simple divorce papers—from off-the-shelf competition."[105] According to one commentator, Nolo's products involve mere "cookie-cutter tasks."[106] However, many attorneys probably focus their entire practices on basic services relating to legal instruments for the end-consumer.

Texas is leading the country in attacking the self-help market, and other jurisdictions are watching with interest and concern. "The Texas ruling raises questions of whether a similar step is possible [in New Jersey] where self-help law books and kits on how to write wills have been available for years."[107] Out-of-state self-help legal publishers fear the UPLC will use the ruling to block the sale of their products within Texas.[108] "The bar may not get far with such unauthorized practice of law arguments if e-law proves popular with the consumer. After all, the primary purpose of regulating the practice of law should be to protect consumers, not lawyers."[109]

*4. First Amendment Implications—the Free Speech Argument*.—New York took a contrasting stance to regulating the unauthorized practice of law by considering whether banning self-help law books violates the First Amendment to the U.S. Constitution. The leading case on the topic is a 1967 decision from the New York Court of Appeals, *New York County Lawyers Ass'n v. Dacey*,

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100. *Id*.

101. *Id*.

102. *Id*.

103. *See* Nolo Press/Folk Law, Inc. v. Unauthorized Practice of Law Comm., Plaintiffs Petition for Declaratory Judgment, *at* http://ww.nolo.com/texas/petition.html (last visited Nov. 30, 2000) (on file with author).

104. *See* John Greenwald, *A Legal Press in Texas*, TIME, Aug. 3, 1998, at 51.

105. *Id.*

106. *Id.* (quoting Steven Gillers, a New York University law professor).

107. Scott Goldstein, *When Does Software Cross the Line Into Law Practice?*, N.J. LAW., Feb. 9, 1999, at 3.

108. *See* Council, *supra* note 83, at 1 (quoting Casey Dobson, a Texas attorney for a legal publisher).

109. Johnston, *supra* note 1, at 36.

which ruled that the state's attempt to ban the best-selling book entitled "How to Avoid Probate" violated freedom of expression.[110] The *Dacey* court ruled that the practice of law involves the rendering of legal advice and opinions directed to particular clients.[111] According to the court:

> That it is not palatable to a segment of society which conceives it as an encroachment of their special rights hardly justifies banning the book. [It] is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions' (Bridges v. California, 314 U.S. 252, 270[)] . . . . Free and open discussion or even controversy could lead to reforms, if needed, or improvement where desirable. Books purporting to give advice on the law, and books critical of law and legal institutions have been and doubtless will continue to be published. Legal forms are available for purchase at many legal stationary stores. Unless we are to extend a rule of suppression beyond the obscene, the libelous, utterances of or tending to incitement, and matters simply characterized, there is no warrant for the action here taken.[112]

The court conceded that "if the exercise of Dacey's right to freedom of speech by this publication violates reasonable standards erected for the protection of society, or of important interests of society, his right could be subordinated for the common good and the protection of the whole."[113] But in contrast to the modern trend, the *Dacey* court concluded that the book is "not of the kind or quality to provoke disorder. . . . In fact there is no substantive evil imminently threatening the public."[114]

The position taken by the *Dacey* court clearly differs from *Parsons*, which deemed certain self-help products so imminently dangerous as to warrant an injunction. What difference exists between self-help in 1967 versus today? Despite changes in form, consumers and legal needs are arguably similar. The discrepancy may be partly attributable to a change in times. When *Dacey* was decided, the self-help market was not mainstreamed. At that time, Dacey's book was among a few of its kind. Those that purchased it sought it out, rather than having it actively marketed to them. Software and the Internet did not exist then to spontaneously deliver the law to the people. Today, the *Dacey* court may view the issue with greater imminence.

Another distinction is that *Dacey* was decided on the basis of the First Amendment's protection of free speech, which in the modern debate has yet to emerge as the cure-all solution for self-help publishers. Granted, the free speech

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110. 283 N.Y.S.2d 984, 996 (N.Y. App. Div. 1967), *rev'd on the dissenting opinion*, 234 N.E.2d 459 (N.Y. 1967) (finding Norman Dacey, with thirty-five years of experience in estate planning, had no law degree).

111. *Id.* at 1000-01.

112. *Id.*

113. *Id.* at 1000.

114. *Id.*

argument did eventually bail out Parsons Technology in this particular case. Sponsors of the bill in Texas that invalidated the court's ruling in *Parsons* explained that banning self-help products denied the public's right to read about the law either in self-help books or software.[115] However, this policy was advanced by the lobbyists and not the courts. The committee that investigates unauthorized practice is appointed by the Texas Supreme Court, and it will not likely discontinue its mission merely because of this case. Modern proponents of the argument that the First Amendment should apply in the self-help context advocate that "[n]o matter what else the First Amendment stands for, it absolutely stands for the free flow of information."[116]

The extent to which the First Amendment will help legal publishers is unclear. Since *Dacey*, the U.S. Supreme Court has determined that legal advice is entitled to full protection under the First Amendment. In *Board of Trustees, State University of New York v. Fox*,[117] respondents challenged a public university rule that banned persons from dormitories whose motives involved for-profit activities.[118] In overriding the ban, the court noted that such a rule would prevent a student from receiving legal advice in his or her dorm room, which is a form of constitutionally-protected speech.[119] Thus, even though few cases have been decided on this issue, *Dacey* and *Fox* provide certain insight concerning the free speech debate.

The technological revolution undoubtedly confuses the workings of jurisdiction and rules for ethics, advertising and solicitation in the legal market. Further, these issues frustrate what has long been the bar's principal means of control—regulating the unauthorized practice of law. As technology expands the ways lawyers can practice, activities that constitute the "practice of law" is increasingly uncertain. This uncertainty is at the heart of the debate between lawyers and regulators. To prevent unauthorized practice from occurring, it is necessary to know what defines "practice."

*5. What Constitutes the "Practice of Law"?*—The law is ambiguous as to what constitutes the unauthorized practice of law and to whom the regulations apply. The Supreme Court of Arizona noted that "[i]n the light of the historical development of the lawyer's functions, it is impossible to lay down an exhaustive definition."[120]

Clearly, the practice of law encompasses more than trying cases in the courts.[121] Black's Law Dictionary defines the "practice of law" as "maintaining an office where [a person] is held out to be an attorney, using a letterhead

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115. *See supra* text accompanying note 84.

116. T. Gerald Treece, *The Law as a Foreign Language*, 40 S. TEX. L. REV. 971, 972 (1999).

117. 492 U.S. 469 (1989).

118. *See id.* at 471-72.

119. *See id.* at 482.

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

121. *See* Unauthorized Practice of Law Comm. v. Parsons, No. CIV.A.3:97-C-2859H, 1999 WL 47235, at *1, *4 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999).

describing [that person] as an attorney, counseling clients in legal matters, negotiating with opposing counsel about pending litigation, and fixing and collecting fees for services rendered."[122] In contrast to this seemingly narrow definition, Texas law defines unauthorized practice as "any service requiring the use of legal skill or knowledge."[123] Texas code then gives courts the authority to determine on a case-by-case basis whether other services and acts not enumerated under the statute constitute the practice of law.[124] This language appears somewhat vague and could arguably be applied to any situation where a person advises another on any topic.

In *In re Duncan*,[125] the court found that the practice of law may include the "preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law."[126] However, a comprehensive definition of just what qualifies as the practice of law is "impossible," and "each case must be decided upon its own particular facts."[127] The court in *Palmer* held that the sale of will forms containing blanks and instructions constituted the unauthorized practice of law.[128]

The Quicken Family Lawyer program goes beyond merely instructing someone how to fill in a blank form. The program directs the user to "answer a few questions to determine which estate planning and health care documents best meet [the user's] needs" and that it will "interview you in a logical order, tailoring documents to your situation."[129] As the *Parsons* court noted, "[w]hile no single [aspect of this program] . . . may constitute the practice of law, taken as a whole Parsons [Technology] . . . has gone beyond publishing a sample form book with instructions, and has ventured into the unauthorized practice of law."[130]

A fundamental question is at what point information takes the form of legal advice. According to the New Jersey State Bar Association's Unlawful Practice

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122. BLACK'S LAW DICTIONARY 1172 (6th ed. 1980).

123. TEX. CODE ANN. § 81.101 (Vernon 2000).

124. *See id*.

125. 65 S.E. 210 (S.C. 1909).

126. *Id*. at 211.

127. Palmer v. Unauthorized Practice of Law Comm., 438 S.W.2d 374, 376 (Tex. App. 1969); *see also* Fadia v. Unauthorized Practice of Law Comm., 830 S.W.2d 162, 165 (Tex. App. 1992) ("The selling of legal advice is the practice of law.").

128. *Palmer*, 438 S.W.2d at 376.

129. Unauthorized Practice of Law Comm. v. Parsons, No. CIV.A.3:97-C-2859H, 1999 WL 47235, at *1 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999).

130. *Id.* at *6; *see also* People v. Landlords Prof'l Serv., 264 Cal. Rptr. 548, 553 (Cal. Ct. App. 1989) (finding that clerical services do not constitute the practice of law, but personal advice to a specific individual does constitute unauthorized practice); Fla. Bar v. Brumbaugh, 355 So.2d 1186, 1194 (Fla. 1978) (holding that sale of legal forms and instructions to the general public rather than to a specific individual for a particular legal problem does not constitute the practice of law); Or. State Bar v. Gilchrist, 538 P.2d 913, 917 (Or. 1975) (finding that advertisement and sale of divorce kits without personal advice does not constitute the practice of law).

Committee, it depends on the underlying purpose.[131] "If the software simply provides examples or general information on how to proceed with a will or a divorce, there's no problem . . . . [b]ut if it tells people specifically what not to do, what to put in and how to put it in, they may have a problem."[132] One commentator likens the issue to the use of a medical book: "You can tell people what the symptoms of an illness are and how to recognize an illness, but you can't treat somebody . . . [t]hat's the unauthorized practice of medicine."[133]

The issue of unauthorized practice is especially compelling considering that it will compound in accordance with available technology. However, technology can also increase business for lawyers that are authorized to practice. For example, some Web sites urge users to consult a real lawyer, which creates a marketing opportunity for law firms.[134] FreeAdvice.com offers tutorials on "everything from accident law to premarital agreements so consumers can sort out whether their claims are worth pursuing further."[135] The site then links to a list of endorsed attorneys.[136]

Confusion over jurisdictional boundaries, ethics and unauthorized practice is precisely why state bar regulators are concerned about who is responsible for the advice and whether it is dispensed by lawyers.[137] Regardless of counselors' intentions, responding to a question over the Internet might "unintentionally establish an attorney-client relationship in the mind of the person seeking advice and may render the provider liable for actions taken on the basis of offhand e-mail comments, forwarded far and wide."[138] Internet site operators may claim to merely offer general information about the law, not specific legal advice.[139] Yet, who is accountable to the Web-user who reasonably relies on that information? This is the question being posed by legal regulators. The answers are critical to the state of the legal marketplace because the analysis to determine whether "unauthorized" practice exists depends upon the very definition of "practice," and more importantly, whether it is necessary at all.

## II. PUBLIC POLICY AND THE REGULATORY RESPONSE

The history behind statutes banning the unauthorized practice of law tells of a rationale that the legal profession is obligated to prevent nonlawyers from practicing law to protect the public against incompetents and to preserve the

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131. *See* Goldstein, *supra* note 107, at 3.

132. *Id.* (quoting Eric C. Landman, chairman of the New Jersey State Bar Association's Unlawful Practice of Law Committee).

133. *Id.*

134. *See* Schmitt, *supra* note 18, at B1.

135. *Id.*

136. *See id.*

137. *See id.*

138. Wendy R. Liebowitz, *Regulators Crack Down on 'Cyberlawyers,'* N.Y. L.J., Feb. 23, 1999, at 5.

139. *See* Schmitt, *supra* note 18, at B1.

practitioner's independence for the client's benefit.[140] Indeed, since the late 1800s, this alleged justification has gone largely unchallenged.[141] However, modern critics are questioning whether the benefits from the enforcement of such rules justify their continuation.

The invigorated initiative in Texas to ferret out the unauthorized practice of law presents an opportunity to question the theories that have long supported the monopolistic baseline. Why are states choosing to fight unauthorized practice now, when for the past century it has been a non-issue? This has given rise to questions about whether lawyer conduct is legitimate and deserving of an exclusive privilege to provide legal services free from outside regulation.[142] The paradigm is based on the notion that lawyers possess "esoteric knowledge inaccessible to laypersons," thus relieving them of the regulatory pressure that surrounds businesspersons.[143] Today, the widespread perception is that the law is essentially a business.[144] This perception is driving a fresh critique of the policies and merits behind the legal monopoly.

### *A. Consumer Protection*

The stated mission behind regulations that prohibit the unauthorized practice of law is to protect consumer interests.[145] The theory purports that legal advice from non-lawyers is necessarily incompetent. Yet, in order for this premise to be sound, logic would dictate that absent such rules, the public would be unduly injured by legal incompetence. In reality, there is strikingly little case law involving injury to individuals from unauthorized practice.[146]

An examination of 144 reported unauthorized practice cases from 1908 to 1969 indicates only twelve that involve actual injury to anyone.[147] The vast majority of such actions have been brought by the bar as a result of committee investigations against potential dangers of such an injury, not direct complaints by consumers.[148] In fact, statistics show that only two percent of unauthorized practice inquiries, investigations, and complaints actually arise from consumer

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140. *See* Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 1 AM. B. FOUND. RES. J. 159, 200 (1980).

141. *See id.* at 200-01.

142. *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, 1238 (1995).

143. *Id.* at 1239 (quoting Raymon L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 146 (Robert L. Nelson et al. eds., 1992)).

144. *See id*. at 1232.

145. *See* Rhode, *supra* note 65, at 3.

146. *See* Christensen, *supra* note 140, at 203.

147. *See id.* at 203 n.235.

148. *See id.* at 203.

injury.[149] Another study concluded that complaints about the unauthorized practice of law come largely from lawyers themselves, who are protecting their turf.[150] Solid evidence regarding the malignant effects of legal self-help from software and the Internet is equally sparse. The Texas UPLC references anecdotal evidence of consumer problems arising from the use of self-help legal software, such as lost custody rights, incorrectly drafted deeds, wills with adverse tax consequences, and immigration misdeeds.[151] However, Nolo contends that there has yet to be a published court decision arising from an injury caused by self-help materials.[152]

The lack of evidentiary findings that unauthorized practice causes actual harm to consumers, though somewhat illustrative, does not warrant the conclusion that consumers will be relatively unharmed by self-help products. Nonetheless, certain insight can be gained from an analysis of the validity and merits of statutory will forms, where researchers studied the effects of consumer reliance on self-help in lieu of attorney counsel.

In 1993, a pilot study investigated the merits of self-help statutory will forms.[153] The chief problem with self-help forms was improper completion.[154] Less than thirty percent of all participants were able to answer the forms without error.[155] Further, nearly twenty-five percent of the wills were deemed partially invalid and another twenty percent raised potential problems.[156] Although over eighty percent of those studied favored the idea of will forms,[157] approximately half the total respondents believed the forms and instructions were inadequate to answer their questions.[158]

Erroneous completion of the forms was fatal in around twenty percent of the cases. The nearly 150 probate judges who responded to the query indicated that more than eighty percent of the forms actually offered for probate were admitted.[159] Those that were denied probate were due to improper execution,

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149. *See* Rhode, *supra* note 65, at 43.

150. *See id*. at 37.

151. *See* Robert L. Ostertag, *Nonlawyers Should Not Practice: Nothing Can Substitute for the Professional Skills and Values of a Lawyer*, A.B.A. J., May 1996, at 1.

152. *See Self-Help Law Books and Software*, *supra* note 38.

153. *See* Gerry W. Beyer, *Statutory Fill-In Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 797 (1993). The study comprised statutorily-approved fill-in-the-blank will forms for four states: California, Maine, Michigan and Wisconsin. The will forms in this study were not legally valid, but void documents designed to test the self-help process. *See id.*

154. *See id*. at 784.

155. *See id*. at 810.

156. *See id.*

157. *See id*. at 804.

158. *See id*. at 802.

159. The probate judges were from the four states that comprised this study's population: California, Maine, Michigan and Wisconsin. *See id*. at 818.

ineffective dispositions of property, and errors in formalities and attestation.[160] Interestingly, the study indicated that about fifty percent of probate judges criticized the statutory will concept as being inadequate for individual needs, too confusing, and a negative factor responsible for deterring individuals from acquiring comprehensive estate plans.[161]

The study indicated that ostensible disadvantages of self-help included potentially dangerous misuse and frustrated intent. "Users may ignore portions of the form and leave blanks empty because they erroneously believe that certain sections are irrelevant," which in fact may render a will ineffective.[162] However, the statutory wills were viewed as potentially advantageous due to greater overall use and awareness of estate planning from reduced time, effort, and cost.[163]

Another interesting benefit cited by the study is the decreased reliance on commercial (versus statutory) self-help materials.[164] This evidences the legal community's disdain over entrepreneurs that desire to profit from the public's need for estate planning.[165] Products are faulted for not being prepared with a particular jurisdiction in mind, which may deceive a user concerning the validity and effect of the will.[166] "As a result, the forms and accompanying explanations usually are designed to look 'official' or 'legal' so that they sell, not to convey the information truly needed by the consumer."[167]

The above analysis is cursory and arguably limited in its application beyond self-help will forms. Yet, it drives a larger issue to the forefront: operating under the unconfirmed theory that consumers suffer from unauthorized practice, the legal profession has "engaged in disturbingly little introspection concerning the proper scope of its monopoly."[168] The absence of consumer injury begs the question whether regulators are upholding the law, or upholding lawyers. A growing contingent seems to question the motives of the legal community and whether consumer interests are best served by allowing consumers to counsel themselves, where possible. Advocates for self-help believe that the benefits outweigh the dangers and rely on the premise that "most people have a basic store of common sense and are honest, fair and intelligent enough to know when they need legal advice."[169] There is a line separating when lawyers are needed

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160. *See id.*

161. *See id*. at 823.

162. *Id.* at 784.

163. *See id*. at 778.

164. *See id*. at 780.

165. *See id*. at 781-82.

166. *See id*. at 781. Certain publications often assert that the supplied will form is valid in all states. *See, e.g.*, SJT ENTERPRISES, DO-IT-YOURSELF WILL KIT (1993) (asserting that "[t]his kit is valid in all states"); E-Z LEGAL FORMS, LAST WILL & TESTAMENT KIT (1991) (asserting that it is "[v]alid in All 50 States").

167. Beyer, *supra* note 153, at 782.

168. Rhode, *supra* note 65, at 3.

169. Beyer, *supra* note 153, at 795 (quoting James N. Zartman, *The New Illinois Power of Attorney Act*, 76 ILL. B.J. 546, 553 (1988)).

and when consumers can take care of themselves. The issue is where to draw it.

Legal protectionists advocate that consumers who truly need a lawyer's counsel rather than a commodity product will suffer if self-help evolves. Indeed, there are (and will continue to be) ample situations where an attorney's individualized advice and representation are warranted.[170] For these needs, self-help avenues will not likely suffice. It is ironic, then, that arguments against self-help products are targeted to the low-end consumer (whose needs may be legitimately satisfied by such products). Consider one legal commentator's forecast of the self-help market:

> Kiosks at shopping malls will offer such things as wills. Insert a credit card, answer a few questions, and out pops an 'estate plan.' That same technology of expert systems and artificial intelligence available to attorneys will be easily accessible to those who choose to rely upon such systems for legal self help . . . . [N]on-lawyer 'document preparers,' such as the present divorce and bankruptcy services . . . performing what has heretofore been deemed to be the unauthorized practice of law, will proliferate as the Information Age reaches adolescence.[171]

The linchpin of the arguments supporting the exclusive professional license is the claim that the lawyer-client relationship is asymmetric: clients cannot adequately evaluate the quality of legal services, and consequently they must rely on those they consult.[172] However, commentators note that "legal services resemble many other goods and services in terms of consumers' ability to evaluate them."[173] Many consumers are more sophisticated than the legal community gives them credit for, and they may not need such heightened protections.[174] Further, allowing consumers the freedom to choose would not necessarily slight those consumers who lack the ability to evaluate legal services. In accordance with the free market philosophy, they may opt out of the self-help market and procure legal assistance through other means (such as hiring a lawyer or pursuing public assistance programs). Self-help legal materials may even place consumers in a better position for quality legal counsel by empowering the public to become informed about the law. Particularly for mundane legal matters, such as uncontested divorces and wills, where lawyers charge disproportionately high prices by virtue of their monopoly, self-help is justifiable.

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170. *See id*.

171. Crostwait, *supra* note 43, at 3.

172. *See* Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15, 34 (1998) (citing Roger Cramton, *The Future of the Legal Profession: The Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994)).

173. Pearce, *supra* note 142, at 1267.

174. *See id*.

### *B. The Legal Monopoly in a Free Enterprise System*

Lawyers have historically achieved autonomy from external regulation under the theory that their commitment to clients and public service surpasses their financial self-interest.[175] The term "professional" means lawyers should "subordinate self-interest and private gain to the interests of a client or, generally, to the public good."[176] However, more than twenty years ago the U.S. Supreme Court recognized in *Bates v. State Bar of Arizona*[177] that lawyers are motivated by financial gain, in addition to (and perhaps above) protecting the public good.[178] Indeed, by 1987, "the legal services industry 'added over $60 billion to the gross national product.'"[179] The law has become a larger industry than steel or textiles.[180] In piercing the veil that long protected lawyers from marketplace rules, the *Bates* Court declared "the belief that lawyers are somehow 'above' trade has become an anachronism."[181]

The gap in competence between professionals and laypersons, institutionalized by the monopolies of training, certification, and enforcement, necessarily sets professionals apart.[182] In essence, some argue, the legal industry has intentionally mystified itself in order to be self-perpetuating. The law remains inaccessible because it appears to be written in a "foreign language" the general public cannot understand.[183] One critic notes that "[m]ystification is aggression upon the spiritual autonomy of others; it is inevitably a depersonalizing assertion of hierarchal status based on the assumption that there is an authority somewhere that has the right to assign and enforce identities."[184] The result is that restricting the passage of legal information has produced a society of legal illiterates.[185]

Despite the longstanding rationale that regulations against unauthorized practice are necessary to protect consumers, others advocate that consumer interests are best protected by the ideals of free enterprise. The legal theory underlying prohibitions against unauthorized legal practice is that low cost

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175. *See id.* at 1229.

176. Treece, *supra* note 116, at 972.

177. 433 U.S. 350, 371-72 (1977).

178. *See id.* at 368-69; *see also* Pearce, *supra* note 142, at 1249.

179. Pearce, *supra* note 142, at 1251 (quoting Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 1, 8 (Robert L. Nelson et al. eds., 1992)).

180. *See id*.

181. *Bates*, 433 U.S. at 371-72.

182. *See* MAGALI S. LARSON, THE RISE OF PROFESSIONALISM—A SOCIOLOGICAL ANALYSIS (Univ. of Calif. Press 1977).

183. Treece, *supra* note 116, at 972.

184. Rieber, *supra* note 35 (quoting THEODORE ROSZAK, PERSON/PLANET: THE CREATIVE DISINTEGRATION OF INDUSTRIAL SOCIETY (1979)).

185. *See Self-Help Law Books and Software*, *supra* note 38.

services will also be low in quality.[186] However, economic theory holds that increased competition in the legal market "would likely result in better quality services at a lower cost."[187] Confining the legal practice to members of the organized bar is an ineffective means of achieving quality assurance; instead it leads to higher fees and an artificial shortage of legal assistance.[188]

In this sense, the self-help legal market could actually improve the quality of services available from lawyers. The more resources available for consumers to tap, the more service providers would be required to compete for business, both on price and quality. Their ability to compete on price would be hampered, since lower-priced self-help products would be an alternative. Thus, legal service providers would resort to compete on quality (similar to most other players in the free market).

Although many lawyers attempt to defend their autonomy under the auspices of fidelity and consumer protection, industry commentators have discredited this position by taking note of the decline of professionalism in the legal field.[189] Indeed, critics view unauthorized practice of law regulations as "deliberately constructed violations of the principles of free trade among the states, and of the antitrust laws that have governed every other sphere of domestic commerce for nearly a century."[190]

### *C. Faith in Consumer Intelligence*

Regulations against the unauthorized practice of law assume either that lawyers lack the confidence to meet free and open competition, or they lack faith in the intelligence of the public to make sound decisions.[191] It seems neither premise is admirable or accurate. Banning a self-help product because it may cause harm to legal consumers assumes that consumers are unable to judge for themselves whether the legal product is appropriate for their needs.[192] Arguably, most consumers are capable of determining for themselves when they need to turn to a licensed lawyer. Likewise, people can perceive that many law-related issues can be handled without the aid of a lawyer. After all, people do their own taxes, life insurance, healthcare, and home maintenance; and they often rely on self-help books and learning aids to assist in these endeavors.[193] Thus, in many areas other than the law, individuals are free to turn to self-help.

If the rationale that requires use of a licensed lawyer is to prevent harm to the public, why is it satisfactory for people to harm themselves by doing their own

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186. *See* Bertelli, *supra* note 172, at 15.

187. Pearce, *supra* note 142, at 1232-33.

188. *See* Bertelli, *supra* note 172, at 37.

189. *See* Anthony E. Davis, *New Jersey and the House of Lords*, N.Y. L.J., Jan. 4, 1999, at 5.

190. *Id.*

191. *See* Christensen, *supra* note 140, at 216.

192. *See* Elias & Jermany-Elias, *supra* note 2.

193. *See id*.

taxes or insurance?[194] Despite this inconsistency, many self-help products are careful to indicate which situations require professional assistance. For those instances requiring individualized counseling, the products also contain explanations and disclaimers regarding individual responsibilities when using self-help products.

The law profession's general reference to the "public interest" neglects to delineate other important public interests such as unrestrained trade, the interest in readily available legal services, and the public interest in freedom of choice.[195] "[T]he essence of the democratic idea is the notion that the individual can think for himself, that he is capable of making his own decisions."[196] Freedom of choice is a fundamental tenet of the American marketplace. Naturally, individual freedom cannot go wholly ungoverned; such a contention is blind to the concept of ordered society. However, certain protections are provided by criminal law, tort law, and consumer protection laws. Counter to the traditional monopoly approach, consumers in an open market could make informed decisions about the purchase of legal services.[197]

In addition, some argue that enjoining the distribution of self-help legal materials runs counter to the principles behind the rights of citizens to represent themselves in court. In *Faretta v. California*,[198] the U.S. Supreme Court ruled that a person could be self-represented in a murder case involving the death penalty.[199] In *Faretta*, the Court noted that the right of self representation has been "protected by statute since the beginnings of our Nation. [P]arties may plead and manage their own causes personally or by the assistance of such counsel."[200] If self representation in a murder case is permissible, then why would it not be permissible, for example, in an uncontested divorce or bankruptcy, where much less is at stake?[201] Further, if the Constitution guarantees citizens the right to represent themselves, then how can the act of providing information to aid such endeavors be wrong?

In 1995, the ABA published a report on the nexus between unauthorized practice restrictions and the legal needs of low-income individuals.[202] The report called for states to adopt an analytical approach in assessing whether and how to regulate varied forms of nonlawyer activity, considering 1) the risk of harm presented by these activities, 2) whether consumers can evaluate providers' qualifications, and 3) whether the net effect of regulating unauthorized practice

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194. *See id*.

195. *See* Christensen, *supra* note 140, at 201-02.

196. *Id.* at 202.

197. *See* Pearce, *supra* note 2, at 1249.

198. 422 U.S. 806 (1995).

199. *See id.* at 836.

200. *Id*. at 812-13 (quoting Judiciary Act of 1789, § 35, 1 Stat. 73, 92) (current version at 28 U.S.C. § 1654 (2000)).

201. *See* Elias & Jermany-Elias, *supra* note 2.

202. *See* Bertelli, *supra* note 172, at 40.

will benefit the public.[203] The ABA itself recognized that "Americans are independent-minded and historically value choice in pursuing services of any kind. Government efforts to restrict individual choice are, thus, unpopular in this country."[204] The report states that "when consumers know the pros and cons of the choices of assistance, they will make reasonable ones with which government need not unduly interfere."[205]

### *D. Lack of Access to Affordable Legal Counsel*

Certain legal commentators believe the popularity of the self-help legal market is a symptom of a longer-standing problem: the lack of affordable legal assistance.[206] In the 1980's, the ABA estimated that at least 100 million Americans lacked adequate access to the courts, often because they could not afford it.[207] Nationally, only one-quarter of low-income and one-third of middle-income households have their legal needs met.[208] In 1992, a study found that forty-eight percent of low-income households reported involvement in a situation of requisite severity for resolution in the justice system.[209] Of those households, thirteen percent consulted a non-lawyer third party, forty-one percent attempted to handle the situation themselves, and thirty-eight percent did nothing.[210]

More recent evidence suggests a similar story. On-line newsgroups feature pleas for legal assistance from lay persons who claim to have been injured in accidents, fired from jobs, treated unfairly in divorce proceedings, or otherwise confronted by a situation demanding a legal response.[211] Unfortunately, legal clinics do not provide a ready solution. Due to "lack of funding, accessibility to legal aid clinics is dwindling."[212] The Legal Services Corporation, which provides services to the nation's poor, "turns away thousands of potential clients annually because of cutbacks in funding."[213] In 1993, only 1.5 million of the fifty million potentially eligible clients received services,[214] and in 1994, sixty percent of those seeking assistance were turned away.[215]

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203. *See id*.

204. *Id.* at 37.

205. *Id.* at 133.

206. *See id.*

207. *See id.*

208. *See* Deborah L. Rhode, *Meet Needs with Nonlawyers: It Is Time to Accept Lay Practitioners—and Regulate Them*, A.B.A. J., Jan. 1996, at 1.

209. *See* Bertelli, *supra* note 172, at 18, 19.

210. *See id*. at 19.

211. *See* Lanctot, *supra* note 4, at 151.

212. Treece, *supra* note 116, at 971.

213. Raymond P. Micklewright, *Discrete Task Representation A/K/A Unbundled Legal Services*, COLO. LAW., Jan. 2000, at 5.

214. *See id.*

215. *See id*. (citing Francis J. Larkin, *The Legal Services Corporation Must Be Saved*, JUDGES J., Winter 1995, at 1).

A macro-perspective shows that, concomitant with the liability associated with on-line counsel, self-help provides enormous promise for meeting the unmet legal needs of consumers. As a way of getting law to the people, e-law could open new markets and provide an inexpensive means of delivering legal services to the poor.[216] In fact, supporters of self-help point to the lack of access to the legal market as evidence that strong regulations against the unauthorized practice of law actually harm consumers more than they help.[217] "The truth is that millions of Americans are priced out of the legal system."[218] Some find it difficult to justify regulating unauthorized legal practice to ensure the quality of legal services when the result is that the poor population receives no legal services at all.[219] "It is equally difficult to assert that persons have meaningful access to justice resulting from the right to proceed pro se when a lay person cannot realistically negotiate our complex legal system."[220] For these reasons, the demand has increased for self-help legal assistance.[221] "There is a serious problem in this country because many people either can't afford attorneys or, to be blunt, don't trust attorneys or don't want to pay an attorney."[222]

Supporters of self-help note that such products make legal services more available to low-income persons, thus contributing to the administration of justice. This view is related to the unfortunate reality in the modern legal system that contrary to the goal of equal justice under the law, "justice . . . is related to the quality of lawyering that a client can afford."[223] Currently, less sophisticated consumers presumably access legal services through consumer guides or paid referral services if they feel they lack expertise.[224] Although the self-help market may not fully provide equal access to legal services, it is a marked improvement to the existing system.

The State Judicial Council of California is taking the unique approach of embracing self-help to benefit the low-income population. Despite some resistance from lawyers, the program encourages local courts to provide self-help centers for persons requiring assistance with family law.[225] In addition, the state has repeatedly proposed a licensing system for low-cost paralegals, though

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216. *See* Johnston, *supra* note 1, at 36.

217. *See* Pearce, *supra* note 142, at 1238.

218. Greenwald, *supra* note 104, at 51 (quoting James Turner, executive director of Help Abolish Legal Tyranny (HALT), a legal reform group).

219. *See* Bertelli, *supra* note 172, at 15.

220. *Id*. at 15-16.

221. *See id*. at 17.

222. Liebowitz, *supra* note 6, at A18 (quoting Mark J. Welch, an attorney and consultant on Internet commerce).

223. Pearce, *supra* note 142, at 1271 (quoting Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed To Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1112 (1985)).

224. *See id.* at 1273.

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

lawyer groups have fended off the attempts thus far.[226]

## III. BALANCING THE INTERESTS OF CONSUMERS AND THE LEGAL INDUSTRY: SOLUTIONS AND ALTERNATIVES WITH SELF-HELP

### *A. Feasibility of Regulation and the Appropriate Driving Force*

In connection with the difficulties posed to regulators struggling to keep pace with technology, confusion exists regarding exactly how to regulate.[227] Whether the ABA is best situated to protect consumer interests in the field of cyberlaw is not a foregone conclusion. In the law, where there are "demonstrable grounds for paternalism, [the enforcement of unauthorized practice] should emanate from institutions other than the organized bar."[228] Some critics question whether the states would be better equipped to make the determination. According to one commentator following *Parsons*, "[h]opefully, what [this case] will stimulate is thoughtful consideration in each state about what [is] appropriate."[229]

A critical analysis of the issues in cyberspace logically begins with whether our existing framework of laws is sufficient to handle Internet issues.[230] State lawmakers are beginning to target on-line regulation, though at this point, the subject matter seems limited to tortious or criminal communications.[231] The Texas UPLC has shut down several Web sites for practicing law without a license, including one site where non-lawyers were processing divorce petitions for a fee.[232] While our current system may be sufficient in some areas, technology is bound to present unique and unfathomed scenarios for which our system is ill-equipped. Legal commentators have considered this challenge:

> Political pressure exists to pass regulatory measures which would severely inhibit the development and growth of the Internet. Legislation

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226. *See* Associated Press, *supra* note 99. Chief Justice Phillips says U.S. Attorney General Janet Reno has called for the broadening of authority of paralegals as a way to meet the legal needs of the poor. *See* Elliot, *supra* note 88, at 4.

227. Some assert that the Internet's unique qualities warrant heightened regulation as compared to other media, based on 1) interactive capabilities; 2) the economic feasibility of transmitting vast amounts of information; and 3) the speed and personal nature of communications that threaten undue influence by solicitors. *See* T.K. Read, *Pushing the Advertising Envelope: Building Billboards in the Sky Along the Information Superhighway*, 23 W. ST. U. L. REV. 73, 96 (1995). Others argue that Internet regulation should be minimized to avoid undermining its value for information sharing. *See* ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

228. Rhode, *supra* note 65, at 99.

229. Liebowitz, *supra* note 138, at 5 (quoting Will Hansley, staff counsel to the ABA Division for Legal Services).

230. *See* Caden & Lusas, *supra* note 225.

231. *See, e.g.*, 1995 Ga. Laws 322 (prohibiting the computer transmission of bomb-making instructions); 1995 Va. Acts ch. 839 (restricting child pornography on the Internet).

232. *See* Schmidt, *supra* note 18, at B1. Texas UPLC chairman Mark Ticer remarks, "[t]hese things may be very well-meaning . . . [b]ut who [sic] are they accountable to?" *Id.*

> aimed at restricting the Internet will be challenged on First Amendment grounds and potentially held unconstitutional. It is difficult to imagine, even if such legislation were passed, how it could be applied to individuals from other nations who distribute material to the United States. Within our own country, it is unclear how "community standards" can be applied to Internet transmissions available to every city, county, and state in America.[233]

Regardless of the difficulty that necessarily accompanies regulation, litigation over on-line matters will inevitably increase. From a logistical standpoint, "[j]udicial resolutions may be the only avenue for companies and individuals to clear the Internet's murky waters."[234]

### *B. Proposed Solutions*

*1. Caveat Emptor*.—One way that commentators propose reducing the risk to consumers is by use of disclaimers on self-help products and sources. The purpose of a disclaimer is to ensure that an attorney-client relationship does not arise when a person contacts a firm's Web page.[235] However, despite the common use of disclaimers, ethical and legal concerns have prevented many attorneys from creating interactive Web pages and otherwise participating in global conversation. If more restrictive ethical rules appear, some attorneys will be deterred from embracing technology. Nonetheless, disclaimers are hardly a guarantee. In *Parsons*, the court recognized that when users install the Quicken Family Lawyer software, a disclaimer appears on the screen.[236] According to the *Parsons* court, "[the] false impression [of reliability] is not diminished by the program's disclaimer. There is no guarantee that the person who initially uses the program is the same person who will later use and rely on the program."[237]

Attorneys who offer legal information on their Web sites "need to make clear to browsers that [the information is] for educational purposes, not intended as legal advice. Otherwise, they may find an attorney-client relationship has formed."[238] The more a lawyer learns about a questioner's case, the greater the risk of establishing an attorney-client relationship and exposure to malpractice claims.[239] "The lawyer's not charging for the advice does not protect him if the advice turns out to be unsound, just as it wouldn't [] in a real-world pro bono

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233. Caden & Lucas, *supra* note 225, at 95.

234. *Id.* at 101.

235. *See* Dietrich, *supra* note 57, at 13.

236. *See* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. CIV.A.3:97-C-2859H, 1999 WL 47235, at *2 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 356 (5th Cir. 1999).

237. *Id.* at *6.

238. Leigh Jones, *Things to Watch When Doing Business on the Web*, J. RECORD, July 24, 1997, at 2.

239. *See* Resnick, *supra* note 42.

case."[240] Further, "[s]ince a lawyer's [W]eb page will be viewed outside the state of licensing, it should clearly indicate where the lawyer is licensed."[241]

*2. Regulate the Self-Help Market with a Sliding Scale Approach*.—To the degree that a state has a compelling interest in regulating legal advice by non-lawyers, a state could advance a "constitutionally permissible" system of regulation, rather than an outright ban.[242] Under this approach, a regulatory body could "certify" the materials, thus giving consumers the choice between certified and uncertified products.[243] This approach would neither require any change to the licensing of lawyers, nor would it necessitate that anyone but trained and committed lawyers hold themselves out as attorneys.[244] In short, the public could exercise its freedom of choice over a variety of legal options.

For example, the self-help market could be audited and tested.[245] Alternatively, the bar could require a special license to sell legal software.[246] "Before granting a license, attorneys could review legal software for competence and accuracy," and the license could be revoked if the products fail to meet established standards.[247]

*3. Clarify Regulatory Confusion Via a System of Uniform Rules*.—Part of the difficulty for legal regulations and the self-help market alike is that regulations are varied. As e-commerce spreads, states and industries are hurriedly trying to develop rules to protect personal and commercial interests. This leads to a conundrum: How does one comply with the rules without knowing what they are? In fact, many states have specific rules that address a problem that is, practically speaking, ajurisdictional.[248] A primary function of the rules regulating the legal community is to "provide lawyers with guidance on how they should properly disseminate information about their services."[249] "As applied to the Internet, current regulations [do not] seem to serve [that] purpose"[250] because the Internet blurs state lines, rendering varying state regulations difficult to apply.

For these reasons, some suggest that although regulation is along state lines,

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240. *Id.* (quoting Professor Ronald D. Rotunda, University of Illinois College of Law).

241. LAWYERS' MANUAL, *supra* note 68, § 81:568, at 58-59. "Without such a disclosure, a lawyer's Web page may be considered misleading." *Id. See also In re* Schwarz, 132 N.E. 921 (N.Y. Ct. App. 1921) (sanctioning a lawyer for sending cards and letterhead implying that he was authorized to practice law in states where he was not).

242. Christensen, *supra* note 140, at 213.

243. *See id*. at 214.

244. *See id.*

245. *See* Brown, *supra* note 71.

246. *See id.* at 171.

247. *Id*.

248. *See* Peter Krakaur, *Internet Advertising: States of Disarray? Are Uniform Rules a More Practical Solution?*, N.Y. L.J., Sept. 15, 1997, at 54; *see also* Matt Ackerman, *ABA Panel Urges Special Rules for Lawyer Solicitation on Web*, N.J. L.J., Sept. 21, 1998, at 9.

249. Krakaur, *supra* note 248, at 54.

250. *Id.*

a national approach may be necessary.[251] "Uniform rules would level the field for all lawyers, and provide clear guidance on how to disseminate information to the public."[252] Further, "such rules would insure that the public receives consistent, complete and clear information about the law and the availability of legal services."[253] One commentator notes that the "notion of a local bar locally licensed to serve local clients is anachronistic in an era of national and global law firms attending to the needs of clients with cross-border problems."[254]

One hurdle to implementing a uniform regulatory system is that local lawyers may resist outside competition if clients can seek advice from outside sources or the Internet.[255] Yet, proposals for a national practice may actually sustain the bar's competitive advantage.[256] States' two main interests in requiring locally-licensed lawyers are accountability for competence and honesty.[257] As for competence, a great deal of American law is uniform (except for probate, real estate and family law matters, where variations might be more significant).[258] Exclusion may not be justified where an out-of-state lawyer, who is more versed in a particular area of the law, could provide services superior to a less-qualified in-state lawyer.

Further, accountability is not necessarily sacrificed under this approach. If a client retains an out-of-state lawyer, his good standing there may provide sufficient protection.[259] "If the host state wants more protection for its citizens, it can create 'long-arm discipline,' giving it professional jurisdiction over any lawyer who performs legal work within its borders, actually or virtually."[260] Lawyers in good standing should be able to render services to clients anywhere, and states can declare certain areas off-limits if they involve unusually unique state law issues.[261] One commentator views this issue with critical imminence: "If we do not construct a system that moves us toward national bar admission and national regulation . . . , we will find one day that, like dinosaurs, we have become extinct."[262]

*4. Dispel the Legal Monopoly and Embrace Free Enterprise.*—Critical analysis of the rationale underlying the legal monopoly reveals flawed logic. To base a centuries-old policy of unauthorized practice on a presumption that

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251. *See id.*

252. *Id.*

253. *Id.*

254. Stephen Gillers, *Unauthorized Practice: Rules Update Needed: Morass of Local Systems Is Anachronistic in Age of Global Business*, FULTON COUNTY DAILY REP., Nov. 12, 1998, at 7.

255. *See id.*

256. *See id.*

257. *See id.*

258. *See id.*

259. *See id.*

260. *Id.*

261. *See id.*

262. Davis, *supra* note 189, at 5.

consumers are incapable of making sound decisions insults the intelligence of both consumers and lawyers. Indeed, dispelling the myth surrounding legal practice and embracing a free market philosophy will benefit consumers, and in the process, improve the quality of legal services in general.

The free market has successfully developed "rules of the road" to protect buyers, sellers, and intermediaries and avoid heavy-handed government regulation. These tools may adequately protect the interests of self-help legal consumers. The Uniform Commercial Code (UCC) provides one approach, which would apply the Deceptive Trade Practices Act to legal software.[263] To the extent that self-help legal products would be subject to UCC jurisdiction, consumers could derive protection from practices that fall short of the code's standards.

Another approach is to consider whether "unbundling" legal services, known as "discrete task representation" (DTR), provides a more effective model for lawyers to use in offering limited legal help that many people need but cannot afford.[264] DTR is akin to a compromise between the demand for legal services among the low-resource sector and the requirements of competence and ethics as set forth by the bar. The concept of parceling out counsel is a response to the deluge of self-help and *pro se* litigation that has resulted from expensive legal services, outmoded and time-consuming methods, and the public's resentment toward lawyers.[265]

In "unbundled" representation, an attorney is available to an individual to give specific advice on a legal matter (e.g., reviewing a will drafted by a client, negotiating a discrete issue, or researching particular topics).[266] The problem with unbundling is the conflict between a lawyer's duty of impartiality and the overriding necessity to assure that cases are fully and competently represented.[267] "[A]s distinguished from accepting responsibility for a client no matter what task is required[,] the onus of fair and adequate representation is shifted to a court officer who is neither competent nor accountable to any regulatory or disciplinary body for the faithful discharge of the duty."[268] Nonetheless, the need for an immediate solution is clear, and some states have already enacted rules that make unbundling ethically permissible.[269]

The above-referenced examples illustrate the willingness of the market to bridge the accessibility of legal self-help with quality assurance. The concept is not new. Noted legal commentator Karl Llewellyn recognized the futility of efforts spent protecting the legal monopoly as early as the 1930s. Llewellyn urged the bar to divert the time, energy and resources expended on fighting

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263. *See* Polly Ross Hughes, *Potential Ban on Legal Software Spurs Reform Call*, HOUSTON CHRON., Feb 14, 1999, at S1.

264. Lanctot, *supra* note 4, at 167.

265. *See* John L. Kane, Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 15.

266. *See* Micklewright, *supra* note 213, at 6.

267. *See* Kane, *supra* note 265, at 16.

268. *Id.*

269. *See id*.

unauthorized practice to instead improving the legal services provided to the public.[270] Instead of relying on regulated mandates to protect the legal market, licensed practitioners could deliver a better product, which the market would demand. In this sense, the legal monopoly appears to underestimate more than consumer intelligence; it also indicates that lawyers underestimate their own value in the marketplace. Licensed lawyers have much to offer consumers, including valuable resources such as individualized counsel, sound advocacy skills, legal proficiency, and a commitment to high ethical standards.[271]

Lawyers who embrace market advances and technological trends can expedite routine matters and cut unneeded costs for clients through heightened efficiency. They will accrue more time to provide individual attention and advice. Further, attorneys may utilize technology to enhance their legal knowledge and efficiency, and pass along savings in time and money to clients.[272]

"Indeed, having to stand virtually unprotected in the legal service marketplace may force the legal profession to do some important things that it has heretofore neglected,"[273] such as improving the quality and image of the bar. Lawyers might actually "appear to be what they should be—proud, self-confident, able professionals, willing to be judged by the public on their merits."[274]

## CONCLUSION

The state of the modern legal marketplace is an appropriate concern for the new millennium. Information technology has reshaped the ways lawyers deliver services and the ways consumers procure them. The self-help legal market capitalizes both on available technology and the demands of a public that, for centuries, has been forced to support a monopoly of law. Clearly there are instances where consumers will need the individualized attention of an experienced, licensed lawyer. It would be impractical to advocate that consumers will always make sound choices, or that no actual harm will inure to them from unlicensed legal sources.

Disturbing, though, is the perpetuation of a legal monopoly whose arguably flawed rationale has gone unchallenged since its inception. The evolution of self-help drives this issue to the forefront. "At every level of enforcement, the consumer's need for protection has been proclaimed rather than proven."[275] The very nature of the Information Revolution is to deliver better information to people for a healthier and more productive society. To this end, society would be well served if regulators boldly attempt to balance consumer interests and the interests of the legal industry in a modern context.

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270. *See* Christensen, *supra* note 140, at 212.

271. *See id*. at 214.

272. *See, e.g.*, Jeffrey R. Kuester, *Attorney Sites Can Avoid Violations of Ethics Rules*, NAT'L L.J., Aug. 12, 1996, at B11.

273. Christensen, *supra* note 140, at 215.

274. *Id*. at 216.

275. Rhode, *supra* note 65, at 97.