

## SCRIVENERS IN CYBERSPACE: ONLINE DOCUMENT PREPARATION AND THE UNAUTHORIZED PRACTICE OF LAW

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### I. INTRODUCTION—SCRIVENERS IN CYBERSPACE

Anyone who attempts to determine whether particular activities by lay people constitute the unauthorized practice of law will inevitably confront the central mystery of the legal profession: Why are lawyers incapable of defining what they mean by “the practice of law?” Doctors seem to know what it means to practice medicine. Architects surely understand what their profession entails. Even plumbers or auto mechanics presumably can explain the basic attributes of their livelihood. But lawyers have famously struggled for decades to define what it is that they do for a living, and it is the amorphous nature of the practice of law that makes inquiries into unauthorized practice principles so challenging.

The legal profession’s notorious inability to produce a principled definition of the practice of law is reflected in its professional codes. The 1969 *Model Code of Professional Responsibility* expressly noted the difficulty of giving a comprehensive definition of the practice of law, but offered the following explanation:

Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. *The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client.*<sup>1</sup>

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1. MODEL CODE OF PROF'L RESPONSIBILITY EC 3-5 (1982) (emphasis added).

The *Model Rules of Professional Conduct* (“Model Rules”) did not even attempt this much of a definition, stating what could charitably be described as obvious: “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.”<sup>2</sup> The new *Restatement of the Law Governing Lawyers* also avoided the definitional dilemma, contending that attempts at definition had been “vague or conclusory,” and had engendered controversy over a variety of out-of-court activities.<sup>3</sup> Indeed, when confronted with the daunting task of giving meaning to this phrase, most courts also have taken an ad hoc approach, sometimes asserting confidently that, while the phrase is incapable of definition, the particular activities before it nevertheless can be said to meet any such definition.<sup>4</sup> One wonders whether such judicial default is motivated by Justice Potter Stewart’s most famous utterance about another ineffable legal concept—pornography—and that now-clichéd dictum: “I know it when I see it.”<sup>5</sup> Resting a fundamental

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2. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. (2001) (emphasis added). Model Rule 5.5(b) prohibits a lawyer from assisting “a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.” *Id.* R. 5.5(b).

3. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000) [hereinafter RESTATEMENT] (“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 particular areas.”).

4. See, e.g., *id.* § 4 reporter’s note cmt. c. The Reporter’s Note to Comment c states:

Courts have occasionally attempted to define unauthorized practice by general formulations, none of which seems adequately to describe the line between permissible and impermissible nonlawyer services, such as a definition based on application of difficult areas of the law to specific situations. Many courts refuse to propound comprehensive definitions, preferring to deal with situations on their individual facts.

*Id.* (citations omitted); see also Appeal of Campaign for Ratepayers’ Rights, 634 A.2d 1345, 1351 (N.H. 1993) (asserting that “[i]t would be difficult to give an all-inclusive definition of the practice of law, and we will not attempt to do so,” but holding that the activity at issue is reserved to lawyers); cf. Miller v. Vance, 463 N.E.2d 250, 251, 253 (Ind. 1984) (stating that “[t]his Court has not attempted to provide a comprehensive definition of what constitutes the practice of law because of the infinite variety of fact situations which must each be judged according to its own specific circumstances” but holding that the challenged activity did not meet the definition of practice of law). For general discussions of the wide divergence in approaches to defining the practice of law, see generally Angela M. Vallario, *Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad*, 59 MD. L. REV. 595 (2000); Pamela Lopata, Comment, *Can States Juggle the Unauthorized and Multidisciplinary Practices of Law?: A Look at the States’ Current Grapple with the Problem in the Context of Living Trusts*, 50 CATH. U. L. REV. 467 (2001); Andrew S. Morrison, Note, *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, 75 CAL. L. REV. 1093 (1987).

5. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Deborah Rhode noted presciently in 1981: “A number of jurisdictions simply proscribe, without defining, the practice of law. Other states employ a circularity scarcely less cryptic: The practice of law is what

regulatory principle of the legal profession on such a formless concept creates its own set of problems when lawyers seek to prevent lay people from encroaching on their professional territory.

In some ways, the failure of the courts and of the legal profession itself to define the practice of law may well be grounded in pragmatic concerns. The principal reason for determining whether particular human activities constitute the practice of law is to enable the guardians of the profession to regulate those activities, or, more accurately, to prevent those who are not licensed professionals from engaging in such activities. As Deborah Rhode demonstrated in her groundbreaking 1981 article, concerns about defining what the practice of law means arose first during the Great Depression, at a time when lawyers, like other members of American society, struggled against economic dislocation.<sup>6</sup> It is not mere historical coincidence that the first bar committees on unauthorized practice emerged during that time.<sup>7</sup> In the years since then, bar regulators have periodically focused on the evils of unauthorized practice of law, focusing on various economic competitors who had begun to provide certain professional services that had traditionally been done by lawyers, such as real estate agents, bankers, insurance agents, and title companies.<sup>8</sup> The most recent spasm of such activity occurred during the 1970s and early 1980s, when the threat to the monopoly of the legal profession came not from other professions such as banking and real estate brokers, but rather from lay people seeking to provide document preparation assistance and other services.<sup>9</sup>

Today, as our profession again faces economic challenges from a variety of sources, lawyers again must struggle to define what it is that they do for a living. The issue of what constitutes the practice of law is at the heart of the three issues that pose the greatest challenge to the legal profession in this first decade of the twenty-first century. First, the issue of multidisciplinary practice has at its core the question of whether lawyers and accountants may be employed together without violating the

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lawyers do.” Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 45 (1981) (footnote omitted) [hereinafter Rhode, *Policing the Professional Monopoly*].

6. See Rhode, *Policing the Professional Monopoly*, *supra* note 5, at 6-8. For an early discussion of the concept of unauthorized practice of law, see Ralph T. Catterall, *The Unauthorized Practice of the Law*, 19 A.B.A. J. 652 (1933). See also Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 198-218 (1999) (discussing unauthorized practice enforcement efforts during the 1930s).

7. See Rhode, *Policing the Professional Monopoly*, *supra* note 5, at 8.

8. See *id.* at 10.

9. See *id.*

principles of unauthorized practice of law.<sup>10</sup> Second, the issue of multijurisdictional practice also focuses on whether lawyers who provide legal advice or other services across state lines have engaged in unauthorized practice of law, prompted by the now-notorious California case of *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*.<sup>11</sup> Third, the proliferation of legal information and advice on the Internet, both by lawyers and by lay people, places in sharp relief the question of whether these activities can be said to be the practice of law. It is this issue that I will examine in this Article.

I will consider the weaknesses in our current definition of the practice of law by examining its application to the emerging phenomenon of lay document providers in cyberspace. In recent years, a number of websites have emerged that are dedicated to providing consumers with legal documents tailored to their individual circumstances. These entrepreneurs have hoped to garner a portion of the market for legal services that traditionally has been underserved by the organized bar. The recent economic downturns in the dot-com world have taken their toll on this area, but a number of sites still exist to provide these services. As the preparation of legal forms tailored to the needs of consumers has been perceived in the legal information

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10. See Michael W. Loudenslager, *Cover Me: The Effects of Attorney-Accountant Multidisciplinary Practice on the Protections of the Attorney-Client Privilege*, 53 BAYLOR L. REV. 33, 34-37 (2001) (noting that the controversy over multidisciplinary practice stems from concerns regarding attorneys and accountants practicing together).

11. 949 P.2d 1 (Cal. 1998). In that case, the California Supreme Court held it to be unauthorized practice of law for a New York lawyer to advise "a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means." *Id.* at 5-6. *Birbrower* has been the subject of extensive criticism, including sections of the new *Restatement of the Law Governing Lawyers* ("Restatement") and proposed amendments to the Model Rules from the Ethics 2000 Commission. Nevertheless, it is noteworthy that the problem with *Birbrower* has not been with its definition of what constitutes the practice of law, but rather with a different issue about narrowing the scope of state restrictions on such practice by licensed attorneys from other states. Indeed, even as it rejects the reasoning in *Birbrower*, the Restatement nevertheless concedes that the activities at issue there could fairly be characterized as legal services, and instead proposes the following rule: "A lawyer currently admitted to practice in a jurisdiction may provide legal services to clients . . . at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice . . ." RESTATEMENT, *supra* note 3, § 3(3). The ABA's Ethics 2000 Commission proposed a similar amendment to Model Rule 5.5. See COMM'N ON EVALUATION OF THE RULES OF PROF'L CONDUCT, ABA, REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES 214 (2001) (Proposed Rule 5.5), available at [http://www.abanet.org/cpr/e2k-whole\\_rpt.doc](http://www.abanet.org/cpr/e2k-whole_rpt.doc) (last visited Mar. 22, 2002). For recent discussions of *Birbrower*, see, for example, Ann L. MacNaughton & Gary A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold?*, 47 LOY. L. REV. 665, 683-84 (2001); La Tanya James & Siyeon Lee, *Current Development, Adapting the Unauthorized Practice of Law Provisions to Modern Legal Practice*, 14 GEO. J. LEGAL ETHICS 1135, 1139-41 (2001).

community to be a growth area, the regulatory concerns it raises merits particularly close attention.

Broadly speaking, there are two types of services provided online that raise questions about unauthorized practice: (1) services that provide blank forms, with instructions, that enable consumers to prepare their own legal documents; and (2) services that go one step further, and fill out the forms for the consumers, based on information the consumers provide. Before examining the law governing lay form preparation, let us briefly explore examples of the websites that provide these services.

The website that initially received the most attention, at least in legal technology circles, was the British website called *Desktop Lawyer*.<sup>12</sup> *Desktop Lawyer* was the brainchild of two brothers, Richard Cohen, a solicitor, and Graham Cohen, who launched the site to much fanfare in 1999.<sup>13</sup> The site provides basic legal documents to lay people over the Internet, for a fee.<sup>14</sup> According to its founders, the site had garnered an estimated six percent of uncontested divorce petitions since its inception in July 1999.<sup>15</sup>

*Desktop Lawyer* uses a software assembly package called "Rapidocs," to offer customized legal documents online.<sup>16</sup> Consumers are invited to order personalized legal documents in a wide array of areas, including divorce, wills, powers of attorney, and sales of goods, which are described as having been prepared by "barristers and solicitors who are experts in drafting legally binding documents."<sup>17</sup>

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12. See Desktop Lawyer, Welcome to Desktop Lawyer, at <http://www.desktoplawyer.co.uk/dt/browse/law> (last visited Mar. 22, 2002) [hereinafter Desktop Lawyer].

13. For a general discussion of *Desktop Lawyer*, see Darryl Van Duch, *Technology from Hell Challenges, Scares Bar*, N.Y. L.J., Apr. 11, 2000, at 5.

14. See Desktop Lawyer, *supra* note 12.

15. See Delia Venables, *Desktop Lawyer Scoops the Pool*, INTERNET NEWSL. FOR LAW., Jan./Feb. 2000, available at <http://www.venables.co.uk> (last visited Apr. 13, 2002). Venables quotes Graham Cohen as asserting that 24,000 documents had been "purchased or accessed" as of early 2000, although he conceded that the majority of them had been free as part of a promotion. He further noted that 1850 divorce packets were downloaded in the first ten weeks, amounting to six percent of the divorces in the UK during that period. His figure assumes that all those forms were filed in court; the actual number of *Desktop Lawyer* divorces filed is unknown.

16. See Desktop Lawyer, Software, at <http://www.desktoplawyer.co.uk/dt/browse/law/> (last visited Mar. 22, 2002).

17. Desktop Lawyer, *supra* note 12.

The customer pays for the document online, with a credit card, and then downloads the relevant document, along with Rapidocs software.<sup>18</sup> According to the website, the software

automatically assembles legally binding documents and letters. It asks you a series of easy-to-answer questions and then tailors your document to suit your precise requirements. Each question is accompanied with appropriate guidance designed to provide users with the information needed to answer the question correctly. Further guidance and legal information is available through attached comprehensive user notes.<sup>19</sup>

A few aspects of *Desktop Lawyer* merit our attention before we proceed. First, *Desktop Lawyer* is quite emphatic that no attorney-client relationship is formed with the purchaser.<sup>20</sup> Moreover, although the website encourages consumers to solve their legal problems without having to pay an expensive barrister, the site's disclaimer is somewhat less assuring about the value of the documents:

While every care has been taken in preparing the documents, in the majority of cases they will have to be tailored to suit your particular circumstances.

Therefore the basis on which you acquire or make use of any document is that the document is suitable to be used by you in conjunction with proper advice as to its application and adaptation for your particular requirements. The documents are not made available to you on any other basis. . . .

. . . .

We will not have any liability to you at all if you use any document without obtaining appropriate legal advice as to its suitability for your particular requirements. Whatever advice you receive is the responsibility of the solicitor or other person advising you and we cannot in any way be responsible for it.<sup>21</sup>

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18. See Venables, *supra* note 15.

19. *Id.*

20. See LawAssure, Disclaimer, at <http://www.lawassure.co.uk/lw/browse> (last visited Apr. 13, 2002) ("LA is not a law firm and cannot provide you with legal advice."); Venables, *supra* note 15 (quoting Richard Cohen as stating that "[i]n the *Desktop Lawyer* no client relationship is formed as we are not a law firm"). Cohen nevertheless recognized the possibility that "[a] mistake in a document which is sold many hundreds of times could be very costly." *Id.*

21. Desktop Lawyer, Disclaimer for England and Wales, at <http://www.desktoplawyer.co.uk> (last visited Apr. 13, 2002).

In fact, *Desktop Lawyer* also sells prepaid telephone consultations with barristers, limited in time, for consumers who want additional assistance.<sup>22</sup> The uncontested divorce package, for example, costs £59.99, and comes with a telephone consultation of no more than ten minutes with a lawyer who is not formally affiliated with *Desktop Lawyer*.<sup>23</sup>

*Desktop Lawyer*'s well-advertised emergence generated some controversy in the United Kingdom.<sup>24</sup> In particular, groups opposed to divorce, including the Roman Catholic Church, objected to making divorce easier.<sup>25</sup> Nevertheless, as of early 2000, its founders expected the site to expand rapidly. As one of its founders boasted at an American Bar Association meeting in early 2000: "The legal knowledge we've compiled . . . is in a centralized location . . . and it's easily accessible to consumers. It costs us little to create, it costs us virtually nothing to store, and it cost[s] us nothing to deliver."<sup>26</sup> The financial downturn in the technology market, however, seems to have slowed the predicted expansion of *Desktop Lawyer*.<sup>27</sup> Nevertheless, a companion site in the

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22. See LawAssure.com, Welcome to LawAssure, at <http://www.lawassure.co.uk/lw/browse/LawAssure/> (last visited Apr. 13, 2002).

23. The uncontested divorce package costs £54.99 without the telephone support. The site is affiliated with a prepaid legal plan, called "LawAssure," which entitles the individual purchaser to unlimited access to Rapidocs services and FirstAssist telephone consultation, as well as insurance to cover legal expenses, for an annual fee of £199. See *id.*

24. *Desktop Lawyer* has periodically generated publicity by linking particular legal documents to other online services, such as marketing prenuptial agreements in conjunction with a wedding planning site. See Michelle Stanistreet, *Download A Divorce as You Marry*, EXPRESS, Jan. 14, 2001, at 1 (quoting Richard Cohen as explaining: "[o]ur partnership with Confetti will enable people to familiarise themselves with possible legal issues which may arise in getting married, and purchase legal documents in the comfort of their own home without paying the high cost of a solicitor"). The firm also publicized the availability of a form letter for use in complaining about vacation travel, such as lost luggage and flight delays. See *Legal Aid*, POST, Feb. 15, 2001 (Magazine), at 10, available at <http://193.131.112.113/story.asp?sectioncode=00&arch=true&storycode=358748> (last visited Mar. 3, 2002).

25. See David Norris, *Anger at Scheme for Internet 'Quickie' Divorces On The Cheap*, DAILY MAIL, July 26, 1999, at 33 (stating that a spokesperson for Roman Catholic Church termed the service "repellent" and argued that face-to-face sessions with lawyer could give couples chance to "stop and think").

26. *Id.* The same article describes his "disbelief that no one in America had already created a carbon copy of Desktop Lawyer before he and his brother could import their Yankee-ized version." *Id.*

27. See Helen Power, *Virtually There*, LAWYER, June 11, 2001, at 30 (describing *LawAssure* as "obvious victim of the dotcom downturn, and the company will post losses of £6.1m this year and has just laid off 20 staff"; although it now asserts that it is operating in the black). Richard Cohen recently explained that the window of opportunity for global expansion had disappeared after February 2000, and that in his business the bulk of income came from *LawAssure*, not *Desktop Lawyer*. See *id.* He is quoted as conceding that the anticipated domination of the "high street"

United States that offers legal documents for sale using the Rapidocs technology is *MyLawyer.com*, operated by Maryland attorney Richard Granat.<sup>28</sup> Other similar sites offering legal documents online currently are available on the Internet, although it is difficult to determine how economically viable they have proven to be.<sup>29</sup>

An example of the second kind of website, which provides completed forms to consumers, rather than just the forms themselves, is *LegalZoom.com*.<sup>30</sup> The service offers form preparation for a variety of situations, including uncontested divorces, living wills, and prenuptial agreements.<sup>31</sup> The consumer answers an online questionnaire, and then the documents are prepared and reviewed by “experienced paralegals,”<sup>32</sup> and returned to the consumer for use. The site contains a general disclaimer of any attorney-client relationship:

LegalZoom is not a law firm, and the employees of LegalZoom are not acting as your attorney. LegalZoom does not practice law and does not give legal advice. This site is not intended to create an attorney-client relationship, and by using LegalZoom, no attorney-client relationship will be created with LegalZoom. Instead, you are representing yourself in any legal matter you undertake through LegalWiz. Furthermore, the legal information on this site is not legal advice and is not guaranteed to be correct, complete or up-to-date. Because the law changes rapidly, LegalZoom cannot guarantee that all the information on the site is completely current. The law is different from jurisdiction to jurisdiction, and is also subject to interpretation by different courts. The law is a personal matter, and no general information or legal tool

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(which means “Main Street” in American idiom) market was “not happening as fast as I anticipated, and is possibly five years away.” *Id.*

28. See *MyLawyer.com*, Divorce, Legal Forms, Information and Services to Solve Your Legal Problem, at <http://www.mylawyer.com> (last visited Feb. 12, 2002).

29. *USLaw.com*, for example, offers a variety of forms for sale at its website. See *USLaw.com*, Create a Document, at <http://uslaw.com/build-a-document/> (last visited Apr. 13, 2002). The website markets packages of documents to be completed online. See *id.* Its “family package” is offered for \$20, and includes forms for wills, codicils, powers of attorney, and other documents. See *id.* The website explains: “Each document can only be used once. Once a document is purchased, you can only modify it within the next three days, at which time it will become a final, unchangeable document. All documents are built on-line.” *Id.* Although the website is still in operation, the continued viability of *USLaw* is unclear. Press reports indicate that the company’s staff had been reduced from a high of eighty to twenty-three, and that only four “virtual lawyers” remained affiliated with the site. See John O’Keefe, *Hard Times Hit Legal Help Web Sites*, N.Y. L.J., Mar. 20, 2001, at 5.

30. See *LegalZoom.com*, at <http://www.legalzoom.com/index.html> (last visited Feb. 12, 2002).

31. See *id.*

32. *LegalZoom.com*, LegalWiz Living Wills, at <http://www.legalzoom.com> (last visited Feb. 12, 2002).

like the kind LegalZoom provides can fit every circumstance. Therefore, if you need legal advice for your specific problem, or if your specific problem is too complex to be addressed by our tools, you should consult a licensed attorney in your area.<sup>33</sup>

Other sites offering similar services have emerged in the last several years.<sup>34</sup>

One might legitimately question whether these websites garner enough business to pose any significant threat to the legal profession. It is certainly true that much of the hubris about dot-coms generally has waned in the last year or two, and legal document websites have not escaped the economic difficulties that have pervaded the cyberspace market. For example, one of the most highly touted legal services sites, *Americounsel*, opened to great fanfare in March 2000, with the ubiquitous Harvard Law School professor Arthur Miller as its public spokesperson.<sup>35</sup> The site was designed to enable consumers to purchase legal services from participating lawyers for fixed rates, and to simplify many basic legal services.<sup>36</sup> As of June 2001, the company had suspended operations, and it later went out of business.<sup>37</sup>

There is no question that the long-term economic viability of online legal websites remains unproven. On the other hand, the shortage in availability of low-cost legal services is well-established,<sup>38</sup> and many consumers would prefer to resort to lay assistance, rather than lawyers, if the option is made available to them. A particularly troubling example of

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33. LegalZoom.com, Disclaimer, at <http://www.legalzoom.com/universal/disclaimer.html> (last visited Feb. 12, 2002).

34. Similar sites include: National Court Documents, at <http://www.docupro.org/index.html> (last visited Feb. 12, 2002) (“We’ll prepare your paperwork in the correct format for your state and county, and provide you with step-by-step instructions and assistance throughout the filing process.”); US Legal Forms, Legal Forms, Forms, Form Preparation Services, at <http://www.uslegalforms.com/completion.htm> (last visited Mar. 2, 2002) (“Forms which have the preparation/completion services option are completed for you based upon information you provide.”); Docupronet, at <http://docupro.net/index.php?count=1> (last visited Mar. 2, 2002) (“You will click on the document you need and fill out a questionnaire. I enter this information into our computer with state-of-the-art software and your documents are printed onto the proper legal forms. These documents are returned to you with filing instructions.”).

35. See Liane Gouthro, *Find a Flat-Fee Lawyer Online: AmeriCounsel Puts Legal Services on The Web, But Is The Price Right?*, PC WORLD, Apr. 3, 2000, at <http://www.pcworld.com/news/article.asp?aid=16029> (last visited Feb. 12, 2002).

36. See *id.*

37. See Jeffrey Krasner, *Failing to Get Along Famously: Celebrity Presence Just Not Enough for These Web Sites*, BOSTON GLOBE, June 21, 2002, at C1 (noting that only two legal websites, nolo.com and law.com, register more than 100,000 unique visits a month); see also O’Keefe, *supra* note 29 (discussing how “[t]he concept of the virtual lawyer has gone over about as well as the Edsel”).

38. See Lanctot, *supra* note 6, at 250.

this phenomenon is Marcus Arnold, a fifteen-year-old boy who gave so-called “legal advice” over the Internet, which he simply made up out of his head, to more than a thousand people.<sup>39</sup> Although he originally pretended to be a lawyer, perhaps the most telling aspect of Marcus Arnold’s story is that his popularity as a legal advice-giver dramatically increased once he was exposed to be a teenage pretender working out of his parents’ basement.<sup>40</sup> His story may be more about consumer ignorance and gullibility than about the unmet need for legal services, yet it nevertheless stands as a powerful reminder of how desperate many lay people are for legal services they can afford, and how easily cyberspace may be used to provide them.

Online document providers thus merit a closer look than they have received to date from the legal profession. The obvious question is whether these websites are engaged in the unauthorized practice of law, or whether, instead, they simply are selling information to consumers. In order to answer that question, presumably we first ought to decide what the “practice of law” means. Most lawyers, if asked to define the practice of law, probably would adopt the common sense notion that the action of a lawyer providing specific legal advice in response to the query of a lay person is the paradigm of the practice of law.<sup>41</sup> But what is the meaning of the phrase “legal advice?” If a lay person advises another lay person on how to respond to a particular legal issue, is that advice? Does Ann Landers give legal advice when she answers questions about the law in her column?<sup>42</sup> More particular to our circumstances, if a lay person advises another lay person on which legal form to select to meet a specific legal need, or assists that person in completing a form, did that activity constitute legal advice? And what if the “advice” comes not from a live person bringing conscious thought to bear on the specific facts, but rather from a computer software program?

To resolve these issues, we must first turn to our profession’s traditional understanding of what constitutes unauthorized practice of

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39. See Michael Lewis, *Faking It*, N.Y. TIMES, July 15, 2001 (Magazine), at 32, 61.

40. See *id.* at 61.

41. Cf. Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 U. KAN. L. REV. 453, 461 (1997) (“Giving a client legal advice tailored to the specific facts presented by that client is at the heart of the definition of the practice of law.”). Charles Wolfram has criticized reliance on the giving of “legal advice” as overly broad. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 15.1, at 838 (1986).

42. See Alan Morrison, *Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question*, 4 NOVA L.J. 363, 374 (1980); Rhode, *Policing the Professional Monopoly*, *supra* note 5, at 47.

law in the context of generating or preparing legal documents, and then consider whether that approach remains viable today. I will begin by revisiting an early battleground in the unauthorized practice of law wars—the saga of Norman Dacey and his Sixties best-seller *How To Avoid Probate!*<sup>43</sup> I then examine the struggle to define the line between legal information and legal advice as it emerged during the Seventies and Eighties, with the proliferation of “typing services” that offered to prepare the then-novel no-fault divorce pleading. The line remains blurry at best, as can be seen by examining the recent conflict in Texas over application of unauthorized practice of law principles to the sale of a CD-ROM called *Quicken Family Lawyer*.<sup>44</sup> There, a federal district court struggled not only with how new technology should be treated under existing precedent, but also with whether First Amendment principles might limit the ability of regulators to ban certain types of software. After issuing an injunction banning the sale of the software, the court’s holding was quickly made moot by a change in state law prompted by intense lobbying. Thus, the story of *Quicken Family Lawyer* in Texas reflects not only the law, but also the politics of unauthorized practice of law, and raises the question of where consumer protection ends and economic self-protection begins.

On the other hand, there are legitimate concerns about how a completely unregulated market in legal document preparation and advice might adversely affect consumers. Lay people are not always capable of determining whether a particular document suits their needs, and relying on untrained and unlicensed document preparers who are largely immune from liability for their services can result in harm. This is not merely a hypothetical concern. As I will show in Part V, the current controversy in bankruptcy courts over the proliferation of “bankruptcy petition preparers” demonstrates in microcosm the potential for mischief when unsuspecting consumers try to avoid legal fees by using less expensive lay practitioners.

There is ample legal precedent to permit the conclusion that many online document providers are engaged in the unauthorized practice of law. But the fact that these activities may technically fall within that category does not resolve the larger question about whether applying this law to these websites would raise substantial constitutional concerns, particularly under the First Amendment. Although a full discussion of the constitutional issues is beyond the scope of this Article, I conclude

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43. NORMAN F. DACEY, *HOW TO AVOID PROBATE!* (1965); see also *infra* Part II.

44. See *infra* Part IV.

with some preliminary thoughts about the viability of regulation of scrivener services, focusing not only on adapting twentieth-century precedent to twenty-first-century technology, but also on the constitutional issues lurking beneath the surface that might hamper any attempt to enforce unauthorized practice of law statutes aggressively today.

## II. THE SAGA OF NORMAN DACEY

Let us begin by revisiting one of the early combatants in the battle over what constitutes legal advice—the once-infamous Norman Dacey. Dacey's saga serves as a cautionary tale about the ability of the organized bar to control the dissemination of legal information.

In 1965, an enterprising estate planner named Norman Dacey self-published a book called *How to Avoid Probate!*,<sup>45</sup> which was destined to become one of the most successful books ever self-published.<sup>46</sup> Dacey's book combined a sharp critique of the existing probate court system with advocacy of use of the revocable *inter vivos* trust as a "legal wonder drug" to avoid probate.<sup>47</sup> The book contained numerous forms for trusts and wills, with instructions explaining their use.<sup>48</sup> Dacey had 10,000 copies privately printed, and talked bookstores in Connecticut into selling it.<sup>49</sup> The book's surprising success prompted Crown Publishers to enter into a publishing contract with Dacey in 1966.<sup>50</sup> The book quickly rose to number one on the *New York Times* best-seller list,<sup>51</sup> with thirty-two printings by 1970.<sup>52</sup> Indeed, the most telling indicator of the book's popularity is the fact that it remained on the best-seller list for forty-seven weeks and became the best-selling nonfiction book of 1966, far ahead of the number two best-seller, the equally-notorious *Human Sexual Response* by Masters and Johnson.<sup>53</sup>

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45. DACEY, *supra* note 43.

46. See Edwin McDowell, *Book Notes*, N.Y. TIMES, Mar. 7, 1990, at C23.

47. See *Dacey v. N.Y. County Lawyers' Ass'n*, 423 F.2d 188, 189-90 (2d Cir. 1969).

48. See *id.* at 190. The book contained about 55 pages of text and 310 pages of forms with instructions. See *N.Y. County Lawyers' Ass'n v. Dacey*, 283 N.Y.S.2d 984, 989 (App. Div.), *rev'd*, 234 N.E.2d 459 (N.Y. 1967).

49. See McDowell, *supra* note 46.

50. A Colorado printer initially published the book and it sold over 10,000 copies. See *N.Y. County Lawyers' Ass'n v. Dacey*, 283 N.Y.S.2d at 999 (Stevens, J., dissenting).

51. See McDowell, *supra* note 46.

52. See *Dacey v. Fla. Bar, Inc.*, 427 F.2d 1292, 1294 (5th Cir. 1970). Dacey had become a frequent speaker on radio and television. See *id.* at 1294-95. In 1967, his reported income was \$232,570. See *id.* at 1294.

53. See McDowell, *supra* note 46. Dacey later estimated that he had made at least two hundred television appearances to promote his book. See *Dacey v. Fla. Bar, Inc.*, 427 F.2d at 1294.

The popularity of *How to Avoid Probate!* prompted a number of state bars to investigate Dacey, and to charge him with unauthorized practice of law.<sup>54</sup> An arm of the Connecticut State Bar brought an action against Dacey based on his distribution of a thirty-page booklet advocating use of the so-called “Dacey Trust” and “Dacey Will.”<sup>55</sup> The action charged that Dacey not only published and distributed these booklets, but that he met with “clients” and advised them on how to fill out his forms.<sup>56</sup> The Connecticut Supreme Court agreed with the state bar, noting that Dacey had done “far more than fill in blanks.”<sup>57</sup> In its view:

The determination that a given form should be followed without change is as much an exercise of legal judgment as is a determination that it should be changed in given particulars. In either case, legal judgment is used in the adaptation of the form to the specific needs and situation of the client.<sup>58</sup>

Moreover, without passing on whether general advice in the booklets might have constituted practice of law, the court stated that “[w]hen the information given is directed toward a particular person and his needs and to a particular instrument prepared for his execution, it is no longer within the ‘general information’ classification but has become legal advice embraced within the phrase ‘practice of law.’”<sup>59</sup> The court enjoined Dacey from drafting or preparing legal documents and advising people about the effect of legal documents, stating that “Dacey’s activities present a sordid picture.”<sup>60</sup>

The Connecticut litigation proved to be little more than a preliminary skirmish. The real battle was to be fought in New York, where the New York County Lawyers’ Association (“NYCLA”) brought an action against Dacey in the Supreme Court of New York, Special Term, to enjoin publication, sale, and distribution of *How To Avoid*

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As of 1992, sales of Dacey’s book were estimated at two million copies. See Richard D. Lyons, Obituary, *Norman Dacey, 85; Advised His Readers to Avoid Probate*, N.Y. TIMES, Mar. 19, 1994, at 52.

54. See *infra* notes 56-84 and accompanying text.

55. See *Grievance Comm. v. Dacey*, 222 A.2d 339, 341-43 (Conn. 1966).

56. See *id.* at 343.

57. *Id.* at 346.

58. *Id.*

59. *Id.* at 347.

60. *Id.* at 352. The court dismissed the First Amendment argument raised, stating that the injunction against “advising and counseling any person concerning said documents, the effects thereof and the laws applicable thereto” did not deprive him of any constitutional rights. *Id.* at 349.

*Probate!*<sup>61</sup> In New York, however, there were no allegations that Dacey had given individual legal advice in face-to-face meetings with clients. Instead, the proceeding was based solely on the book itself.<sup>62</sup> In its opinion, issued in June 1967, the lower court saw no distinction between publishing a book and giving individual legal advice:

It is clear beyond doubt that what Dacey did in Connecticut with a small pamphlet supplemented by a confrontation and which was thereupon enjoined, he is doing now through his enormously enlarged and radically changed Book. As best he can he makes the confrontation through the Book by selection, advice, guidance, instructions, questions, fitting and fashioning to individual need and by sale and further solicited sale on request of forms to fit a precise need in a given situation.<sup>63</sup>

The court gave short shrift to Dacey's claim that he had a free speech right to publish his book, calling it "ill-considered."<sup>64</sup> Dacey was convicted of criminal contempt for willfully engaging in the unauthorized practice of law, permanently enjoined from disseminating his book or any legal forms, and fined \$250.<sup>65</sup>

In September 1967, the Appellate Division upheld the lower court, with some modifications, in *New York County Lawyers' Association v. Dacey*.<sup>66</sup> Like the lower court, the Appellate Division saw no difference between live advice-giving and written instructions accompanying

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61. See *N.Y. County Lawyers' Ass'n v. Dacey*, 282 N.Y.S.2d 985, 986 (Sup. Ct.), *aff'd in part and rev'd in part*, 283 N.Y.S.2d 984 (App. Div.), and *rev'd*, 234 N.E.2d 459 (N.Y. 1967). I have detailed elsewhere the activities of the New York County Lawyers Association ("NYCLA") with respect to combating unauthorized practice of law in the Thirties, when it successfully suppressed a popular radio program, the Good Will Court, that provided legal advice to lay people over the air. See Lanctot, *supra* note 6, at 198-218.

62. See *N.Y. County Lawyers' Ass'n v. Dacey*, 282 N.Y.S.2d at 986-87. Under New York law, unauthorized practice could be punished by criminal contempt in summary proceedings. See *id.* at 992 (citing the relevant sections of the *New York Judiciary Law*).

63. *Id.* at 994.

64. *Id.* at 995. In comparing Dacey's "sole emphasis . . . upon legal advice and practice" with the ban on pornographic books "commercially exploited solely for the sake of prurient appeal," the court contended: "Unauthorized practice of law cannot be transferred to the book and by that device to attain the security of a constitutional umbrella to immunize against the power of the court to reach unlawful practice of the law." *Id.* at 995. The court added that "[t]he New York Civil Liberties Union urges that unauthorized practice of law like libel can claim no talismanic immunity from constitutional limitations." *Id.* at 988.

65. See *N.Y. County Lawyers' Ass'n v. Dacey*, 283 N.Y.S.2d 984, 987-88 (App. Div.), *rev'd*, 234 N.E.2d 459 (N.Y. 1967). The order banned Dacey from "advising or recommending to the public in the State of New York . . . that any 'form' . . . is legally sufficient, suitable or proper for use for any specific legal purpose." *Id.* at 988. Dacey was fined \$250 and was sentenced to prison for thirty days if he did not pay the fine.

66. 283 N.Y.S.2d 984 (App. Div.), *rev'd*, 234 N.E.2d 459 (N.Y. 1967).

forms.<sup>67</sup> The “advice” furnished with the forms consisted of statements such as that the form “will be suitable for use” to accomplish a particular objective, or that the forms are “legally correct . . . and may be employed with complete assurance that they will serve the readers’ purpose well.”<sup>68</sup> Moreover, as the court noted, “[p]rominently emphasized on the back cover is the direction and statement: ‘ADMINISTER YOUR OWN ESTATE! This book will revolutionize estate administration in America!’”<sup>69</sup> The court said: “On the whole, the book is represented and purports to be a compilation of instructions and legal counsel by Mr. Dacey, a nonlawyer.”<sup>70</sup>

The court further objected to the apparent intent of Dacey’s book. Although Dacey never gave particularized individual advice, by preparing and drafting the documents and forms, and by representing them as legally adequate documents and furnishing instructions on how to complete them, he “[u]nquestionably” intended that “his advice be adopted and followed by laymen,” which, according to the court, “constitutes the practice of law.”<sup>71</sup> Indeed, “[t]he copying or completion of a form may consist merely of clerical work but the selecting of the proper form and telling a clerk what to copy and how to fill in the blanks is lawyers’ work.”<sup>72</sup> As to the absence of live interaction, the court claims that “the book is bought with the understanding that the purchaser is thereby obtaining legal counsel from an expert who is fully qualified to give the same.”<sup>73</sup> In its view, Dacey is “actually engaged in the practice of giving legal counsel to all and sundry who are willing to receive the same.”<sup>74</sup> Thus, although the court paid lip service to the First Amendment right of Dacey’s publishers “to publish, distribute and sell Dacey’s views and opinions with respect to probate procedure, with incidental criticism of the legal profession and its methods,” and

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67. *See id.* at 989 (“Clearly, it was Dacey’s purpose to circumvent the effect of the Connecticut decree by substituting here a multiplicity of forms of legal instruments with particularized instructions as to each form so that they could be used on the basis of his written rather than face-to-face oral advice.”).

68. *Id.*

69. *Id.*

70. *Id.* The court cited to *Rosenthal v. Shepard Broadcasting Service*, 12 N.E.2d 819 (Mass. 1938), in support of the proposition that giving legal advice is reserved for lawyers. I have elsewhere discussed the *Rosenthal* case, which arose out of a desire to suppress legal advice programs on the radio in the 1930s. *See* Lanctot, *supra* note 6, at 213-16.

71. *N.Y. County Lawyers’ Ass’n v. Dacey*, 283 N.Y.S. 2d at 990.

72. *Id.*

73. *Id.* at 991. “It would be senseless to permit a person who is not an attorney to engage in the business of selling and distributing particularized legal advice to the public on a wholesale basis when he would not be permitted to do so on an individual basis.” *Id.*

74. *Id.* at 992.

accepting the concession of the bar association that the court “may not restrain” publication of the book “as an undertaking independent of unlawful practice of law activities,” the court nevertheless stated that the publishers and distributors of the book were actively furthering Dacey’s unlawful activities by promoting his book.<sup>75</sup>

Despite the resounding rejection of Dacey’s position, just one month later, in December, the New York Court of Appeals reversed the lower courts, and instead adopted a dissenting opinion issued in the Appellate Division case as its own.<sup>76</sup> That opinion had drawn a careful distinction between the “publication of a legal text which purports to say what the law is”<sup>77</sup> and the “essential of legal practice [which is] the representation and the advising of a particular person in a particular situation.”<sup>78</sup> The opinion further noted that the publication of forms is a “commonplace activity” and that many statutes and court rules contain forms to be used in conjunction with them.<sup>79</sup> What was determinative for the court here was the absence of personal contact, because “[a]t most the book assumes to offer general advice on common problems, and does not purport to give personal advice on a specific problem peculiar to a designated or readily identified person.”<sup>80</sup>

Finally, by adopting the dissenting opinion, the New York Court of Appeals embraced a far broader understanding of the constitutional issues presented by the regulation of unauthorized practice of law. It characterized the lower court’s injunction against *How to Avoid Probate!* as a prior restraint, without a “precise definition or even clear indication of what material falls within the prohibited category.”<sup>81</sup> In the absence of any clear and present danger from the publications, and in light of the availability of lesser restrictions, such as laws punishing false and misleading advertisements, the injunction violated free speech

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75. *Id.* at 993-94. The court claimed: “Legal advice is not a constitutionally protected matter and one illegally peddling such advice may not take refuge in the constitutional guarantees of freedom of expression.” *Id.* at 994.

76. *See* N.Y. County Lawyers’ Ass’n v. Dacey, 234 N.E.2d 459, 459 (N.Y. 1967).

77. *N.Y. County Lawyers’ Ass’n v. Dacey*, 283 N.Y.S.2d at 996-97 (Stevens, J., dissenting).

78. *Id.* at 998 (Stevens, J., dissenting) (“The lectures of a law school professor are not legal practice for the very reason that the principles enunciated or the procedures advised do not refer to any activity in immediate contemplation though they are intended and conceived to direct the activities of the students in situations which may arise.”).

79. *See id.* at 997 (Stevens, J., dissenting).

80. *Id.* at 998 (Stevens, J., dissenting). The opinion further noted that there was no factual record to show that there had been any harmful effect from the sale or use of Dacey’s book. “Every individual has a right to represent himself if he chooses to do so, and to assume the risks attendant upon what could prove a precarious undertaking.” *Id.* at 999 (Stevens, J., dissenting).

81. *Id.* at 1000 (Stevens, J., dissenting).

rights.<sup>82</sup> In a slap at the self-protective attitude of the organized bar, the opinion had concluded:

That it is not palatable to a segment of society which conceives it as an encroachment of their special rights hardly justifies banning the book. “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.” Free and open discussion or even controversy could lead to reforms, if needed, or improvement where desirable. Books purporting to give advice on the law, and books critical of law and legal institutions have been and doubtless will continue to be published. Legal forms are available for purchase at many legal stationery stores. Unless we are to extend a rule of suppression beyond the obscene, the libelous, utterances of or tending to incitement, and matters similarly characterized, there is no warrant for the action here taken.<sup>83</sup>

Dacey savored his victory by pressing a lawsuit against the NYCLA for violating his constitutional rights by attempting to suppress publication and sale of his book.<sup>84</sup> In rejecting the NYCLA’s claim of immunity against suit,<sup>85</sup> Judge Irving Kaufman outlined the First Amendment concerns that had been implicated by the Association’s actions against Dacey:

The gravamen of the Association’s complaint against Dacey was not that he had given specific advice to specific individuals concerning their particular legal problems. Instead, the Association acted to prevent Dacey from disseminating his views to the public generally by means of the publication and distribution of a book. Moreover, the book at which the attack was directed contained a critical discussion of an important public institution—the probate court—and of the officials who administer it and practice before it.<sup>86</sup>

The court emphasized that important free speech principles were implicated, even when the publication consisted of legal forms:

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82. *See id.* (Stevens, J., dissenting) (“The book is not of the kind or quality to provoke disorder or incite one to public disturbance. In fact there is no substantive evil imminently threatening the public.”).

83. *Id.* at 1000-01 (Stevens, J., dissenting) (citation omitted).

84. *See Dacey v. N.Y. County Lawyers’ Ass’n*, 290 F. Supp. 835, 837 (S.D.N.Y. 1968), *aff’d*, 423 F.2d 188 (2d Cir. 1969). The district court had accepted the bar association’s claim of immunity from suit, but this holding was overturned on appeal. *See id.* at 842.

85. *See Dacey v. N.Y. County Lawyers’ Ass’n*, 423 F.2d 188, 194 (2d Cir. 1969) (“We do not suggest, however that immunity would be unavailable to the Association in a case in which it had sought to enjoin an unauthorized practitioner from proffering to specific individuals legal advice relating to their specific problems or had instituted proceedings to disbar an attorney.”).

86. *Id.* at 192-93.

Nor does it matter that the opinions expressed were contained in a book comprised largely of legal forms. The argument Dacey sought to press upon the public—the virtue of which we do not pass upon—was that the infirmities of the probate system required every thoughtful person to avoid the administration of his estate by the probate court. Given this viewpoint, the forms which comprised the bulk of *How To Avoid Probate!* buttressed Dacey's argument that the goal he advocated was not only desirable but feasible. *Dacey's book was therefore protected by the first amendment's guarantee of free speech and any attempt to suppress it on the ground that it constituted the unauthorized practice of law must be scrutinized with extreme care.*<sup>87</sup>

Although the court concluded that the bar association was not entitled to immunity, it also determined that Dacey did not have a valid cause of action because the issuance of a final injunction by the state court was evidence that the bar association had had probable cause to proceed against him on the unauthorized practice of law claim.<sup>88</sup>

Norman Dacey certainly had an effect on the law,<sup>89</sup> although whether it was for good or evil continues to be a source of debate.<sup>90</sup> But

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87. *Id.* at 193 (emphasis added). Further, without passing on the allegations, the court noted that the inherent conflict of interest for the NYCLA in suppressing a potential competitor also weighed against treating it like a judge or a public prosecutor. *See id.* at 193-94. The court stated:

We merely note the inevitable presence of a possible conflict of interest between the purposes served by the Association and its conception of the public interest whenever it exercises its statutory power to initiate contempt proceedings under [the authorizing statute] and secures an injunction against the sale and distribution of a book critical of the profession.

*Id.* at 194.

88. *See id.* at 195.

89. Dacey proved to be a tenacious litigant in later years. He brought a libel suit against a lawyer who had written a review of *How To Avoid Probate!* in the March 1967 issue of the *Florida Bar Journal*. *See Dacey v. Fla. Bar, Inc.*, 427 F.2d 1292, 1293 (5th Cir. 1970). The author, a probate lawyer, conceded that he was "unhappy about the probable diminution of probate income to attorneys as a consequence of the acceptance of the ideas expressed in Dacey's book." *Id.* at 1294. Nevertheless, the court concluded that Dacey had become a public figure by thrusting himself into public controversy, and that the article's allegations that Dacey had been "convicted" of unauthorized practice did not amount to actual malice. *See id.* at 1295-96. Dacey's firm, Norman F. Dacey & Associates, located in Bridgeport, Connecticut, was censured by the Securities and Exchange Commission in 1970 for attempting to sell mutual fund shares without making proper disclosures, and Dacey retired from the financial field soon thereafter. He moved to Ireland in 1980, and later to England. *See A.J. Cook, Taxes; Expert at Eluding Probate Couldn't Escape Uncle Sam*, COM. APPEAL (Memphis), June 1, 1992, at B2. In a battle over back taxes, Dacey asserted that he had given up his American citizenship on January 1, 1981 by writing a letter to the State Department criticizing American foreign policy. *See id.* The Internal Revenue Service continued to insist that Dacey owed taxes on his royalties from the book, noting that no copy of the letter had been located and that Dacey had renewed his American passport as late as January 21, 1985. It successfully persuaded the Tax Court to order Dacey to pay \$224,697 in additional taxes, plus interest, for the years 1981-85, during which Dacey had received royalties totaling \$371,954 but had

what is the lesson of the Dacey story for lay providers of legal forms in cyberspace? First, Dacey's success in the marketplace is yet another example of how the lay public both mistrusts lawyers and wants low-cost solutions to its legal problems. Second, the reaction of the organized bar to Dacey's activities demonstrates the long-standing regulatory concerns about unauthorized practice of law, and how they sometimes mask less noble economic motivations. Third, the reaction of the courts is equally telling, both in the willingness of some courts to suppress the sale of legal information and in the concern other courts raise about First Amendment issues. Cyberspace document providers like *Desktop Lawyer* and *LegalZoom* are similar to Dacey's book in that they offer legal information to consumers, in writing, and do not necessarily involve personal interaction between live human beings. On the other hand, online legal document services provide far more detailed assistance to the consumer than an inanimate book like Dacey's can ever do. In particular, Dacey's book did not, and could not, make selections among various forms or fill in blanks based on a consumer's particular needs.

The litigation over Norman Dacey's best-seller was not the last salvo in the battle over nonlawyer advice-giving. As the next section will demonstrate, legal developments in the Seventies created new concern within the organized bar about the intrusion of lay people into areas formerly reserved to lawyers, and spawned a new series of litigation under the unauthorized practice statutes.

### III. DACEY'S PROGENY: REGULATING SCRIVENER SERVICES

Let us turn from Dacey's best-seller to a more prosaic form of legal information—the preparation of standardized legal forms. Although much of the law governing the applicability of unauthorized practice of law principles to the sale or preparation of legal forms emerged in the early 1970s, the basic approach has remained relatively constant. In general, most states have permitted nonlawyers to sell preprinted legal forms, and to provide some types of “scrivener” services, but have not

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paid no income taxes. *See id.* Dacey, the grandson of Irishmen, formally renounced his citizenship in Ireland in 1988. *See IRS Vanquishes Avoid Probate Author*, CHI. SUN-TIMES, Apr. 2, 1992, at 65. Dacey died in London on March 16, 1994. *See Lyons, supra* note 54. The last edition of his book had been published by Harper Collins in 1993 and was in its fifth edition at the time of his death.

90. *See* Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't Have to Think of England Anymore*, 62 ALB. L. REV. 543, 563 n.91 (1998). Dobris traces the “advent of trust mills selling revocable *inter vivos* trusts to old folks all over the country” to Dacey's original efforts in the mid-Sixties. *Id.* at 565.

permitted such lay people to provide any advice about what form to purchase or what information should be entered on the forms.<sup>91</sup> The distinction between serving as a scrivener and providing advice becomes murky, however, because of the difficulty inherent in preparing a form for someone without answering any question or offering an opinion.

The emergence of “no-fault” divorce laws in many states in the early Seventies spawned a new industry—the sale of so-called “divorce kits”—consisting of the forms necessary for couples to obtain a divorce without the assistance of a lawyer.<sup>92</sup> Inevitably, this activity received attention from the organized bar in many states, which took the position that the sale of these kits, or the preparation of these documents by nonlawyers, constituted the unauthorized practice of law.<sup>93</sup> The courts struggled to determine whether these activities could be characterized as law practice.

The Florida Bar had been an early enforcer of the unauthorized practice of law restrictions against lay document sellers. In *Florida Bar v. Stupica*,<sup>94</sup> the Florida Supreme Court had taken the position that the sale of legal forms by lay people was forbidden if the forms came accompanied by written instructions.<sup>95</sup> However, the hard line taken by Florida and other states<sup>96</sup> became more difficult to sustain when the United States Supreme Court began to scrutinize other restrictions on the practice of law, striking down minimum fee schedules in *Goldfarb v. Virginia State Bar*,<sup>97</sup> and reaffirming the right to pro se representation in *Faretta v. California*.<sup>98</sup>

The shift in approach to lay preparation of legal forms is reflected by the 1975 decision in *Oregon State Bar v. Gilchrist*.<sup>99</sup> In that case, the

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91. See, e.g., *Or. State Bar v. Gilchrist*, 538 P.2d 913, 916, 919 (Or. 1975) (en banc).

92. A typical divorce kit might have included the following: a petition for dissolution of the marriage, a summons, a marital settlement agreement, an order of default, an affidavit of nonmilitary service, a decree of dissolution of marriage, and a manual for divorce explaining how to complete the various forms. See *id.* at 914.

93. See, e.g., *id.*

94. 300 So. 2d 683 (Fla. 1974).

95. *Stupica* attempted to rely on the *Dacey* case, but the court explained that it did not follow that rationale. See *id.* at 685. Instead, the court asserted that, since the divorce kits contained “direct legal instructions and advice as to their use or application,” that this constituted “legal counselling,” and “direct legal advice as to how to proceed to secure a dissolution of the marriage relation.” *Id.* at 687. See also *Fla. Bar v. Am. Legal & Bus. Forms, Inc.*, 274 So. 2d 225, 227 (Fla. 1973) (“[I]t is in the filling out and use of such legal forms that legal advice is inextricably involved and that therein lies the danger of injury and damage to the public if not properly done in accordance with law.”).

96. See *Palmer v. Unauthorized Practice Comm.*, 438 S.W.2d 374, 377 (Tex. Civ. App. 1969).

97. 421 U.S. 773, 791-92 (1975).

98. 422 U.S. 806, 807 (1975).

99. 538 P.2d 913 (Or. 1975) (en banc).

Supreme Court of Oregon attempted to delineate the activities that lay people could engage in with respect to divorce kits.<sup>100</sup> It held that these kits could be marketed and sold without violating prohibitions against unauthorized practice of law, “so long as the defendants have no personal contact with their customers.”<sup>101</sup> The personal contact prohibited consisted of “consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms, or suggesting or advising how the forms should be used in solving the particular customer’s marital problems.”<sup>102</sup>

The Michigan Supreme Court followed a similar approach one year later in *State Bar v. Cramer*,<sup>103</sup> but not without debate. In that case, the lay person had not only sold divorce kits, but regularly met with her customers and prepared the documents for them.<sup>104</sup> Concerned about the potential overbreadth of a flat ban on this conduct, the court noted that individuals have the constitutional right to speak freely, to represent themselves, and to have privacy in their marital relationships.<sup>105</sup> The court reasoned that these rights would be adequately protected by the distinction drawn in *Gilchrist* between selling forms and advising customers on how to complete them, explaining: “There can be no serious challenge raised to this or any enterprise which is otherwise in compliance with those regulations applicable to products placed in the stream of commerce.”<sup>106</sup> Advice, on the other hand, was strictly prohibited: “Because defendant offers counsel in the form of professional guidance to persons seeking to extricate themselves from a legal relationship, the party represented, as well as the public in general, has a right to be assured that these interests are properly represented by members of the bar.”<sup>107</sup>

It is noteworthy that in *Cramer*, two justices of the Michigan Supreme Court would have gone farther and permitted the lay person to give advice in conjunction with the forms.<sup>108</sup> The Chief Justice dissented, asserting that the majority’s prohibition on giving advice was “unsound

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100. *See id.* at 914.

101. *Id.* at 916.

102. *Id.* at 919.

103. 249 N.W.2d 1 (Mich. 1976) (per curiam).

104. *See id.* at 2-3.

105. *See id.* at 7-8.

106. *Id.* at 9.

107. *Id.*

108. *See id.* at 10 (Kavanagh, C.J., concurring in part and dissenting in part); *id.* at 11 (Levin, J., concurring with Kavanagh’s opinion).

and counterproductive.”<sup>109</sup> Another justice objected on more pragmatic grounds, noting: “[T]he organized bar, which has not made available the minimal counseling which would enable a person to exercise his right of self-representation, cannot be heard to say that this service which it does not provide is the practice of law.”<sup>110</sup>

*Gilchrist* and *Cramer* reflected the change in position that many courts took during the Seventies and Eighties. Indeed, by 1978, Florida had revisited its ban on providing written instructions with legal kits in *Florida Bar v. Brumbaugh*.<sup>111</sup> Although the court reiterated its concern that “there is a danger that some published material might give false or misleading information,”<sup>112</sup> it limited its prior holdings, permitting the sale of “printed material purporting to explain legal practice and procedure to the public in general and . . . sample legal forms,” but continuing its ban on specific advice or assistance in preparing the forms.<sup>113</sup> Other courts also followed the approach of *Gilchrist* and *Cramer*, permitting lay people to sell legal forms for divorce, landlord-tenant relations, and other routine legal matters, and even to prepare them.<sup>114</sup> The general approach of these early cases was to preclude the lay scriveners from furnishing any kind of advice about how the forms ought to be completed.<sup>115</sup>

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109. *Id.* at 10 (Kavanagh, C.J., concurring in part and dissenting in part).

110. *Id.* at 12 (Levin, J., dissenting).

111. 355 So. 2d 1186 (Fla. 1978) (per curiam).

112. *Id.* at 1193.

113. *Id.* at 1194.

114. The cases are collected at Patricia Jean Lamkin, Annotation, *Sale of Books or Forms Designed to Enable Laymen to Achieve Legal Results Without Assistance of Attorney as Unauthorized Practice of Law*, 71 A.L.R.3d 1000 (1976). See, e.g., *State v. Hill*, 573 P.2d 1078 (Kan. 1978) (per curiam) (selling divorce kits, with accompanying audiotape, is not unauthorized practice of law because no personal legal advice is given); *In re Thompson*, 574 S.W.2d 365 (Mo. 1978) (en banc) (holding that the sale of divorce kits does not constitute unauthorized practice of law, but rather is similar to the sale of forms ordinarily prepared by real estate brokers). In *Hill*, the court determined that the defendant “may encourage customers to listen to the tape and/or buy the kit, but he has no attorney-client relationship with the customers.” *Hill*, 573 P.2d, at 1079. The *Hill* court also noted: “This is not, in any way, to mean that the product sold is found to be wholesome, harmless, adequate, worthwhile, useful, etc., but only that the defendant is not practicing law.” *Id.*

115. See *People v. Landlords Prof'l Servs.*, 264 Cal. Rptr. 548 (Ct. App. 1989). In *Landlords Professional Services*, the court stated that selling forms does not amount to the unauthorized practice of law:

if it made forms available for the client's use, filled the forms in at the specific direction of the client and filed and served those forms as directed by the client. Likewise, merely giving a client a manual, even a detailed one containing specific advice, for the preparation of an unlawful detainer action and the legal incidents of an eviction would not be the practice of law if the service did not personally advise the client with regard to his specific case.

Since the issue of lay preparation of legal documents first arose in the Seventies and early Eighties, various jurisdictions have continued to try to regulate the practice. The legality of scrivener services has come up repeatedly, with cases brought against document preparers in a variety of different contexts, including “living trust” documents,<sup>116</sup> preparation of documents by social workers,<sup>117</sup> forms for wills and estate planning,<sup>118</sup> mechanics’ liens,<sup>119</sup> law students giving advice,<sup>120</sup> filling out

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*Id.* at 553; *see, e.g.*, *Pulse v. N. Am. Land Title Co.*, 707 P.2d 1105, 1109 (Mont. 1985) (holding that preparing or filling in blanks on legal forms, particularly real estate forms, constitutes the practice of law); *N.J. State Bar Ass’n v. Divorce Ctr. of Atl. County*, 477 A.2d 415, 422 (N.J. Super. Ct. Ch. Div. 1984) (holding that forms may be sold, however “rendering of advice or answering questions regarding the manner in which the form is to be filled out will be prohibited” as the court found that advice had often been inaccurate or fraudulent); *People v. Divorce Associated & Publ’g Ltd.*, 407 N.Y.S.2d 142 (Sup. Ct. 1978); *Sup. Ct. Comm’n on the Unauthorized Practice of Law*, Op. 20, 100 N.J.L.J. 893 (1977).

116. *See Fla. Bar v. Am. Senior Citizens Alliance, Inc.*, 689 So. 2d 255 (Fla. 1997) (per curiam). The court in *American Senior Citizens Alliance* held that:

Under the untenable guise of “gathering information,” nonlawyer ASCA employees answered specific legal questions; determined the appropriateness of a living trust based on a customer’s particular needs and circumstances; assembled, drafted and executed the documents; and funded the living trusts in direct violation of our clear admonitions to the contrary in *Brumbaugh* and *Living Trusts*. The particularized legal advice and services rendered by ASCA’s nonlawyer employees clearly constituted the unlicensed practice of law.

*Id.* at 259; *see, e.g.*, *In re Mid-America Living Trust Assocs.*, 927 S.W.2d 855, 860 (Mo. 1996) (en banc) (“All courts that have addressed the issue have held that non-lawyer trust salespeople render legal advice and engage in the unauthorized practice of law when they recommend living trusts to specific individuals.”); *In re Morin*, 878 P.2d 393 (Or. 1994) (per curiam) (holding that the defendant lawyer improperly assisted nonlawyers to provide specific legal advice in living trust seminars). *See generally* *Lopata*, *supra* note 4.

117. *See In re Darlene C.*, 1998 Conn. Super. LEXIS 2 (Conn. Super. Ct. Jan. 2, 1998) (asserting that preparation of documents by social workers for termination of parental rights must cease because it is unauthorized practice of law), *rev’d in part*, 717 A.2d 1242 (Conn. 1998) (finding that the statute authorized actions). *See generally* Anthony Bertelli, *Should Social Workers Engage in The Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15 (1998).

118. *See, e.g.*, *Fadia v. Unauthorized Practice of Law Comm.*, 830 S.W.2d 162, 163 (Tex. App. 1992); *Palmer v. Unauthorized Practice Comm.*, 438 S.W.2d 374, 375 (Tex. Civ. App. 1969).

119. *See generally* *Crain v. Unauthorized Practice of Law Comm.*, 11 S.W.3d 328 (Tex. App. 1999). The court, in discussing the activities of Crain and Credit Management Consulting Company (“CMCC”) with respect to the preparation and filing of legal instruments affecting real property, stated:

The preparation of these documents involves the use of legal skill and knowledge. In preparing these documents, CMCC impliedly advises its clients of their legal rights and entitlement under the law. CMCC also prepares and sends letters to property owners interpreting home owner insurance policy provisions and advising them to make a claim against their title insurance policy in furtherance of perfection of the legal rights of its clients. When CMCC sends such letters to home owners, it impliedly advises them that they do in fact have legal rights and should make a claim. CMCC engages in these tactics to procure settlements with insurance companies in exchange for release of liens.

forms for real estate purposes,<sup>121</sup> immigration law forms,<sup>122</sup> divorce,<sup>123</sup> and other situations.<sup>124</sup> The cases generally follow the traditional distinction between simply typing information provided by the consumer without alteration or advice, which is permitted, and making changes or suggestions based on the information provided, which is prohibited. In general, the cases also permit generic written instructions to accompany the materials. Although some have criticized the distinction between typing and advising as formalistic or unworkable, it remains the benchmark for determining whether a lay scrivener has been involved in the unauthorized practice of law.<sup>125</sup>

Indeed, in one state, the dividing line is even more stringent. Texas case law restricts not only the providing of individualized legal advice, but the sale of written documents that purport to give general advice about the appropriate course of action. In 1969, in *Palmer v. Unauthorized Practice Committee*,<sup>126</sup> the court enjoined the sale of will forms by a lay person, advancing the following rationale:

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Settling claims secures an individual's legal rights with respect to such claims, and involves the use of legal skill and knowledge.

*Id.* at 333.

120. See Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 91-137 (1991) (discussing the ethical consequences of a third-year law student acting on behalf of an attorney at a deposition).

121. See *Pulse v. N. Am. Land Title Co.*, 707 P.2d 1105, 1109 (Mont. 1985) (filling in blanks in forms for instruments dealing with land deemed the practice of law); see also Joyce Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says “Cease Fire!”*, 31 CONN. L. REV. 423 (1999).

122. See *Or. Bar v. Ortiz*, 713 P.2d 1068, 1070-71 (Or. Ct. App. 1986) (holding that advising customer about what benefits are available under immigration law, how to obtain benefits, and what forms to use is the practice of law).

123. See *United States v. Hardy*, 681 F. Supp. 1326, 1328-29 (N.D. Ill. 1988) (“[C]ommon sense dictates that the drafting of even a simple complaint or an uncomplicated petition for dissolution of marriage requires at least some degree of legal knowledge or skill.”); *Statewide Grievance Comm. v. Harris*, 683 A.2d 1362, 1362 (Conn. 1996) (enjoining nonlawyer divorce document preparation service); cf. *Nowicki v. Voss*, No. 94-2919, 1996 U.S. App. LEXIS 30369, at \*1-2, 13 (7th Cir. Nov. 20, 1996) (precluding paralegal and reporter for Divorced Dads Against Discrimination from representing another member in divorce proceeding, over constitutional objection).

124. See *Statewide Grievance Comm. v. Patton*, 683 A.2d 1359, 1360-61 (Conn. 1996) (enjoining service that prepared divorce, bankruptcy, corporate, and estate documents and stating that “the preparation of legal documents is commonly understood to be the practice of law”).

125. See generally Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990) (discussing developments in the lay practice of law); Alicia R. Bromfield, Comment, *The Florida Bar v. American Senior Citizen Alliance: Is “Gathering the Necessary Information” the Unlicensed Practice of Law?*, 12 QUINNIPIAC PROB. L.J. 523 (1998) (analyzing the possible ramifications of the court's failure to define “gathering the necessary information” by nonlawyers).

126. 438 S.W.2d 374 (Tex. Civ. App. 1969).

A will “form” as distributed by defendants is almost a will itself. The “form” purports to make specific testamentary bequests in the planning of estates of potential decedents. By reading defendants’ advertisements, by reading the will form, and by reading the definitions that are attached, the unsuspecting layman is led to believe that defendants’ will “form” is in fact only a form and that all testamentary dispositions may be thus standardized. The assumption is misleading and certainly will lead to unfortunate consequences for any layman who might rely upon the “form” and the definitions attached.<sup>127</sup>

Lest this case be considered to be a relic of the past, consider the 1992 opinion by the Texas Court of Appeals in *Fadia v. Unauthorized Practice of Law Committee*.<sup>128</sup> In that case, the court enjoined the sale of a book entitled *You and Your Will: A Do-It-Yourself Manual*.<sup>129</sup> The court reasoned:

Because a will secures legal rights and involves the giving of advice requiring the use of legal skill or knowledge, the preparation of a will involves the practice of law. No phase of law requires a more profound learning on the subject of trusts, powers, taxation law, legal and equitable estates, and perpetuities than preparing a will. An unlicensed person, untrained in such complex legal subjects, cannot perform these duties for someone else.<sup>130</sup>

Apparently untroubled by the fact that this was a book and not a live human being, the court took the position that this was not “simple layman’s advice,” but rather “the practice of law” because Fadia “purports to advise a layperson on how to draft a will,” and “[r]eliance on his forms leads to a false sense of security and often unfortunate circumstances for the general public.”<sup>131</sup> As we shall see in the next section, the stringency of Texas case law had a dramatic effect on the battle over the sale of will preparation software just a few years later.

For an example of possible regulatory reaction to the proliferation of scrivener sites, we need look no farther than the Texas litigation over a CD-ROM called *Quicken Family Lawyer*. The battle over that CD-ROM, which resulted in an injunction from a federal district court

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127. *Id.* at 376.

128. 830 S.W.2d 162 (Tex. App. 1992).

129. The book apparently included “information on how to prepare a will,” as well as “fill-in-the-blank forms.” *Id.* at 163.

130. *Id.* at 164 (citations omitted). The court rejected the invitation to overrule *Palmer* as a request to “legislate from the bench.” *Id.*

131. *Id.* at 165. The court sidestepped the First Amendment issue raised by Fadia on the ground that he had waived his right to complain by not presenting evidence at the summary judgment phase of his case. *See id.* at 164-65.

banning its sale in the state of Texas, followed by an intense lobbying effort that succeeded in amending the Texas unauthorized practice of law statute, may be a foreshadowing of what lies ahead for those who seek to regulate scriveners in cyberspace.

#### IV. THE CD-ROM AS SCRIVENER: THE CASE OF *QUICKEN FAMILY LAWYER*

In 1998, the Unauthorized Practice of Law Committee of the Texas Bar (“UPLC”) sued Parsons Technology,<sup>132</sup> the publisher of a number of popular software packages, including the CD-ROM *Quicken Family Lawyer*.<sup>133</sup> *Quicken Family Lawyer* operated on a principle similar to that used by online document providers. The software offered over one hundred different legal forms, including leases, premarital agreements, and wills, and contained instructions on how to fill them out.<sup>134</sup> The software prompted the user for certain information, and then marked particular forms as appropriate based on the responses (such as the state of residence).<sup>135</sup> If the user decided to review a particular legal form, the software again had a series of prompts to assist in filling in the blanks, and altered the form accordingly.<sup>136</sup> The software also contained a feature entitled “Ask Arthur Miller,” which permitted the user to select a general topic and then a specific question, and obtain either an answer in text or a sound and video image of Harvard Law School professor Arthur Miller answering the question.<sup>137</sup> The Committee contended that the sale of this software violated the state’s prohibition against the unauthorized practice of law. The Texas unauthorized practice of law statute in effect at the time was similar to provisions in other states. Specifically, section 81.101 of the *Texas Government Code* defined the practice of law as follows:

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132. The Unauthorized Practice of Law Committee of the Texas Bar (“UPLC”), made up of six Texas lawyers and three lay citizens appointed by the Supreme Court of Texas, has the responsibility for enforcing Texas’ unauthorized practice of law statute. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. 3:97-CV-2859-H, 1999 U.S. Dist. LEXIS 813, at \*2 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999).

133. Among its products are Quicken Financial Software, Turbo Tax, and Webster’s Talking Dictionary. See *id.* at \*3.

134. See *id.*

135. See *id.* at \*5.

136. See *id.* at \*6.

137. See *id.* at \*7. The opinion admits that none of this information is tailored to a set of specific facts, but rather “answers a number of predetermined frequently asked legal questions in the general topics of estate planning, family and personal, powers of attorney, health and medical, real estate, employment, financial, corporate, consumer and credit, and common questions.” *Id.* at \*7 n.4.

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

(b) The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.<sup>138</sup>

On January 22, 1999, the district court adopted the reasoning of the UPLC, and held that the sale of this computer software in Texas violated its unauthorized practice of law statute.<sup>139</sup> Relying heavily on Texas precedent,<sup>140</sup> Judge Barefoot Sanders concluded that the software “purports to select” the appropriate document, “customizes the documents,” and “creates an air of reliability about the documents, which increases the likelihood that an individual user will be misled into relying on them.”<sup>141</sup> The fact that the product also contained a disclaimer had little influence on the district court.<sup>142</sup> In short, Judge Sanders concluded that:

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138. TEX. GOV'T CODE ANN. § 81.101(a)-(b) (Vernon Supp. 2002) (emphasis added).

139. See *Parsons Tech.*, 1999 U.S. Dist. LEXIS 813, at \*18.

140. The UPLC contended that *Quicken Family Lawyer* acts as a “high tech lawyer by interacting with its “client” while preparing legal instruments, giving legal advice, and suggesting legal instruments that should be employed by the user.” *Id.* at \*13-14. As noted in part III, *supra*, at least two Texas cases had previously employed an expansive reading of the “practice of law.” In the 1969 case of *Palmer v. Unauthorized Practice of Law Committee*, 438 S.W.2d 374 (Tex. Civ. App. 1969), the court had held that the sale of will forms with instructions constituted the unauthorized practice of law. In the more recent case of *Fadia v. Unauthorized Practice of Law Committee*, 830 S.W.2d 162 (Tex. App. 1992), the court enjoined sale of a do-it-yourself will manual, reaffirming its earlier conclusion in *Palmer* that no personal interaction between a putative lawyer and a putative client was required for a finding of unauthorized practice of law. See *id.* at 164.

141. *Parsons Tech.*, 1999 U.S. Dist. LEXIS 813, at \*18.

142. See *id.* at \*18-19. The disclaimer read as follows:

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

*Id.* at \*4-5. The court criticized the disclaimer as not diminishing the “false impression” given by the software, explaining: “This disclaimer does not appear anywhere on QFL's packaging.

[The software] goes beyond merely instructing someone how to fill in a blank form. While no single one of QFL's acts, in and of itself, may constitute the practice of law, taken as a whole Parsons, through QFL, has gone beyond publishing a sample form book with instructions, and has ventured into the unauthorized practice of law.<sup>143</sup>

The court also rejected the contention that the statute itself requires personal contact between a putative lawyer and a putative client, reading paragraph (b) of the statute to give a court ample authority to conclude "that services provided to the public as a whole, as opposed to a singular client, qualify as the practice of law."<sup>144</sup> As a federal court sitting in diversity, it also declined the invitation to construe the statute to require such a relationship.<sup>145</sup> Finally, although it called the question "close," the court rejected Parsons's claims that the application of the Texas unauthorized practice of law statute to its software violated the First Amendment, explaining that the statute "does not 'substantially burden' more speech than necessary, and that the government's interest would be achieved less effectively absent the regulation."<sup>146</sup> It candidly explained:

Absent the regulation, as it is being applied in this case, the State's ability to combat the unauthorized practice of law in the computer age would be hindered. The State possesses an interest in protecting the uninformed and unwary from overly-simplistic legal advice. The UPLC does not seek to prevent the simple provision of information concerning legal rights; rather, it seeks to prevent the citizens of Texas from being lulled into a false sense of security that if they use QFL they will have a "legally valid" document that's "tailored to [their] situation" and "best meets their needs." If the UPLC is prevented from prosecuting Parsons, the State's interests in preventing those who are not authorized to practice law from giving legal advice would be less effectively achieved.<sup>147</sup>

The court, therefore, enjoined the sale of the CD-ROM within the state of Texas.<sup>148</sup>

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Additionally, it does not appear on subsequent uses of the program unless the user actively accesses the 'Help' pull-down menu at the top of the screen and then selects 'Disclaimer.'" *Id.* at \*5.

143. *Id.* at \*19.

144. *Id.* at \*20.

145. The court noted that this very argument had been made and rejected in *Fadia*. The court indicated that it was likely that the Texas Supreme Court would follow *Fadia*, and that it was not inclined to "impose a new interpretation of a state statute which has been on the books in its current form since 1987, and some form since 1939." *Id.* at \*20-21.

146. *Id.* at \*29.

147. *Id.* at \*29-30.

148. *See id.* at \*32-33.

The district court's opinion sparked immediate controversy.<sup>149</sup> The attorney for the UPLC, Mark Ticer, defended the opinion, explaining: "We're just the first state that has moved on this. Parson's forms are inherently misleading . . . We think people should have access to legal information . . . but if I didn't intercede on this until after people were ripped off, I'd be criticized."<sup>150</sup> However, a vigorous lobbying campaign persuaded the Texas State Legislature to amend its unauthorized practice of law statute to permit software like *Quicken Family Lawyer*.<sup>151</sup> In response, the United States Court of Appeals for the Fifth Circuit vacated and remanded the district court's opinion in *Parsons*.<sup>152</sup>

The particular battle between a group of Texas lawyers and a software manufacturer may well be over. But the larger war over unauthorized practice of law remains anything but settled.<sup>153</sup> It is not difficult to imagine that similar challenges may be brought in the future to online scriveners or legal software manufacturers, particularly if these entities manage to capture any significant share of the market for routine

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149. See, e.g., Mark Curriden, *Bar Exam: State Lawyers Sharply Divided on Whether Ban Should Be Lifted on Do-It-Yourself Legal Software*, DALLAS MORNING NEWS, Apr. 21, 1999, at 1D; Wendy R. Leibowitz, *Lawyers, \$15.95 a Box*, NAT'L L.J., Feb. 22, 1999, at A18 (describing the controversy); Matt Richtel, *Texas Committee Fights Spread of Electronic Legal Advice*, CYBER L.J., Sept. 3, 1999. The Committee reportedly received the 1999 Muzzle Award from the Thomas Jefferson Center for the Protection of Free Expression. See Polly Ross Hughes, *Bill to Lay Down the Law on Self-Help Software*, HOUSTON CHRON., June 13, 1999, at 1.

150. Leibowitz, *supra* note 149.

151. See Julee C. Fischer, Note, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 132 n.84 (2000). The amendment had almost unanimous support in the Texas Legislature, passing the House by a vote of 138-2 and the Senate by a vote of 26-4. See Hughes, *supra* note 149. As ultimately adopted, the amendment to section 81.101 read as follows: "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney." H.B. 1507, 76th Leg., Reg. Sess. (Tex. 1999), available at <http://wwwcapitol.state.tx.us/tlo/76R/billtext/HB01507F.HTM> (last visited Mar. 20, 2002). *Quicken's* disclaimer notes: "Because we cannot decide which forms are best for your individual situation, you must use your own judgment and, to the extent you believe appropriate, the assistance of a lawyer." Richtel, *supra* note 149.

152. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956 (5th Cir. 1999) (per curiam). For general discussions of this litigation, see William H. Brown, Comment, *Legal Software and the Unauthorized Practice of Law: Protection or Protectionism*, 36 CAL. W. L. REV. 157 (1999); Steve French, Note, *When Public Policies Collide: Legal "Self-Help" Software and the Unauthorized Practice of Law*, 27 RUTGERS COMPUTER & TECH. L.J. 93 (2001); Fischer, *supra* note 151; Marie A. Vida, Comment, *Legality of Will-Creating Software: Is the Sale of Computer Software to Assist in Drafting Will Documents Considered the Unauthorized Practice of Law?*, 41 SANTA CLARA L. REV. 231 (2000).

153. Indeed, some opponents of the measure argued that it violated principles of separation of powers for the legislature to define the practice of law, but that contention apparently has not been pressed in court since its passage. See Hughes, *supra* note 149.

legal documents.<sup>154</sup> Mark Ticer argues: “Ultimately, the kinds of mistakes and problems you’ll see won’t manifest themselves for years down the line,” until wills done with do-it-yourself software are contested in court.<sup>155</sup>

Does the Parsons Technology litigation effectively resolve the question of scriveners in cyberspace? One might argue that the case demonstrates that the sale of automated document preparation is unauthorized practice under traditional principles, since the Texas Legislature found it necessary to amend its unauthorized practice of law statute to exclude this kind of activity. On the other hand, Judge Sanders’s reasoning is not without controversy, particularly because he perceived no distinction between advice provided by a live person and a CD-ROM.<sup>156</sup> Indeed, the district court’s opinion seems to expand principles of unauthorized practice beyond their traditional boundaries, by banning the sale of generic, nonspecific, written instructions accompanying legal forms.

There is one additional area in which the debate over lay legal document preparation has been especially significant because it has received congressional attention. Although it has received little attention outside the specialized world of the bankruptcy courts, the proliferation of lay bankruptcy petition preparers has generated a federal statute and a substantial amount of litigation. This body of law provides additional insight into the question of unauthorized practice by scriveners, because some of these cases specifically address the use of computer software to prepare documents for lay people. But many of these cases also reflect some of the risks inherent in deregulating the preparation of legal documents, as many bankruptcy judges have expressed concern about

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154. Nolo Press, perhaps the best-known publisher of self-help legal publications and software, had been the subject of investigation by the same Texas committee since 1998. *See* Richtel, *supra* note 149. As of September 21, 1999, that investigation had been terminated in response to the legislative amendment on unauthorized practice of law. *See* Letter from Stephen A. Moyik, Assistant Disciplinary Counsel, Unauthorized Practice of Law Committee, to Peter D. Kennedy, Counsel to Nolo Press (Sept. 21, 1999), available at [www.nolo.com/texas/fromUPL.html](http://www.nolo.com/texas/fromUPL.html) (last visited Feb. 12, 2002). There are signs that New Jersey’s Unauthorized Practice Committee may be investigating a grievance filed by the New Jersey State Bar Association against some Internet legal information providers, but the grievance and investigation have as of yet been kept confidential. *See* Robert G. Seidenstein, *Online Forms; Crossing The Line Into Legal Advice?*, N.J. LAW., Apr. 23, 2001, at 1.

155. Richtel, *supra* note 149; *see also* Mark A. Ticer, *Self-Helpless*, RECORDER, Mar. 10, 1999, at 5 (referring to “radical opponents” of the opinion).

156. *See* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. 3:97-CV-2859-H, 1999 U.S. Dist LEXIS 813, at \*19-21 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999).

the quality of the legal documents prepared by lay practitioners. It is to this area of law that I now turn.

#### V. SCRIVENERS IN BANKRUPTCY COURT: THE CONTROVERSY OVER “BANKRUPTCY PETITION PREPARERS”

In 1994, as part of a comprehensive overhaul of federal bankruptcy law, Congress amended the Bankruptcy Code to regulate so-called “bankruptcy petition preparers” who were said to be preying on poor, uneducated debtors and taking advantage of their plight.<sup>157</sup> The legislative history to this amendment reflects the concern that prompted this regulation:

[Section 110] adds a new section . . . to create standards and penalties pertaining to bankruptcy petition preparers. Bankruptcy petition preparers not employed or supervised by any attorney have proliferated across the country. *While it is permissible for a petition preparer to provide services solely limited to typing, far too many of them also attempt to provide legal advice and legal services to debtors.* These preparers often lack the necessary legal training and ethics regulation to provide such services in an adequate and appropriate manner. These services may take unfair advantage of persons who are ignorant of their rights both inside and outside the bankruptcy system.<sup>158</sup>

The new legal provision, 11 U.S.C. § 110, sets forth required standards and penalties for petition preparers.<sup>159</sup> Specifically, § 110 prohibits petition preparers from executing documents on behalf of debtors,<sup>160</sup> using the term “legal” in their advertisements,<sup>161</sup> or receiving payment from the debtor for court fees in connection with the petition.<sup>162</sup> This law also imposes liability on petition preparers for negligent

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157. Article I, section VIII of the United States Constitution gives Congress the sole power to enact bankruptcy laws. *See* U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”).

158. H.R. REP. No. 103-835, at 56 (1994) (emphasis added), *reprinted in* 1994 U.S.C.A.N. 3340, 3365; *see also In re Hobbs*, 213 B.R. 207, 210-11 (Bankr. D. Me. 1997) (discussing legislative history).

159. *See* 11 U.S.C. § 110 (2000).

160. *See id.* § 110(e)(1).

161. *See id.* § 110(f)(1) (“A bankruptcy petition preparer shall not use the word ‘legal’ or any similar term in any advertisements, or advertise under any category that includes the word ‘legal’ or any similar term.”). For cases enforcing this provision, *see*, for example, *In re Farness*, 244 B.R. 464, 468-69 (Bankr. D. Idaho 2000), and *In re Wagner*, 241 B.R. 112, 121 (Bankr. E.D. Pa. 1999).

162. *See* 11 U.S.C. § 110(g)(1).

preparation of bankruptcy forms,<sup>163</sup> and subjects fees received from preparers to review and limitation if they are excessive.<sup>164</sup> Section 110 also specifically addresses the issue of unauthorized practice of law, stating: “Nothing in this section shall be construed to permit activities that are otherwise prohibited by law, including rules and laws that prohibit the unauthorized practice of law.”<sup>165</sup>

Section 110 was the subject of some controversy. Critics assailed the amendment, alleging that it was nothing but an attempt by lawyers to protect a lucrative legal market.<sup>166</sup> Nevertheless, bankruptcy courts believed it was a method to protect uneducated consumers.<sup>167</sup>

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163. See *id.* § 110(i)(1) This section states:

If . . . a bankruptcy petition preparer violates this section or commits any fraudulent, unfair, or deceptive act, the bankruptcy court shall certify that fact to the district court, and the district court, on motion of the debtor, the trustee, or a creditor and after a hearing, shall order the bankruptcy petition preparer to pay to the debtor—(A) the debtor’s actual damages; (B) the greater of—(i) \$2,000; or (ii) twice the amount paid by the debtor to the bankruptcy petition preparer for the preparer’s services; and (C) reasonable attorneys’ fees and costs.

*Id.*; see also *id.* § 110(j)(2)(A) (imposing civil liability if a bankruptcy petition preparer has misrepresented experience or education, or engaged in “any other fraudulent, unfair, or deceptive conduct”).

164. See *id.* § 110(h)(2) (“The court shall disallow and order the immediate turnover to the bankruptcy trustee of any fee . . . found to be in excess of the value of services rendered for the documents prepared.”).

165. *Id.* § 110(k).

166. See, e.g., Joseph A. Guzinski et al., *Section 110 and the Problem of Petition Preparers*, 1997 AM. BANKR. INST. J., available at 1997 ABI JNL LEXIS 119, at \*6 (describing how critics argued before the National Bankruptcy Review Commission that “lawyers, judges and the U.S. Trustees have used this provision to force bankruptcy petition preparers out of business and to protect the pocketbooks of the lawyers”); see also Susan Adams, *The Guild Fights Back*, FORBES, Nov. 18, 1996, at 102 (“[B]ankruptcy trustees, lawyers and judges are working hard to protect the coin they receive from the lucrative personal bankruptcy market . . . [T]o the bankruptcy bar’s dismay, paralegals . . . are chipping away at the fee structure, using inexpensive offices and the same legal software many law firms use, to underprice the full-price lawyers.”), quoted in Guzinski, *supra*, at \*6-7.

167. The District Court for the Central District of California, known as the “bankruptcy capital” of the country with twenty-one bankruptcy judges in 1996, explained its frustration with petition preparers who had “taken unconscionable advantage of bankruptcy debtors . . . [including] incompetent preparation of papers, misleading and/or false advertising, charging excessive fees and other false and deceptive practices.” See *Interpreting 11 U.S.C. § 110 Which Governs Conduct of Non-Lawyer Bankruptcy Petition Preparers and Delineating the Relationship, Powers and Functions of the Bankruptcy Court and the District Court Under the Statute*, 198 B.R. 604, 606 (C.D. Cal. Mar. 6, 1996). “The statute is intended, and in this court will operate, as a consumer protection device, not as a restraint on competition.” *In re Moore*, 232 B.R. 1, 6 (Bankr. D. Me. 1999); see *In re Fraga*, 210 B.R. 812, 818-19 (B.A.P. 9th Cir. 1997); *In re Rausch*, 213 B.R. 364, 369 (D. Nev. 1997); *In re Hobbs*, 213 B.R. 207, 210-11 (Bankr. D. Me. 1997); *In re Hartman*, 208 B.R. 768, 776 (Bankr. D. Mass. 1997).

During the seven years since § 110 became law, bankruptcy courts have repeatedly attempted to define the conduct that is permissible for lay petition providers. Generally, the trigger for sanctions has been a finding by the bankruptcy court that the bankruptcy petition preparer provided some type of legal advice to the debtor.<sup>168</sup> In some cases, however, the court has imposed sanctions based on the sale of forms or other written information, regardless of whether the forms were tailored to the specific factual circumstances of the debtor.<sup>169</sup>

A number of bankruptcy courts have issued injunctions banning bankruptcy petition preparers from engaging in the unauthorized practice of law, based on the way they prepared legal forms. The particular conduct said to constitute legal advice is ordinarily the selection of which exemptions to be claimed, or the determination of how to categorize certain debts.<sup>170</sup> Several cases address the use of computer software to prepare documents for consumers. A typical case is *In re Wagner*,<sup>171</sup> in which the bankruptcy petition preparer routinely selected exemptions to be taken by Chapter 7 debtors, determined how debts were to be categorized, and made “other important legal decisions” for debtors.<sup>172</sup> The court identified a variety of errors made in the selection and categorization of information, and also found that the bankruptcy petition preparer had violated prior orders to cease and had persisted in using the misleading title “Esquire” in his advertising.<sup>173</sup> In response to the bankruptcy petition preparer’s claim that he did nothing but “enter[] the information provided me by the [d]ebtor on the computer,”<sup>174</sup> the court responded by quoting the Bankruptcy Court for the Southern District of California in *In re Kaitangian*:

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168. See, e.g., *In re Moore*, 232 B.R. 1, 7-8 (Bankr. D. Me. 1999); *In re Hobbs*, 213 B.R. at 218.

169. Although bankruptcy proceedings are governed by federal law, bankruptcy courts look to state law when determining whether there has been unauthorized practice of law. See, e.g., *In re Stacy*, 193 B.R. 31, 38 (Bankr. D. Or. 1996).

170. These cases often involve other fraudulent conduct. See *In re Ellingson*, 230 B.R. 426, 435 (Bankr. D. Mont. 1999) (finding unauthorized practice of law where paralegal not only gave advice, but instructed customers to lie to court if asked about her role); *In re Stone*, 166 B.R. 269, 269, 275 (Bankr. W.D. Pa. 1994) (discussing situation where a nonlawyer associated with an attorney to circumvent a prior order).

171. 241 B.R. 112 (Bankr. E.D. Pa. 1999).

172. See *id.* at 114.

173. See *id.* at 119. As to the title “Esquire,” the court noted that it was “in our experience . . . used exclusively by attorneys, [which] in itself appears to constitute a violation of this statute.” *Id.* at 115.

174. *Id.* at 116.

The Court finds that [the Respondents'] contention that the Bankruptcy Specialty Software "does it all" is disingenuous. Plugging in solicited information from questionnaires and personal interviews to a prepackaged bankruptcy software program constitutes the unauthorized practice of law. Moreover, advising of available exemptions from which to choose, or actually choosing an exemption for the debtor with no explanation, requires the exercise of legal judgment beyond the capacity and knowledge of lay persons.<sup>175</sup>

A similar recent case is *In re Moffett*,<sup>176</sup> where the court held that a lay bankruptcy petition preparer had engaged in the unauthorized practice of law by advising her customers about what exemptions to claim, and by using a questionnaire from the clients as the basis for what to type into a computer program, because "transferring information from the questionnaire to the official bankruptcy forms invariably will require some legal judgment. This Court has no problem with [the lay preparer] using a computer program, but she is only permitted to receive information from potential debtors on official bankruptcy forms."<sup>177</sup>

A number of other courts have taken a similar approach to the use of software.<sup>178</sup> In the case of *In re McDaniel*,<sup>179</sup> the court found

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175. *Id.* at 119 (quoting *In re Kaitangian*, 218 B.R. 102, 110 (Bankr. S.D. Cal. 1998)). Similar is *In re Stacy*, 193 B.R. 31, 38-39 (Bankr. D. Or. 1996), where the court relied on expert testimony to conclude that to engage in the following activities constituted unauthorized practice of law in bankruptcy court:

- (1) suggest values for personal property if those values are based on a statutory amount;
- (2) advise a customer whether to include personal property on bankruptcy schedules;
- (3) suggest to a debtor to schedule a car that he or she intends to buy in the future;
- (4) suggest exemptions; (5) submit a letter to the court objecting to a proposed dismissal;
- (6) advise a customer to tell creditors that the nonlawyer is a lawyer; (7) advise a customer not to make payments to creditors in the context of a bankruptcy; (8) advise someone to file a Chapter 13 case instead of a Chapter 7 case because a student loan would not be discharged in a Chapter 7; (9) recommend that a debtor file under one particular chapter rather than another; (10) prepare a Chapter 13 plan; (11) classify debts; and (12) advise regarding the recovery of a tax refund.

*Id.* at 39.

176. 263 B.R. 805 (Bankr. W.D. Ky. 2001).

177. *Id.* at 815.

178. *See, e.g., In re Farness*, 244 B.R. 464, 472 (Bankr. D. Idaho 2000). The court reasoned, with respect to the defendant petition preparer, that:

He is not saved by his use of preprinted bankruptcy forms or bankruptcy software which automatically placed the information he solicited from the Debtors' into the appropriate schedule. [The lay preparer's] approach requires debtors to rely on his judgment as to the forms required to successfully file and prosecute a bankruptcy case, his use of computer software to ensure that information is correctly disclosed, and his resources as to what exemptions were available and the legal authorities supporting those claims.

*Id.* at 472; *see also In re Bradshaw*, 233 B.R. 315, 330-31 (Bankr. D.N.J. 1999) (observing that "defendants' entire enterprise was based upon the unauthorized practice of law," because they

unauthorized practice of law by a lay petition preparer that used commercial computer programs to prepare bankruptcy petitions. The court described his transgression as follows:

[The lay preparer] tells his “clients” that he does not practice law, but he then proceeds to give them legal advice. He asserts that all he does is pass along to them information which is provided by the courts, which is in the Bankruptcy Code, or which is in published bankruptcy materials. He states that his clients could get the same information at a public library. But [he] does not give information; he gives advice. He applies the statutes, rules, and information from publications to the facts of the particular case. He selected how creditors would be treated in the case, he gave advice concerning reaffirmations, and he counseled with the McDaniels concerning various matters, including the claiming of exemptions.<sup>180</sup>

In addition to these cases, some courts have imposed penalties under § 110 merely for selling forms or other written materials to debtors. It merits noting that some of these decisions relied on the broad power granted under § 110 to control fees charged to debtors, rather than on specific findings that the bankruptcy petition preparer had engaged in unauthorized practice of law. Nevertheless, the cases reflect judicial concern with the possibility that lay people might be victimized by incorrect or fraudulent legal information.

The Bankruptcy Court for the Eastern District of Pennsylvania has been particularly active in this area. In its decision in *In re Campanella*,<sup>181</sup> for example, the court enjoined the operations of the “Divorce and Bankruptcy Center” (“Center”), operated by a nonlawyer, which sold “bankruptcy kits” consisting of written instructions for filing bankruptcy.<sup>182</sup> The operator of the Center asserted that official bankruptcy forms were “purposefully devised by lawyers to be incomprehensible to lay persons and that the mysteries of the forms could be unlocked by the use of his kits, the text of which he wrote himself, allegedly after consultation with lawyers.”<sup>183</sup> Moreover, his kits

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explained the differences between Chapters 7 and 13, defined legal terms, solicited financial information from their customers to prepare their schedules, prepared motions for customers, and advised them which exemptions to take, etc).

179. 232 B.R. 674 (Bankr. N.D. Tex. 1999).

180. *Id.* at 678-79.

181. 207 B.R. 435 (Bankr. E.D. Pa. 1997).

182. The Divorce Bankruptcy Center (“Center”) purported to be providers of “do-it-yourself” kits, and denied that it provided legal advice or even typing services for the forms. *See Campanella*, 207 B.R. at 437.

183. *Id.* at 438.

included some disclaimers, purporting to warn debtors that they should hire lawyers if their bankruptcy petitions were “complicated.”<sup>184</sup> Although the court detailed a myriad of inaccuracies and falsehoods contained in the bankruptcy kits, it noted that § 110 did not reach the use of bankruptcy kits when the petitions were prepared by the debtors and not by third parties.<sup>185</sup> Thus, it had to determine whether the Center had engaged in the unauthorized practice of law.<sup>186</sup>

The court recognized that “[t]he Pennsylvania courts have understandably been unable to specifically define the practice of law, except to say that it is more than mere appearances in court and the conduct of litigation and that it involves the application of legal knowledge and technique.”<sup>187</sup> It instead determined that unauthorized practice of law is implicated “whenever and wherever the services require legal knowledge, training, skill, and ability beyond those possessed by the average man.”<sup>188</sup> Thus, the court stated that “it is clear that the preparation of pleadings and other types of legal papers and giving of advice in legal matters constitutes the practice of law, because all of these activities require a familiarity with legal principles which are beyond a layperson’s knowledge.”<sup>189</sup> Here, however, the nonlawyer had not prepared pleadings nor had he given advice; he had simply sold instructions and “kits” for bankruptcy. Although early precedent in Pennsylvania provided some basis for treating such sale as unauthorized practice of law,<sup>190</sup> the court found that the law on the sale of kits was in “a state of flux,” and thus did not hold that the nonlawyer’s conduct here constituted unauthorized practice of law.<sup>191</sup> Instead, the court publicly criticized the nonlawyer’s business as “a public nuisance which [is] taking advantage of their customers’ ignorance of both how easily and cheaply *pro se* bankruptcies can be filed on one hand, and how important competent legal advice for those not willing to take the chance of appearing *pro se* can be on the other hand.”<sup>192</sup> It instead used its power

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184. *See id.* at 441.

185. *See id.* at 443.

186. *See id.* at 443-44.

187. *Id.* at 444.

188. *Id.*

189. *Id.* at 444-45.

190. *See id.* at 445 (discussing a Pennsylvania case where sale of “A Practical Aid for Executors and Administrators of Decedents’ Estates,” which purported to give legal advice and instructions on how to draft wills and manage decedents’ estates, held to be unauthorized practice of law despite assertion of First Amendment claim).

191. *See id.* at 450.

192. *Id.* at 449. The owner of the Center had previously been sued by the New Jersey State Bar Association for the unauthorized practice of law in selling divorce kits. *See N.J. State Bar Ass’n v.*

to order disgorgement under § 110, based on its finding that the Center had grossly overcharged its customers for “basically useless information.”<sup>193</sup>

Similar is *In re Agyekum*,<sup>194</sup> in which the petition preparer sought to charge the debtor a “document license fee” for what he termed his “copyrighted intellectual property” in a set of preprinted bankruptcy materials.<sup>195</sup> The court disallowed such a fee, reasoning that under state law, the practice of law is defined as “legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in a court.”<sup>196</sup> Although the document preparer attempted to analogize his documents to those provided by Nolo Press, the court rejected this argument.<sup>197</sup> Rather, the court held that the written materials at issue “not only provided information about the bankruptcy process, it provided information on what to consider when filing bankruptcy as well as a glossary of bankruptcy terms,” and “functioned to solicit information to be used to complete bankruptcy schedules. Soliciting information from a debtor which is then typed into schedules constitutes the unauthorized practice of law.”<sup>198</sup>

The bankruptcy cases give some guidance about how courts might view document preparation by lay practitioners in cyberspace. Indeed, they reinforce the traditional dividing line between typing information into a form and advising about how the form should be prepared. Moreover, they demonstrate that unauthorized practice issues are not avoided simply by relying on a computer program to assist in making selections. Bankruptcy judges have found it to be unauthorized practice of law for the preparer to make judgments about which form to use or

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Divorce Ctr. of Atl. County, 477 A.2d 415 *passim* (N.J. Super. Ct. Ch. Div. 1984). In that case, the court had concluded that the Center did more than simply sell kits, but rather that its employees also gave advice to customers, some of which was inaccurate or fraudulent. *See id.* at 417. Because the Center’s actions went beyond merely selling kits and instructions, the additional conduct constituted the unauthorized practice of law. *See id.* at 420-21. In the *Campanella* case, the court explained that there was no evidence that the center had provided any advice at all, which would otherwise have made it a “very easy case.” *See Campanella*, 207 B.R. at 443.

193. *Id.* at 436.

194. 225 B.R. 695 (B.A.P. 9th Cir. 1998).

195. The written materials consisted of about 170 pages of bankruptcy-related information, including a “Fast Facts Guide” and “InfoForm Questionnaire.” *See id.* at 701.

196. *Id.* In addition, specific guidelines for bankruptcy preparers in the Northern District of California precluded the type of services allegedly provided in this case, such as “[h]ow to respond to the bankruptcy forms,” and “[w]hat exemptions should be claimed.” *Id.*

197. *See id.* at 702.

198. *Id.*

how to categorize certain information furnished by the consumer.<sup>199</sup> It is difficult to see a meaningful distinction between that activity and the types of services provided by many of the legal document websites I have previously discussed.

The significance of the litigation over bankruptcy petition preparers, however, goes far beyond the precedential value of the opinions I have discussed. These cases emphasize that there are legitimate consumer protection issues raised when untrained and unlicensed lay practitioners prepare legal documents for other lay people. Many of the bankruptcy judges have expressed concern, if not dismay, over the quality of the legal documents purchased by unsuspecting lay people.<sup>200</sup> Although some of these cases involve misrepresentation or negligence by unscrupulous entrepreneurs trying to make a quick buck, others arose because honest lay practitioners, who genuinely believed they were providing a valuable service, made basic errors because of their lack of adequate training or experience with the complexities of the bankruptcy codes.<sup>201</sup>

The question of consumer protection as one of the purposes for unauthorized practice of law statutes is one that deserves renewed consideration. Much of the critique of unauthorized practice of law statutes has stressed that the driving force behind enforcement is to protect the legal profession's lucrative monopoly on providing legal services. Undoubtedly, there is some truth to this claim. But there is another side to this equation that the bankruptcy cases reflect. An unregulated market in the selling of personalized legal documents could create new problems for consumers if their rights are inadequately protected or even harmed by the documents they receive.

If legal document services begin to flourish in cyberspace, the legal profession will have to consider whether to challenge them under the unauthorized practice statutes or otherwise regulate them. Despite the large body of law that would seem to give bar regulators the legal basis to pursue these websites, however, there may be substantial obstacles to aggressive enforcement of unauthorized practice principles against them. In particular, the free speech implications inherent in the sale of

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199. See, e.g., *In re Bradshaw*, 233 B.R. 315, 330-31 (Bankr. D.N.J. 1999); *In re Moore*, 232 B.R. 1, 7-11 (Bankr. D. Me. 1999); *In re Hobbs*, 213 B.R. 207, 218 (Bankr. D. Me. 1997).

200. See, e.g., *In re Rausch*, 213 B.R. 364, 367 (D. Nev. 1997); *In re Hartman*, 208 B.R. 768, 776 (Bankr. E.D. Mass. 1997).

201. See, e.g., *Moore*, 232 B.R. at 9 (recognizing, but dismissing, that defendant "stress[es] to his customers that he is not an attorney and that he cannot and will not provide them with legal representation"); *Hartman*, 208 B.R. at 775, 778-79 (finding that petition preparer's ignorance of § 110 did not excuse his violations of the statute).

information related to the law may generate significant constitutional concerns. Moreover, it is not clear as a policy matter that pursuing these websites would be effective or wise. Although a lengthy discussion of these questions is beyond the scope of this piece, I close with a few preliminary observations on the potential pitfalls ahead for bar regulators.

VI. ENFORCING THE UNAUTHORIZED PRACTICE OF LAW STATUTES  
AGAINST SCRIVENERS IN CYBERSPACE:  
SOME PRELIMINARY THOUGHTS

The first question to consider about sites like *Desktop Lawyer* or *LegalZoom* is whether the services they provide could be said to constitute the practice of law under existing precedent. This question is entirely separate, in my view, from the more difficult question of whether it would be wise to pursue remedies under that body of law.

Services like *Desktop Lawyer* and *LegalZoom* are simply more sophisticated versions of the scrivener services that proliferated in the Seventies and Eighties. The case law is fairly consistent in taking the position that generating legal documents for lay people, whether done over the Internet or in an office, constitutes the unauthorized practice of law if the provider of the form furnishes any kind of “advice.”<sup>202</sup> Further, the courts have consistently taken the position that selecting which form to use, giving advice about which information ought to be included in a form, or soliciting information from a lay person and then making determinations about how to use the information in the form is the equivalent of practicing law.<sup>203</sup>

A website that provides a questionnaire to consumers, and then uses the information on the questionnaire to generate a personalized legal document, presents the easiest case. At least under existing precedent, the act of determining how to use the raw information provided by the consumer, whether by selecting forms or by categorizing documents in certain ways, is “legal advice,” and thus constitutes the unauthorized practice of law. On the other hand, a website that either sells blank forms for the consumer to fill out, or that uses a computer program to insert the

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202. See, e.g., N.J. State Bar Ass’n v. Divorce Ctr. of Atl. County, 477 A.2d 415, 418-19 (N.J. Super. Ct. Ch. Div. 1984) (finding unauthorized practice of law where “the purveyor of a legal kit goes beyond the mere sale of printed material and begins to engage in activity which includes explaining or recommending particular forms and making judgments as to how a particular individual should fill them out”).

203. See, e.g., Fla. Bar v. Am. Senior Citizens Alliance, Inc., 689 So. 2d 255, 259 (Fla. 1997) (per curiam).

consumer's raw information directly onto a form, is also an easy case, as it would seem to be acting as nothing more than a scrivener and thus exempt from unauthorized practice concerns.

The more difficult kind of service is a website that uses an automated program to convert raw data from the consumer into the personalized legal document.<sup>204</sup> The *Quicken Family Lawyer* CD-ROM is this kind of program. With these programs, no live human being interacted with the consumer to produce the legal document, so it is more difficult to identify the "legal advice" that is essential to finding unauthorized practice. On the other hand, live human beings did design the computer program and determine what automated recommendations it should make to consumers depending on the information provided. Although this seems to be one step removed from the scrivener cases of the past, the fact that Texas successfully pursued an unauthorized practice of law claim against *Quicken Family Lawyer*, and that a specific amendment to the state's unauthorized practice of law statute was apparently necessary to resolve the issue of liability, suggests that concern about this kind of software is more than just theoretical.<sup>205</sup>

The problem is that the courts traditionally have held that advising a consumer on what form to select, or where on the form to place the information, is itself "legal advice," and this is precisely what many of the websites do. But the question posed by computerized form selection is whether "advice" in this context means the conscious application of knowledge and judgment to a set of facts by a live human being, or whether "advice" can include developing an automated system of prompts that indicates to the consumer which forms should be selected and what information to place in the blank spaces. The automated services provided either by CD-ROM, as in *Quicken Family Lawyer*, or by the downloading of documents over the Internet, as in *Desktop Lawyer*, have cleverly eliminated the part of form preparation that historically had created the unauthorized practice of law difficulty—the fact that it is nearly impossible for a live person to fill out forms for another person without giving "advice." In these services, the computer software does it all; no lay person is involved in manually inputting the information, or in selecting the necessary form. Rather, a computer program has been devised that makes these selections automatically. There is a good argument to be made that automated document

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204. See *supra* notes 133-36 and accompanying text.

205. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. 3:97-CV-2859-H, 1999 U.S. Dist. LEXIS 813 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999); see also *supra* note 152 and accompanying text.

preparation is more like Norman Dacey's famous best-seller than like a live lay practitioner, and as such cannot be said to constitute unauthorized practice of law.

I cannot predict with any degree of certainty how the courts would react to an unauthorized practice of law claim brought against an online document preparer, although both the *Quicken Family Lawyer* case and the bankruptcy form preparer cases suggest that the courts are likely to be receptive to such claims. It may well be that the distinction I have suggested between a live typist in the Seventies and a computer program today may not be legally significant. That program did not emerge full-grown like Athena from the head of Zeus; rather, it was created by live human beings and the decision as to what documents would be recommended based on the answers was made by live human beings.

But as we consider an interpretation of unauthorized practice of law that would reach not only personalized legal advice from a live human being, but also software that would give the illusion of such advice, we must not lose sight of the broader implications of such a reading. In particular, enforcing unauthorized practice statutes against this kind of activity would undoubtedly generate constitutional challenges. Although a full discussion of these issues must await another day, I will highlight just a few issues that could pose serious threats to any aggressive pursuit of document preparers in cyberspace.

First and foremost in any consideration of how the unauthorized practice of law statutes might be susceptible to constitutional challenge is, of course, the First Amendment guarantee of freedom of speech. The First Amendment has been raised repeatedly in defense of the rights of lay people to provide legal information to others, with some success. Norman Dacey, for example, successfully persuaded the Second Circuit that his First Amendment rights were violated by attempts to suppress his book.<sup>206</sup> More recently, Judge Barefoot Sanders considered the First Amendment implications of banning the sale of *Quicken Family Lawyer* in Texas.<sup>207</sup> Judge Sanders ultimately concluded that this ban passed constitutional muster, although the question was "close," because it was "unrelated to the suppression of free expression," but rather was aimed at "eradicating the unauthorized practice of law," and did not

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206. See *supra* Part II.

207. See *Parsons Tech.*, 1999 U.S. Dist. LEXIS 813, at \*21-30 ("While there is no right of unlicensed laymen to represent another under the First Amendment's guarantees of freedom of association and freedom to petition one's government, Parsons' rights under the First Amendment's protections of a free press still apply.") (citation omitted).

substantially burden more speech than necessary.<sup>208</sup> The Court of Appeals for the Fifth Circuit never reached the merits of this holding because the intervening change in the unauthorized practice of law statute rendered the issue moot.

Judge Sanders's opinion notwithstanding, there would be substantial First Amendment problems with the enforcement of unauthorized practice of law statutes against legal information providers. I see particular problems with the bar making a successful showing that the suppression of the sale of personalized forms would be no more burdensome than necessary to achieve the state's objective. This is especially problematic because of the historic difficulty with defining the practice of law that I described at the outset of this Article.<sup>209</sup> It is harder to argue that a particular restriction on speech is carefully tailored to suppress only the "unauthorized practice of law," and not legal information or other speech about the law, if no one can agree on what the definition of the practice of law is.<sup>210</sup> Moreover, there undoubtedly will be arguments that the legal profession is seeking not to protect consumers by its actions, but rather to silence a particular political message about consumer self-help and the irrelevance of the legal profession.<sup>211</sup> In order to pursue scrivener websites successfully, the bar will have to convince the courts on the First Amendment issue, and how it would be resolved is anyone's guess. Other constitutional issues may also lurk in unauthorized practice of law prosecutions against online

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208. *Id.* at \*24-25, 27, 29 ("[T]he Court finds that the Statute is aimed at the noncommunicative impact of Parsons' speech, and therefore, is a content-neutral regulation which only incidentally affects speech and therefore is subject only to intermediate scrutiny.").

209. *See supra* notes 6-12 and accompanying text.

210. I hope to address these issues in more detail in a future article. For general discussions of First Amendment issues presented by regulation of legal advice as unauthorized practice of law, see Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 *FORDHAM L. REV.* 2241 (1999); Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 *SEATTLE U. L. REV.* 885 (2000).

211. *See* *Thomas v. Collins*, 323 U.S. 516, 544-45 (1945) (Jackson, J., concurring). Justice Jackson opined that a distinction must be drawn between the constitutional power of a state to "regulate the pursuit of a vocation" and an individual's constitutional right to freedom of state and assembly. *See id.* at 544 (Jackson, J., concurring). He reasoned:

A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views. Likewise, the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.

*Id.* (Jackson, J., concurring); *cf. Lowe v. SEC*, 472 U.S. 181, 211 (1985) (holding that the SEC is limited in its ability to regulate publishers of nonpersonalized investment advice).

information providers.<sup>212</sup> Although at this point I have given only the most cursory consideration to the constitutional implications of regulating these websites, I wish at this juncture only to highlight the fact that even if unauthorized practice of law statutes are applicable to the conduct of online “legal information providers,” there are substantial constitutional roadblocks that may weaken any enforcement effort.

The final question, then, is whether continuing to permit legal document providers to operate in the unregulated world of cyberspace is the wisest option for the legal profession to pursue. Even if we assume that the courts would respond favorably to a concerted enforcement of the unauthorized practice statutes against these websites, an assumption that may be optimistic at best, we must consider the ramifications of such enforcement. The public reaction would likely be negative. Enforcing unauthorized practice of law statutes against online document preparation services would be neither painless nor popular. The lay public, which already detests lawyers, generally perceives unauthorized practice of law enforcement as yet another way for the legal profession to line its collective pockets at the expense of consumers.<sup>213</sup> In addition, it is at least possible that these websites are managing to provide some consumers with a necessary service—basic legal documents at an affordable price. At a time when the bar seems to have abdicated its responsibility to provide routine, noncomplex legal services to the poor and middle class, it could well be counterproductive to try to shut down one vehicle for serving those unmet needs.

Nevertheless, I must confess to deep ambivalence about the prospect of an unregulated new industry that is marketing what are clearly legal services to unsuspecting lay consumers. Indeed, although

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212. For instance, there are cases holding that state unauthorized practice of law statutes may not be used to interfere with the protection of federal rights. *See Johnson v. Avery*, 393 U.S. 483, 490 (1969) (striking down prison regulation that forbade inmates from assisting other inmates in preparing writs or other legal forms). Justice Douglas maintained, in his concurrence, that:

There are not enough lawyers to manage or supervise all of these affairs; and much of the basic work done requires no special legal talent. Yet there is a closed-shop philosophy in the legal profession that cuts down drastically active roles for laymen . . .

That traditional, closed-shop attitude is utterly out of place in the modern world where claims pile high and much of the work of tracing and pursuing them requires the patience and wisdom of a layman rather than the legal skills of a member of the bar.

*Id.* at 491-92 (Douglas, J., concurring) (footnotes omitted); *see also* *Bhd. of R.R. Trainmen v. Va. State Bar*, 377 U.S. 1, 6 (1964) (“[I]n regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution.”). Other possible constitutional issues include challenges under the dormant Commerce Clause, if state unauthorized practice of law statutes are used to interfere unreasonably with interstate commerce, and separation of powers claims that regulating the unauthorized practice of law are within the inherent powers of the courts and not the legislatures.

213. *See Rhode, Policing the Professional Monopoly*, *supra* note 5, at 3.

some members of the legal profession may consider these websites to be providing a valuable service, I wonder how many of us would be happy to learn that our parents had purchased their will through a dot-com. There are real consumer protection issues that we cannot simply ignore by terming all bar attempts to regulate unauthorized practice of law as nothing but economic protectionism. The information given may be false or misleading. The forms may be outdated or not suitable for use for a particular set of facts. There is no follow-up to ensure that the appropriate documents were used, or whether additional assistance was necessary. Consumers themselves may be misled into thinking that they have resolved their legal difficulties without realizing that the documents they have paid for are woefully incomplete. Finally, we have no way of knowing how courts will react in the future, when the first dot-com wills are probated or divorce papers challenged, and turn out to have been inadequate under the law.<sup>214</sup>

How this issue is to be resolved, then, remains a question for the future. However, it is essential for us as a profession to think seriously about how we are going to address the proliferation of these services in cyberspace. The most famous scrivener of them all, Herman Melville's *Bartleby*, responded to all requests from his employer that he take action with an insistent "I would prefer not to."<sup>215</sup> The legal profession cannot afford its continued inaction on scriveners in cyberspace. Indeed, we must think seriously about what constitutes the practice of law in the twenty-first century, before that practice is defined out from under us.

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214. A compromise position would be to permit lay document preparation but impose training and licensing requirements and provide specifically for consumer protection. Such a solution is beyond the scope of this discussion.

215. HERMAN MELVILLE, *BARTLEBY THE SCRIVENER: A STORY OF WALL STREET* 32 (Simon & Schuster 1997) (1853).