

Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer's Monopoly and Improving Access to Justice

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INTRODUCTION

After LegalZoom was founded in 2001,¹ two factors placed considerable pressure on the status quo in the legal market. First, following years of steady growth, the economic recession of the late 2000s gave lawyers renewed incentives to produce cheaper and more efficient legal services.² Rising unemployment, increasingly frequent home foreclosures, and a growing number of bankruptcies afflicting individuals and small businesses contributed to an increase in *pro se* representation by those who failed to qualify for free legal aid.³ Second, at the same time, the rise and proliferation of technology companies—from Google to Facebook to Craigslist—continued to change the way that Americans interact with one another economically, politically, and socially. New technology continued to disrupt traditional practices in many service-based industries, including medicine,⁴ business,⁵ and law.⁶

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¹ LegalZoom.com, Inc., Amendment No. 1 to Registration Statement (Form S-1) 1 (June 4, 2012), available at <http://perma.cc/XAL5-WUVS>.

² See generally Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008); Jordan Weissmann, *The Death Spiral of America's Big Law Firms*, ATLANTIC (Apr. 19, 2012), available at <http://perma.cc/J4TC-B982>. See Catherine J. Lanctot, *Does Legalzoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 255 (2011) [hereinafter Lanctot, *First Amendment*] (“The explosive growth of huge law firms at the turn of the century is now being countered by what some fear may be a precipitous decline, tied in many ways to the plummeting economic fortunes of their large corporate clients. At the other end of the spectrum of legal services, rapid technological developments have created a host of online options for consumers . . .”).

³ See MAGGIE BARRON & MELANCA CLARK, BRENNAN CTR. FOR JUSTICE, FORECLOSURES: A CRISIS IN LEGAL REPRESENTATION 12–14 (2009); Sarah Knapp, *Can Legalzoom Be the Answer to the Justice Gap?*, 26 GEO. J. LEGAL ETHICS 821, 821 (2013); Nathan Koppel, *More Strapped Litigants Skip Lawyers in Court*, WALL ST. J., July 22, 2010 at A4, available at <http://www.wsj.com/articles/SB10001424052748704229004575371341507943822>, <http://perma.cc/HBL9-46ZM>.

⁴ See, e.g., TELADOC, <http://perma.cc/8CM2-28L4>; ZOCDOC, <http://perma.cc/A8LZ-8XDD>.

⁵ See, e.g., TURBOTAX, <http://perma.cc/7QXG-DWKD>.

⁶ See Laurel S. Terry, Steve Mark & Tahlia Gordon, *Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*, 80 FORDHAM L. REV. 2661, 2677

The dual impact of the “Great Recession” and the “startup boom” created a perfect storm for new ways of thinking about the delivery of legal services.⁷ A host of companies have grown out of that milieu.⁸ Non-corporate, individual consumers seeking the services of a lawyer stood to benefit particularly from innovations in online legal document services, an early mover in the legal technology space.⁹ Today, several online legal document service companies are challenging how individuals and small businesses have traditionally obtained legal advice by moving legal document preparation from law offices and boardrooms to the web.¹⁰

This article adopts one such “online legal document service” as a case study: LegalZoom. Arguably the most significant disrupter in the market for legal services thus far,¹¹ LegalZoom has served over two million individuals and small businesses by helping consumers prepare downloadable legal documents such as wills, prenuptial agreements, copyrights, real estate leases, and articles of incorporation.¹² LegalZoom is able to keep costs low by producing much of its work through automated generation and review by non-lawyers.¹³ It disclaims the formation of a lawyer-client relationship in order to avoid prohibitive expenses of hiring attorneys.¹⁴ And it characterizes its services as the dissemination of “legal information,”¹⁵ which non-lawyers are permitted to do,¹⁶ as opposed to the dispensation of “legal advice,” which would constitute the unauthorized practice of law (“UPL”).¹⁷

Despite the relative affordability, refreshing accessibility, and soaring popularity of online alternatives to hiring licensed attorneys, the continued existence of LegalZoom and its competitors in the burgeoning online legal services industry hangs delicately on the omnipresent thread of potential destruction: the legal profession’s monopoly on the practice of law. That is,

(2012) (“The legal profession is no longer the ‘only game in town,’ so regulators now must consider whether and how to respond to nonlawyer, nontraditional legal services providers.”).

⁷ See generally Benjamin H. Barton, *The Lawyer’s Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067 (2014).

⁸ See, e.g., JUDICATA, <http://perma.cc/YM6D-BZGB/>; RAVEL LAW, <http://perma.cc/U7JC-XCGZ/>; AVVO, <http://perma.cc/2PS8-WU87/>; KIRA, <http://perma.cc/KSX8-XHEB/>.

⁹ See Basha Rubin, *Is the Legal Tech Boom Over? It Hasn’t Even Begun*, FORBES (Aug. 12, 2014, 12:00 PM), <http://perma.cc/8EUG-CT5M/>; *About Us*, LEGALZOOM, <http://perma.cc/6FUP-95U7/>.

¹⁰ See, e.g., ROCKET LAWYER, <http://perma.cc/3GWR-SYXM/>; LAWDEPOT, <http://perma.cc/B2RF-QZLY/>; NOLO, <http://perma.cc/384H-UWKM/>.

¹¹ LEGALZOOM, <http://perma.cc/FZJ7-DV53/>; see also Lanctot, *First Amendment*, *supra* note 2, at 257.

¹² See LEGALZOOM, *supra* note 11; *About Us*, *supra* note 9; *Permira to Take Controlling Stake in LegalZoom.com*, REUTERS (Jan. 6, 2014, 8:01 AM), <http://perma.cc/45DK-57CB/>.

¹³ See *How It Works*, LEGALZOOM, <http://perma.cc/3ANN-WY55/>.

¹⁴ See *Disclaimer*, LEGALZOOM, <http://perma.cc/8CQL-SETZ/>.

¹⁵ *Id.*

¹⁶ See Lanctot, *First Amendment*, *supra* note 2, at 265; Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Perils and the Promise*, 49 DUKE L.J. 147, 177–78 (1999) [hereinafter Lanctot, *Attorney-Client Relationships*].

¹⁷ MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 2, 3 (2013); see also Jack P. Sahl, *Cracks in the Profession’s Monopoly Armor*, 82 FORDHAM L. REV. 2635, 2656 (2014); Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2589 (2014).

lawyers enjoy exclusive authority to “practice law,”¹⁸ a right that is amor- phously defined¹⁹ but most often justified on the grounds that consumer choice in the market for legal services must be limited to licensed lawyers to protect consumers from potentially inadequate legal advice.²⁰ As the product of a self-regulated profession,²¹ the lawyer’s monopoly often prioritizes miti- gating perceived risks for clients over external competition and innovation, ultimately harming consumers.²² And as the Supreme Court’s recent decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission* suggests, such self-regulation can produce greater risks of self-dealing in regulatory actions.²³

This article focuses on LegalZoom as a case study in order to provide a window into the uneasy relationship between advances in legal technology and the regulation of the legal market. As the most prominent, well-known, and heavily litigated supplier of online legal services,²⁴ a deep content dive into LegalZoom’s business model and legal challenges sheds light on the potential of online legal services to improve access to justice, and the need for a new regulatory structure that expressly regulates online legal services. Part I provides an overview of LegalZoom’s services and examines efforts to regulate and litigate against LegalZoom and similar online legal services for conducting the unauthorized practice of law. It analyzes the Supreme Court’s recent decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission* (“NCBDE”), which significantly curtails the regulatory autonomy historically enjoyed by state bar associations. It considers implica- tions of NCBDE for online legal services, and the regulation of the practice of law generally.

Part II analyzes ways in which fostering online legal technology might benefit consumers by improving access to justice and encourage competition

¹⁸ See Rhode & Ricca, *supra* note 17, at 2588–89.

¹⁹ See *infra* note 207 and accompanying text.

²⁰ See Mont. Sup. Ct. Comm’n on Unauthorized Practice of Law v. O’Neil, 147 P.3d 200, 213 (Mont. 2006) (The “primary reason for prohibiting the unauthorized practice of law is to protect the public from being advised and represented by unqualified persons not subject to professional regulation.”).

²¹ See *Keller v. State Bar of Cal.*, 496 U.S. 1, 1 (1990) (noting that the State Bar of California “uses its membership dues for self-regulatory functions”); Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 4 GEO. J. LEGAL ETHICS 911, 918, 928–32 (1994).

²² See MODEL RULES OF PROF’L CONDUCT pmb. ¶ 12; Laurel A. Rigertas, *The Legal Profession’s Monopoly: Failing to Protect Consumers*, 82 FORDHAM L. REV. 2683, 2692 (2014) (“Another possible rationale for the monopoly that needs to be addressed is economic protec- tionism. Under this rationale, the state has effectively given lawyers a franchise and, therefore, lawyers have a property interest in their law licenses. Prohibiting competition from unlicensed practitioners protects that property interest in part by keeping lawyers’ fees high.”) (internal citations omitted).

²³ N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 1114 (2015). See *infra* notes 60–89 and accompanying text.

²⁴ See Zachary C. Zurek, *The Limited Power of the Bar to Protect Its Monopoly*, 3 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 242, 267 (2013) (“While LegalZoom is just one website offering this service, it is undoubtedly the most well-known.”); Lanctot, *First Amend- ment*, *supra* note 2, at 260–61.

and innovation, consistent with fundamental principles of U.S. antitrust law. Part III considers arguments against LegalZoom by exploring the risks of divorcing online legal services from the protections built into the legal profession. Part IV then deconstructs common justifications for the professional monopoly, and critiques the connection between those justifications and the regulatory status quo. Finally, Part V explores options for addressing online legal services both within the current regulatory structure and through regulatory reform.

This article concludes that the current regulatory structure—that of UPL lawsuits, self-protective and anticompetitive regulatory policies, and blurry legal contours for what constitutes the “practice of law,” all against the backdrop of a professional monopoly that disadvantages low- and moderate-income groups—is suboptimal for consumers of legal services. The legal profession will better serve consumers by actively working *with*, rather than counterproductively *against* online legal services through the enforcement of UPL restrictions. Rather than deregulating the market for legal services, though, the next step ought to involve thoughtful regulations that reflect technological developments in the legal marketplace. Smarter regulations that explicitly address the role and responsibilities of online legal services can protect consumer rights while embracing the democratizing potential of online legal technology.

I. LEGALZOOM: A CASE STUDY IN THE DELIVERY OF LEGAL SERVICES ONLINE—AND EFFORTS TO SHUT IT DOWN

A. *LegalZoom’s Online Legal Services*

UCLA School of Law graduates Brian Liu and Brian Lee first jotted down the idea for LegalZoom on a napkin in February 2000.²⁵ Liu and Lee, then practicing at Sullivan & Cromwell and Skadden Arps, respectively, in Los Angeles, discussed their shared experience of fielding general legal questions from family and friends.²⁶ The questions often related to common legal issues like estate planning and business formation—precisely the kinds of questions that often require clients to fill out standardized legal documents.²⁷ Within a year, the duo began pursuing a startup that would fulfill this unmet need.²⁸ The company was formed in 2001 and added Robert Sha-

²⁵ *LegalZoom’s Co-Founders Share Their Secrets of Starting a Successful Business*, MARKET WIRED (Feb. 2, 2010), <http://perma.cc/1B8D-2AXU>.

²⁶ *See id.*; *The BusinessMakers Radio Show: Episode #209: Brian Liu of LegalZoom.com* (radio broadcast June 6, 2009), available at <http://perma.cc/3NJW-9E9K>.

²⁷ *See LegalZoom’s Co-Founders Share Their Secrets of Starting a Successful Business for February National Start a Business Month*, LEGALZOOM, <http://perma.cc/BU26-QFQS>; *About Us*, *supra* note 9; Andrea Chang, *How I Made It: Brian Lee; Business partner to stars*, L.A. TIMES, Feb. 10, 2013, at B2.

²⁸ *See Daniel Fisher, Entrepreneurs Versus Lawyers*, FORBES, Oct. 24, 2011, available at <http://perma.cc/WEG9-V98X>.

piro, famed defense lawyer of O.J. Simpson, as a spokesperson.²⁹ Liu, now Chairman of LegalZoom's Board of Directors,³⁰ has said that LegalZoom's goal "has always been to empower Americans to take care of common legal needs in an easy and affordable way."³¹

Consistent with the website's disclaimer, Liu describes the website as "a self-help online legal service," which should not substitute for an attorney.³² LegalZoom provides personalized online legal solutions for customers by helping users create legal documents for personal and business purposes.³³ On the personal side, the company offers document services for wills, divorce, prenuptial agreements, personal bankruptcy, green card issues, disability benefits, personal injury, driving under the influence violations, and personal real estate documents.³⁴ LegalZoom also provides services in a number of areas critical to starting and maintaining a business, including incorporation documents, tax forms, licenses, corporate changes and filings, real estate transactions, trademarks, patents, copyrights, and business compliance.³⁵

LegalZoom's online platform operates through three simple steps. First, the client fills out a series of questions pertaining to a particular legal issue.³⁶ A customer support team is available for assistance as the customer completes the questionnaire.³⁷ Second, LegalZoom's "document assistants" review the answers for "consistency and completeness."³⁸ The company has trademarked this step in the process the "LegalZoom Peace of Mind Review," which includes a series of automated checks as well as personal review by the document scriveners.³⁹ Third, LegalZoom uses the questionnaire to create the necessary legal documents, which it prints and delivers to customers with simple wrap-up instructions.⁴⁰ In addition, while LegalZoom characterizes itself as an online document service,⁴¹ in recent years it has ventured into the world of legal advice by offering "legal plans," or package deals for continuing legal issues that connect customers with licensed attorneys participating in their network.⁴²

Though LegalZoom has not publicly released usage statistics in the past four years, information about LegalZoom's usage was made publicly available in an SEC filing before an expected IPO in 2011.⁴³ At that time,

²⁹ See *id.*

³⁰ See *About Us*, *supra* note 9.

³¹ See *LegalZoom's Co-Founders Share Their Secrets*, *supra* note 27.

³² See *Disclaimer*, *supra* note 14; *The BusinessMakers*, *supra* note 26.

³³ LEGALZOOM, *supra* note 11.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See *How It Works*, *supra* note 13.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *Peace of Mind Review*, LEGALZOOM, <http://perma.cc/462P-UWXL>.

⁴⁰ See *How It Works*, *supra* note 13.

⁴¹ LegalZoom.com, Inc., Registration Statement, *supra* note 1.

⁴² *Legal Plans*, LEGALZOOM, <http://perma.cc/65LL-5333>.

⁴³ See LegalZoom.com, Inc., Registration Statement, *supra* note 1.

LegalZoom had served approximately two million customers. In 2011 alone, LegalZoom customers “placed approximately 490,000 orders and more than 20 percent of new California limited liability companies were formed using [the] online legal platform.”⁴⁴

B. LegalZoom and the Unauthorized Practice of Law

For over a century, the legal profession has enjoyed the ability to self-regulate: regulations governing the profession—including those governing who may engage in the “practice of law”—are proposed by the organized bar and are approved, promulgated, and enforced by state courts.⁴⁵ Though the enforcement practices vary, in most jurisdictions restrictions on UPL are policed by state bar committees formed to enforce unauthorized practice, state attorneys general, local attorneys, or the state’s highest court.⁴⁶ UPL violations are typically enforced by contempt of court or as criminal misdemeanors.⁴⁷ Courts and state bar associations have repeatedly used the regulatory power of the lawyer’s monopoly to enforce UPL against online legal services companies, including against a favorite target: LegalZoom.⁴⁸

1. UPL Regulation by State Bar Associations

State bar associations have state-granted regulatory and enforcement authority over the practice of law.⁴⁹ This inherent authority has led several state bar associations to take action against online legal services companies like LegalZoom for engaging in UPL. For example, the Connecticut,⁵⁰ North Carolina,⁵¹ Pennsylvania,⁵² South Carolina,⁵³ and Texas⁵⁴ state bar associa-

⁴⁴ *Id.*

⁴⁵ See W. Bradley Wendel, *Foreword: The Profession’s Monopoly and Its Core Values*, 82 FORDHAM L. REV. 2563, 2563–66 (2014); Mathew Rotenberg, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 713 (2012); Devlin, *supra* note 21, at 918, 928–32.

⁴⁶ See Rotenberg, *supra* note 45, at 716–17.

⁴⁷ See *id.*

⁴⁸ See, e.g., *Janson v. LegalZoom.com*, 802 F. Supp. 2d 1053, 1064 (W.D. Mo. 2011); *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2012 WL 3678650, at *4–5 (N.C. Super. Ct. Aug. 27, 2012); *Lowry v. LegalZoom.com* No. 4:11CV02259, 2012 WL 2953109, at *2–3 (N.D. Ohio July 19, 2012).

⁴⁹ See *Keller v. State Bar of Cal.*, 496 U.S. 1, 1 (1990) (noting that the State Bar of California “uses its membership dues for self-regulatory functions”); Devlin, *supra* note 21, at 928–32.

⁵⁰ CONN. BAR ASS’N UNAUTHORIZED PRACTICE OF LAW COMM., INFORMAL OP. 2008-01, 3 (2008), available at <http://perma.cc/D52C-H225>.

⁵¹ See Original Complaint at 8, *LegalZoom.com v. N.C. State Bar*, No. 11-CVS-15111, 2011 WL 8424700, (N.C. Super. Ct. Mar. 24, 2014). LegalZoom noted that the North Carolina State Bar’s cease-and-desist letter “contained a number of inaccuracies in its description of the self-help legal document services provided by Plaintiff. . . . [For example,] ‘LegalZoom’s self-help legal document service does not ‘transcribe’ or ‘determine[] [what form] is appropriate for the customer’s legal document.’ Rather, ‘the process is fixed and automated, just as in any form book with instructions or a do-it-yourself kit.’” *Id.* (internal citations omitted).

⁵² PA. BAR ASS’N UNAUTHORIZED PRACTICE OF LAW COMM., FORMAL OP. 2010-01, 7 (2010), available at <http://perma.cc/9UNE-XDNH> (describing LegalZoom’s online document

tions have issued opinions or cease-and-desist letters against online legal services, declaring that they violate UPL restrictions.⁵⁵ These state bar associations gave LegalZoom and other online legal services companies very little due process: they did not notify affected online legal services that they were considering the issue, offered no opportunity for implicated parties to be heard, and conducted no hearings.⁵⁶ Notably, the Connecticut and Pennsylvania bar associations took no enforcement actions against LegalZoom after issuing opinions declaring it violated state law. Perhaps motivated by fear of public outcry,⁵⁷ the decision to refrain from enforcing the opinions denied LegalZoom the standing necessary to challenge the state bar's actions in a court of law.⁵⁸ In addition, with the exception of North Carolina, no state bar association issuing UPL opinions against online legal services companies sought input from the public about the anticompetitive policy it perpetuated, and no bar association provided online legal services companies subject to regulation with the opportunity for judicial review.⁵⁹

The Supreme Court's February 2015 ruling in *North Carolina Board of Dental Examiners v. Federal Trade Commission* ("NCBDE")⁶⁰ suggests that the regulatory autonomy historically enjoyed by state bar associations is now largely restricted to state-supervised actions.⁶¹ Since 1943, the Court has recognized an exception to federal antitrust law under the state action doctrine,⁶² conferring immunity on the anticompetitive conduct of states acting in their sovereign capacity.⁶³ The state action doctrine thus allows states to pass legislation or otherwise engage in conduct with anticompetitive ef-

services and concluding that "the offering or providing [in Pennsylvania] of legal document preparation services as described herein (beyond the supply of preprinted forms selected by the consumer not the legal document preparation service), either online or at a site in Pennsylvania is the unauthorized practice of law and thus prohibited, unless such services are provided by a person who is duly licensed to practice law in Pennsylvania retained directly for the subject of the legal services").

⁵³ S.C. BAR ASS'N ETHICS ADV. COMM., ETHICS ADV. OP. 12-03 (2012), available at <http://perma.cc/DA44-2TYH> (prohibiting lawyers from answering legal questions posted by members of the public on JustAnswer.com).

⁵⁴ SUP. CT. OF TEX. PROF'L ETHICS COMM., OP. 561 (2005), available at <http://perma.cc/2K6M-XMSL> (prohibiting lawyers from paying a fee to be listed on a privately sponsored internet site which obtains information over the internet from potential clients about their legal problems).

⁵⁵ See also Brief of Legalzoom.com et al. as Amici Curiae in Support of Respondent at 19–22, *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (No. 13-534), 2014 WL 3895926.

⁵⁶ *Id.*

⁵⁷ See Robert Ambrogi, *Why is This Man Smiling?: Latest Legal Victory Has LegalZoom Poised for Growth*, 100 A.B.A. J. 33, 34 (Aug. 2014) (quoting critic of the lawyer's monopoly Deborah Rhode, who explained: "With respect to LegalZoom, the train has left the station They've got a couple million satisfied customers and it's going to be really hard for anyone to shut them down.").

⁵⁸ See Brief of Legalzoom.com et al., *supra* note 55, at 19–20.

⁵⁹ *Id.* at 19–22.

⁶⁰ *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015).

⁶¹ See *id.* at 1109–17.

⁶² *Id.* at 1110 (citing *Parker v. Brown*, 317 U.S. 341, 350–51 (1943)).

⁶³ *Id.*

fects.⁶⁴ Respecting state sovereignty is a primary reason for the state action doctrine.⁶⁵ The Court has reasoned that requiring states to comply with the Sherman Act “at the expense of other values a State may deem fundamental would impose an impermissible burden on the States’ power to regulate.”⁶⁶

Yet the Court has limited the antitrust immunity conferred on non-state actors.⁶⁷ In *NCBDE*, the Court extended the exception to state-action immunity by holding that state agencies “controlled by active market participants” are not automatically immune from federal antitrust laws.⁶⁸ Rather, state agencies dominated by market insiders may claim antitrust immunity only if (1) their anticompetitive actions are pursuant to a “clearly articulated and affirmatively expressed” state policy and (2) the state actively supervises the policy.⁶⁹ The *NCBDE* Court determined that the insider-dominated state agency in question, the North Carolina State Board of Dental Examiners, did not receive active state supervision of its anticompetitive conduct, and thus that the Board’s actions were not “cloaked” in antitrust immunity.⁷⁰

Much like state bar associations that are granted regulatory authority over the “practice of law,” the North Carolina legislature empowers the North Carolina State Board of Dental Examiners to regulate “the practice of dentistry.”⁷¹ Under North Carolina law, the Board’s “principal duty is to create, administer, and enforce a licensing system for dentists.”⁷² And similar to state bar associations, which are controlled by practicing, licensed attorneys, the Board is composed of six practicing, licensed dentists, one dental hygienist, and one consumer.⁷³

After dentists complained to the Board that non-dentists had begun administering teeth-whitening services for lower prices than dentists charged, the Board initiated an investigation.⁷⁴ Most of the complaints instigating the Board’s investigation “expressed a principal concern with the low prices charged by nondentists” as opposed to “possible harm to consumers,” of which there were “[f]ew complaints.”⁷⁵ Yet, in an action remarkably similar to licensed lawyers on state bar associations sending cease-and-desist letters to non-lawyer online legal services for engaging in the “practice of law,” the licensed dentists controlling the Board sent cease-and-desist letters to non-dentists whitening services for engaging in the “practice of dentistry.”⁷⁶

⁶⁴ *Id.* at 1109–10.

⁶⁵ *Id.* at 1110 (“Although state-action immunity exists to avoid conflicts between state sovereignty and the Nation’s commitment to a policy of robust competition . . .”).

⁶⁶ *Id.* at 1109 (citing *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978)).

⁶⁷ *See id.* at 1110.

⁶⁸ *Id.* at 1110, 1113.

⁶⁹ *Id.* at 1110 (quoting *FTC v. Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013)) (setting forth requirements for establishing *Parker* immunity).

⁷⁰ *Id.* at 1110–16.

⁷¹ *Id.* at 1107 (citing N.C. Gen. Stat. Ann. § 90-22(a) (West 2013)).

⁷² *Id.* (citing N.C. Gen. Stat. Ann. §§ 90-29–41 (West 2013)).

⁷³ *Id.* at 1108.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

Like the cease-and-desist letter the Pennsylvania Bar Association sent to LegalZoom and other online legal services providers, moreover, the Board in *NCBDE* warned teeth whitening providers that “the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes ‘the practice of dentistry.’”⁷⁷ Eventually, the Board managed to prohibit all non-dentists in the state from offering teeth whitening services.⁷⁸

The Court’s ruling in *NCBDE* extends naturally to state bar associations. Like the dental board, state bar associations are state agencies controlled by market participants.⁷⁹ Just like the dental board, therefore, state bar associations should only get antitrust immunity for anticompetitive actions if they are actively supervised by the state—presumably through state courts, state attorneys general, or perhaps even state legislatures.⁸⁰

Lending further support to the notion that *NCBDE*’s active supervision requirement extends to state bar associations is the fact that the Court’s justifications for placing limits on antitrust immunity closely align with the role state bar associations play in regulating the practice of law. The *NCBDE* Court reasoned that while state agencies controlled by active market participants may harbor good faith, “[d]ual allegiances are not always apparent to an actor,” and therefore “active market participants cannot be allowed to regulate their own markets free from antitrust accountability.”⁸¹ The Court concluded that “[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern.”⁸²

The Court supported its reasoning with three cases involving regulation of the practice of law by state bar associations, one of which gave antitrust immunity partly due to active state supervision, and two of which denied extending antitrust immunity due to the lack of active supervision.⁸³ The Court placed the greatest emphasis on *Goldfarb v. Virginia State Bar*,⁸⁴ which held that a state bar association violated U.S. antitrust law.⁸⁵ The Court reasoned that in *Goldfarb*, “the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had joined in what is essentially a private anticompeti-

⁷⁷ *Id.* (citing Joint Appendix at 13, 15); see also PA. BAR ASS’N, *supra* note 52 (warning that persons engaging in the unauthorized practice of law may face criminal penalties and strongly implying that LegalZoom and the in-person document preparer We the People were engaging in the unauthorized practice of law).

⁷⁸ *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1108. (“Nondentists ceased offering teeth whitening services in North Carolina.”).

⁷⁹ *Id.* at 1114.

⁸⁰ See *id.* at 1110.

⁸¹ *Id.* at 1105, 1111.

⁸² *Id.* at 1111.

⁸³ See *id.* at 1110–14 (addressing *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977)).

⁸⁴ 421 U.S. 773 (1975).

⁸⁵ *Id.* at 791–93.

tive activity for the benefit of its members.”⁸⁶ The *Goldfarb* Court considered the lack of supervision by the “Virginia Supreme Court to be a principal reason for denying immunity.”⁸⁷ The Court’s analysis of *Goldfarb*, *Hoover*, and *Bates* strongly suggests that state bar associations will not get antitrust immunity when they use their regulatory authority to benefit their members without active state supervision.⁸⁸

The Court’s decision in *NCBDE* is a win for those optimistic about the potential of online legal alternatives to ameliorate the access-to-justice crisis. Because the decision subjects the anticompetitive regulatory actions of state bar associations to state oversight, *NCBDE* signals that state officials have the ultimate antitrust-immunized authority over the regulation of the practice of law. Though state judges, prosecutors, attorneys general, and the legal staff at administrative agencies are licensed attorneys, these regulators “do not have a direct financial interest in suppressing perceived competition,” as many state bar associations do—however honorable their intentions.⁸⁹

The next question for those interested in consumer rights in the legal market is what those government officials with the ultimate power to regulate law practice will do with that power. Part V recommends regulatory reform that explicitly incorporates online legal services into the legal landscape, while regulating it to the consumer’s advantage.

2. UPL Litigation

In addition to UPL allegations initiated by state bar associations, private individuals and class litigants have sued LegalZoom in state courts on the basis that the company is engaging in unauthorized practice. Courts faced with such lawsuits have often struggled to determine how online legal services fit within the current regulatory structure.⁹⁰

⁸⁶ *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1114 (internal quotations omitted).

⁸⁷ *Id.*

⁸⁸ See *id.* at 1113; Eric W. Fraser, *Opinion Analysis: No Antitrust Immunity for Professional Licensing Boards*, SCOTUSLOG (Feb. 25, 2015), <http://perma.cc/83BM-HN9Z> (“Today’s opinion cites three important cases concerning regulation of lawyers by state bar associations. The Court’s descriptions of the cases suggest that those cases should be interpreted to mean that only the specific actions of a bar that are actively supervised by the state (e.g., a state supreme court) get antitrust immunity. The rest of a bar association’s activities likely have no such immunity.”).

⁸⁹ Brief of Legalzoom.com, Inc. et al., *supra* note 55, at 24–25 (“No doubt many, if not most, private attorneys given the power by states to enforce the professional bar’s monopoly over the practice of law are honorable individuals. However, logic, academic research and the real-life experience of consumers and innovative service providers show that actual, active state oversight of financially-interested market participants remains a fundamental check on the potential for abuse.”).

⁹⁰ See *LegalZoom.com v. N.C. State Bar*, No. 11 CVS 15111, 2014 WL 1213242, at *10 (N.C. Super. Ct. Mar. 24, 2014); *Janson v. LegalZoom.com*, 802 F. Supp. 2d 1053, 1065 (W.D. Mo. 2011); *Lowry v. LegalZoom.com* No. 4:11CV02259, 2012 WL 2953109, at *2 (N.D. Ohio July 19, 2012).

For one, the operating definition of what actually constitutes the “practice of law” is notoriously unclear, circular, and even anachronistic.⁹¹ In 2003, the ABA formed a Model Task Force on the Practice of Law in order to address the “growing gray area [that] may be partially responsible for the spotty enforcement of unauthorized practice of law statutes across the nation and arguably an increasing number of attendant problems related to the delivery of services by nonlawyers.”⁹² The ABA Task Force declined to offer a single model definition itself, opting instead to providing guidance to the states in crafting their own definition.⁹³ The 2013 Model Rules of Professional Conduct still punts the definition to states: “[t]he definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.”⁹⁴

State definitions of the practice of law remain “consistently vague.”⁹⁵ As an illustration of a state’s attempt at a definition, Massachusetts provides the following:

Whether a particular activity constitutes the practice of law is fact specific. While a comprehensive definition would be impossible to frame[,] what constitutes “the practice of law”, in general, consists of: Directing and managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving or furnishing legal advice as to such rights and methods and the practice, as an occupation, of drafting documents by which such rights are created, modified, surrendered or secured⁹⁶

The Restatement of Law Governing Lawyers also frankly addresses difficulties in defining the practice of law, expressly admitting that “the definitions and tests employed by courts to delineate unauthorized practice by nonlawyers have been vague or conclusory, while jurisdictions have differed significantly in describing what constitutes unauthorized practice in particu-

⁹¹ See *infra* note 206 and accompanying text.

⁹² See A.B.A. TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, PRESIDENT’S CHALLENGE STATEMENT, available at <http://perma.cc/7SXS-BPC7>.

⁹³ See LISH WHITSON, A.B.A. TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT 1 (Aug. 2003), available at <http://perma.cc/P43P-5KY2>.

⁹⁴ MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 2 (2013); see also Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 812 (2002) [hereinafter Lanctot, *Scriveners*].

⁹⁵ Rotenberg, *supra* note 45, at 718 (quoting Shari Claire Lewis & Dylan Braverman, *The Internet “Big Bang” Unauthorized Practice of Law in the Cyber Age*, FOR THE DEF., Oct. 2007, at 26, 27).

⁹⁶ *Mass. Conveyancers Ass’n v. Colonial Title & Escrow*, 13 Mass. L. Rptr. 633, 2001 WL 669280, at *5 (Mass. Super. Ct. 2001) (internal citations and quotations omitted).

lar areas.”⁹⁷ Perhaps even more troubling for online legal services companies and their consumers, most state legislatures drafted UPL prohibitions before the Internet was even invented.⁹⁸ These existing statutory definitions of “practice” are at odds with the modes of interaction enabled by the Internet.

The fact-specific nature of the unauthorized practice inquiry has driven many courts to make tenuous distinctions between self-help aids and legal advice. In *Janson v. LegalZoom.com*, for example, a federal district court considered a class action suit brought by 15,000 plaintiffs against LegalZoom.⁹⁹ The plaintiffs alleged that LegalZoom was violating Missouri UPL law, though they admitted that they “never believed they were receiving legal advice while using the LegalZoom website.”¹⁰⁰ In response to a class certification motion, the court drew a strained distinction between “do-it-yourself” legal kits which are permissibly offered by non-lawyers to aid *pro se* litigants, and “we’ll do it for you” internet portal services, which “go[] beyond mere general instruction” and must be carried out by lawyers.¹⁰¹ Using its own dividing line, the court ultimately held that LegalZoom’s sale of blank legal forms and general instructions amounted to *pro se* aid that did not constitute UPL, but that its services actually *preparing* the legal documents constituted UPL.¹⁰² “Because those that provide that service [the preparation of legal documents] are not authorized to practice law in Missouri,” the court reasoned, “there is a clear risk of the public being served in legal matters by ‘incompetent or unreliable persons.’”¹⁰³

The *Janson* court sent a clear message to LegalZoom and its competitors: the lawyer’s monopoly was capable of eviscerating the competitive advantage of the online legal services business model. LegalZoom ultimately settled the case, which resulted in payouts to the 15,000 plaintiffs joining the class action as well as additional compensation to LegalZoom’s customers in Missouri.¹⁰⁴ Pursuant to the settlement, LegalZoom was able to continue its services given specified but undisclosed changes to its business practices.¹⁰⁵

An ongoing case in North Carolina also highlights the difficulty many courts face enforcing unclear UPL restrictions against online legal services. In *LegalZoom.com v. North Carolina State Bar*, the North Carolina Superior

⁹⁷ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000); *see also* Lanctot, *Scriveners*, *supra* note 94, at 812.

⁹⁸ Rotenberg, *supra* note 45, at 710–11. (“State legislatures drafted most unauthorized practice statutes prior to the emergence of the Internet or without any focus on recent advancements in computer research capabilities.”).

⁹⁹ *See Janson v. LegalZoom.com*, 802 F. Supp. 2d 1053, 1064 (W.D. Mo. 2011).

¹⁰⁰ *Id.* at 1063.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1064.

¹⁰³ *Id.*

¹⁰⁴ Nathan Koppel, *Seller of Online Legal Forms Settles Unauthorized Practice of Law Suit*, WALL ST. J.L. BLOG (Aug. 23, 2011, 11:47 AM), <http://blogs.wsj.com/law/2011/08/23/seller-of-online-legal-forms-settles-unauthorized-practiced-of-law-suit/>, <http://perma.cc/KUH7-ZS5N>.

¹⁰⁵ *Id.*

Court denied LegalZoom’s motion to dismiss a UPL claim brought by the North Carolina state bar association, though without prejudice to further consideration.¹⁰⁶ The court grappled with the policy issues that arise under the current UPL restrictions. On the one hand, the court wrote, *pro se* litigants have a right to self-representation and to seek out the assistance of “unlicensed individuals [who] may record information that another provides without engaging in UPL as long as they do not also provide advice or express legal judgments.”¹⁰⁷ On the other hand, the court struggled with the question of when it could assert that LegalZoom had crossed the line from a provider of legal information to the realm of advice or “express legal judgments.”¹⁰⁸ The court called upon the legislature to make changes, noting “that strict application of statutes prohibiting the unauthorized practice of law has yielded economic inefficiency, including but not limited to causing basic legal services to be outside the reach of many or most consumers. . . . [S]uch policy changes are more appropriately addressed to the Legislature and are not now before the court.”¹⁰⁹ The court’s call for reform should not go unaddressed. The tension between modern online legal services and the relic regulatory model for the legal market puts state courts in an uneasy interpretive position.

II. THE ARGUMENT FOR ONLINE LEGAL SERVICES: RECONSIDERING THE PROFESSIONAL MONOPOLY IN THE INFORMATION AGE

The legal needs of low- and middle-income groups in the United States are far too often ignored.¹¹⁰ Unlike in peer countries, in the United States indigent litigants have no positive right to a lawyer outside of criminal prosecutions.¹¹¹ Free and reduced-cost legal services organizations lack adequate funds to serve over eighty percent of legal needs for low-income individu-

¹⁰⁶ LegalZoom.com v. N.C. State Bar, No. 11 CVS 15111, 2014 WL 1213242, at *13 (N.C. Super. Ct. Mar. 24, 2014).

¹⁰⁷ *Id.* at *9.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at *8.

¹¹⁰ See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 97–98 (1981) [hereinafter Rhode, *Policing*]; see also Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 703, 711–12 (1996).

¹¹¹ See Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 26–27 (1981); Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011); Jeanne Charn, *Foreword*, 7 HARV. L. & POL’Y REV. 1, 1–2 (2013) (The “United States, the largest and wealthiest Western democracy, stands alone among its peers. Government-funded legal aid programs of many common law countries (e.g., the United Kingdom, Ireland, Australia, New Zealand, and most Canadian provinces) and civil law countries (e.g., the Netherlands, Germany, Sweden, Norway, and Finland) guarantee access to an attorney in a wide range of civil matters. Eligibility for free or low-cost legal assistance often extends to middle-income people. Because income eligibility is higher and everyone who qualifies for legal assistance gets it, legal aid expenditures are much higher—from two to eight times more per capita than in the United States.”).

als.¹¹² And for every low-income individual who receives publicly-funded legal aid, one applicant is turned away.¹¹³

In response to the access to justice crisis for low- and middle-income groups, the organized bar has focused “almost exclusively” on two worthy endeavors: (1) improving legal aid services and (2) increasing commitment to pro bono.¹¹⁴ Today, approximately \$1.3 billion in funding for civil legal services is provided by the Legal Services Corporation (“LSC”), which is heavily supplemented by federal, state, and local resources.¹¹⁵ Some estimate that pro bono legal assistance contributes approximately three-quarters as much to legal aid, though the amount is highly responsive to booms and busts in the legal economy.¹¹⁶ But while pro bono and legal aid assistance is an enormously laudable contribution to the solution, there remains a “huge gap today between the legal needs of low-income people and the capacity of the civil legal assistance system to meet those needs,” as well as “severe inequality in funding among states.”¹¹⁷ For-profit online legal services like LegalZoom can bridge the justice gap by breaking down barriers to access for low- and middle-income individuals and by encouraging innovation and competition in the market for legal services at the benefit of non-lawyer consumers of legal services.¹¹⁸

LegalZoom’s technology enables the company to service many otherwise unmet legal needs at low costs. By employing non-lawyers and relying heavily on automated technology, LegalZoom is able to offer free evaluations for some premium packages,¹¹⁹ and it charges as little as \$29 for residential leases,¹²⁰ \$69 for wills,¹²¹ \$149 for business formation,¹²² and \$169

¹¹² See ALAN HOUSEMAN, CENTER FOR AMERICAN PROGRESS, THE JUSTICE GAP: LEGAL ASSISTANCE TODAY AND TOMORROW 3 (2011), available at <http://perma.cc/2YK7-U8Y9>.

¹¹³ *Id.*

¹¹⁴ See LEGAL SERVS. CORP., REPORT OF THE PRO BONO TASK FORCE 12 (2012), available at <http://perma.cc/QK2L-GHPG> (“Pro bono lawyers are a great potential resource for reducing demand for legal services.”); Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 425 (2003) (“During the mid-twentieth century, the bar sought to encourage greater pro bono involvement. Part of the motivation was to prevent the government from responding to pervasive unmet needs by loosening the rules against practice by nonlawyers”); Bridgette Dunlap, *Anyone Can “Think Like a Lawyer”*: How the Lawyers’ Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States, 82 FORDHAM L. REV. 2817, 2828 (2014).

¹¹⁵ Charn, *supra* note 111, at 8 (citing ALAN W. HOUSEMAN, CENTER FOR L. & SOC. POL’Y, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2009 12 (2009), available at <http://perma.cc/7PK3-3UVJ>).

¹¹⁶ Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL’Y REV. 83, 83, 109 (2013).

¹¹⁷ ALAN HOUSEMAN, CENTER FOR AMERICAN PROGRESS, THE JUSTICE GAP: CIVIL LEGAL ASSISTANCE TODAY AND TOMORROW 3 (2011), available at <https://perma.cc/W2FS-YPNK>.

¹¹⁸ See Jane Ribadeneyra, *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 246–47, 292–304 (2012).

¹¹⁹ See, e.g., *Personal Injury Overview*, LEGALZOOM, <http://perma.cc/2U52-LYEE>; *Disability Benefits Overview*, LEGALZOOM, <http://perma.cc/S7BH-8BAQ>.

¹²⁰ *Real Estate Leases Overview*, LEGALZOOM, <http://perma.cc/8Z56-FCPJ>.

¹²¹ *Wills Overview*, LEGALZOOM, <http://perma.cc/XQ68-9SPW>.

¹²² *Corporation Overview*, LEGALZOOM, <http://perma.cc/NVA7-2GWB>.

for trademark registration.¹²³ LegalZoom's fees pale in comparison to average hourly billing rates for major law firms, which charge an average of \$370 per hour for associates and \$536 per hour for partners.¹²⁴ Online legal services, moreover, tend to be more affordable than smaller law firms, which more directly compete with services like LegalZoom. LegalZoom, for example is able to keep costs low in no small part by employing non-lawyers: document scriveners make a starting salary of approximately \$33,140 a year,¹²⁵ compared with \$67,000, the median starting salary for a licensed lawyer at a small law firm that employs fewer than twenty-five employees.¹²⁶

Relatedly, anticompetitive enforcement of the lawyer's monopoly against online alternatives limits consumer choice and conflicts with the governing principles of U.S. antitrust law.¹²⁷ U.S. antitrust law "enhances consumer choice and promotes competitive prices [so that] society as a whole benefits from the best possible allocation of resources."¹²⁸ Yet the lawyer's monopoly often deprioritizes competition and innovation in favor of mitigating perceived risks for clients, cutting at the heart of the principles of antitrust law enforced by lawyers at the Department of Justice and Federal Trade Commission.¹²⁹

It is crucial to note that the monopoly's tendency for anticompetitive effects do not necessarily imply bad faith on behalf of regulators. As the Supreme Court explained in *NCBDE*, state actors controlled by market participants "possess singularly strong private interests" and "risk[s] of self-dealing" that may impact regulatory actions.¹³⁰ But the recognition that market forces may impact judgment does not presume bad faith on behalf of state regulators as much as it "is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals."¹³¹ Prohibiting non-lawyer professionals such as real estate brokers, accountants, and trained experts from conducting routine and learnable tasks, such as completing blanks on forms falling within their area of expertise, may be one area where such anticompetitive biases come to light.

Allowing a space for technological innovations in legal services may also improve access to justice. For example, public interest groups have followed LegalZoom's lead by adopting similar technology to benefit people who are often at the greatest disadvantage in the legal system. The Legal

¹²³ *Trademark Registration Overview*, LEGALZOOM, <http://perma.cc/GBE2-HQEE>.

¹²⁴ Debra Cassens Weiss, *Average Hourly Billing Rate for Partners Last Year was \$727 in Largest Law Firms*, A.B.A. J. (July 15, 2013, 6:33 PM), <http://perma.cc/UL5C-B2J4>.

¹²⁵ *LegalZoom.com Legal Document Preparation Specialist Salary*, GLASSDOOR, <http://perma.cc/JGC5-M5ZJ>.

¹²⁶ *Private Sector Salaries*, NAT'L ASSOC. FOR LAW PLACEMENT, <http://perma.cc/A2SJ-55SH>.

¹²⁷ See 15 U.S.C. § 1 (2012).

¹²⁸ U.S. DEP'T OF JUSTICE & FTC, *ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS* (1995), available at <http://perma.cc/MY8X-RKCT>.

¹²⁹ See generally Rhode & Ricca, *supra* note 17; Sahl, *supra* note 17.

¹³⁰ *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1114 (2015).

¹³¹ *Id.* at 1106.

Services Corporation, a congressionally-created nonprofit that is the largest provider of legal aid to the poor in the United States, has begun to use online legal services technology to significantly broaden its ability to serve clients' legal needs.¹³² Leaders at the LSC have stated that it was able to develop and implement this technology through a team of experts studying "commercially available document assembly systems" and inviting "the leading vendors to meet with a group of LSC experts."¹³³ By following the lead of for-profit online legal services, today many of these services operate high-quality, high-volume document assembly technology.¹³⁴

Corporate clients also stand to benefit from technological innovation in the legal services industry. For example, the online legal service LegalForce offers corporate clients a range of services for intellectual property issues online. The LegalForce website assists with trademark searches and filings, providing on-call "chat-torneys" to answer clients' legal needs. LegalForce operates out of its storefront in Palo Alto, where clients can also meet with attorneys without an appointment for \$45 for fifteen minutes.¹³⁵ Unlike LegalZoom, LegalForce avoids UPL violations by expressly operating as a law firm and assuming the responsibilities accompanying attorney-client relationships.¹³⁶ Similar to LegalZoom, however, LegalForce—which was founded seven years after LegalZoom innovated its questionnaire document system—relies on automated technology that uses a questionnaire to produce a range of personal and business documents.¹³⁷ Moreover, breaking down the monopoly may also benefit the startup industry by eroding barriers to starting businesses by mitigating the fear of expensive or unpredictable legal fees. Individuals might be more willing to take on the risk of starting a new company if business formation documents can be completed online. Online legal technology has the potential to eliminate the transaction costs of finding an attorney, and to mitigate the considerable financial costs of hiring one to assist with commonplace issues like incorporation documents.

¹³² Ronald W. Staudt, *All the Wild Possibilities: Technology that Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117, 1123–24 (2009).

¹³³ *Id.* at 1127. This sentence quotes the exact words not of the LSC leaders but rather Ronald Staudt.

¹³⁴ *Id.* at 1123–28.

¹³⁵ John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995, 3013 (2014); see also Nicel Jane Avellana, *Online Legal Startups Plans To Demystify and Make Law Less Expensive—Report*, VENTURE CAPITAL POST (Jan. 25, 2014, 4:43 PM), <http://perma.cc/H6HQ-WQU5>.

¹³⁶ See Dzienkowski, *supra* note 135, at 3013–14.

¹³⁷ *Frequently Asked Questions About the Legal Forms*, LEGALFORCE, <http://perma.cc/HY8V-LCWC>.

III. THE ARGUMENT AGAINST ONLINE LEGAL SERVICES: WHY THE LAWYER'S MONOPOLY MIGHT PROTECT CONSUMERS

The primary rationale offered to justify the lawyer's monopoly on the practice of law is that it protects the "public interest"¹³⁸—that is, public consumers—from the risk of bad legal advice dispensed by unlicensed, untrained, and uninformed non-lawyers.¹³⁹ Lawyers' regulation of unauthorized practice is seen as a *quid pro quo*: the ABA itself proclaims that in order to self-regulate, the legal profession is obligated to prioritize the "public interest" over the profession's own self-interest.¹⁴⁰ Thus, while allowing online legal services to operate has the potential to enhance consumer choice, galvanize innovation, and improve access to justice,¹⁴¹ LegalZoom may carry risks for consumers because of the assumptions underlying the current regulatory structure. If LegalZoom is *not* "practicing law" (if is not violating applicable unauthorized practice restrictions), then it is necessarily a non-lawyer that operates beyond the reach of protections built into the legal profession. Unauthorized practice proponents will point out that because regulatory protections are built into the legal profession, but no regulatory protections are in place for online legal services, consumers may be worse off getting bad legal advice from LegalZoom than from their local attorney. This section thoroughly investigates the argument against LegalZoom and in favor of the professional monopoly, weighing whether maintaining the monopoly in fact protects consumers from the occurrence or consequences of negligent legal advice.

There are several assumptions underlying the paradigm that a licensed lawyer's advice for consumers is superior to the conceivable alternatives. One major assumption is that lawyers are bound to the rules governing the legal profession, and that those rules are designed to protect consumers. If it in fact achieves what it sets out to disclaim, LegalZoom's extensive disclaimer and terms of use demonstrate that there is some merit to the argument that limiting the practice of law to lawyers benefits consumers by guaranteeing protections built into the legal profession.¹⁴² Consider the following excerpt:

¹³⁸ Rigertas, *supra* note 22, at 2691–92; Rotenberg, *supra* note 45, at 714–15.

¹³⁹ In a particularly instructive piece, Professor Laurel Rigertas provides a thorough analysis of the three most commonly employed justifications for limiting the practice of law to licensed attorneys. See Rigertas, *supra* note 22, at 2685 n.16, 2689–93.

¹⁴⁰ MODEL RULES OF PROF'L CONDUCT pmb. ¶ 12 (2013).

¹⁴¹ Brief of LegalZoom, Inc. et al. as Amici Curiae in Support of Respondent at 6, N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015) (No. 13-534), 2014 WL 3895926 ("This access crisis is caused, in large part, by over-regulation of the legal market and unnecessarily high and complex barriers to entry.").

¹⁴² *Disclaimer*, *supra* note 14.

LegalZoom is not a law firm, and the employees of LegalZoom are not acting as your attorney. LegalZoom's legal document service is not a substitute for the advice of an attorney.

LegalZoom cannot provide legal advice and can only provide self-help services at your specific direction.

LegalZoom is not permitted to engage in the practice of law. LegalZoom is prohibited from providing any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, remedies, defenses, options, selection of forms or strategies.¹⁴³

By renouncing the attorney-client relationship and purporting to provide legal information rather than legal advice, LegalZoom hopes to achieve two business advantages at the expense of consumers: (1) sidestepping professional responsibilities governing the legal profession and (2) avoiding liability.¹⁴⁴

Supporters of unauthorized practice restrictions on online legal services might emphasize that LegalZoom avoids the responsibilities of law practice by characterizing its services as "self-help" for *pro se* litigants and maintaining that the website cannot substitute for an attorney, without regard to any understandable assumptions otherwise.¹⁴⁵ LegalZoom employees are trained to disseminate legal information, but expressly forbidden to give legal "advice." LegalZoom's general counsel publicly reinforced the distinction, explaining: "If someone asks me a question and the answer depends on the person asking it, then LegalZoom can't do it."¹⁴⁶ Thus, if taken at face value, LegalZoom's disclaimer and terms of use allow it to operate "free from the confines of ethical rules enforceable upon attorneys."¹⁴⁷

Proponents of the lawyer's monopoly may also argue that by falling outside the existing regulatory space for legal services—where regulations are designed by and applied to licensed lawyers—online legal services deny consumers redress that they would otherwise have for faulty legal advice. For example, communications with the website are protected only by the company's Privacy Policy, not the attorney-client privilege or work product doctrine.¹⁴⁸ LegalZoom has no duty of confidentiality, which would otherwise prevent an attorney from revealing information relating to the represen-

¹⁴³ *Id.*

¹⁴⁴ See Lanctot, *First Amendment*, *supra* note 2, at 265 ("For purposes of determining whether an attorney has created a professional relationship with a potential client . . . as long as the communication was simply 'information' rather than advice tailored to the particular circumstances of that potential client, there is no attorney-client relationship. Similarly, unauthorized practice prosecutions often have focused on whether the service provided by the lay practitioner was tailored or customized to a set of individualized facts."); see also Lanctot, *Attorney-Client Relationships*, *supra* note 16, at 177–78.

¹⁴⁵ See *Disclaimer*, *supra* note 14.

¹⁴⁶ See Fisher, *supra* note 28.

¹⁴⁷ Zurek, *supra* note 24, at 274.

¹⁴⁸ See *Disclaimer*, *supra* note 14.

tation.¹⁴⁹ Under the existing regulatory structure, LegalZoom also operates beyond the reach of comparable disciplinary authorities for charging an unreasonable fee¹⁵⁰ or obtaining consent for representing clients with conflicts of interest.¹⁵¹ Deceptive advertising is another particularly relevant problem for many clients using LegalZoom, which at the extremes has been critiqued for opaque annual fees, misleading advertisements about free consultations, and unexpectedly expensive services after the expiration of tempting free trials.¹⁵² Lawyers' monopoly defenders might argue that if LegalZoom was a law firm, its practices would be disciplined by potential violations for communicating false or misleading information about its services.¹⁵³

Moreover, regulators enforcing the professional monopoly will point out that LegalZoom limits its own liability for problems arising from its services in ways impermissible for practicing lawyers. By operating outside the professional rules, LegalZoom bypasses the duties of competence and diligence required of all lawyers practicing law—duties which, if violated, could give teeth to malpractice actions.¹⁵⁴ A comprehensive liability limitation clause requires that customers hold LegalZoom “and its officers, directors, employees, and agents harmless for any indirect, punitive, special, incidental, or consequential damage,” except as prohibited by law.¹⁵⁵ Some trust and estate lawyers have observed that without a lawyer to fall back on, customers relying on LegalZoom sometimes fail to comply with jurisdiction-specific requirements, resulting in an increase of reliance on lawyers conducting post-mortem fixes to remedy problems.¹⁵⁶ Though the disclaimer is not guaranteed to waive LegalZoom of all liability, it makes it more difficult for clients to avoid shouldering liability for costly errors in legal documentation.¹⁵⁷

LegalZoom may claim that its consumers are on notice of its status as a self-help enabler, as it includes the disclaimer on nearly every page of the

¹⁴⁹ MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013).

¹⁵⁰ MODEL RULES OF PROF'L CONDUCT R. 1.5(a).

¹⁵¹ MODEL RULES OF PROF'L CONDUCT R. 1.7(a).

¹⁵² See Lauren Axelrod, *Pros and Cons of Using LegalZoom vs. Hiring an Attorney*, KNOJI (Nov. 30, 2012), <http://perma.cc/BSK4-KVNB>.

¹⁵³ MODEL RULES OF PROF'L CONDUCT R. 7.1 (“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”).

¹⁵⁴ MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3.

¹⁵⁵ See *Terms of Use*, LEGALZOOM, <https://perma.cc/GQ77-C3W3>.

¹⁵⁶ See Wendy S. Goffe & Rochelle L. Haller, *From Zoom To Doom? Risks Of Do-It-Yourself Estate Planning*, EST. PLN. Sept. 2010 at 27, 30; see also Tara Siegel Bernard, *In Using Software to Write a Will, a Lawyer Is Still Helpful*, N.Y. TIMES, Sept. 10, 2010, at B1, available at <http://perma.cc/7UP8-4XWN>.

¹⁵⁷ See Lanctot, *Attorney-Client Relationships*, *supra* note 16, at 177–78 (2000); Lanctot, *First Amendment*, *supra* note 2, at 294 (“A blanket assertion that all work product performed by these online scriveners is excluded from constitutional protection as false or fraudulent commercial speech may not automatically succeed.”); Lindsey Schindler, Comment, *Skirting the Ethical Line: The Quandary of Online Legal Forms*, 16 CHAP. L. REV. 185, 207–08 (2012).

website.¹⁵⁸ Yet even conceding the ubiquity of the disclaimer, a non-lawyer consumer might not appreciate the broader implications of waiving the attorney-client relationship and attendant obligations.¹⁵⁹ For instance, non-lawyers might accept that LegalZoom is operating as a self-help agency in the abstract, but may not understand how that relationship waives the uncertain protections governing the legal profession, and the opportunity to hold LegalZoom liable for violating these duties and providing ineffective assistance.

IV. CONNECTING REGULATORY MEANS WITH ENDS: DECONSTRUCTING JUSTIFICATIONS FOR THE MONOPOLY

Consumers deserve regulatory protection from bad legal advice. To that end, much of the fear motivating the lawyer's monopoly is justifiable: a system that allows consumers to walk away with one legal issue resolved and several more (potentially unknown) legal problems created in the process might be worse than a system where more legal issues go unmet because online legal services are stamped out of the marketplace. Yet if it is conceded that protecting consumers from bad advice is a priority,¹⁶⁰ then it is imperative to connect the legitimate concern about a U.S. legal system that allows for substandard, unaccountable legal advice with the solution currently in place to resolve it: the lawyer's monopoly.

The default justification for the lawyer's monopoly—that limiting legal advice to members of the bar is the optimal design for consumers—smacks of self-interest, and thus requires careful deconstruction and analysis.¹⁶¹ The baseline question to ask is simple: why must legal advice be limited to *lawyers*? What is underlying the assumption that bar membership shields consumers from bad advice, or the consequences thereof? Turning the question on its head, is it possible to design regulations that hold non-lawyer online legal services accountable for bad legal advice to the same or even greater degree as licensed lawyers? Breaking it down, the notion that consumers are only protected from bad legal advice if the advice is provided by licensed lawyers is only true insofar as (1) legal advice from licensed lawyers is superior to alternative forms of advice, including legal services obtained online, (2) the protections embedded in the legal profession provide meaningful consumer protection, and (3) non-lawyers, including automated online legal

¹⁵⁸ See Pierce G. Hunter, Comment, *Constitutional Law—Unauthorized Practice of Law: Driving Legal Business Without A License, Legalzoom, Inc., and Campbell v. Asbury Automotive, Inc.*, 2011 Ark. 157, 381 S.W.3d 21, 36 U. ARK. LITTLE ROCK L. REV. 201, 215 (2014) (“In fact, disclaimers abound throughout the website’s many pages.”); Schindler, *supra* note 157, at 207; *Disclaimer*, *supra* note 14.

¹⁵⁹ Hunter, *supra* note 158, at 215 (“While the multiple disclaimers—made obvious to the user—appear to send a unified message, LegalZoom’s prolific advertisement campaigns muddy the legal waters.”).

¹⁶⁰ See *supra* note 139 and accompanying text.

¹⁶¹ See *id.*

services, cannot be subject to regulations that provide consumers with comparable protection.

First, the notion that licensed lawyers provide uniformly superior services for consumers of legal services has obvious limitations. Unlike many of our peer countries, in the United States entrance to the legal profession does not require an apprenticeship or formal on-the-ground training before practice.¹⁶² Without required practical training or experience, there is a tenuous logical connection between completing law school and passing the bar exam and the assumption of superiority in handling specialized but commonplace issues like prenuptial agreements or incorporation documents that are easily missed or glossed over in law school, and not tested on the bar exam for that matter.¹⁶³ Why is a J.D. who passed the bar considered the best we can do for consumers across the board? Put more vividly, why is a barred attorney who exclusively deals with financial transactions between Fortune 500 companies less likely to give negligent legal advice on divorce documents than a trained, specialized paralegal in a family law office who deals with those documents every day? Moreover, on the off chance that a low- or moderate-income individual has the opportunity to connect with such a lawyer, is that lawyer necessarily more equipped to find and select the appropriate divorce form than a sophisticated online tool that has the capacity to use algorithms analyzing large pools of data?

The argument that licensed lawyers are not uniformly superior at providing certain kinds of legal advice may be even more persuasive when compared to online legal services than for paraprofessionals. The vast analytical and informational capabilities of the Internet enable online legal services to provide consumers with efficient, transparent, and affordable services.¹⁶⁴ The automated nature of online services provides consumers with up-to-date information that is less prone to human error. There is simply no reason that sophisticated, specialized technology used in combination with licensed professionals cannot provide superior legal services in particular

¹⁶² See Jeanne Charn, *Service and Learning: Reflections on Three Decades of The Lawyering Process at Harvard Law School*, 10 CLINICAL L. REV. 75, 88, 110 (2003) (pointing out “that our profession is alone in requiring no mentoring or apprentice experience prior to full licensure.”); Leah Wortham, *The Lawyering Process: My Thanks for the Book and the Movie*, 10 CLINICAL L. REV. 399, 443 (noting that “[i]n many civil law countries, students become licensed to practice in a legal profession through entry into an apprenticeship post-law school, which in at least some countries is completely controlled by the profession.”); see generally James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 CIN. L. REV. 83 (1991) (describing the U.S. legal profession’s shift from the apprenticeship model to the “Harvard” method of legal education).

¹⁶³ See, e.g., N.Y. STATE BD. OF LAW EXAM’RS, CONTENT OUTLINE FOR THE NEW YORK STATE BAR EXAMINATION (2014), available at <http://perma.cc/J4VZ-62H9>; STATE BAR OF CAL. COMM. OF BAR EXAM’RS/OFFICE OF ADMISSIONS, SCOPE OF THE CALIFORNIA BAR EXAM, <http://perma.cc/ABJ7-X5VZ>.

¹⁶⁴ See Basha Rubin, *Legal Tech Startups Have a Short History and a Bright Future*, TECHCRUNCH (Dec. 6, 2014), <http://perma.cc/UU4B-X69H>.

substantive areas than some members of the organized bar whose daily practice focuses on other matters.

Second, the consumer protection justification for the lawyer's monopoly implies that the rules governing the legal profession provide meaningful redress for consumers who receive bad legal advice from a licensed lawyer. In reality, though, there are major gaps between the rules on the books and the experience of those looking for their enforcement. Lawyers are only policed by affirmative consumer complaint.¹⁶⁵ Lawyers and judges—the other parties empowered to initiate enforcement of the rules—rarely fulfill their ethical duty to report misconduct.¹⁶⁶ Neither courts nor bar associations engage in organic enforcement of the rules governing lawyers.¹⁶⁷ Because consumers rarely bring time-consuming and costly enforcement actions, many rules designed to protect clients (e.g., confidentiality, conflicts of interest, competence, and diligence) effectively go unenforced, providing little meaningful protection for the most vulnerable consumers.¹⁶⁸ In addition, the fact that lawyers are not required to carry malpractice insurance further undercuts the rationale for the monopoly by weakening the efficacy of the rules governing the legal profession.¹⁶⁹ In many states, uninsured lawyers are not even required to disclose their lack of insurance to their client, denying the consumer the ability to make an informed choice of representation.¹⁷⁰ The optional nature of malpractice insurance means that those consumers who actually manage to bring a complaint may not be able to recover from licensed lawyers who provide negligent advice.¹⁷¹

In light of the fact that the rules governing the legal profession provide minimal means of redress for consumers, it is the third assumption where

¹⁶⁵ See Arthur F. Greenbaum, *The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap*, 73 OHIO ST. L.J. 437, 440 (2012) [hereinafter Greenbaum, *Automatic Reporting*] (noting that clients are “by far the largest category of complaints disciplinary authorities receive”); see generally Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMKC L. REV. 537 (2009); Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259 (2003).

¹⁶⁶ Geoffrey C. Hazard, Jr. & Dana A. Remus, *Advocacy Revalued*, 159 U. PA. L. REV. 751, 774 (2011) (noting that “[l]awyers rarely report each others' misconduct” and “[j]udges are similarly reluctant”); see also Greenbaum, *Automatic Reporting*, *supra* note 165, at 506.

¹⁶⁷ See Carol S. Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2705 (2013) (“[A]t the state level . . . are state bar overseers and associations. These organizations could do more to police attorney quality through bar discipline, especially in some of the lowest-performing jurisdictions that produce the horror stories that are all too easy to find.”).

¹⁶⁸ *Id.*

¹⁶⁹ Oregon is the only state that requires malpractice insurance for all practicing lawyers. See OR. REV. STAT. § 9.080(2)(a) (2003); see also *Malpractice Insurance*, A.B.A., <http://perma.cc/95MY-3DBM> (“By, [sic] law attorneys are not required to obtain legal malpractice insurance.”).

¹⁷⁰ See Jeffrey D. Watters, *What They Don't Know Can Hurt Them: Why Clients Should Know If Their Attorney Does Not Carry Malpractice Insurance*, 62 BAYLOR L. REV. 245, 247 (2010); Farbod Solaimani, Comment, *Watching the Client's Back: A Defense of Mandatory Insurance Disclosure Laws*, 19 GEO. J. LEGAL ETHICS 963, 966 (2006).

¹⁷¹ See Watters, *supra* note 170, at 247–48; Solaimani, *supra* note 170, at 968.

justifications for the lawyer's monopoly fundamentally break down. If rules governing lawyers are designed to protect consumers of legal services, why isn't it also possible to design rules that govern online legal services and the non-lawyers associated with them that provide consumers with comparable or even enhanced protection? For example, could online legal services be subject to the duties of competence and diligence, confidentiality, and conflicts of interest constraints? Could online legal services be required to carry malpractice insurance, and be incentivized *ex ante* to operate at the consumers' advantage?

This juncture in the analysis—exploring consumer protection in the non-lawyer, online legal services space—is critical for consumers. UPL critics will quickly point out the fundamental flaws in the lawyer's monopoly, yet many call for the opposite extreme: deregulation. Deregulatory advocates argue that because the lawyer's monopoly is anticompetitive and dampens access to justice, the legal space ought to be “deregulated,” meaning that either the entry into the profession or the conduct once admitted ought to remain free from government regulation.¹⁷² Yet there are glaring logical flaws in the unauthorized practice versus deregulation binary. Online legal services are not a panacea to access to justice issues. Like traditional law practice, online legal services pose risks for consumers: risks stemming from unprepared lawyering, no apprenticeship model, and limited redress for consumers. Recognizing these risks, the next step in designing a system that protects consumers and improves access to justice is not deregulation but rather careful regulation of an alternative space for online legal services.¹⁷³ Instead of fighting innovation with an outdated system, the legal system ought to move towards *smarter* regulations that cultivate online legal technology, while at the same time forcing online legal services to operate for both profit and consumers.

V. REWRITING THE RULES: ENVISIONING A LEGAL MARKET THAT EMBRACES TECHNOLOGY WHILE PROTECTING CONSUMERS

The rise and dominance of LegalZoom and its competitors feels inevitable. With millions of satisfied customers,¹⁷⁴ an access-to-justice crisis partic-

¹⁷² See, e.g., Barton, *Lawyer's Monopoly*, *supra* note 7, at 3069 (substantial deregulation inevitably resulting from innovations in the legal market will “work out wonderfully for consumers of legal services”); Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429 (2001) (concluding that the legal services market should be entirely deregulated); Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J.L. & BUS. 1, 5 (2012) (noting that the “deregulation of legal services provided to corporate clients has allowed innovation to flourish”).

¹⁷³ See Rhode & Ricca, *supra* note 17, at 2607–08 (“From a regulatory perspective, the key focus should not be blocking these innovations from the market, but rather using regulation to ensure that the public's interests are met. Some jurisdictions are moving in this direction.”).

¹⁷⁴ See LegalZoom.com, Inc., Registration Statement, *supra* note 1.

ularly affecting many Americans struggling to find representation for pressing legal issues such as housing and immigration,¹⁷⁵ a legal market ripe for disruptive innovation,¹⁷⁶ and massive changes that are fundamentally transforming other professional industries,¹⁷⁷ it is inconceivable that the lawyer's monopoly on law practice will emerge unscathed by online non-lawyer competitors. In both Silicon Valley and for the technology-savvy general public, it is an implausible notion that the organized bar's dwindling regulatory power¹⁷⁸ will be able to shut down the overdue yet flourishing advances in legal technology out of the marketplace. This part attempts to concretize the future of unauthorized practice both by reviewing options for addressing online legal services within the current regulatory structure, and by envisioning a new regulatory design. It challenges current thinking on regulating law practice by proposing a separate regulatory regime for online legal services that incentivizes legal technology businesses to operate at the consumer's advantage, regardless of whether the service is construed to engage in the "practice of law."

A. Options Within the Current Regulatory Structure

1. Enforcing UPL Restrictions

Enforcing UPL restrictions against LegalZoom is one way to address the risks raised by online legal services within the current regulatory structure. As Part I.B illustrated, several state bar associations have used this method, as have state courts enforcing UPL restrictions in response to litigation against online legal services companies.¹⁷⁹ Yet the efficacy of this method is waning.¹⁸⁰ LegalZoom has warded off most UPL lawsuits.¹⁸¹ The Supreme Court's recent ruling in *NCBDE* signaled that state bar associations

¹⁷⁵ See *supra* Part III; see also Staudt, *supra* note 132; Carrie Johnson, *Rights Advocates See 'Access To Justice' Gap In U.S.*, NPR (Mar. 10, 2014, 12:05 AM), <http://www.npr.org/blogs/thetwo-way/2014/03/10/288225649/rights-advocates-see-access-to-justice-gap-in-u-s>, <http://perma.cc/G99H-8HC6>.

¹⁷⁶ See Rubin, *supra* note 164.

¹⁷⁷ See Ronald C. Merrell & Charles R. Doarn, *The Journal, Telemedicine, and the Internet*, 20 *TELEMEDICINE & E-HEALTH* 293, 294 (2014) ("Telemedicine research, as reflected in our journal, has been dynamic and burgeoning. At this date, there are over 900 items in the *Journal* that are related to the Internet. That is nearly half of all articles issued since publication was begun in 1994, and the first Internet article did not appear for several years after that. It seems clear that the future of telemedicine is entwined with that of the Internet.").

¹⁷⁸ See Zurek, *supra* note 24, at 279–80.

¹⁷⁹ See *supra* Part I.B.

¹⁸⁰ See Rhode & Ricca, *supra* note 17, at 2607 ("Almost all of the scholarly experts and commissions that have studied the issue have recommended increased access to licensed non-lawyer legal service providers. Until recently, almost all judges and bar associations have ignored those recommendations. There are, however, some signs of change.").

¹⁸¹ See Ambrogi, *supra* note 57, at 33 ("In recent years, LegalZoom has faced lawsuits in eight states seeking to shut it down for violating state laws barring the unauthorized practice of law. But with a notable recent victory in South Carolina, and having fended off all but one of the other lawsuits, LegalZoom is anything but shutting down.").

are potentially subject to antitrust liability for taking action against LegalZoom without proper supervision from state actors.¹⁸²

As Part II described, tightening the profession's control over online legal services by enforcing current UPL restrictions limits consumer choice and dampens access to justice.¹⁸³ Importantly, too, enforcing UPL restrictions against alternative services like LegalZoom weakens the legitimacy of the legal profession by generating the perception that lawyers are shutting out outside competition for self-interested purposes, at odds with general principles of antitrust law. In one of the first major critiques of the professional monopoly, Professor Deborah Rhode found that "almost one-half [of bar association officials] perceived some consumer skepticism concerning the bar's capacity for self-regulation generally, or its ability to act disinterestedly in unauthorized practice enforcement. Common observations were that the public views bar actions against lay practitioners as self-protective, monopolistic, or greedy."¹⁸⁴ When bar association officials themselves widely admit the tendency towards anticompetitive self-protectionism,¹⁸⁵ it is not difficult to imagine the perception of an informed consumer. Even more so today, when access to justice issues loom large and new technology is waiting in the gates to provide innovative solutions, enforcement of outdated UPL statutes will exacerbate existing "cracks in the profession's monopoly armor."¹⁸⁶

2. *Assurances of Discontinuance*

One option within the confines of current UPL law allows LegalZoom and other online legal services providers to continue operations after entering into assurances of discontinuance with states in which its services are offered.¹⁸⁷ In 2010, for example, LegalZoom adopted an assurance of discontinuance in a settlement agreement with Washington, a state that exercises particularly aggressive restrictions on unauthorized practice.¹⁸⁸ In the assurance, LegalZoom agreed to refrain from a number of practices, including but not limited to: (1) comparing the costs of its products and clerical services with those of an attorney; (2) misrepresenting the costs, complexity, and time required to probate an estate in the state; (3) misrepresenting the benefits or disadvantages of legal documents; (4) engaging in the unauthorized practice of law; (5) failing to have a licensed attorney to review all self-help

¹⁸² N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015) (No. 13-534). *See supra* notes 60–89 and accompanying text.

¹⁸³ *See supra* notes 110–37 and accompanying text.

¹⁸⁴ Rhode, *Policing*, *supra* note 110, at 40.

¹⁸⁵ *See* Rigertas, *supra* note 22, at 2692–93.

¹⁸⁶ *See generally* Sahl, *supra* note 17.

¹⁸⁷ Assurance of Discontinuance at 2–3, *In re LegalZoom.com*, No. 10-2-02053-2 (Wash. Super. Ct. Sept. 15, 2010); *see also* Hunter, *supra* note 158, at 220; Schindler, *supra* note 157, at 208.

¹⁸⁸ *See generally* Assurance of Discontinuance, *supra* note 187; *see also* Goffe, *supra* note 156, at 31.

estate planning forms offered for sale to Washington customers; (6) selling, transferring, or disclosing Washington consumer information to third parties; and (7) failing to clearly disclose that communications between LegalZoom and Washington consumers are not protected by the attorney-client or work product privileges.¹⁸⁹ Some have argued that assurances of discontinuance may benefit consumers by forcing LegalZoom to refrain from offering services that generate risks for clients.¹⁹⁰ Requiring LegalZoom to provide more information about its role, for example, may help inform consumers about risks they are taking on by opting for LegalZoom over traditional law service.

Yet assurances of discontinuance are merely a temporary fix, as they fall short of addressing the more fundamental issues underlying the debate. Such an assurance would not clear up the confusion regarding the line between aiding self-representation and legal advice that troubled the North Carolina court, for example. Even more troubling, Washington's assurance of discontinuance tautologically prohibits the unauthorized practice of law without discerning where the line falls. A long-term solution calls for a more explicit delineation of the role online legal services play in law practice, and what responsibilities to consumers that entails.¹⁹¹

3. *Forming Attorney-Client Relationships Online*

The best option to mitigate risks while enhancing consumer choice within the current regulatory structure would allow LegalZoom to use its technology to connect customers with practicing lawyers via telephone or videoconference, triggering a formal attorney-client relationship. This stance is legally sound under the Model Rules, which permit qualified lawyer referral services that are "approved by an appropriate regulatory authority."¹⁹² Yet a bright-line rule permitting online legal services to match attorneys with consumers would still be a "reform" in some states where such practices are discouraged or even prohibited. The Texas bar association, for instance, issued an ethics opinion forbidding any lawyer from participating in any internet service connecting licensed lawyers with potential clients¹⁹³—a description bearing striking resemblance to LegalZoom's online referral services, as well as competitors like Nolo, which provides a lawyer referral service.¹⁹⁴

¹⁸⁹ Assurance of Discontinuance, *supra* note 187, at 2–3.

¹⁹⁰ See Hunter, *supra* note 158, at 220; Schindler, *supra* note 157, at 208.

¹⁹¹ This solution will be explored in Section B, *infra*.

¹⁹² MODEL RULES OF PROF'L CONDUCT R. 7.2, 7.2 cmt. 6 (2013).

¹⁹³ SUP. CT. OF TEX. PROF'L ETHICS COMM., OP. 561 (2005), available at <http://perma.cc/4DZC-JE5L> (forbidding lawyers from participating in any "privately owned forprofit internet service . . . that encourages lawyers and law firms to list their names and areas of practice so that the Internet Service can assist consumers who desire legal assistance to connect with lawyers who might be available to represent such individuals").

¹⁹⁴ *Law Firms & Lawyers*, NOLO, <http://perma.cc/ZRX6-7UXJ>.

LegalZoom has made forays into this sort of arrangement by offering legal plans for customers facing continuing legal issues.¹⁹⁵ One popular plan helps clients form limited liability companies, either by starting a new business or converting an existing business.¹⁹⁶ The plan includes assistance filing LLC state documents, a personalized operating agreement, and a provision to safeguard personal assets. The service ranges from \$149 to \$359 depending on the turnaround time for services and the attorney support needed.¹⁹⁷

LegalZoom promises its legal plan customers the opportunity to “discuss as many legal matters as you need for one low monthly fee,” to “avoid costly mistakes and gain peace of mind,” to “get attorney-drafted letters,” and, most of all, to “build a history with an attorney who knows you.”¹⁹⁸ Customers are able to develop a relationship with real lawyers by scheduling consultations with the same attorney, who they can call on the phone or message through the membership portal.¹⁹⁹ Members have access to a directory of attorneys, which includes ratings from former customers, the lawyer’s experience conducting LegalZoom consultations, the states in which they are licensed to practice, their education, headshots, and sometimes even an introductory video.²⁰⁰ The sophisticated customer rating system is reminiscent of Uber’s innovations in consumer experience, and it allows customers to learn from past customers’ perceptions of the attorney’s friendliness, knowledge, and responsiveness.²⁰¹

Though LegalZoom disclaims that the customer is forming a lawyer-client relationship with LegalZoom itself through the Legal Plans,²⁰² the client necessarily forms an attorney-client relationship with the practicing attorney with whom they communicate, and attorneys participating in the network must assume the responsibilities of such a relationship when they accept a client. Hence, in the context of Legal Plans, LegalZoom operates most accurately as lawyer referral service.

While imperfect, the technologically advanced online lawyer referral services model that connects customers to practicing lawyers via telephone or videoconference is the most appealing option within the current regulatory structure. Such a relationship is more limited than traditional law practice, where a lawyer meets with clients in his or her office. Yet this option balances the goal of protecting clients from poor legal advice by triggering the protections of the lawyer-client relationship and the rules governing the legal profession, while at the same time promoting an affordable, accessible model of online legal services. Lawyers opting to participate in such plans may adjust accordingly, whether through their preparation for discussions,

¹⁹⁵ *Legal Plans*, *supra* note 42.

¹⁹⁶ *Limited Liability Company*, LEGALZOOM, <http://perma.cc/PVY2-HA7E>.

¹⁹⁷ *LLC Pricing*, LEGALZOOM, <http://perma.cc/F2RV-XPAP>.

¹⁹⁸ *Legal Plans*, *supra* note 42.

¹⁹⁹ *Id.*

²⁰⁰ *Legal Plan Attorney Directory*, LEGALZOOM, <http://perma.cc/4YCL-SHGD>.

²⁰¹ *See, e.g., LegalZoom Advantage Attorneys, Depinder Aujla*, LEGALZOOM, <http://perma.cc/82A5-2MU3>; *see also Feedback Matters, UBER*, <http://perma.cc/7HZE-SDFY>.

²⁰² *See Legal Plan Contract*, LEGALZOOM, <http://perma.cc/BCA6-BFRQ>.

the form of advice they give, and salary they are willing to accept to join the service. And though such services would cost more than LegalZoom's alternative "document services," the technology might still enable more competitive rates than traditional law practice, making the services more attainable for low- and middle-income individuals who might not otherwise be able to hire an attorney.

B. Recommendation: Consumer-Centric Regulatory Reform

Rather than shutting down online legal services like LegalZoom for violating flawed and anachronistic UPL restrictions, or adopting temporary reform measures such as assurances of discontinuance, the rules governing law practice ought to explicitly incorporate online legal services into the regulatory landscape. A new regulatory space for online legal services that strikes a middle ground between enforcing UPL restrictions against LegalZoom and a *laissez faire* deregulatory approach will encourage competition and innovation, improve access to justice, and provide the protection consumers deserve in the consequential legal services space. Instead of forcing "a square peg in a round hole," as one critic analogized enforcing UPL against online legal services,²⁰³ lawmakers should begin to rethink how to regulate the dispensation of legal information, advice, and services online.

A fundamental change in the rules governing unauthorized practice for online legal services could come about in several ways. Writing new rules could conceivably start with bar associations, who have historically drafted and proposed rules governing the legal profession and assisted state courts in their adoption.²⁰⁴ Under *NCBDE*, state bar associations will be liable for anticompetitive rules unless subject to adequate state supervision, suggesting that the organizations will have some incentive to write rules favorable to online legal services.²⁰⁵ The legal change could also start with legislators or administrators, and even with judges, who are playing an increasingly active role in the regulation of the legal profession.²⁰⁶ Given the limited scope of this paper, though, this part focuses less on where the change comes from than on what the change would entail. This part offers three ideas related to the substance of the new rules, along with one procedural recommendation, addressing suggestions generally to "rulemakers."

First, rulemakers should create a distinct regime for online legal services that does not depend on whether the services are seen to amount to the "practice of law." At present, the legal profession's "notorious inability to produce a principled definition of the "practice of law" puts online legal services companies and their customers in a precarious position.²⁰⁷ The diffi-

²⁰³ Rotenberg, *supra* note 45, at 712.

²⁰⁴ Sahl, *supra* note 17, at 2636.

²⁰⁵ See *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1110–16 (2015).

²⁰⁶ *Id.*

²⁰⁷ Lanctot, *First Amendment*, *supra* note 2, at 262; Lanctot, *Scriveners*, *supra* note 94, at 811.

culties caused by the lack of definitional clarity have been emphasized by scholars of the legal profession time and time again: when each state has a different, often ambiguous, definition of what actions rise to the level of “law practice,” prompting that jurisdiction’s professional rules, online legal services lack notice and guidance of what rules apply.²⁰⁸ The court’s open dialogue in *North Carolina State Bar* exemplifies the struggles courts face enforcing such amorphous concepts given our technological reality.²⁰⁹ The definition fails to provide guidance for companies like LegalZoom, which ultimately seek to make money but have an obvious business interest in continuing operations legally.

In light of these difficulties, the concept of the “practice of law” should be stricken from regulations governing online legal services. New regulations should seek to address all online law services, without any parsing of whether a service constitutes the practice of law. Instead, there ought to be a separate regulatory regime that deals with LegalZoom and the full range of its competitors in online legal services, including corporate programs like LegalForce, do-it-yourself legal software like Nolo, and similar services like Rocket Lawyer.²¹⁰ The regulatory regime could prohibit deceptive advertising, hold online legal services accountable for poor legal services, and institute other means to protect consumers from unfair and deceptive practices.

Second, rulemakers can promote consumer protection in the online legal services industries by creating a certification system for legal paraprofessionals supporting automated legal technology.²¹¹ Such a system could shore up the legal status of LegalZoom’s non-lawyer legal document reviewers essentially acting as paralegals by permitting them to continue their work after obtaining specialized training offered for discrete categories of legal issues, including estate planning, business formation, or trademark registra-

²⁰⁸ See MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2013) (“The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.”); A.B.A. TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT, APP. A: STATE DEFINITIONS OF THE PRACTICE OF LAW (2003), available at <http://perma.cc/XQ2N-9ZNG>; see also Campbell, *supra* note 172, at 37 (“No one, it seems, has adequately defined what is meant by ‘the practice of law.’ A blue ribbon ABA task force labored and failed. State definitions tend to be circular, describing the practice of law as ‘what lawyers do.’ Some commentators now seem to view even pursuing a definition as a fool’s errand.”); Lanctot, *First Amendment*, *supra* note 2, at 262; Lanctot, *Scriveners*, *supra* note 94, at 849–50; Rhode & Ricca, *supra* note 17, at 2588; Rotenberg, *supra* note 45, at 717–18.

²⁰⁹ See *LegalZoom.com v. N.C. State Bar*, No. 11 CVS 15111, 2014 WL 1213242 (N.C. Super. Ct. Mar. 24, 2014).

²¹⁰ See *supra* notes 8 and 9.

²¹¹ See Rhode, *Policing*, *supra* note 110, at 98–99 (“Where there are demonstrable grounds for paternalism, it should emanate from institutions other than the organized bar.”); Carl M. Selinger, *The Retention of Limitations on the Out-of-Court Practice of Law by Independent Paralegals*, 9 GEO. J. LEGAL ETHICS 879, 886–87 (1995).

tion.²¹² Training programs ought to teach and test trainees about legal context, doctrine, case law, statutory and regulatory requirements, and the most prevalent problems in the area in which they are receiving certification. The programs should also require continuing legal education, so that document review paraprofessionals will stay abreast of important developments in the respective areas of law. Training and certification systems for non-lawyer online legal services employees would represent an improvement from the status quo: safeguarding consumers from inadequate or misinformed advice, while providing option value for cost-conscious consumers who would prefer to pay lower rates in exchange for potentially more limited legal advice over no legal advisement at all.

Washington has made headway on this recommendation by becoming the first state to adopt a licensing system for non-lawyer “legal technicians” practicing family law.²¹³ Certified technicians must pass an exam covering specialized areas of law and participate in continuing education.²¹⁴ Over the Washington State Bar Association’s objections that the non-lawyer licensing regime would represent “the beginning of the institutionalization of second class, separate but unequal justice” and that it would “take work away from young, rural, and less affluent lawyers,”²¹⁵ the Washington Supreme Court endorsed the new regulatory regime.²¹⁶ The court reasoned that the licensing “rule itself authorizes no one to practice. It simply establishes the regulatory framework for the consideration of proposals to allow non-attorneys to practice.”²¹⁷ Moving forward, regulatory reform ought to incorporate similar licensing systems that accommodate automated legal services, in addition to licensed technicians.

Third, rulemakers should create continuous oversight for online legal services. For example, Washington created a “Limited License Legal Technician Board” that has the “authority to oversee the activities of and discipline certified limited legal technicians in the same way the Washington

²¹² See Hunter, *supra* note 158, at 223; Michael S. Knowles, Comment, *Keep Your Friends Close and the Laymen Closer: State Bar Associations Can Combat the Problems Associated with Nonlawyers Engaging in the Unauthorized Practice of Estate Planning Through A Certification System*, 43 CREIGHTON L. REV. 855, 882–86 (2010).

²¹³ See *In re* Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1005, slip op. at 7 (Wash. June 15, 2012), available at <http://perma.cc/ZRV2-SFE3>. See also Rigertas, *supra* note 22, at 2693.

²¹⁴ Steve Crossland, *Restore Access to Justice Through Limited License Legal Technicians*, GPSOLO, May/June 2014, at 56, available at <http://perma.cc/K3SX-K3Q4>.

²¹⁵ See Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. 75, 106 (2013) (quoting Letter from WSBA President Mark Johnson to Washington State Supreme Court, at 1 (Sept. 26, 2008) (on file with Brooks Holland)); see also Rigertas, *supra* note 22, at 2693. Though these objections have merit, the access to justice crisis already renders legal support totally unavailable to large parts of the population, making the impact on rural voters less than uniform.

²¹⁶ *In re* Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1005, slip op. (Wash. June 15, 2012), available at <http://perma.cc/ZRV2-SFE3>.

²¹⁷ *Id.* at 2–3.

State Bar Association does with respect to attorneys.”²¹⁸ The state courts reserved the right to review any decisions by the board to authorize licensing in specific substantive areas of law practice.²¹⁹ Such continued oversight is a critical component to creating a regulatory regime that incentivizes online legal services to operate at the consumers’ advantage.

Procedurally, a new regulatory drafting process should incorporate input from a range of stakeholders to encourage a balanced discussion regarding the risks consumers face and the advantages of allowing online legal services. The discussion ought to include active members of the bar, as well as representatives from low-income legal services organizations, access to justice initiatives, and online services companies. A diversity of interests is essential to ensure a better solution for consumers. Decisionmakers must consider a range of policy choices, importantly including ways to ensure consumers opting for online services are informed about any risks that come with that decision.

One potentially manageable method to incorporate a multitude of voices would be to utilize a notice-and-comment proceeding for regulatory changes at the state level. Such a process would invite comments on the drafted rules from all interested parties, including the interested public, online legal services advocates, lawyers, and law firms who might have a stake in the future of online legal services. Like a regulatory process governed by the Administrative Procedure Act, state rulemakers using a notice-and-comment process to create new regulations governing online legal services could benefit from obtaining widely dispersed information from members of the public.²²⁰ Rulemakers harnessing the Hayekian, information-sharing power of the notice-and-comment process could address the public’s input in the rules that are ultimately adopted to govern online legal services.²²¹

CONCLUSION

[T]he bar itself has much to gain from abdicating its role as self-appointed guardian of the professional monopoly. Given mounting popular skepticism about unauthorized practice enforcement, pru-

²¹⁸ *Id.* at 3.

²¹⁹ *Id.* at 3–4.

²²⁰ See Cass Sunstein, *Democratizing Regulation, Digitally*, 34 *DEMOCRACY J.* 42, 46 (2014), available at <http://perma.cc/NH9L-F5Z2> (noting that one goal of notice-and-comment rulemaking “is overwhelmingly substantive, in a sense even Hayekian—to fill gaps in knowledge and to see what might have been overlooked. In particular, the agency’s assessment of the likely consequences of regulations is subject to close scrutiny. If the agency has inaccurately assessed costs and benefits, public participation can and often will supply a corrective. Democratization of the regulatory process, through public comment, has an epistemic value. It helps to collect dispersed knowledge and to bring it to bear on official choices.”).

²²¹ See 5 U.S.C. § 553(c) (2012); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 248–51 (2d Cir. 1977); *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987) (“At the least, such a statement should indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did, particularly in light of the statutory objectives that the rule must serve.”).

dential as well as policy considerations argue for greater consumer choice. . . . If, as bar spokesmen repeatedly insist, the “fight to stop lay practice is the public’s fight,” it is time for the profession to relinquish the barricades.²²²

Thirty-four years after legal scholar Professor Rhode wrote this poignant critique of unauthorized practice of law, the barricades of the professional monopoly remain mounted. Through UPL regulation, litigation, and enforcement against competitors in the online legal services industry, today the legal profession is struggling to hold up the barricades against millions of consumers pounding at the gates.²²³ The realities of our technological world and the access to justice crisis make it even more crucial for the legal profession to reconsider, reform, and modernize the monopoly to make room for online legal services today.

The regulatory regime for law practice should not limit itself to the “lawyers can practice law, non-lawyers cannot practice law” binary, which forces stakeholders to engage in the unproductive argument about whether online legal services are in fact “practicing law.” Instead, the regulators must incorporate online legal services into the legal landscape. The dialogue must therefore shift focus from *whether* to embrace online legal services through tenuous enforcement of unauthorized practice of law to *how* to best situate legal technology in a regulatory framework that protects consumers from unfair and deceptive practices, ensures informed consumer choice, and improves access to justice. Consumer rights will be better served by zooming past the outdated lawyer’s monopoly and by enacting a new regulatory framework that embraces technological advances in legal services as a welcome reality of the information age, while incentivizing online legal alternatives to operate at the consumers’ advantage.

²²² Rhode, *Policing*, *supra* note 110, at 98–99 (internal alterations omitted).

²²³ LegalZoom has serviced at least 2 million consumers, 90% of whom would recommend the service to friends and family. See LegalZoom.com, Inc., Registration Statement, *supra* note 1. Millions more have used alternative legal services sites. See, e.g., *Rocket Lawyer Semi-Annual Small Business Index Finds Growth for More Than Half of Small Enterprises, 80% Believe 2014 Will Be Even Better*, ROCKETLAWYER (Dec. 10, 2013), <http://perma.cc/TQJ4-YZBD> (“Since 2008 we’ve helped over 20 million families and small businesses take care of their legal matters – so they can focus on what really matters.”).