Internet Wars: The Bar Against the Websites

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A. Introduction

Consumers are increasingly consulting the internet to find providers of legal services.¹ Sites that respond to this demand are

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proliferating. This new supply and demand system is changing the nature of the delivery of legal services and challenging a profession which is resistant to change. The tension between the new providers and the traditional bar appears to be escalating. This article will describe the tensions and will highlight the ethical and legal questions that these changes present.

Three of the more popular sites will be used as examples of the huge number of legal delivery services that are available on the internet. LegalZoom appears to be the most successful such website. It has recently raised $100 million from Kleiner Perkins and Institutional Venture Partners and is poised to go public. Nolo was recently purchased by Internet Bands; Rocket Lawyer has recently raised $18.5 million in financing, in which Google Ventures participated. Investors are attracted by the fact that these web-based pro-

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1 See Jennifer Smith, No-Frill Legal Services Grow, WALL ST. J., Dec. 3, 2012, archived at www.webcitation.org/6GRQezkdt (observing newfound access to online legal services).
2 See id. (describing the online legal services market as having become “increasingly crowded”).
3 See WILLIAM HORNSBY, IMPROVING THE DELIVERY OF AFFORDABLE LEGAL SERVICES THROUGH THE INTERNET: A BLUEPRINT FOR THE SHIFT TO A DIGITAL PARADIGM 4 (1999) (commenting on lawyers’ unwillingness to adapt to an online, unbundled offering of legal services).
4 See Smith, supra note 1 (noting the many legal conflicts between the traditional legal community and its online counterpart).
5 See LegalZoom: Online Legal Documents Services, LEGALZOOM, archived at www.webcitation.org/6EBcBHZTy [hereinafter LegalZoom] (providing an example of an online legal service outlet); Nolo: Law for All, NOLO, archived at www.webcitation.org/6EBcoZ4Q0 [hereinafter Nolo] (noting services offered by another online legal service organization); Rocket Lawyer, archived at www.webcitation.org/6EBcymDCj (describing the services of an online legal services provider as, “[e]verything you need to make it legal.”).
6 See LegalZoom, supra note 5 (presenting various accolades received by the likes of Forbes and the Wall Street Journal).
7 See John Wallbillich, LegalZoom: Substance Over Forms?, WIREDGC, May 4, 2011, archived at www.webcitation.org/6EBdp6sDX (announcing two venture capitalists’ investment in LegalZoom).
9 See Internet Brands Acquires Nolo, the Definitive Online Source for Consumer Legal Information, MARKET WIRED, May 2, 2011, archived at www.webcitation.org/6GRWsChLo (announcing the acquisition of Nolo); Debra
providers of legal service to the public are disruptive models in huge, decentralized business of law, with revenues of $230 billion last year in billings from 160,000 law firms.10

These sites provide legal services to the public in a variety of ways: first, by providing legal information in a format to be understood by a lay audience,11 second, by offering to find the customer an appropriate lawyer,12 third, by maintaining a bulletin board and inviting the public to post questions to be answered by lawyers who are registered with the site,13 fourth, by selling memberships which entitle the member to free or discounted legal services on a continuing basis as the needs arise,14 and fifth, by selling legal forms, either in blank, or, customized to the particular needs of the customer by interactive branching software which will use customer information to develop the appropriate document.15

Cassens Weiss, Rocket Lawyer Raises $18.5M; Google Ventures is Among the Investors, ABAJOURNAL, Aug. 11, 2011, archived at www.webcitation.org/6EBwM8US (reporting the investment made by large investors in Rocket Lawyer).

10 See Daniel Fisher, Silicon Valley Sees Gold in Internet Legal Services, FORBES, Oct. 5, 2011, archived at www.webcitation.org/6EC1CrAiP (reporting fee billings by 160,000 law firms in a year); see also Richard Granat, LegalZoom’s Achilles’ Heel: Free Legal Forms, E LAWYERING BLOG, Aug. 4, 2012, archived at www.webcitation.org/6EC1GOpvH [hereinafter LegalZoom’s Achilles’ Heel] (describing the financial benefits of free online legal forms, and the harm that they may cause the online legal services market).

11 See Lawguru, archived at www.webcitation.org/6EC0Mf34A (attempting to provide free legal advice that can be understood by a lay audience); Rocket Lawyer, supra note 5 (providing another example of online legal research).

12 See Rocket Lawyer, supra note 5 (including amongst the services provided, the ability to connect with a lawyer).

13 See, e.g., Lawguru, supra note 11 (allowing customers to visit message boards and post questions).

14 See, e.g., Plans and Pricing, ROCKETLAWYER, archived at www.webcitation.org/6GRZIkIcz (proving various pricing plans for services provided).

15 See Rocket Lawyer, supra note 5 (offering clients the ability to “make a document” and allowing them to personalize their legal needs electronically).
B. LegalZoom

1. Introduction

LegalZoom was founded in 2001 by two former firm associates in Hollywood, California and currently claims serving over 1 million customers and employing roughly 400 workers.\textsuperscript{16} Co-founder Robert Shapiro, a California attorney best known for his role on the O.J. Simpson defense team, is touted as one of the “top attorneys” behind the development of the site.\textsuperscript{17} A nationwide advertising program in major national media markets seeks to brand LegalZoom as the leading legal services web site on the Internet.\textsuperscript{18} However, the scheduled August 2, 2012, IPO was cancelled when institutional investors evaluated its stock at $7 to $8 per share, one third less than LegalZoom’s evaluation.\textsuperscript{19} The gloomy assessment by investors is probably influenced by the legal problems described herein, as well as the proliferation of competing sites.

2. The Site

LegalZoom maintains a multi-faceted website that provides information, maintains a blog, and sells personalized forms.\textsuperscript{20} It also markets legal services plans for a monthly fee which entitles members to certain circumscribed services free of charge.\textsuperscript{21} LegalZoom uses the tag line: “We Put the Law on Your Side.”\textsuperscript{22}

\textsuperscript{17} See id. (describing Shapiro as the “public face” of the company).
\textsuperscript{18} See Bill Draper, Missouri Lawyers Challenge LegalZoom’s Service, THE SAN DIEGO UNION-TRIBUNE, July 30, 2011, archived at www.webcitation.org/6ED0R5Nr9 (discussing the advertising campaign designed to position LegalZoom as the most recognizable of the online legal services websites).
\textsuperscript{19} See LegalZoom’s Achilles’ Heel, supra note 10 (discussing how LegalZoom’s IPO was delayed because they were not able to get the $10-$12 per share that they desired).
\textsuperscript{20} See LegalZoom, supra note 5 (advertising the range of LegalZoom’s services).
\textsuperscript{21} See Personal Legal Plan, LEGALZOOM, archived at www.webcitation.org/6GRdizm5G (offering a variety of legal service plans).
\textsuperscript{22} See Richard Granat, Analyzing LegalZoom’s Advertising Practices, ELAWYERING BLOG, Feb. 12, 2009, archived at www.webcitation.org/6ED3IOp53 (stating LegalZoom’s tagline).
When customers arrive at the LegalZoom web site they are presented with a menu of legal documents that are sold for a fixed price. The documents are either those commonly needed by the individual client like powers of attorney, living wills, residential leases, purchase and sale agreements and no-fault divorce petitions; or those commonly needed by businesses such as certificates of incorporation, trademark applications, and contracts for the sale of goods. These forms are available in blank or they may be customized by the site software. The customer completes a series of questions and the document assembly software generates a legal document, which is sent to the customer in paper format by regular mail after the customer pays for the document by credit card. Examples of costs are: 501(c)(3) application - $595, certificate of incorporation - $99, last will and trust - $69, living will - $39, joint venture agreement - $129 and copyright application - $114.

The company provides a “peace of mind review” to assure that all answers are completed, that the spelling and formatting is cor-

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23 See LegalZoom, supra note 5 (providing a gateway to access the legal documents and services offered).
24 See LegalZoom, supra note 5 (listing several of the most popular forms provided).
25 See Donna Seyle, LegalZoom and Unauthorized Practice of Law, LAWYERIST, Aug. 17, 2011, archived at www.webcitation.org/6GRkKEWW1 (quoting a Missouri District Court as saying that, “LegalZoom’s sale of blank forms over the internet does not constitute the unauthorized practice of law.”) LegalZoom has touted the ability of clients to fill the documents, as well. See id., noting of LegalZoom advertising that clients needs only, “answer a few simple online questions and LegalZoom takes over. You get a quality legal document filed for you by real helpful people.”).
26 See, e.g., Trademark Registration, LEGALZOOM, Feb. 5, 2013, archived at www.webcitation.org/6ED51hJPP [hereinafter Trademark Registration] (prompting the customer to complete the online questionnaire to obtain their document).
27 See 501c3 Application, LEGALZOOM, archived at www.webcitation.org/6GRioJWap (providing the cost of an application); Certificate of Incorporation, LEGALZOOM, archived at www.webcitation.org/6GRjEd3NM (showing the cost of a certificate of incorporation); Last Will and Testament, LEGALZOOM, Feb. 5, 2013, archived at www.webcitation.org/6GRkpIXzT (showing the cost of a last will and testament); Living Will, LEGALZOOM, archived at www.webcitation.org/6ED7BkDdb (providing the cost of a living will); Joint Venture Agreement, LEGALZOOM, archived at www.webcitation.org/6ED7Ppm33 (showing the cost of a joint venture agreement); Copyright Registration, LEGALZOOM, archived at www.webcitation.org/6ED7Zgr27 (showing the cost of a copyright registration).
rect, and that the document has been proof-read. Some documents come with a higher priced package that includes a one-half hour consultation with a lawyer.

3. The Disclaimers

The LegalZoom site includes the following disclaimer:

The information provided in this site is not legal advice, but general information on legal issues commonly encountered. LegalZoom is not a law firm and is not a substitute for an attorney or law firm. Communications between you and LegalZoom are protected by our Privacy Policy, but are not protected by the attorney-client privilege or work product doctrine. LegalZoom cannot provide legal advice and can only provide self-help services at your specific direction; LegalZoom cannot provide any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, remedies, defenses, options, selection of forms or strategies.

The site has a detailed section entitled “Our Commitment to Privacy,” which explains in detail the difference between contractual privacy and the attorney-client privilege, how personal data is handled, how third party vendors may have access to personal information, and customer options to withhold information. The customer satisfaction guarantee provides company credit for the price of documents that do not satisfy the customer.

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28 See Peace of Mind Review, LEGALZOOM, archived at www.webcitation.org/6ED87k2Xb (describing attributes of the policy).
29 See Legal Plan Contract, LEGALZOOM, archived at www.webcitation.org/6ED8dRRZP (providing for a legal consultation).
30 About Us, LEGALZOOM, archived at www.webcitation.org/6ED95oVcN.
31 See Our Commitment to Privacy, LEGALZOOM, archived at www.webcitation.org/6EDQLtE32 (explaining some of the company’s policies).
32 See The LegalZoom Satisfaction Guarantee, LEGALZOOM, archived at www.webcitation.org/6EDSYolhc (articulating the refund process for LegalZoom products).
4. Offer of Membership

After the completion of the creation of a document, the customer is offered a variety of membership options.\(^3\) For the individual or family subscriber, there are two options: the Legal Advantage Standard subscription for $7.99 per month and the Legal Advantage Plus subscription at $14.99 per month.\(^4\) For the business subscriber, the options include the Business Advantage Standard subscription at $7.99 per month and the Business Advantage Pro subscription at $29.99 per month.\(^5\) The site proceeds to explain these plans in great detail.\(^6\)

5. Website Blog

The site also maintains a busy interactive blog on which an attorney fields the questions of the public on every imaginable subject.\(^7\) LegalZoom answers additional questions on Facebook and can be followed on Twitter.\(^8\) In addition, one can find over one hundred

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\(^3\) See Legal Plan Contract, supra note 29 (setting forth fees for Business and Legal Advantage subscription services); Supplemental Terms of Service for Advantage Subscriptions, LEGALZOOM, archived at www.webcitation.org/6EDV2rEnP (quoting monthly subscription prices).

\(^4\) See Legal Plan Contract, supra note 29 (stating a specific price for Advantage Plus subscription); Supplemental Terms of Service for Advantage Subscriptions, supra note 33 (explaining the pricing of the Advantage Standard subscription plan).

\(^5\) See Legal Plan Contract, supra note 29 (publishing prices for the Business Advantage Pro subscription plan); Supplemental Terms of Service for Advantage Subscriptions, supra note 33 (providing prices for the Business Advantage Standard subscription plan).

\(^6\) See Business Legal Plan, LEGALZOOM, archived at www.webcitation.org/6EDY2OSPm (outlining details of the legal plan for business entities); Personal Legal Plans, LEGALZOOM, Feb. 5, 2013, archived at www.webcitation.org/6EDYN5kF5 (explaining the details of the legal plan for individuals and families).

\(^7\) See LegalZoom Blog, LEGALZOOM, archived at www.webcitation.org/6EDZX88zU (offering explanations and insight into various legal issues in the news).

\(^8\) See LegalZoom, supra note 5 (inviting visitors to follow LegalZoom on Facebook, Twitter, LinkedIn, and their blog).
LegalZoom videos on YouTube. 39 These run the gamut of type and subject matters: including testimonials, how-to-do-it legal advice, biographies of the founders and employees and even video of the firm Christmas party. 40

6. Everyday Law Articles

The site maintains a library of articles that seek to explain legal issues in plain and simple language. 41 For instance, the site makes available the article titled, “5 Steps to Protect Family Heirlooms.” 42 “You’ve probably heard at least one horror story about adult children fighting over how to divide up possessions or whether to keep or sell those precious family heirlooms after their parents have died.” 43 The article then provides several steps to avoid family disputes over the items. 44

7. Miscellaneous

The website also seeks affiliates to sell memberships in the group legal services plans at 15% commission. 45 The website states, “[t]he LegalZoom Affiliate Program is a way for you to earn a commission by promoting LegalZoom products using banner ads or text links within your website. Each time a visitor clicks on a LegalZoom link on your website and completes a purchase, you’ll earn money.” 46 The site goes on to describe who might be attractive applicants: web marketers committed to preserving the integrity of the LegalZoom brand, franchise companies searching for a cost effective solution for business formation requirements, Esq., CPAs, CFAs & CFPs

39 See LegalZoom, YouTube, archived at www.webcitation.org/6EDb740BO (showing 649 results for a search of “LegalZoom” videos on YouTube.com).
40 See id. (demonstrating the range of search results for LegalZoom on YouTube).
41 See Article Center, LEGALZOOM, archived at www.webcitation.org/6Fkp3jXb (displaying a number of articles that users can use for reference).
42 See Heleigh Bostwick, 5 Steps to Protect Family Heirlooms, LEGALZOOM, Oct. 2010, archived at www.webcitation.org/6EENxCARk (describing steps that one can take to protect family heirlooms).
43 Id.
44 See id. (outlining five steps).
45 See LegalZoom Affiliates Program, LEGALZOOM, archived at www.webcitation.org/6EEPEEs4kS (describing the benefits of being a LegalZoom affiliate).
46 Id.
exploring value added services to their clientele, [c]ompanies with online marketing specialists and content writing teams, [c]ompanies who look for niche products and build sites to promote products, [w]ebsite owners with a strong SEO presence for legal keywords, and [s]ites or directories that are targeted and useful to online shoppers.\(^47\)

The site also suggests that affiliations will not be from the following: “[c]oupon or incentives-only websites, [a]pplications or ad-ware known to overwrite cookies, [e]xcessive use of banners with no supporting content, [f]lash or graphics-only websites, [w]ebsites that have no value-add content, [u]se of black-hat SEO tactics, [a]ny version of spam[.]”\(^48\)

Finally the site is seeking over twenty job applicants at one of the three LegalZoom office in Glendale, San Francisco and Austin in one of the following job classifications: corporate legal, customer care, finance, human resources, marketing, operations, product management, research and development, and sales.\(^49\)

C. Other Sites

The Nolo site encourages the visitors to post legal questions publicly on the site and then posts answers from lawyers who have registered with the site.\(^50\) Rocket Lawyer sells legal forms and also has a stable of lawyers ready to assist the purchasers of the forms who feel that they need further assistance.\(^51\) The Total Attorneys site provides advertising for its member lawyers by eliciting rudimentary

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\(^47\) Id. (listing several parties that might benefit from the arrangement) (changes to punctuation not identified).

\(^48\) Id. (changes to punctuation not identified).

\(^49\) See Career Center, LEGALZOOM, archived at www.webcitation.org/6EEQGPbH1 (providing a list of available positions at LegalZoom).

\(^50\) See Nolo, supra note 5 (encouraging users to post legal questions).

\(^51\) See Rocket Lawyer, supra note 5 (offering users the opportunity to purchase legal forms and related legal assistance). LegalZoom has sued Rocket Lawyer for unfair competition. See Jennifer Smith, LegalZoom Gets in the Ring with Rocket Lawyer, WALL ST. J., Nov. 28, 2012, archived at www.webcitation.org/6EefBETgB (reporting that RocketLawyer was sued by LegalZoom for allegedly employing unfair business tactics, “for the purpose of injuring LegalZoom”).
client information and then linking the client with their most appropriate lawyer member who has paid for the affiliation with Total Attorneys and pays for each lead. The cost varies with subject matter but cost $50 to $107 per referral. It provides other services targeting the solo practitioner or small firm, including a virtual receptionist, training in law firm management, and client-tracking technology.

D. Legal and Ethical Questions

1. Introduction

It is certainly not surprising that a company that is tending to the legal needs of a nationwide clientele and is claiming one million satisfied customers might draw the attention of the organized bar. LegalZoom has had to do battle on many fronts and no less than seven states have expressed the opinion that LegalZoom is engaged in the unauthorized practice of law. In Missouri and California LegalZoom has had to pay damages to classes of consumers who

52 See Total Attorneys, TOTAL ATTORNEYS, archived at www.webcitation.org/6EEhlvXQF (advertising the ability to “Turn more Prospects into Clients”).
54 See id. (describing the various services offered by Total Attorneys, including iPad and iPhone applications, payment processing, and virtual receptionists); Marketing and Leads, TOTAL ATTORNEYS, archived at www.webcitation.org/6GuZg7RDf (promoting the virtual receptionist’s function in “hot-transferring” calls to attorney offices); Practice Management, TOTAL ATTORNEYS, archived at www.webcitation.org/6EEjjHbU3 (describing several tools that support administrative functions of attorneys, such as cloud storage of documents, management of time and billing practices, and client contact).
55 See Catherine Lanctot, Does LegalZoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 257 (2011) (describing the “campaign” the organized bar has launched against LegalZoom).
56 See Brandon Schwarzentraub, Electronic Wills & The Internet: Is LegalZoom Involved in the Unauthorized Practice of Law or is Their Success Simply Ruffling the Legal Profession’s Feathers?, 5 EST. PLAN. & COMMUNITY PROP. L.J. 1, 6-13 (2013), archived at www.webcitation.org/6FntaBqAP (summarizing legal issues LegalZoom has had in multiple states).

The authority of the various state disciplinary agencies over an out-of-state corporation that maintains a legal website is not always clear. Bar disciplinary committees are typically populated by lawyers appointed by the state’s highest court which may oversee an office that handles everyday enforcement of the rules of professional conduct against the state’s licensed lawyers. They typically deal with fee disputes, IOLTA and lawyer trust account regulation and lawyer incompetency and non-feasance. They may or may not have jurisdiction over claims of unauthorized practice against a foreign corporate entity whose website is available to the state’s residents over the internet. Some states make unauthorized practice a crime which may be prosecuted by a local district attorney or a state attorney general.

57 See id. at 9-11 (describing LegalZoom’s payment of damages for engaging in deceptive practices).
58 See Lanctot, supra note 55, at 259-61 (describing findings of violations in several states); Schwarzentraub, supra note 56 at 6-13 (explaining concerns of several states and their Opinion that LegalZoom is acting unlawfully).
59 See Lanctot, supra note 55, at 264-65 (noting the enforcement issues related to the internet websites).
62 See MODEL RULES OF PROF’L CONDUCT R. 1.15 (2011) (noting the funds should be kept in separate accounts).
63 See MODEL RULES OF PROF’L CONDUCT R. 1.3 (2011) (stating that a lawyer shall, “act with reasonable diligence and promptness”).
64 See Lanctot, supra note 55, at 264-65 (expressing the difficulty in enforcement); MODEL RULES OF PROF’L CONDUCT (2011) (making no mention of internet and its effect on jurisdiction).
65 See, e.g., MASS. GEN. LAWS ANN. ch. 221, § 41 (West 2011) (laying out penalties for incorrectly holding oneself out as being an attorney).
In a civil class action, former customers made claims of fraudulent and deceptive practices and malpractice and sought damages and injunctive relief as a remedy.\(^{66}\) In the \textit{Jansen} case a federal district court in Missouri found that LegalZoom’s sale of customized documents to be a fraudulent and deceptive practice because the service was unauthorized practice of law (“UPL”) under Missouri law.\(^{67}\) These and other ethical claims lodged against LegalZoom and other providers will be summarized below.

2. \textit{The Publication of Forms and Information}

Explanations of the law and the legal process designed for the non-professional have been common in paper form since 1970.\(^{68}\) In \textit{New York Lawyers’ Ass’n v. Dacey},\(^{69}\) the New York bar sought an injunction against the publication and sale of the book \textit{How to Avoid Probate} which contained about sixty pages of narrative describing the will probate process in negative terms and suggesting methods for avoidance of the process, including blank forms which the reader could adopt and file in court.\(^{70}\) The NY Supreme Court granted the injunction and the Appellate Division affirmed over a dissent by Justice Stevens.\(^{71}\) The NY Court of Appeals reversed and adopted the Stevens opinion as its own.\(^{72}\)

In his appellate dissent, Justice Stevens asked: “[s]tripped of the arguments and the contentions of the various parties, the question

\(^{66}\) See \textit{Janson v. LegalZoom.com, Inc.}, 802 F.Supp.2d 1053, 1057 (W.D. Mo, 2011) (describing the complaint); \textit{Janson v. LegalZoom.com, Inc.}, 271 F.R.D. 506, 508-10 (W.D. Mo. 2010) [hereinafter \textit{Janson Motion to Certify Class}] (seeking class certification against LegalZoom).

\(^{67}\) See \textit{Janson}, 802 F.Supp.2d at 1062-65 (offering an in-depth analysis of Missouri case law and its application).


\(^{69}\) See \textit{id}.

\(^{70}\) See \textit{Dacey}, 283 N.Y.S.2d, at 987-91 (reviewing the contents of the book and noting the request for an injunction)

\(^{71}\) See \textit{id} at 984, 996-1001 (outlining the procedural history of the case, the Special Term’s conclusions, and providing the dissent of Justice Stevens).

\(^{72}\) See \textit{New York Cnty. Lawyer’s Ass’n v. Dacey}, 21 N.Y.2d 694, 694-95 (N.Y. 1967) [hereinafter \textit{Dacey II}] (reversing the Order of the Appellate Division).
may be briefly and baldly expressed: Does the writing, publication, advertising, sale and distribution of ‘How to Avoid Probate!’ constitute the unauthorized practice of law within the meaning of Section 750(B)?” 73 Like Justice Stevens, the Court of Appeals would later answer the question in the negative. 74 The dissent further stated:

Every individual has a right to represent himself if he chooses to do so, and to assume the risks attendant upon what could prove a precarious undertaking. Those of sufficient substance to require trusts or wills for the most part are persons of some common sense and, normally, would hardly be expected to rely completely and unquestioningly upon a mass-printed form, even with accompanying instructions. However, they have a right to do so. 75

The Stevens dissent also cited the First Amendment case of Whitney v. California 76 in remarking:

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 stationery stores. Unless we are to extend a rule of suppression beyond the obscene, the libelous, utterances of or tending to incitement, and matters similarly characterized, there is no warrant for the action here taken. 77

Dacey’s holding that books that instruct the public in how to achieve their legal goals by doing their own research and drafting are protected by the First Amendment seems to have settled that question for books and also for the internet. 78 That conclusion is ratified by

73 Dacey, 283 N.Y.S.2d at 997 (Stevens, J., dissenting).
74 See Dacey II, 21 N.Y.2d at 694 (reversing the Order).
75 Dacey, 283 N.Y.S.2d at 999 (Stevens J., dissenting).
76 274 U.S. 357 (1927).
77 Dacey, 283 N.Y.S.2d at 1000-01 (Stevens, J., dissenting) (distinguishing the book at issue in Dacey from content that would provoke disorder or public disturbance).
78 See Dacey II, 21 N.Y.2d at 694 (overturning the Appellate Division’s decision and implicitly adopting the Stevens dissent); Dacey, 283 N.Y.S.2d at 1000-01 (Ste-
the number of websites maintained by courts, both state and federal, which are seeking to assist their pro se litigants with on-line forms and explanations. Virtually every governmental agency now maintains a website with full text statutes and regulations. Forms are available as well. Administrative offices for courts and court libraries maintain a large catalogue of forms which encourage the public to do their own legal work. The Massachusetts Trial Court Libraries, for example, supplies free forms for conservatorships, health care proxies, FOIA requests, 14 day notices to quit (a tenancy) and affidavits, J., dissenting) (holding that a book about probate is protected speech under the First Amendment and does not constitute the practice of law); see also State Bar of Michigan v. Cramer, 249 N.W.2d 1, 8-9 (Mich. 1976) (remarking that, “advertisement and distribution to the general public of forms and documents utilized to obtain a divorce together with any related textual instructions” would not rise to the level of legal practice); Oregon State Bar v. Gilchrist, 538 P.2d 913, 919 (Or. 1975) (concluding that advertising and selling divorce kits was not the unauthorized practice of law). But see People v. Landlords Prof’l Servs., 264 Cal.App.3d 1599, 1608 (Cal. Ct. App. 1989) (concluding that offering eviction assistance beyond merely clerical services amounts to the unauthorized practice of law); Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1193-94 (Fla. 1978) (differentiating between selecting and preparing legal documents and selling printed materials explaining the legal practice and procedures).

See Representing Yourself, U.S. DISTRICT COURT, N. DISTRICT OF CA, archived at www.webcitation.org/6EGM5ipDE (providing litigants information on self-representation); Representing Yourself in Federal Court (Pro Se), U.S. DISTRICT COURT, S. DISTRICT OF NY, archived at www.webcitation.org/6EGM2RkGj (offering information to litigants that are not represented by an attorney); Introducing Serving the Self-Represented Litigant: A Guide By and For Court Staff, MA COURT SYSTEM, July 15, 2010, archived at www.webcitation.org/6EGLpVLx (directing court staff on how to advise pro se litigants); Representing Yourself in a Civil Case: Things to Consider When Going to Court, MA COURT SYSTEM, Jan. 4, 2010, archived at www.webcitation.org/6EGLyeA9t (outlining the civil process for pro se litigants).


vits of indigence: it also has a “Questions? Ask us” function. Other sites include the Internal Revenue Service, LawHelp Interactive, Illinois Legal Aid, and the US Bankruptcy Court. Private vendors proliferate as well.

3. Advertising

Lawyers have engaged in extensive advertising since the 1977 decision of Bates v. State Bar of Arizona. In Bates, the Court extended First Amendment protection to newspaper advertisements offering to provide various services for specified fees including uncontested divorce, adoption, non-business bankruptcy, and change of name. In Bates, the Arizona Supreme Court had censured two lawyers for conduct in violation of its code of professional responsibility. The U.S. Supreme Court reversed, noting that a consumer’s interest in commercial speech is “substantial” and “often may be far keener than concern for urgent political dialogue.” Further, the Court noted commercial speech serves important societal interests by informing the public of the “availability, nature, and the price of

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83 See id. (making numerous legal forms readily available to the general public).
84 See Forms and Publications, supra note 81 (containing links to IRS forms).
85 See Fill Out Legal Forms Faster, LAWHELP INTERACTIVE, archived at www.webcitation.org/6EGSeMo7b (providing an example of an organization that “helps you fill out legal forms”).
86 See Illinois Legal Aid – Automated Form Library, ILLINOIS LEGAL AID, Feb. 7, 2013, archived at www.webcitation.org/6EGyOSjP (indexing automated forms provided by Illinois Legal Aid).
87 See Bankruptcy Forms, U.S. BANKRUPTCY COURT, archived at www.webcitation.org/6EGTj19mC (offering fillable forms from the United States Bankruptcy Court).
88 See, e.g., State-Specific Legal Forms, U.S. LEGAL FORMS, archived at www.webcitation.org/6EGV1EoEQ (cataloguing over 36,000 online legal forms).
90 See Bates, 433 U.S. at 355, 384. (protecting right of attorneys to advertise services subject to various rules and restrictions).
91 See id. at 355-58 (reducing Board of Governor’s recommended punishment of suspension to censure).
92 Id. at 364.
products and services.\footnote{Id.} The court rejected the State’s claims that advertising had an adverse effect on professionalism, was inherently misleading, or had an adverse effect on the administration of justice.\footnote{See Bates, 433 U.S. at 368-77 (analyzing the purported adverse effects of advertising).} In subsequent cases the court invalidated prohibitions on targeted advertising,\footnote{See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (holding that an attorney could not be disciplined after having advertised to persons with a specific legal problem).} direct mail advertising,\footnote{See Shapero v. Kentucky Bar Ass’n, 486 U.S. 466, 468-72 (1988) (concluding that First and Fourteenth Amendments preclude complete prohibition of direct mail to potential clients).} bona fide advertising of one’s field of specialization,\footnote{See Peel v. Att’y Registration & Disciplinary Comm’n of Illinois, 496 U.S. 91, 109 (1990) (finding unconstitutional a prohibition of attorney advertising found to be “dissemination of accurate factual information”).} and lawyer participation in collective activity undertaken to obtain meaningful access to the courts.\footnote{See Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964) (establishing that solicitations by an attorney working alongside a railroad group which intended to advise workers on their legal rights and recommending specific lawyers were constitutionally protected).} Today it is the rare law office, whether large or small, that does not maintain a firm website, which, like most instruments of public relations, attempts to present the firm in a positive light.\footnote{See Kristine M. Moriarty, Law Practice and the Internet: The Ethical Implications that Arise from Multijurisdictional Online Legal Service, 39 IDAHO L. REV 431, 436-37 (2003) (explaining that attorneys use the internet to provide legal services, casting a favorable light on their law firms).} The site is typically created and maintained by a technology consultant.\footnote{See Clover Legal Web Design, CLOVER, archived at www.webcitation.org/6GIomZ3mP (providing an example of a technology consulting company that helps create and manage websites for law firms).} The firm uses the website to pursue the goals of information and public relations.\footnote{See Marketing the Law Firm: Business Development Techniques, LAW J. PRESS, §11C.03, (2013) (describing methods, techniques, and various content housed on legal websites).} The biographies and accomplishments of the firm members are publicized.\footnote{See id. (explaining the various content forms that may appear on websites belonging to law firms).} Blogs, tweets, list-serves, videos, podcasts and other postings may be added at the initiative of members of
the firm. Lawyers may also make liberal use of other social media like Facebook, LinkedIn, YouTube and Twitter in order to advance their practices.

Lawyers in search of clients may contract with independent websites to provide other opportunities for lawyers to gain contact with potential clients. Both Nolo and Rocket Lawyer provide a lawyer referral service. Nolo’s appears a bit more accessible by seeking only a subject area and state of residence from the customer in order to be presented with a list of lawyers. The lawyers then provide links to their firm or other relevant websites. Rocket Lawyer requires the questioner to provide personal information and then seeks a description of the client’s legal problem. The site then states that it will present the client’s description to a lawyer who will then contact the client. Depending upon the site’s rules, lawyers may participate for free, or for a fixed monthly fee, or on a fee per re-

103 See id. (describing forms of substantive content that can be utilized on a law firm’s website).
104 See id. (discussing content on websites); InstaLaw.com, archived at www.webcitation.org/6ENi3E8nM (facilitating lawyer access to social media); Rebecca Porter, Texts and “Tweets” by Jurors, Lawyers Pose Courtroom Conundrums, AM. ASS’N FOR JUSTICE, Aug. 2009, archived at www.webcitation.org/6ENgC8Rw0 (noting courtrooms around the country have allowed lawyers to access social media and blogs during trials).
105 See Rocket Lawyer, supra note 5 (connecting clients and lawyers through the website’s online database); but see Laurence A. Canter, B.P.R. 006032, Board of Prof’l Resp. of the Supreme Court of Tennessee, (1997) archived at www.webcitation.org/6ENjfFRqb (disciplining a lawyer for placing pop-up ads on unrelated sites).
106 See Rocket Lawyer, supra note 5 (providing an example of a service that matches lawyers and clients); Find Law Firms, Lawyers and Attorneys, NOLO, archived at www.webcitation.org/6ENqKcEvs (allowing potential clients to search for a lawyer in the Nolo database).
107 See Find Law Firms, Lawyers and Attorneys, supra note 106 (allowing users to first select from the practice area needed, and then choose the state in which legal services are needed).
108 See Law Firms, Lawyers and Attorneys, supra note 106 (allowing a party to arrive at a page offering a link to the attorney webpage).
109 See Connect With a Lawyer, ROCKET LAWYER, archived at www.webcitation.org/6lj8RMtpJ (displaying the screen asking the potential client to insert their personal information).
110 See id. (informing patrons that after entering their contact information, they will be contacted within one business day and connected with an attorney).
ferral. Total Attorneys provides advertising services. In return lawyers receive referrals produced by the site’s software. The cost to the lawyer is typically between $50 and $100 regardless of whether the referral turns into a retained case. Total Attorneys also provides other services to the lawyer including client management software, billing services, and credit card payment capabilities.

a. Rule 7.1

The Attorney General of Washington charged LegalZoom with a violation of Rule 7.1 which prohibits making “a false or misleading communication about a lawyer or a lawyer’s services.” He objected to LegalZoom’s statement that “With LegalZoom’s lawyer-free service, you can save up to 85% off the rates an attorney would charge for the same procedure.” The Attorney General objected that this comparison misrepresents the contribution that an attorney makes when serving a client. It suggests that the LegalZoom service is equivalent to the services of an attorney and

111 See On Call Sign Up, ROCKET LAWYER, archived at www.webcitation.org/6ENO8niX0 (showing an example of a possible payment plans for lawyers to utilize the website’s services); Build Your Business Online, NOLO, archived at www.webcitation.org/6ENOAyqK (showing an example of a possible payment plans for lawyers to participate in Nolo’s services).

112 See Marketing and Leads, supra note 54, (summarizing the company’s services to help expand law practices). See also Stephen Fairley, Law Firm Marketing and Business Development Strategies, THE RAINMAKER BLOG, archived at www.webcitation.org/6EO7Vjly1 (posting marketing and advertising tactics).

113 See Marketing and Leads, supra note 54 (illustrating some of the benefits lawyers receive from the site).

114 See Squillante, supra note 53 (citing pricing models for the Total Attorneys website).

115 See Practice Management, supra note 54 (advertising client management services offered by Total Attorneys).


117 See Richard Granat, What is Legal Zoom?, eLAWYERING BLOG, Apr. 8, 2008, archived at www.webcitation.org/6EPS0rg2L (claiming that this statement “misrepresents the contribution that an attorney makes when serving a client.”).

118 See id. (describing the confusion that can arise from the statement); see also Jason Beahm, WA State AG: ‘DIY Legal Forms Aren’t a Substitute for an Attorney’, FINDLAW, Sept. 27, 2010, archived at www.webcitation.org/6EPUsFmeb (citing concerns about the potential for confusion).
that a consumer will receive the same result that they would get if they went to an attorney.\textsuperscript{119}

The charge was settled.\textsuperscript{120} The settlement agreement prohibits LegalZoom from engaging in the unauthorized practice of law, selling personal information obtained from Washington customers or misrepresenting the benefits of any estate distribution document; it also requires a Washington attorney to review any and all estate planning forms sold by LegalZoom to Washington customers.\textsuperscript{121}

Likewise, South Carolina Ethics Advisory Opinion 12-03 suggests that lawyers not participate in Just Answer’s website because of misleading statements on the site and the dangers of creating an unintended attorney-client relationship.\textsuperscript{122}

The website’s use of testimonials, endorsements, the word “expert,” and other misleading statements prohibit South Carolina lawyer’s participation. The site invites specific questions about specific legal matters and offers specific legal advice but uses buried small-type statements to attempt to disclaim the creation of attorney-client relationships and to warn against reliance on the advice. The Committee believes lawyer’s participation under these circumstances would be improper.\textsuperscript{123}

\textit{b. Rule 7.2}

\begin{flushleft}
\textsuperscript{119} See Granat, supra note 117 (explaining that LegalZoom “clearly isn’t” equivalent to the services of an attorney).
\textsuperscript{120} See Quinn, supra note 116 (discussing the Assurance of Discontinuance entered by LegalZoom and the State of Washington).
\textsuperscript{121} See In re LegalZoom.com Assurance of Discontinuance, Sept. 15, 2010, archived at www.webcitation.org/6EPXRAGAs (providing the Attorney General’s assertions and the Agreement between the parties); Quinn supra note 116 (reviewing the Assurance of Discontinuance and the implications thereof).
\textsuperscript{122} See Ethics Advisory Opinion 12-03, SOUTH CAROLINA ETHICS ADVISORY COMMITTEE, 2003, archived at www.webcitation.org/6EPaPqppS (warning attorneys that the Just Answer website could put attorneys at risk).
\textsuperscript{123} Id.; see also Formal Opinion 10-457, ABA COMMITTEE ON ETHICS & PROF’L RESPONSIBILITY, August 5, 2010, archived at www.webcitation.org/6EPhiyLVN (conveying fears about creation of an attorney-client relationship through lawyer websites).
\end{flushleft}
Yet another objection to websites that make any kind of qualitative assertion about an attorney on a legal website arises out of Rule 7.2. 124 MR 7.2 (b) prohibits a lawyer from giving “anything of value to a person for recommending the lawyer’s services, although he may pay the usual charges of a legal services plan or referral service.”

A New Jersey Ethics Committee opinion states that the website, as a lay intermediary, cannot guide customers to particular lawyers. 126 As such, websites must make full lists of participating attorneys available to the site’s visitors. 127 Participating attorneys almost certainly cannot split fees with website operators. 128 Payment of a fixed fee is probably permissible. 129 A fee per click or fee per referral should await future pronouncements. 130 Rule 1.5 prohibits fee splitting among lawyers unless “the division is in proportion to the services performed by each lawyer… [and] the client agrees to the arrangement.”

The committee stated:

In sum, the content and operation of Internet advertising websites must not be misleading. Internet websites must make the methodology for the selection of the attorney’s name clear, especially if the website limits participation of attorneys by geographical area or practice area. If participation is limited, all requirements for attorneys to participate in the website must be specified. Websites may state that the participating attorneys meet these requirements but must refrain from making statements vouching for the quality

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125 Id.
127 See id. at 10 (listing the requirements for compliance with the Committee’s opinion).
128 See MODEL RULES OF PROF’L CONDUCT R. 5.4a (2011) (stating the general rule that lawyer’s cannot split fees with non-lawyers).
129 See MODEL RULES OF PROF’L CONDUCT R. 7.2 (2011) (stating that lawyers are allowed to pay a reasonable fee for advertising services).
130 See Op. 43, supra note 126 at 11-12 (noting that the permissibility of pay-per-lead referral agreements between lawyers and websites has some limited support).
of the participating attorneys or comparing participating attorneys to other attorneys. Internet websites must make a full list of participating attorneys readily accessible. Websites must provide this information to consumers in plain language, not convoluted “legalese.” Such information cannot be countermanded or undermined by contrary statements or suggestions. The language “attorney advertisement” and “not an attorney referral service” must still be prominently displayed on the website.  

The Committee found that the Internet company website is advertising and “not an impermissible referral service.” The website, however, was misleading, in violation of Rule of Professional Conduct 7.1(a). Attorneys are responsible for the language and methods of websites on which they advertise. A New Jersey attorney who participates in a website that is misleading violates Rule of Professional Conduct 7.1(a).

4. Group legal services and insurance

While Rule 7.3 in general strictly limits “real-time” live solicitations from prospective clients, Rule 7.3 (d) allows for a broad and open-ended exception for pre-paid or group legal service plans.
This is very much in contradiction with the ABA Model Code of Professional Responsibility which strictly limited such plans to a list of eligible non-profit agencies.138

A “prepaid legal plan” is any type of arrangement in which a participant prepays or an employer pays on behalf of employees for legal services participants may require in the future.139 In many respects, a prepaid legal plan is similar to a medical benefit plan: a consumer pays a fixed amount each year or month in exchange for certain service benefits to be used as and if needed.140

A “group legal plan” may have a prepaid feature, such as those offered by employers as an enrollment choice and paid via a payroll deduction, but may also be similar to a group discount buying service for lawyer services.141 Group legal plan benefits - usually available without charge to members of an association, union, coop, or other group - feature free telephone legal advice plus fee discounts from a participating lawyer for other services.142

Most every legal plan includes brief office consultations, review of simple legal documents, preparation of a simple will, and short letters written or phone calls made by a lawyer.143 Other plans

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138 See MODEL CODE OF PROF’L RESPONSIBILITY DR 2-103(D) (1983) (restricting lawyer’s ability to participate in pre-paid and group legal service plans to a few select exceptions).
140 See id. at 880 (noting the features of a prepaid legal plan).
141 See Individual Legal Plans, ARAG LEGAL SOLUTIONS, archived at www.webcitation.org/6EYMg65a2 (advertising opportunity for employers to fund their program through a payroll deduction).
142 See Legal Help Within Your Reach, AARP LEGAL SERVICES NETWORK, archived at www.webcitation.org/6EYNU9Mkj (reporting that AARP membership secures access to a “group legal plan”).
143 See How It Works, LEGALSHIELD, archived at www.webcitation.org/6EYPtWjcw (explaining how paying enrollees have access to a law firm); Plans for Businesses, LEGALSHIELD, archived at www.webcitation.org/6EYQ9RxFv (stating that membership affords clients a
offer more comprehensive coverage for trials, marital problems, bankruptcy, real estate matters, and the like. In addition to the member, most plans include or offer coverage for his or her spouse and dependent children.

LegalZoom offers four membership options: group legal services plans with distinctive coverage, two for individuals and two for businesses. The Legal Advantage Plan is a subscription to a Legal Plan, which is “not insurance,” and provides the following benefits (collectively, the “Plan Benefits”):

(i) Telephone consultations with a participating firm (the “Firm”), during normal business hours, of up to one half (1/2) hour each, limited to one consultation per Plan Group for each new legal matter. If the Firm determines after the initial consultation that a telephone call or a letter would be of further assistance to a Plan Member, such Firm, in its sole discretion, may provide, at no additional charge, either: (a) one letter of up to two (2) pages; or (b) one (1) telephone call during normal business hours on the Plan Member’s behalf. Telephone consultations may not include discussion of any of the following:
   1. Tax-related matters;
   2. Patent-related matters; or
   3. Violent felonies;
   4. Legal Advantage Plus Plan Members may not consult about matters related to any Plan Member’s business because business coverage is separately provided in the Business Advantage Pro membership.

See What is a legal plan?, AMERICAN PREPAID LEGAL SERVICES (API), archived at www.webcitation.org/6EYR3Oeoi (comparing plans and noting some plans cover marital issues and trials).

See id. (explaining that some policies offer coverage for family members).

See Business Legal Plan, supra note 36 (advertising the options for businesses); Personal Legal Plan, supra note 36 (advertising the LegalZoom legal plans available for individuals).
(ii) Review by the Firm of legal documents of up to ten (10) pages, limited to review of one (1) document per Plan Group for each new legal matter. The Firm shall provide one (1) telephone consultation, during normal business hours, about the reviewed document and a written summary of such consultation. The consultations are designated as “third party independent contractors.” Contract disputes are subject to arbitration.

(iii) Once during each membership year, the Primary Member shall be entitled to a legal check-up.\textsuperscript{147}

All packages include the “LegalZoom Peace of Mind Review,” which not only includes “hundreds of automated online checks,” but also careful review by “document scriveners” for grammar, spelling, and completeness of information.\textsuperscript{148} By way of contrast, LegalShield, the successor to Pre-Paid Legal Services, which characterized their plan as legal insurance, is a total services entity.\textsuperscript{149} Its website seeks individual customers, businesses, and lawyers to provide services and brokers who will act as salespeople for the policies.\textsuperscript{150} The law firm of Parker Stanbury, with five partners and about fifty associates, claims on their website to service over 119,000 clients who are LegalShield policy holders.\textsuperscript{151} Even with the limits on the services provided by the policy one wonders how so few law-

\textsuperscript{147} See Personal Legal Plan, supra note 36 (describing various attributes of the plan).
\textsuperscript{148} See Peace of Mind Review, LEGALZOOM, archived at www.webcitation.org/6EYUk2lQY (describing LegalZoom’s Peace of Mind Review services).
\textsuperscript{149} See About LegalShield, LEGALSHIELD, archived at www.webcitation.org/6EYjXG1aw (offering a variety of services and direct toll free access to the client’s provider law firm).
\textsuperscript{150} See LegalShield, LEGALSHIELD, archived at www.webcitation.org/6Ijlp3uO0 (providing links to opportunities for individuals, businesses, attorneys, and brokers).
\textsuperscript{151} See LegalShield Services, PARKER STANBURY, LLP, archived at www.webcitation.org/6EYkk5SN6 (claiming to be the sole LegalShield firm in the state of California, servicing approximately 190,000).
yers can service such an overwhelming number of potential clients.\textsuperscript{152} The distinction between a group plan and an insurance policy appears quite thin although insurance is a highly regulated industry and a group legal services plan merits almost no regulation.\textsuperscript{153} The non-lawyer brokers gain commissions for each sale, like LegalZoom’s affiliate to whom the LegalZoom website states, “you’ll have access to a wide range of marketable LegalZoom products that will help drive traffic to your website and earn your company commissions.”\textsuperscript{154} Commissions that will be enhanced by 45-day cookies which “[m]ake money on sales made up to 45 days from the date your ad was clicked.”\textsuperscript{155}

The liberalization of rules surrounding group legal services were certainly advanced by the Supreme Court’s rulings concerning union-sponsored legal service plans. In \textit{Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar}, the Court protected a labor union in advising its members to seek representation from particular lawyers as the First Amendment protected.\textsuperscript{156} The Court explained that “[i]t cannot be seriously doubted that the First Amendment’s guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers’ Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow.”\textsuperscript{157}

The Court found that the right of the union members to consult with each other necessarily included the right to select a spokesman to give the best advice.\textsuperscript{158} Further the right of the workers to

\textsuperscript{152} See LegalShield Service Standards, PARKER STANBURY, LLP, archived at www.webcitation.org/6EYluiz04 (listing a timeline for providing services that helps the firm meet the demand of its customers).
\textsuperscript{153} See Wilkins, supra note 139, at 880 (comparing legal services plans to insurance agency plans).
\textsuperscript{154} LegalZoom Affiliates Program, supra note 45.
\textsuperscript{155} LegalZoom Affiliates Program, supra note 45.
\textsuperscript{156} 377 U.S. 1,8 (1964) (holding “the First and Fourteenth Amendments protect the right of the members...to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers.”).
\textsuperscript{157} Id. at 5-6.
\textsuperscript{158} See id. at 6 (stating that the right of organization members to consult with one another includes the right to select a spokesman on their behalf).
advise their fellow members on legal assistance and recommenda-
tions of lawyers was “an inseparable part of this constitutionally
guaranteed right to assist and advise each other.” 159 As to the objec-
tion that this constituted unauthorized practice, the Court responded
that “[t]he railroad workers, by recommending competent lawyers to
each other, obviously are not themselves engaging in the practice of
law, nor are they or the lawyers whom they select parties to any solici-
ting of business.” 160

In United Mine Workers of America, District 12 v. Illinois
State Bar Ass’n, the Illinois State Bar Association obtained an injunc-
tion against the local affiliate of the United Mine Workers for em-
ploying an attorney on its staff to represent union members in work-
ers compensation claims, on the grounds that it was “unauthorized
practice of law.” 161 The Supreme Court reversed, stating: “We hold
that the freedom of speech, assembly, and petition guaranteed by the
First and Fourteenth Amendments gives petitioner the right to hire at-
torneys on a salary basis to assist its members in the assertion of their
legal rights.” 162 It explained: “[B]road rules framed to protect the
public and to preserve respect for the administration of justice can in
their actual operation significantly impair the value of associational
freedoms.” 163

Although the advocacy merely concerned mundane workers’
compensation claims, Justice Black identified broader concerns
raised by the attempt to invoke the unauthorized practice statute here:

The litigation in question is, of course, not bound up
with political matters of acute social moment, as in
Button, but the First Amendment does not protect
speech and assembly only to the extent it can be char-
acterized as political. “Great secular causes, with
small ones, are guarded. The grievances for redress of
which the right of petition was insured, and with it the
right of assembly, are not solely religious or political

159 Id.
160 Id. at 6-7.
162 Id. at 221-22.
163 Id. at 222.
And the rights of free speech and a free press are not confined to any field of human interest.\footnote{Id. at 223 (quoting Thomas v. Collins, 323 U.S. 516, 531 (1945)).}

5. Bulletin boards

Some websites invite the public to draft questions and to post them publicly on a website bulletin board.\footnote{See, e.g., LawGuru, LAWGURU, archived at www.webcitation.org/6EZwoZbv7 (providing example of legal advice on online bulletin board); LawInfo, LAWINFO, archived at www.webcitation.org/6Ezy9dtBD (conveying the usefulness of legal bulletin boards within websites); FreeAdvice Legal Forum, FREEADVICE LEGAL FORUM, archived at www.webcitation.org/6EzyG3Bj7 (exemplifying online bulletin board for legal advice).} Lawyers registered with the site may draft answers to the questions, which often end with a suggestion that the questioner call the lawyer’s office to discuss the matter further.\footnote{See e.g., Barry Gartenberg, Legal Answer, LAWGURU, Feb. 20, 2013, archived at www.webcitation.org/6Ea2Y4L4S (providing an example of a question answered by lawyer suggesting that the author contact a lawyer and including lawyer’s contact info).} On some sites the questioner must register in order to post a question.\footnote{See LawInfo, supra note 165 (requiring registration in order to post questions).}

One of the more active bulletin boards can be found on LAWGURU which allows free posting of questions without registration.\footnote{See LawGuru, supra note 165 (giving Internet users the option to post questions).} The questions and answers are catalogued and maintained by the site.\footnote{See LawGuru, supra note 165 (providing searchable database of archived questions).}

LegalZoom also maintains a blog which is featured on Facebook.\footnote{See LegalZoom, FACEBOOK, archived at www.webcitation.org/6FyXseA89 (showing maintenance of a social media presence).} The author is Joe Escalante, a California lawyer with an apparently public personality.\footnote{See Bio, Joe ESCALANTE, archived at www.webcitation.org/6FyYggBP0 (providing a short biography of the author).} His legal blog comes out twice a week.\footnote{See Joe Escalante, Is My Kid’s School Violating His Right to Privacy? And More Free Legal Advice, LEGALZOOM BLOG, May 25, 2012, [hereinafter Is My
Just Answer Legal is a website that claims to have numerous lawyers online continuously who will answer questions submitted by website visitors, but neither the question nor the answer is posted.173

This feature seems to be one of the more troubling aspects of internet legal websites. Perusal of the questions and answers raise questions about competence and malpractice. In the Escalante case, the answers appear only to be half serious.174 Careful lawyers are re-

Kid’s School Violating His Right to Privacy?] archived at www.webcitation.org/6Ea8A1qZn (listing answers to questions asked); Joe Escalante, How to Change a Parent’s Name on a Birth Certificate And More Free Legal Advice, LEGALZOOM BLOG, Apr. 4, 2012, [hereinafter How to Change a Parent’s Name on a Birth Certificate] archived at www.webcitation.org/6Ea9YVB05 (displaying responses to reader inquires).

173 See About JustAnswer, JUSTANSWER, archived at www.webcitation.org/6EaA7cEac (providing a description of how the website works).

174 See How to Change a Parent’s Name on a Birth Certificate supra note 172 (containing several of Mr. Escalante’s responses to questions on the LegalZoom Blog). In one request, “Don” asked: “[I] just got arrested for grand theft in the third degree. iv (sic) read the penalties are maximum 5 yrs jail or 5 years probation or 5000$ (sic) fine how do i ensure i get NO jail time? a response would be much appreciated.” Mr. Escalante responded:

In my jurisdiction, your attorney would go before the E.D.P. prosecutor. That’s Early Disposition Program. He tries to make a deal to avoid jail time based on a clean record or a weak case. E.D.P. also stands for “Everybody Does Prison” so it’s not guaranteed. The other way is to beat the rap. Not guilty means no jail time, for this offense at least. Or you can run away to Mexico, but that can be worse than jail if you are trying to be undercover.

Id.

In a separate blog post, “Susan” asked:

My question for Joe Escalante is about my son’s school district. The only legal way a child can be excused from school is with a doctors note, which is taking away my son’s medical privacy. My son also feels uncomfortable changing for physical education in front of the other students and is failing in gym because of it. Is there any legal way around the school’s rules?

Mr. Escalante responded:

This story has home school written all over it. The school gets money from the state, or whoever, if your kid is sick when he’s
luctant to voice legal opinions off the top of one’s head outside of a narrowly circumscribed specialty and without a more extensive investigation of the facts of a client’s situation than is possible with a short client recitation of the problem.175

6. Rule 5.5- Unauthorized Practice

UPL may be governed by rules of professional conduct and also by criminal statutes.176 Bar disciplinary committees enforce the rules that prohibit multi-jurisdictional practice (“MPL”) of law against lawyers from other states that do not hold a local license to practice.177 Model Rule 5.5 entitled Unauthorized Practice of Law; Multijurisdictional Practice of Law states:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so. (b) A lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law.178

Subsections (c) and (d) contain a list of narrow exceptions.179 These rules protect local lawyers from out of state competition.180 They

absent. If he’s just out in front of the liquor store smoking, the school gets no money. They need to know if he’s sick or not. They don’t need to know if it’s an STD or anything personal. They just need to know that he’s sick. It would be difficult to convince a court that this requirement is a violation of any rights you may have, in light of this compelling state interest to fund the education system in your area.

Is my School Violating His Right to Privacy? supra note 172.

177 See MODEL RULES OF PROF’L CONDUCT R. 5.5 (2011) (mandating that lawyers may not practice in jurisdictions where they do not hold a license to practice).
178 Id.
179 See id. (describing exceptions to the general rule). Subsections (c) and (d) read:
may also require that a locally admitted lawyer maintain a local office.\textsuperscript{181}

The criminal statute is more typically enforced against individuals who practice with no license having never been admitted to the bar.\textsuperscript{182} At times, courts fail to distinguish between these two forms of unauthorized practice.\textsuperscript{183}

\textit{(c)} A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that: (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

\textit{(d)} A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that: (1) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or (2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

\textit{Id.} \textsuperscript{180} See id. (limiting lawyers to their own jurisdiction).

\textsuperscript{181} See Home Office \textit{infra} at pg. 36 (analyzing whether an attorney must maintain a local office in jurisdictions within which the attorney is admitted to practice).


\textsuperscript{183} See, e.g., \textit{infra} note 232 (reviewing the \textit{Janson} decision and noting that the court did not address the “type” of problem it faced).
In Unauthorized Practice of Law Committee v. Parsons Technology, Inc.,184 the Defendant, appealed the district court’s order permanently enjoining it from selling and distributing its software program, Quicken Family Lawyer, within the state of Texas.185 The district court held that the sale and distribution of the software constituted “practice of law” under the Texas Unauthorized Practice Statute which included, “the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.”186

Subsequent to the filing of an appeal, however, the Texas Legislature enacted an amendment to § 81.101 providing that “the ‘practice of law’ does not include the design, creation, publication, distribution, display, or sale . . . of computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney,” effective immediately.187 The Court of Appeals therefore vacated the injunction and judgment.188

In In re Reynoso v. Kistler,189 the Ninth Circuit found that the so-called Ziinet Bankruptcy Engine, which sold for $219 to customers in California who then used it to produce computer generated petitions in bankruptcy, engaged in the unauthorized practice of law and violations of the Bankruptcy Code for failing to disclose its role in relevant places on the bankruptcy petitions that were filed with the Bankruptcy Court.190 The Ninth Circuit was troubled by a number of

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184 179 F.3d 956 (5th Cir. 1999).
185 See id. (noting the lower court’s decision and the basis for appeal). Texas separates the enforcement of UPL from Multidisciplinary practice with separate bar committees having jurisdiction. See Gregory Huffman, UPL, MDP, MJP How Irresistible Are These Changes?, 65 TEX. B.J. 428, 429 (discussing the different committees governing UPL and MDP).
186 See Parsons Tech. Inc., 179 F.3d at 956.
188 See Parsons Tech. Inc., 179 F.3d at 956.
189 477 F.3d 1117 (9th Cir. 2006).
190 See id. at 1120-1122, 1124, 1126 (reciting the facts and affirming Bankruptcy Court’s holdings against Frankfort who sold access to the Ziinet Bankruptcy Engine).
imprudent assertions in the defendant’s advertising materials. It quoted the following from Ziinet ads:

Ziinet is an expert system and knows the law. Unlike most bankruptcy programs which are little more than customized word processors the Ziinet engine is an expert system. It knows bankruptcy laws right down to those applicable to the state in which you live. Now you no longer need to spend weeks studying bankruptcy laws.

The site also offered customers access to “the ‘Bankruptcy Vault’-a repository of information regarding ‘loopholes’ and ‘stealth techniques.’” For example, according to the site, the Vault would explain how to “hide a bankruptcy from credit bureaus and how to retain various types of property.”

The Ninth Circuit stated that several features of Frankfort’s business, taken together, lead it to the conclusion that the business engaged in the unauthorized practice of law. The court stated:

To begin, Frankfort held itself out as offering legal expertise. Its websites offered customers extensive advice on how to take advantage of so-called loopholes in the bankruptcy code, promised services comparable to those of a “top-notch bankruptcy lawyer,” and described its software as “an expert system” that would do more than function as a “customized word processor.”

*Janson v. LegalZoom, Inc.*, was a class action brought on behalf of the customers of LegalZoom between 2004 and 2011 seek-

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191 See id at 1120-1121,1123-1124 (upholding the Bankruptcy Court’s finding that the seller of the software acted as preparer by making selections beyond data entered by customer).
192 Id. at 1120.
193 Id. at 1121.
194 Id. (quoting Ziinet site’s claims about the Vault).
195 See In re Reynoso, 477 F.3d at 1125 (summarizing the holding).
196 Id. (quoting the court’s statements about the business’s underrepresentation of its actual role in customers’ bankruptcy filings).
197 802 F. Supp. 2d 1053 (W.D. Mo. 2011).
ing damages and injunctive relief in Missouri state court under the Missouri Merchandising Practices Act which prohibits “any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . .” After LegalZoom removed the case to federal court, District Court Judge Laughrey ruled that LegalZoom had violated the Missouri unauthorized practice statute in providing to the plaintiff class legal documents that were prepared through the LegalZoom website. The Missouri unauthorized practice statute states that “no person shall engage in the practice of law or do law business.” The “law business” is defined as “the advising or counseling for a valuable consideration of any person . . . as to any secular law or the drawing . . . of any paper, document or instrument affecting or relating to secular rights or the doing of any act . . . to secure for any person . . . any property or property rights whatsoever.”

198 Id. at 1057 (reviewing procedural history of certified class and asserted claims). See also Mo. Rev. Stat. § 407.020(1) (2012). The statute reads in relevant part:

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri, is declared to be an unlawful practice. The use by any person, in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 407.453, in or from the state of Missouri of the fact that the attorney general has approved any filing required by this chapter as the approval, sanction or endorsement of any activity, project or action of such person, is declared to be an unlawful practice. Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

199 Id. at 1058 (outlawing deceit in advertising).
200 See Janson, 802 F. Supp. 2d at 1065 (stating that LegalZoom’s services constituted unauthorized practice of law).
201 Id. at 1058 (quoting Mo. Rev. Stat. § 484.020 (2011)).
LegalZoom claimed that its service was simply self-help like do-it-yourself divorce kits which were found not to be prohibited by the above statute in a 1978 case. But the Court found that the fact that LegalZoom reviews the client answers for completeness, spelling, grammatical errors and consistency was evidence of more than a self-help kit. Further, the Court found that a computer cannot prepare a legal document without human input. The programming creates a document derived from Missouri law that is selected for the customer based on the information provided by the customer. Of LegalZoom’s products, the Court stated: “There is little or no difference between this and a lawyer in Missouri asking a client a series of questions and then preparing a legal document based on the answers provided and applicable . . . law. Since the services were the practice of law and LegalZoom was not licensed in Missouri, LegalZoom failed to disclose a material fact concerning its service in violation of the act.

The Court rejected LegalZoom’s Constitutional defenses as well. The First Amendment has indeed been construed to protect legal advice provided by lawyers in the group legal service context. It has also protected publishing of manuals about the law for lay people, but the Court was not persuaded by LegalZoom’s attempt to draw analogies from these cases. The court also rejected

203 See Janson, 802 F. Supp. 2d at 1065 (summarizing LegalZoom’s several arguments); In re Thompson, 574 S.W.2d 365, 366 (Mo. 1978) (en banc) (describing claim of unauthorized practice of law brought against companies making do-it-yourself packets providing divorce forms).
204 See Janson, 802 F. Supp. 2d at 1064-65 (describing the services offered by LegalZoom and how they went beyond mere self-help).
205 See id. at 1065 (stating, “[i]t is that human input that creates the legal document.”).
206 See id. (explaining that a human being must program the computer to create legal documents and that LegalZoom has input into the creation of the document).
207 Id.
208 See id. at 1064-65 (stating the role played by human employees makes LegalZoom’s services the unauthorized practice of law in Missouri).
209 See id. at 1066 (declining to “alter Missouri law” based on LegalZoom’s free speech argument).
210 See United Mine Workers, 389 U.S. at 221-22 (sanctioning a union sponsored group legal services plan).
211 See Janson, 802 F. Supp. 2d. at 1065-66 (declining to apply LegalZoom’s analogies involving the protection of free speech).
LegalZoom’s claim that the Missouri definition of the practice of law was void for vagueness.\textsuperscript{212}

Finally the Court found merit in the LegalZoom claim that the application of Missouri’s unauthorized practice of law principles to copyright and patent practice was preempted by federal law which provides for recognition of practitioners and agents before the respective governmental agencies.\textsuperscript{213} Thus treble damage claimants under the Missouri Merchandising Practices Act who sought reimbursement for fees paid for trademark, copyright and patent services were dismissed.\textsuperscript{214}

The \textit{Janson} case was subsequently settled.\textsuperscript{215} The fifty-six page settlement agreement provides “a maximum of $6.0 million in settlement of this case,” of which $1.86 million may go for attorney’s fees, costs and expenses.\textsuperscript{216} The class action settlement notice includes a lengthy list of documents for which re-imbursement is offered.\textsuperscript{217} It includes: copyright, divorce, incorporation, green card, living will, change of name, prenuptial, real estate lease and small claims.\textsuperscript{218} LegalZoom also agrees to a series of “business practices changes.”\textsuperscript{219} The site must show blank documents which will serve as templates for the client specific documents that will be produced by the software.\textsuperscript{220} A Missouri attorney must review all templates.\textsuperscript{221}

\textsuperscript{212} See id. at 1067 (finding that LegalZoom’s due process argument failed because it did not establish that the statute was vague).
\textsuperscript{213} See id. at 1067-69 (finding that LegalZoom’s claim that the application of Missouri’s unauthorized practice of law principles to copyright and patent practice was preempted by federal law).
\textsuperscript{214} See id. at 1068-69 (dismissing patent and trademark application claims).
\textsuperscript{215} See \textit{Settlement Agreement}, Janson v. LegalZoom, 802 F.Supp.2d 1053 (W.D. Mo. 2011) (No. 2:10-cv-04018-NKL) archived at www.webcitation.org/6FymM58VM [hereinafter \textit{Janson Settlement Agreement}] (providing the parties’ agreement to the settlement in order to resolve and discharge the claims).
\textsuperscript{216} See id. at 12-15 (discussing the payments and allocation of payments to be made in the settlement agreement).
\textsuperscript{217} See id. at 8-9 (listing the Class Products for which customers are eligible to receive reimbursements).
\textsuperscript{218} See id. at 8-9 (naming the various Class Products).
\textsuperscript{219} See id. at 15-18 (outlining the various business practices changes LegalZoom will implement when servicing clients in Missouri).
\textsuperscript{220} See id. at 16 (discussing how LegalZoom has agreed to make available sample documents with blank spaces where customer info would be entered).
Certain phrases on the website, such as “we will take care of all the rest” must be deleted.\textsuperscript{222} The so called “Peace of Mind Review” is prohibited unless it is performed by a Missouri Attorney.\textsuperscript{223} Certain premium offers on the site such as the “Legal Advantage Plus Program” must include at least a half-hour consultation with a Missouri attorney.\textsuperscript{224}

A similar consumer protection class action filed in the Los Angeles Superior Court ended in settlement entered on April 18, 2012 awarding up to $2.2 million to the plaintiff class.\textsuperscript{225} Further, the LegalZoom website has been declared an unauthorized practice of law in Pennsylvania,\textsuperscript{226} Connecticut,\textsuperscript{227} Ohio,\textsuperscript{228} North Carolina,\textsuperscript{229} and Alabama.\textsuperscript{230}

\textsuperscript{221} See Janson Settlement Agreement, supra note 215 at 16 (stipulating to a Missouri attorney reviewing all templates).
\textsuperscript{222} See Janson Settlement Agreement, supra note 215 at 16-17 (agreeing to delete the “we take care of all the rest” phrase as part of the settlement agreement).
\textsuperscript{223} See Janson Settlement Agreement, supra note 215 at 17 (stipulating to have a Missouri attorney perform any and all Peace of Mind Reviews).
\textsuperscript{224} See Janson Settlement Agreement, supra note 215 at 17-18 (agreeing to include a half-hour consultation with a Missouri attorney as a part of the Legal Advantage Plus Program).
\textsuperscript{225} See Class Action Settlement Agreement, Webster v. LegalZoom.com, Inc., 18-19, Feb. 27, 2013, archived at www.webcitation.org/6EkJZ3lXdB (limiting the award for fees, costs and expenses to no more than $2.2 million).
\textsuperscript{226} See Formal Opinion 2010-01, PENNSYLVANIA BAR ASS’N, UNAUTHORIZED PRACTICE OF LAW COMMITTEE, Mar. 10, 2010, archived at www.webcitation.org/6EkJZDQxAA (finding that offering or providing of legal document preparation services that go beyond the supply of preprinted forms selected by the consumer is an unauthorized practice of law).
\textsuperscript{227} See Informal Opinion 2008-01 CONNECTICUT UNAUTHORIZED PRACTICE OF LAW COMMITTEE, Jan. 2008, archived at www.webcitation.org/6Eka0KJim (summarizing the Committee’s opinion that LegalZoom and We the People were engaged in unauthorized practice of law in Connecticut).
\textsuperscript{228} See Ohio State Bar Ass’n v. Cohen, 836 N.E.2d 1219, 1219-20 (2005) (characterizing use of computer software and official court forms to prepare legal documents and pleadings for customers as an unauthorized practice of law).
\textsuperscript{229} See Letter of Caution: Allegation of Unauthorized Practice of Law, File number 07AP0011, N.C. STATE BAR AUTHORIZED PRACTICE COMMITTEE, May 5, 2008, archived at www.webcitation.org/6EkbCK0jY (warning LegalZoom to immediately end all operations providing or offering legal services in North Carolina); see also Nate Raymond, LegalZoom Lawsuit Against NC Bar May Proceed: Judge, Aug. 8, 2012, archived at www.webcitation.org/6EkcXBVa9 (reporting that
The *Janson* court concluded that LegalZoom engaged in unauthorized practice of law. The court did not really address whether it faced a multi-jurisdictional problem or an unauthorized practice of law problem. The settlement agreement requires the participation of Missouri lawyers in the future. Will this solve the problem or can a future case seek to know the identities of the writers of the software? What if the writers are primarily non-lawyers working overseas? Does the locus of the website matter?

The locus question was addressed in a leading California case, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*. The California Supreme Court denied a New York law firm’s claim for one million dollars in legal fees against its client, ESQ., a California software company, for representation provided to the client in a dispute with a customer, a Delaware corporation with its principal place of business in California. The retainer agreement was declared void, unenforceable and illegal as a violation of a California unauthorized practice statute. ESQ claimed unauthorized practice

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> Alabama’s unauthorized practice of law statutes prohibit anyone who is not a lawyer from advising or counseling another person on legal matters, and from preparing or assisting another person in preparing any document or instrument such as a will or deed in Alabama.

*Id.*

231 See *Janson*, 802 F.Supp.2d. at 1063-65 (finding LegalZoom’s activities unauthorized practice of law).

232 See *id.* (failing to specify the extent to which the multijurisdictional nature of LegalZoom contributed to the holding).

233 See *Janson Settlement Agreement, supra* note 215 at 17 (requiring Missouri lawyers to cooperate in assisting in future legal matters).

234 949 P.2d 1 (Cal. 1998) [hereinafter *Birbrower*].

235 See *id.* at 13 (holding that while the client may be required to pay for legal services rendered in New York, the contract was unenforceable to the extent that the work was done in California).

236 See *id.* at 12-13 (citing the statute as the reason for unenforceability).
as an affirmative defense because the Birbrower lawyers who handled most of the work on the case originated out of a New York law firm and were not licensed to practice law in California. The background of the relationship was that the client, ESQ originated in New York (“ESQ-NY”), as did its principal in the early eighties. As its California business expanded, the principal and his brother formed a second corporation in California (“ESQ-CA”).

The California Supreme Court found that the retainer agreement was illegal, but that a quantum meruit for legal services rendered survived. The court defined the practice of law as: “the doing and performing services in a court of justice,” but also included, “legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation.”

Strangely, however, the court ruled that any work for ESQ-CA, performed by the Birbrower lawyers while they were physically present in New York (and assumedly en route to California), was severable from the illegal California-based work. Thus, the case was remanded for trial on the question of quantity of work performed in what locus. The court further muddied the locus of the work-performed standard in stating, “[o]ur definition does not necessarily depend on or require the unlicensed lawyer’s physical presence in the

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237 See id. at 13 (severing the work done in California from the work done in New York).
238 See id. at 3 (discussing formation of the company).
239 See id. (highlighting the creation of ESQ as a brother company).
240 See Birbrower, 949 P.2d at 3, 5, 10 (relying upon the California statute making unauthorized practice a misdemeanor and upholding the Appellate Court’s quantum meruit decision). See also CAL. BUS. & PROF. CODE § 6125 (West 1994) (providing that “[n]o person shall practice law in California unless the person is an active member of the State Bar.”).
241 See Birbrower, 949 P.2d at 5 (citing People v. Merchants Protective Corp., 209 P. 363, 365 (Cal. 1922)).
242 See id. at 13 (stressing the severability of work done in New York and work illegally done in California).
243 See id. at 12-13 (remanding the case to resolve the dispute regarding fee agreement and to determine whether the agreement conforms to California law). Quantum meruit is an equitable claim where the defense of unclean hands is available, such as when the court has labeled the lawyer’s representation a crime. See Vista Designs, Inc. v. Melvin K. Silverman, P.C., 774 So. 2d 884, 888 (Fla. Dist. Ct. App. 2001) (disallowing the payment of an earned fee and rejecting a claim for quantum meruit, on behalf of a registered patent lawyer whose advice strayed from the strict confines of patent law).
The court further held that “... advising a California client on California law in connection with a California legal dispute by telephone, fax, computer or other modern technological means” might constitute unauthorized practice as well.\footnote{Birbrower, 949 P.2d at 5.}

The court’s ruling makes no sense. Why should the locus of the lawyer make a difference when he or she is working for a California client and interpreting California law? But, if locus is important, why should phone or fax messages be different from letters or other kinds of work rendered for the client? Clearly a Birbrower type rule is some solace to the operators of legal websites. On the other hand, perhaps the court should be concerned with the locus of the development of the software. If the websites’ software is state-specific and licensed attorneys either assist in its development or indeed, endorse it, the concerns about competence and licensing would seem to evaporate because bar authorities could hold a state licensee responsible for the competence of the representation.\footnote{Id. at 5-6.} Of course, technology and the advent of national and international law firms would suggest that the interstate prohibitions are in serious need of revision. The reality is that the practices of a majority of the 1.2 million lawyers\footnote{See Stephen Gillers, A Profession, If You Can Keep It: How Information Technology and Fading Borders are Reshaping the Law Marketplace and What We Should Do About It, 63 HASTINGS L.J. 953, 1006 (2012) (considering a Texas court ruling that software must clearly state that the products are not a substitute for advice from an attorney)} in the United States crosses borders: state, national and international, with impunity; that the demand for transactional work is higher than for litigation; and that finding a finite locus for a legal transaction is increasingly out of touch. The assumption that every legal task requires local knowledge and that an out-of-state lawyer has no access to it ignores modern reality. Modern legal problems are only rarely static disputes between immobile and unsophisticated neighbors, for which knowledge of a single state’s law is sufficient. Everyone seems to agree with all of this, but enforcement persists and lawyers have to sneak around local prohibitions. Strict enforcement of these rules would discipline and even criminalize

much of the routine legal work of large and small firms alike. The local UPL enforcement apparatus is typically a committee of local lawyers who are often single statute enforcers who see the world through a prism of parochial protection at the expense for the common good. 248

7. Home Office Rules

As stated above, R. 5.5 prohibits the out of state lawyer from establishing a local office; it says nothing about local lawyers having an obligation to maintain a local office. 249 Some states however have imposed just such a requirement. In Opinion 41, 250 the issue presented in New Jersey was whether a home office or a “virtual office” can qualify as a bona fide office for the practice of law” under Ethical Rule 1:21-1(a) which states that “a bona fide office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney’s behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time.” 251

The New Jersey Opinion states: “A so-called ‘virtual office’ does not qualify as a bona fide office. A ‘virtual office’ refers to a type of time-share arrangement whereby one leases the right to reserve space in an office building on an hourly or daily basis.” 252

248 See Gerard J. Clark, The Two Faces of Multi-Jurisdictional Practice, 29 N. KY. L. REV. 251, 252 (explaining that the enforcement of unauthorized practice rules is a task that typically falls to a committee comprised of local attorneys).

249 See MODEL RULES OF PROF’L CONDUCT R. 5.5 (2011) (preventing a lawyer who is not admitted to practice in a jurisdiction from establishing an office in that jurisdiction).


251 Id. at 2.

252 Id.
So in New Jersey, even under the new interpretation of the *bona fide* office rule, lawyers can still work from home and can even meet clients at locations other than home.\footnote{253}{See id. at 3 (suggesting that lawyers can work from home or from “virtual offices” as long as the attorney could be found there and clients could be met there).} But they still have to comply with the rule requiring a *bona fide* office.\footnote{254}{See id. at 3 (summarizing the requirements of a bona fide law office).} “As long as the *bona fide* law office is in fact the place where the attorney can be found, and clients could be met there, an attorney’s decision to meet clients at a location outside that office does not render the office non-compliant with Rule 1:21-1(a).”\footnote{255}{See id. at 3 (internal emphasis removed).}

Likewise, in Arizona, some home-based law office practitioners who meet clients off-site and operate virtually from post office boxes or executive suites, were understandably apprehensive at a proposed requirement to publicly disclose the physical address of their home offices.\footnote{256}{See Mauricio Hernandez, *Are Virtual Law Offices Ethically Permissible?*, THE IRREVERANT LAWYER, Apr. 8, 2010, archived at www.webcitation.org/6Etndcf7n (explaining the concerns of lawyers who work from home regarding the purposed disclosure of their home addresses).} The proposal read:

> Bona fide office locations . . . include home offices where the lawyer or law firm reasonably expects to furnish legal services in a substantial way on a regular and continuing basis. The requirement in [the advertising rule] regarding disclosure of the city, town, or county in which the communicating lawyer or law firm maintains a *bona fide* office location applies only to the communications intended to advertise the lawyer’s services. Promotional items such as apparel, coffee mugs, pens, banners and other gift-type items are exempt from the requirements . . . . The city, town or county in which a lawyer or law firm maintains a *bona fide* office location must be readily accessible from the home page of the lawyer’s or the law firm’s website if it specifically offers legal service to or targets Arizona residents.\footnote{257}{Id. Direct Law Office offers assistance in setting up a virtual law office. *See Direct Law, DIRECTLAW*, archived at www.webcitation.org/6Eto7Idm4.}
8. Rule 5.4

Another major obstacle facing any entrepreneurial effort to deliver legal services to the public is Rule 5.4. The Rule states that “a lawyer shall not share legal fees with a non-lawyer.” It prohibits any non-lawyer ownership, any non-lawyer supervision, or any non-lawyer direction or control over the rendition of legal services. LegalZoom is a corporation with a board of directors and stockholders. As such it is ineligible to practice law. The Missouri Rule of Professional Conduct Rule 4-5.4, which in relevant part is a verbatim adoption of the ABA Model, makes corporate entities ineligible to practice law even if Missouri lawyers wrote the document producing software so as to be in compliance with local law, as the fees paid for the service would go into the corporate coffers and then be distributed to the stockholders in violation of the Rule 4-5.4. A Rule

258 See MODEL RULES OF PROF'L CONDUCT R. 5.4 (2011) (addressing the professional independence of a lawyer).

259 See id. at 5.4(a).

260 See id. at 5.4(b),(d) (prohibiting any legal aid from a non-lawyer).

261 See Board of Directors, LEGALZOOM, archived at www.webcitation.org/6EvAZ76eU (showing the make-up of LegalZoom).

262 See Rule 4-5.4: Professional Independence of a Lawyer, MISSOURI COURTS, July 1, 2007, archived at www.webcitation.org/6Ev9Xac2y.

263 See id. (offering the language of the rule). This Rule has always struck the author as a blatant anti-trust violation, although the legal profession is insulated from anti-trust scrutiny by the “state action doctrine.” In Goldfarb v. Virginia State Bar, 421 U.S. 773, 781-82, 787 (1975) the U.S. Supreme Court ruled that the Virginia State Bar attorney fee schedule which dictated minimum fees to be charged for a wide variety of legal services was an anti-trust violation because it was “enforced through the prospect of professional discipline from the State Bar . . . the motivation to conform was reinforced by the assurance that other lawyers would not compete by underbidding . . . anticompetitive practices with impunity.”

On May 18, 2011, the Jacoby & Meyers personal injury law firm filed the class actions in federal district court in New York, where the firm is based, and in New Jersey and Connecticut, where it has offices. Each complaint challenges the jurisdiction's Rule 5.4(d)(1), which forbids lawyers to practice in a for-profit law firm if a nonlawyer owns any interest in the firm. All three complaints assert that the rule exceeds the judiciary's rule-making power, violates state separation of powers doctrine, is void for vagueness, and violates the dormant commerce clause, the due process and equal protection clauses, the takings clause, and freedom of speech and association. The defendants in each suit are the justices that adopt professional conduct rules in that state. See Joan C. Rogers, Trio of Federal Suits Challenge
4-5.4 claim appears not to have been part of the plaintiff’s consumer protection and malpractice claim in *Janson*. Fears about lawyer independence which motivate the rule have been raised against LegalZoom in a lawsuit filed by a firm that was part of the LegalZoom network.

Rule 5.4 was the subject of lengthy study and debate in the ABA Commission on Multi-Disciplinary Practice which recommended a liberalization of the Rule, in reaction to trends in the European Union and Great Britain to create firms that could combine law, finance, accounting, public relations and other disciplines in service of a multi-national clientele. Its recommendations were however rejected by the House of Delegates. The subject continues to generate considerable heat inside the ABA, as can be seen from the August 2012 debate in the House of Delegates when ABA 2020 Commission presented its proposals.
Certainly the websites that produce custom made documents are engaged in providing less than full and comprehensive representation. The terms “unbundled,” or “disaggregated,” or “discrete

The House not only was unreceptive to the Ethics 20/20 Commission’s proposals, but also beat back an effort by some delegates to derail its further consideration of possible choice of law rules on lawyers’ fee-sharing with nonlawyers. A few jurisdictions, including the District of Columbia and a growing number of countries, permit some degree of nonlawyer ownership of law firms. See 28 Law. Man. Prof. Conduct 250. The commission issued draft proposals on these subjects in December 2011, floating possible rule changes that could make it feasible for lawyers in states that do not allow nonlawyer owners to be partners and share fees with lawyers in jurisdictions that do allow nonlawyer ownership. See 27 Law. Man. Prof. Conduct 750. By the time the commission dropped any further consideration of even partial nonlawyer ownership of law firms, its discussion draft on “alternative law practice structures” had provoked a firestorm of protest. The Illinois State Bar Association, joined by the ABA Senior Lawyers Division, urged the House to reaffirm its policy, adopted in July 2000, that the sharing of legal fees with nonlawyers and the ownership or control of the practice of law by nonlawyers are inconsistent with the core values of the profession, and that the law governing lawyers that prohibits sharing fees and partnering with nonlawyers should not be revised. By the time debate on this measure got underway in the House, 92 lawyers had signed up to speak on the issue. Lawrence Fox too urged delegates to reaffirm the existing ABA policy against sharing fees with nonlawyers. He said the vote would be another comment—a strong one—opposing what he characterized as the commission’s “stealth proposal” on choice of law rules for sharing fees. We should be exporting our standards against nonlawyer ownership of law practices, not importing the lowest common denominator, he argued. But former ABA president Wells said the delegates would send a “chilling message” to the commission by approving the resolution at this point. Defeating the resolution, he said, would preserve existing ABA policy without signaling that the commission should not even consider the issue. The House postponed further consideration of the issue.

*Id.*

270 See, *e.g.*, *Disclaimer, LEGALZOOM, archived* at www.webcitation.org/6Ewrkm2QW (expressing to potential customers the limited nature of LegalZoom’s services).
task,” refer to limiting the scope of the representation. Rule 1.2 (c) allows this, but only when it is “reasonable under the circumstances” and with the “informed consent” of the client. The difficulty of these limitations is that they appear to require an interface between the client and the lawyer. Reasonableness would usually require at least some inquiry into the client’s ability to complete the additional tasks involved in the engagement that a lawyer would normally provide but will not under these circumstances. Informed consent requires a two-way conversation to assure that the client understands the risks of proceeding alone and an assessment by the lawyer that the client has the capacity to perform the additional tasks required by the matter. A related question concerns client capacity. Rule 1.14 dictates an adjustment of approach by a lawyer when the client has diminished capacity to understand the complexities of the situation confronting the client.

Limiting the scope of the representation may be reasonable in a simple transactional matter like negotiating the terms of a residential lease; but less reasonable in litigation concerning child custody. Unbundling in criminal cases would often be unreasonable under the circumstances. Indeed it is specifically prohibited in Alaska and New Hampshire.

Other states prohibit “ghost-written” documents without disclosure of the fact that an attorney has written or assisted in the writing of a document presented to a court by a pro se litigant. The

272 See MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2011).
273 See id. (leaving vague the issue of whether reasonableness and informed consent can be achieved without interface).
274 See id. at cmt. 7 (giving guidelines for assessing reasonableness).
275 See id. at cmt. 1 (discussing obligations of lawyer to communicate with client).
276 See id. at cmt. 4 (referencing client capacity as a related issue).
277 See MODEL RULES OF PROF’L CONDUCT R. 1.14 (2011) (providing attorney responsibilities when a client has diminished capacity).
278 See STEPHANIE L. KIMBRO, LIMITED SCOPE LEGAL SERVICES: UNBUNDLING AND THE SELF-HELP CLIENT 61 (ABA Law Practice Management Section 2012) (admonishing the use of unbundling in the area of criminal law).
279 See KIMBRO, supra note 278 (pointing to state specific rules that prohibit limited appearances in criminal cases).
Reynoso bankruptcy court suggested that failure to disclose the identity of a document assistant was a violation of federal law. Document preparation by software provided by an internet website is an unbundled legal service and the limitations in Rule 1.2 (c) are yet another obstacle to providers like LegalZoom.

E. Conclusion

The average cost of one hour of legal service is $295. At that rate the simplest of legal tasks like drafting a simple will, preparing a certificate of incorporation, or the filing of a small claim could easily reach $3,000. The cost puts the service out of reach for the middle class American family. The bar has acknowledged and bemoaned the problem of access to the legal system for many decades, but no effective solution has been forthcoming. However, the intelligent consumer can research and access services and products on the internet. The law itself is accessible as never before.

Yet as we have seen, at least twelve states have raised as many as eight separate legal objections to various aspects of internet based legal service delivery systems. The objections include lack of a home office, insufficient consent to a disaggregated legal service, non-lawyer ownership of the delivery enterprise, fears about the unintended creation of an attorney-client relationship, advertising misstatements, consumer fraud, malpractice, incompetence, and the unli-

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280 See Reynoso, 477 F.3d at 1124 (discussing the illegality of bankruptcy preparers practicing as attorneys and failing to disclose their involvement in preparations).
281 See ALM, ALM Legal Intelligence Releases 2011 Survey of Billing and Practices for Small and Midsize Law Firms, Feb. 10, 2011, archived at www.webcitation.org/6G50ypR3F (finding the national average hourly billing rate in 2010 was $295, according to ALM Legal Intelligence, which surveyed 176 small and midsize law firms).
282 See Find Affordable Attorneys, ATTORNEYFEE, Oct. 23, 2012, archived at www.webcitation.org/6G51mQo5W (utilizing this website, any individual can receive price quotes for attorney’s fees in areas of injury, bankruptcy, divorce, and much more).
283 See MODEL RULES OF PROF’L CONDUCT R. 6.1 (2011) (suggesting lawyers do fifty hours of pro bono work per year to ensure everyone has access to legal counsel).
284 See Schwarzentraub, supra note 56 at 4-23 (summarizing legal issues LegalZoom has had in multiple states).
Technology makes these objections anachronistic and parochial at best or cynical and monopolistic at worst. They have the effect of reducing the supply of providers of legal services, in order to preserve the supply of potential clients to the in-state license holders. As such they war against efficiency and price competition.

Consider the example of probate. The modern digital consumer can educate himself on the probate process, just as he might learn about his high blood pressure or which flat screen television is best for him. Clearly, an estate plan that has been drafted from scratch by a lawyer who has twenty-five years of experience after a series of consultations and drafts is the ideal method of developing an estate plan albeit an expensive one. A sixty-nine dollar digitally produced alternative is probably inferior. But what does that mean? Perhaps the expensive plan saves the testator’s estate from an obscure state estate tax. Or the expensive plan sails through the probate process quickly and effortlessly whereas the cheaper plan requires an additional hearing prior to approval. The client protection rationale fails because it denies the client the option of a $69 product which is adequate in favor of $5,000 product which is better. As such ethical enforcement process makes the best the enemy of the good. Similarly, Turbo-tax is an example of a piece of good software: it can enable a lay person with no legal or accounting experience to prepare even the most sophisticated tax return because the software “knows” the whole Internal Revenue Code and can apply it accurately and quickly to any taxpayer who is willing to pay $50. Theoretically, the UPL cases herein described could be applied to Turbo-Tax—or H. & R. Block for that matter. Obviously, computer tax programs are reducing the demand for the services of tax lawyers, accountants and tax preparers. The medical profession seems to have made peace with Web M.D. Ironically, bar opposition against these new digital providers causes the exclusion of perhaps 50 million new clients from the benefits of the legal process. These new consumers do not need

285 See Schwarzentraub, supra note 56 at 4-23 (reporting the complaints against LegalZoom).
287 See id. at 1028 (describing limitations on interstate practice of law).
the protection of the bar. The internet consumer is typically skilled at investigating and comparing products. These new clients are protected by malpractice and consumer protection laws as the Jansen and Webster cases demonstrate. Further, out-of-state lawyers are subject to local disciplinary authority.\textsuperscript{288} The bar should butt out.

Indeed, “constitutional prohibitions against interfering with interstate commerce and with the privileges and immunities of citizenship have served to invalidate local barriers to out-of-state competition in most of the American economy.”\textsuperscript{289} Further, access to legal services has received the protection of the First Amendment.\textsuperscript{290}

Although lawyers remain hostile to the new digital providers of the law, they have enthusiastically embraced technology for their own purposes. The most revolutionary development over the past twenty years was the development of interactive document production software.\textsuperscript{291} Clearly thousands of hours of tedious effort by accountants, lawyers and technology professionals were needed to produce software like Turbo-Tax. Similar software can produce any legal document for which there is a sufficiently large market to pay for the creation of the software. That creation is ongoing at law firms, consulting firms and outsourcing locations around the world.

Document assembly software has already penetrated a large segment of the legal profession.\textsuperscript{292} Small law firms and legal de-
departments most commonly use document assembly for routine or high-volume paperwork, like residential home closing documents, purchasing off-the-shelf templates or producing their own. Larger firms and law departments are more likely to develop custom in-house applications, drawing upon their own experience. Some practitioners in both settings are increasingly interested in sophisticated, high-end drafting applications that combine advanced models of complex documents with rich layers of annotational guidance. And firms of all sizes are experimenting with outward-facing applications aimed directly at clients and non-client customers, in competition with LegalZoom.  

In the nonprofit legal services world legal aid organizations have developed their own systems and made them publicly available. Courts have automated forms as a response to the deluge of self-represented litigants. The integration of document automation goes hand in hand with the movement toward e-filing. Internet legal profession). See also Marc Lauritsen, Dancing in the Cloud, LAW PRACTICE TODAY, December 2011, archived at www.webcitation.org/6FDWeUIP3 (describing how lawyers and clients can produce documents, decisions and knowledge systems with current digital technology).

293 See, e.g., Founder’s Workbench, GOODWIN PROCTOR, LLP archived at www.webcitation.org/6FGMQke2r (providing an example of LegalZoom’s competition); A New Kind of Legal Service, MYLAWYER, archived at www.webcitation.org/6FGmp3yDm (providing legal aid to online clients); Illinois Legal Aid: Helping Illinois Residents Solve their Legal Problems, ILLINOIS LEGAL AID, archived at www.webcitation.org/6FGN1sG6m (noting one of Illinois’s online legal websites); LawHelp Interactive, PRO BONO NET, archived at www.webcitation.org/6FGNE8sXv (showing a nonprofit’s legal assistance available online); Legal Genie: Online Not In Line, LEGAL GENIE, archived at www.webcitation.org/6FGNP6rg7 (providing legal assistance online); Announcing I-CAN! E-File’s Partnership with TaxACT, I CAN E FILE, Jan. 15, 2013, archived at www.webcitation.org/6FGNwJjUH (providing online tax assistance).

294 See Providing Free Noncriminal Legal Assistance for Poor People in Greater Boston, GREATER BOSTON LEGAL SERVICES, archived at www.webcitation.org/6FGOR7m1k (providing family law and eviction defense systems which are starting to be used widely by advocates in Massachusetts).

295 See eFiling, SUPERIOR COURT OF CALIFORNIA OCCOURTS, archived at www.webcitation.org/6FGObhUUm (showing the standard forms available to file with the court as PDFs or interactive applications in state courts).

296 See PACER: Public Access to Court Electronic Records, PACER, archived at www.webcitation.org/6FGOwTJnjZ (noting the federal courts have embraced e-filing enthusiastically though the Pacer system).
providers of these services are voluminous. At a more sophisticated level law firms are outsourcing document production, e-discovery compliance, cloud management and public relations to technology firms. The world of legal service delivery is rapidly changing. The changes advance efficiency, cost and access. The bar should abandon its opposition and embrace the future.

297 See State Specific Legal Forms, USLEGAL, archived at www.webcitation.org/6FGPuHfNz (showing online legal aid is available for a wide variety of services); Smart Legal Forms: Law You Can Afford, SMART LEGAL FORMS, archived at www.webcitation.org/6FGpcomm4 (showing affordable legal options).

298 See Helping Lawyers Work Smarter, CAPSTONE PRACTICE SYSTEMS, archived at www.webcitation.org/6FGPy248q (showing a way for firms to outsource their documents); KIIC Homepage, KIIAC, archived at www.webcitation.org/6FGQ0qSkN (maintaining a library of documents with standard and alternate provisions); Disclosure Solutions, THOMSON REUTERS ACCELUS, archived at www.webcitation.org/6FGQXs0fs (providing organizations consultation and solutions to meet disclosure transparency requirements); Products Services Integrations Support Resellers, HOT DOCS, archived at www.webcitation.org/6FGQnC5w6 (demonstrating the ability to generate legal documents efficiently); WSGR Term Sheet Calculator, WILSON, SONISI, GOODRICH & ROSATI, archived at www.webcitation.org/6FGRf09Z (generating venture finance term sheets based on user responses to online questionnaire); Document Generation Live Demo, EXARL, archived at www.webcitation.org/6FGRUOinN (offering demos on how to generate legal documents online); Konicision: Contract Automation, CONTRACTEXPRESS, archived at www.webcitation.org/6FGRnswbw (demonstrating how to compile and generate legal documents such as a confidentiality agreement); Term Sheet Calculator, ORRICK, archived at www.webcitation.org/6FGSVqBkN (allowing users to generate term sheets easily by entering required data); Powerful Document Assembly and Document Automation Software, PATHAGORAS, archived at www.webcitation.org/6FGSf3w4J (offering cost-effective online document assembly tools).

299 See Richard Granat, Legal Forms for the Price of a Song on iTunes?, Jan. 16, 2012, archived at www.webcitation.org/6FGT0yZ8G (stating, “[l]egal forms, without the legal advice or assistance of a lawyer, continue to decline in value. As a pure digital product, a legal form follows the price curve of other digital goods eventually approaching zero.”).