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The Limited Power of the Bar to Protect Its Monopoly.

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COMMENT

Zachary C. Zurek

The Limited Power of the Bar to Protect Its Monopoly

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I. INTRODUCTION

Every profession faces its own obstacles: manufacturing, technology, and business jobs are frequently outsourced;¹ the medical field endures constant conflict with insurance companies;² and online trading sites are diminishing the need for stockbrokers.³ The legal profession is no exception.⁴ Today, limited positions are available in the legal market, yet law schools continue to churn out new attorneys in huge numbers each year.⁵ Many law graduates will not find work that requires the use of their hard-earned degrees, and others will venture out on their own as they attempt to “hang out a shingle.”⁶ Clearly, the lifestyle attributed to the

1. See Mary Pennisi, *The Global City: Globalizing Local Institutions*, 11 J. INT’L BUS. & L. 111, 128–29 (2012) (describing outsourcing as the result of industrial globalization).

2. See Tara Weiss, *Reasons Not to Become a Doctor*, FORBES (May 5, 2008, 5:30 PM), http://www.forbes.com/2008/05/05/physicians-training-prospects-lead-careers-cx_tw_0505doctors.html (noting there are “lower insurance reimbursement rates” for doctors, “and insurance-company restrictions [result] in less autonomy over how patients are cared for”).

3. See, e.g., E*TRADE FINANCIAL CORPORATION, <https://us.etrade.com/home> (last visited May 10, 2013) (offering online banking products and investing services).

4. See Adam Cohen, *Just How Bad Off Are Law School Graduates?*, TIME (Mar. 11, 2013), <http://ideas.time.com/2013/03/11/just-how-bad-off-are-law-school-graduates/?iid=op-main-lead> (“[A]s a result of globalization, it has become easier for law firms and companies to outsource legal assignments to places like India, where foreign lawyers will work for a fraction of what an American lawyer would earn. There are also new technologies that are putting lawyers out of work . . .”).

5. See Carl Bialik, *Job Prospects for Law Grads? The Jury’s Out*, WALL ST. J. (Mar. 17, 2012, 12:45 AM), <http://online.wsj.com/article/SB10001424052702304692804577283691965596610.html> (reporting on the dismal outlook for law graduates by emphasizing that 2010 graduates experienced the lowest employment rate since 1996). “Meanwhile, just 68.4% of graduates who responded were in jobs that required passage of bar exams.” *Id.*

6. See Gabriel White, *Practice in a Flash: Helping Lawyers Hang a Shingle*, UTAH B.J., Jan.–Feb. 2012, at 60, 60 (noting some attorneys “hang out a shingle,” meaning open a solo-practice, “as a temporary way to make ends meet”); see also Carl Bialik, *Job Prospects for Law Grads? The Jury’s Out*,

golden era of attorneys still acts as a siren for many graduating college students despite the overwhelming evidence that six-figure salaries for new attorneys are now few and far between.⁷

In the midst of a highly competitive legal market, other players are continually emerging.⁸ The problem with this added competition is that these new players are not lawyers. This trend is unsettling to attorneys who are accustomed to the protective bubble the bar maintained in the past.

The practice of law is frequently referred to as a “monopoly.”⁹ Lawyers established a sheltered industry for themselves by creating laws to keep others out.¹⁰ Over time, however, those outside the legal field have discovered innovative ways to encroach upon the practice of law. Theoretically, a barrier exists to keep this added competition out: unauthorized practice of law (UPL) provisions, which prohibit nonlawyers from practicing law.¹¹ Yet all too often, these laws are tiptoed around or simply not enforced.¹²

WALL ST. J. (Mar. 17, 2012, 12:45 AM), <http://online.wsj.com/article/SB10001424052702304692804577283691965596610.html> (detailing the difficulty graduating law students face in obtaining a job in the current legal market).

7. See J. Maureen Henderson, *Why Attending Law School Is the Worst Career Decision You'll Ever Make*, FORBES (June 26, 2012, 10:21 AM), <http://www.forbes.com/sites/jmaureenhenderson/2012/06/26/why-attending-law-school-is-the-worst-career-decision-youll-ever-make/> (exposing the decline in attorney salaries and job availability).

8. See Laurel S. Terry, Steve Mark & Tahlia Gordon, *Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology*, 80 FORDHAM L. REV. 2661, 2677 (2012) (recognizing legal services are no longer dominated by lawyers). “The legal profession is no longer the ‘only game in town,’ so regulators now must consider whether and how to respond to nonlawyer, nontraditional legal services providers.” *Id.*

9. See Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 238–39 (2002) (stressing lawyers enjoyed a “long-standing monopoly over the business of law”).

10. See *id.* at 238–40 (explaining the unauthorized practice of law (UPL) doctrine allows only properly educated and licensed attorneys to practice law).

11. See *id.* at 238–39 (noting the UPL doctrine has been protecting lawyers for more than one-hundred years and violators may incur civil or criminal liability).

12. See Susan D. Hoppock, Current Development, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 720–21 (2007) (describing the problems that contribute to the shaky enforcement of UPL laws). To understand how enforcement problems have plagued this legal realm, consider the following:

There are several enforcement related problems that accompany UPL restrictions. First, there is much confusion, and little uniformity among the states, as to what constitutes UPL. Additionally, enforcement authority varies by state[,] and in several jurisdictions ‘there are two or more authorities authorized to enforce UPL regulations[,] including state attorneys general, private individuals[,] . . . state bar committees/counsel, supreme court committees/commissions, and local and county attorneys.’ Funding problems are also one major source of widespread

Part II of this Comment surveys the development of the bar's power and the origin of UPL laws. Part III discusses key areas in which nonlawyers are able to practice law. Specifically, it touches on: (1) the ability of accountants to give thorough advice to their clients, thereby stepping into the practice of law; (2) the ability of nonlawyers to practice in front of administrative agencies; (3) emerging technology and document preparation services that take clients away from attorneys; and (4) nonlawyer radio station hosts who offer legal advice to callers. This Comment examines case law and statutes aimed at limiting these practices and those allowing them to continue. Moreover, it illustrates how various nonlawyer activities affect attorneys and consumers. It also explores the imbalance of professional ethics standards between attorneys and nonlawyers. Finally, this Comment provides suggestions for practitioners to stay competitive in today's legal market.

II. THE MONOPOLY OF THE BAR AND THE UNAUTHORIZED PRACTICE OF LAW

A. *Putting Things into Context*

The monopoly of the bar (and the barrier to practicing law) began in England,¹³ where attorneys were originally appointed by "litigants who had secured royal permission to carry on their affairs through a representative."¹⁴ In America, such barriers have since come full circle. Originally, what would have been considered the practice of law by today's standards was not exclusively for those who specialized in law; nonlawyers were permitted to conduct many tasks that are now solely reserved for

under-enforcement of UPL restrictions. Finally, enforcement methods are insufficient to create appropriate deterrence and to punish offending lawyers and lay persons.

Id. (citations omitted); see also Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 260 (2002) (reporting an overall decline in the enforcement of UPL violations in the past thirty years).

13. See Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH ADMIN. L.J. 115, 116 (2007) (tracing American legal history to established judicial practices in England).

14. Robert R. Ries, *The Unauthorized Practice of Law in Texas*, 60 TEX. B.J. 37, 37 (1997); see Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH ADMIN. L.J. 115, 116 (2007) (marking 1178 A.D. as the year when England recognized its first "professional" legal practitioner).

attorneys.¹⁵ However, nonlawyers' attempts to navigate the legal system on their own resulted in many problems, and lawyers began to retaliate in the 1930s when the market took a turn for the worse.¹⁶ In response, and in an attempt to protect the public from the misfeasance of the unskilled, the American Bar Association (ABA) formed a UPL committee in 1933.¹⁷ Attorneys have since faced little intrusion from nonlawyers in the practice of law—until recently.

The concept of limiting the practice of law to attorneys spawned a backlash from nonlawyers and the public at large. Critics argued this protective hedge excluding nonlawyers from the courtroom essentially provided an “unjustified monopoly protection of lawyers.”¹⁸ However, this monopoly has proven beneficial for those in need of legal assistance.¹⁹ Although not without faults, the general requirements promulgated by state bars serve as an effective filter of candidates. They allow only those who meet stringent requirements to handle the delicate matters that make up the practice of law.²⁰ Licensed attorneys demonstrate an understanding of complex legal concepts; are proven to be dedicated scholars; and are of good standing in their morality, character, and mental health.²¹ States enact UPL laws to ensure only those possessing these

15. Robert R. Ries, *The Unauthorized Practice of Law in Texas*, 60 TEX. B.J. 37, 37 (1997).

16. See *id.* (emphasizing the necessity of combating the practice of law by unskilled persons and informing the public of the inherent dangers associated with it); see also Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 261–62 (2002) (“The legal profession’s organized opposition to the unauthorized practice of law began in 1930, a time described by Weckstein as ‘a period of economic depression when lawyers, along with almost everyone else, were struggling to protect their livelihood from competition and economic catastrophe.’” (quoting Donald Weckstein, *Limitations on the Right to Counsel: The Unauthorized Practice of Law*, 1978 UTAH L. REV. 649, 674)).

17. Robert R. Ries, *The Unauthorized Practice of Law in Texas*, 60 TEX. B.J. 37, 37 (1997).

18. Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 796 (2003).

19. Robert R. Ries, *The Unauthorized Practice of Law in Texas*, 60 TEX. B.J. 37, 38 (1997) (“The paramount purpose of UPL law is the protection of the people from the inexperienced and unlearned who attempt to practice law without first qualifying themselves through a course of study and training or who may be morally unfit to enjoy the privileges of a legal practice.”). But see Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 268 (2002) (stressing “limited empirical evidence” supports the claim that consumer welfare benefits from UPL laws).

20. See Shane L. Goudey, Comment, *Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law by Real Estate Brokers*, 75 OR. L. REV. 889, 889 (1996) (rationalizing the bar’s monopoly as protecting the public from “untrained, incompetent, and unskilled individuals” doling out consequential legal advice or services).

21. See TEX. GOV’T CODE ANN. § 82.024 (West 2013) (addressing the legal study requirements for bar applicants); *id.* § 82.028 (adopting standards for moral character and fitness of

characteristics are allowed to practice law.²² These laws apply to everyone²³ and typically define the practice of law, who may practice, the penalties for practicing law without the proper authorization, how such a violation is tried, and how the penalties are assigned in a given case.²⁴ Understanding exactly what constitutes the *practice of law* is particularly important when determining whether a specific activity amounts to the *unauthorized practice of law*. In Texas, the practice of law is defined as follows:

[T]he “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.

... [T]his 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.

... [T]he “practice of law” does not include the design, creation,

bar applicants); *General Eligibility Requirements for Admission to the Texas Bar*, TEX. BOARD L. EXAMINERS, <http://www.ble.state.tx.us/Rules/NewRules/ruleii.htm> (last visited May 11, 2013) (listing the attorney licensing requirements in Texas).

22. See generally OHIO GOV'T BAR R. art. VII, § 1 (creating a board for the unauthorized practice of law); TEX. GOV'T § 81.101 (West 2013) (defining the practice of law); *id.* § 81.104 (detailing the duties of the committee for the unauthorized practice of law); WASH. REV. CODE ANN. § 2.48.170 (LexisNexis Supp. 2012) (establishing who may practice law); *Unauthorized Practice Comm., State Bar of Tex. v. Cortez*, 692 S.W.2d 47, 51 (Tex. 1985) (recognizing “the inherent power of the courts” to determine what constitutes the practice of law); Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 795–96 (2003) (explaining UPL laws are created to ensure only the trained and admitted are able to practice law, and the state courts administer these laws).

23. Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 259–60 (2002) (clarifying UPL laws also apply to attorneys who are unlicensed in a certain jurisdiction or who help nonlawyers conduct “the unauthorized practice of law”).

24. See MD. CODE ANN., BUS. OCC. & PROF. § 10-207 (LexisNexis 2010) (detailing the qualifications for admittance to the bar); MO. ANN. STAT. § 484.010 (West 2004) (defining the practice of law as “the appearance as an advocate in a representative capacity[,] the drawing of papers, pleadings or documents[,] or the performance of any act...in connection with proceedings...before any...body...constituted by law or having authority to settle controversies”); R.I. GEN. LAWS ANN. § 11-27-19 (LexisNexis Supp. 2012) (establishing a committee to investigate reports and hold hearings regarding the unauthorized practice of law); VA. CODE ANN. § 54.1-3904 (LexisNexis 2005) (assigning a Class 1 misdemeanor charge to anyone engaging in the unauthorized practice of law).

publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, 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.²⁵

Although this statute appears straightforward, many problems arise with the application of UPL laws nationwide.²⁶

B. *Shaky UPL Enforcement Weakens the Monopoly*

The problem with the enforcement of UPL laws stems from the lack of uniformity among jurisdictions in defining what constitutes the practice of law;²⁷ in some cases, there is no firm definition.²⁸ One law professor explained the problem of defining the practice of law is rooted in the fact that “[l]aw permeates so many aspects of [our] personal lives and

25. TEX. GOV'T § 81.101.

26. See Susan D. Hoppock, Current Development, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 720–21 (2007) (attributing the confusion regarding UPL laws to states' various interpretations of what encompasses the unauthorized practice of law); see also Anthony J. Luppino, *Multidisciplinary Business Planning Firms: Expanding the Regulatory Tent Without Creating a Circus*, 35 SETON HALL L. REV. 109, 131 (2004) (acknowledging “[t]he widespread criticism of UPL provisions as rather vague and difficult to enforce,” and stating that “the difficulty in drafting a workable definition of the ‘practice of law’” goes to the heart of the issue).

27. Susan D. Hoppock, Current Development, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 720 (2007); see also *In re Reinstatement of Mooreland-Rucker*, 237 P.3d 784, 789 (Okla. 2010) (offering an example of why there are problems in the enforcement of UPL laws). Consider the Supreme Court of Oklahoma's description of the problems that occur as a result of the lack of uniformity between the states regarding the enforcement of the UPL laws:

The Texas Unauthorized Practice of Law Committee (UPLC), together with the Texas Board of Law Examiners and the Texas courts, police the unauthorized practice of law within the borders of Texas. While these entities are empowered to assist the Supreme Court of Texas in determining whether violations have occurred, none of these entities are empowered to issue advisory opinions or make a formal determination as to what activities constitute the practice of law. Injecting more confusion in the analysis is the lack of the Texas State Bar's disciplinary authority over out-of-state practitioners who are neither recognized members of the Texas State Bar nor specially admitted by a Texas state court on a particular proceeding. “Accordingly, the Out-of-State Attorney is not subject to disciplinary proceedings or actions by the State Bar of Texas if any of his [or her] activities in Texas violate the Texas Disciplinary Rules, including but not limited to the restrictions on advertising contained therein.”

Id. (citations omitted) (quoting Tex. Comm. on Prof'l Ethics, Op. 516, at *2 (1996)).

28. See Susan D. Hoppock, Current Development, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 722 (2007) (suggesting the inherent ambiguity of the provisions is to blame for inconsistency in enforcement of UPL laws).

commercial affairs that . . . most individuals, whether or not they are lawyers, are knowingly or unknowingly encountering and interpreting laws on a daily basis. . . . [Thus,] defining that province is much easier said than done.”²⁹

Further complicating the matter, the absence of a specific authority designated to assert a UPL cause of action drastically impairs enforcement of these laws. In many areas of the country “there are two or more authorities authorized to enforce UPL regulations including state attorneys general, private individuals[,] . . . state bar committees/counsel, supreme court committees/commissions, and local and county attorneys.”³⁰

Additional impairment of UPL enforcement is linked to the Supreme Court’s decision in *Goldfarb v. Virginia State Bar*,³¹ where “the Court ruled that the state [bar’s] anti-competitive activity violated federal antitrust laws”³² based on its maintenance of a minimum attorney fee schedule.³³ This decision created a chilling effect on UPL enforcement, causing dissension among those who decide whether a specific act constitutes the unauthorized practice of law—in other words, whether they will pledge their allegiance to the bar’s monopoly.³⁴

Moreover, individuals who have a deep understanding of statutory language have the opportunity to exploit the weaknesses of the system through loopholes,³⁵ making it more difficult for the enforcing authority to determine whether an individual actually engaged in the practice of law. The weaknesses within UPL laws, coupled with shaky, fragmented enforcement, allow nonlawyers to perform activities that would otherwise be characterized as the practice of law.

29. Anthony J. Luppino, *Multidisciplinary Business Planning Firms: Expanding the Regulatory Tent Without Creating a Circus*, 35 SETON HALL L. REV. 109, 131 (2004).

30. Susan D. Hoppock, Current Development, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 720–21 (2007) (alteration in original) (quoting ABA STANDING COMM. ON CLIENT PROTECTION, 2004 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES, available at <http://www.abanet.org/cpr/clientpro/2004INTRO.DOC>).

31. *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

32. Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. U. L.J. 223, 226 (2012).

33. *Goldfarb*, 421 U.S. at 773.

34. In fact, the ABA Committee for the Unauthorized Practice of Law disbanded only nine years after the *Goldfarb* decision. Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 262 n.120 (2002).

35. See, e.g., TEX. GOV’T CODE ANN. § 81.101(c) (West 2013) (excluding certain services from the practice of law when simple requirements are met).

III. NONLAWYERS ENGAGING IN THE PRACTICE OF LAW

Constant improvement in technology and education, laced with entrepreneurial spirit, continues to spark new forms of business. Adopting the Red Ocean/Blue Ocean business theory,³⁶ there are two ways to evolve in this environment. The “Red Ocean” strategy calls for competing in existing market space, beating the competition, exploiting existing demand, making “the value-cost trade-off,” and aligning “the whole system of a firm’s activities with its strategic choice of differentiation or low cost.”³⁷ In comparison, the “Blue Ocean” strategy recommends creating uncontested market space, making the competition irrelevant, creating and capturing new demand, breaking “the value-cost trade-off,” and aligning “the whole system of a firm’s activities in pursuit of differentiation and low cost.”³⁸

From a business perspective, Blue Ocean theory rejects the Red Ocean method of competing with existing customers and markets; instead, Blue Ocean proponents aim to create new demand and capture new markets.³⁹ While some individuals find the Blue Ocean strategy of business intriguing, many find the Red Ocean strategy less intimidating to implement and commence.⁴⁰ Unfortunately for attorneys, the “existing market space” that many choose to exploit is the practice of law, and the competition to beat consists of other attorneys.⁴¹

36. *Red Ocean vs. Blue Ocean Strategies*, BLUE OCEAN STRATEGY, <http://www.blueoceanstrategy.com/about/concepts/red-vs-blue/> (last visited May 11, 2013).

37. *See id.* (providing a side-by-side comparison chart contrasting Red Ocean Strategy with Blue Ocean Strategy). The Red Ocean strategy is where industries are today and is similar to a “shark infested ocean where the sharks are fighting each other for the same prey.” Sarah Layton, *Red Ocean vs. Blue Ocean*, BLUE OCEAN STRATEGY (Apr. 21, 2009, 3:22 PM), <http://blueoceanstrategy.corporatestrategy.com/2009/04/red-ocean-vs-blue-ocean.html>. The result of this feeding frenzy is bloody water, hence the term “Red Ocean.” *Id.*

38. *See Red Ocean vs. Blue Ocean Strategies*, BLUE OCEAN STRATEGY, <http://www.blueoceanstrategy.com/about/concepts/red-vs-blue/> (last visited May 11, 2013). The Blue Ocean strategy is represented by a calm, serene ocean with very little competition—thus resulting in sparkling blue water—an ideal location for businesses. Sarah Layton, *Red Ocean vs. Blue Ocean*, BLUE OCEAN STRATEGY (Apr. 21, 2009, 3:22 PM), <http://blueoceanstrategy.corporatestrategy.com/2009/04/red-ocean-vs-blue-ocean.html>.

39. Sarah Layton, *Red Ocean vs. Blue Ocean*, BLUE OCEAN STRATEGY (Apr. 21, 2009, 3:22 PM), <http://blueoceanstrategy.corporatestrategy.com/2009/04/red-ocean-vs-blue-ocean.html>.

40. *See Four Hurdles to Execution*, BLUE OCEAN STRATEGY, <http://www.blueoceanstrategy.com/about/concepts/4-hurdles-to-execution/> (last visited May 11, 2013) (“The Cognitive Hurdle: Red oceans may not be the paths to future profitable growth, but they may have served the organization historically and employees have grown comfortable with them, so why rock the boat? People must be woken up to the imperative for strategic shift.”).

41. *See Red Ocean vs. Blue Ocean Strategy*, BLUE OCEAN STRATEGY, <http://www.blueoceanstrategy.com/about/concepts/red-vs-blue/> (last visited May 11, 2013) (applying the Blue Ocean

The high expense involved in employing an attorney⁴² combined with the fatigued pocketbooks of a nation plagued by an intense recession⁴³ leaves many consumers in need of more financially feasible alternatives to resolve their legal issues. This state of affairs has formed a Blue Ocean⁴⁴ opportunity upon which many businesses have capitalized.⁴⁵ Feeling similar effects from the constrained economy, some industries have expanded their normal field of work⁴⁶ in an attempt to provide a one-stop shop for consumers.⁴⁷ Furthermore, for those who cannot afford attorney representation, the alternative of nonlawyer representation before administrative agencies is appealing.⁴⁸ As a result, these savvy Blue Ocean business decisions can be highly beneficial for some. Nevertheless, they represent a troubling thorn for legal practitioners and a headache for courts tasked with resolving disputes ignited by shouts and fingers pointed toward UPL laws.⁴⁹

theory to the legal market).

42. See Vanessa O'Connell, *Big Law's \$1,000-Plus an Hour Club*, WALL ST. J. (Feb. 23, 2011), <http://online.wsj.com/article/SB10001424052748704071304576160362028728234.html> (revealing the highest known attorney hourly rate in 2009 and 2010 to be \$1,250).

43. See Binyamin Appelbaum, *New Figures Put Recession and Recovery in Focus*, N.Y. TIMES (July 27, 2012, 8:50 AM), <http://economix.blogs.nytimes.com/2012/07/27/new-figures-put-recession-and-recovery-in-focus/> (proclaiming GDP numbers revealed the recession, as a whole, was far worse than originally reported, and thus, the recovery has been slower than what was predicted).

44. *Red Ocean vs. Blue Ocean Strategies*, BLUE OCEAN STRATEGY, <http://www.blueoceanstrategy.com/about/concepts/red-vs-blue/> (last visited Apr. 11, 2013).

45. LegalZoom is a perfect example of a business that has taken advantage of the Blue Ocean strategy. See generally LEGALZOOM, <http://www.legalzoom.com> (last visited May 11, 2013) (advertising LegalZoom gives an affordable alternative to hiring the services of an attorney for common legal documents).

46. See Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney–Accountant Tax Turf War*, 36 ST. MARY'S L.J. 1, 98 (2004) (noting accountants seeking to expand their practices are branching out into areas of law).

47. See, e.g., *Services*, BRADLEY & DAVIS CPAS, <http://www.bradleyanddaviscpas.com/Services> (last visited May 11, 2013) (detailing services provided by the firm); *Solutions*, PANNELL KERR FORSTER OF TEX., P.C., <http://www.pkftexas.com/solutions/> (last visited May 11, 2013) (listing services provided by the firm, including “Litigation and Bankruptcy Solutions”); see also *Services*, PADGETT STRATEMANN, <http://www.padgett-cpa.com/services> (last visited May 11, 2013) (pointing out the wide range of services provided by the CPA firm, including litigation support as a consulting service).

48. See Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH ADMIN. L.J. 115, 122 (2007) (citing the common problem of inability to afford attorney representation as one motivation for passing laws that allow nonlawyer representation in front of administrative agencies).

49. See *Lowry v. LegalZoom.com, Inc.*, No. 4:11CV02259, 2012 WL 2953109, at *1 (N.D. Ohio July 19, 2012) (“Plaintiff alleges that Defendant’s providing of online legal services to Ohio citizens constitutes the unauthorized practice of law.”); *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1057 (W.D. Mo. 2011) (“[A] claim for unlawful practice of law.”); *Hunt v. Maricopa*

While courts have resolved the status of some nonlawyer activities in terms of their relationship with UPL laws, other activities are still contested.⁵⁰ For instance, the line separating where the practice of accounting ends and where the practice of law begins remains unclear.⁵¹

Cnty. Emps. Merit Sys. Comm'n, 619 P.2d 1036, 1037 (Ariz. 1980) (hearing petitioner's request for permission to be represented by a nonattorney before a county employee commission pursuant to an Arizona statute); *In re Estep*, 933 A.2d 763, 771 (Del. 2007) (calling the service of drafting wills and trusts without a license the unauthorized practice of law); *In re Banks*, 805 A.2d 990, 994 (D.C. 2002) (upholding adjudications of civil and criminal contempt against a nonlawyer who was holding himself out as a licensed attorney by "advertising the words 'former administrative law judge,' 'esquire[.],' or other words suggesting his membership in the legal profession"); State Bar of Mich. v. Galloway, 369 N.W.2d 839, 840 (Mich. 1985) (posing the issue of whether nonlawyers could provide representation in quasi-judicial proceedings); *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2012 WL 3678650, at *1 (N.C. Super. Ct. Aug. 27, 2012) (evaluating whether LegalZoom engaged in the unauthorized practice of law, but deferring a decision based on procedural issues); *Ohio State Bar Ass'n v. Dalton*, 924 N.E.2d 821, 822 (Ohio 2010) (determining whether a land title agency engaged in the unauthorized practice of law by creating general warranty deeds for its client); *Miami Cnty. Bar Ass'n v. Wyandt & Silvers, Inc.*, 838 N.E.2d 655, 657 (Ohio 2005) (stating an accountant could not lawfully prepare business entity creation documents); *Columbus Bar Ass'n v. Verne*, 788 N.E.2d 1064, 1064 (Ohio 2003) (noting the respondent, despite lacking authorization to practice law in any jurisdiction, used forms from the Secretary of State's office to draft articles of organization and form a limited liability company, thereby engaging in the unauthorized practice of law); *In re Reinstatement of Mooreland-Rucker*, 237 P.3d 784, 786 (Okla. 2010) (granting reinstatement to the Oklahoma Bar despite finding petitioner had engaged in the unauthorized practice of law in Texas); *Unauthorized Practice Comm., State Bar v. Cortez*, 692 S.W.2d 47, 48 (Tex. 1985) (explaining how offering assistance in the immigration process and completing immigration forms led to "an injunction case in which the [UPL] Committee . . . [sought] to enjoin [the defendants] from engaging in certain acts alleged to be the practice of law").

50. See *Loury*, 2012 WL 2953109, at *1 (contesting LegalZoom's online services as "the unauthorized practice of law"); *Janson*, 802 F. Supp. 2d at 1062 (questioning whether LegalZoom engaged in the unauthorized practice of law by examining the definition under Missouri law); *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905, 906 (Fla. 2010) (reviewing claims based on mortgage documents prepared by clerical personnel); *N.C. State Bar*, 2012 WL 3678650, at *5 (determining whether, in the absence of criminal proceedings, the state bar had concluded LegalZoom illegally practiced law); *Dalton*, 924 N.E.2d at 822 (outlining the statutory elements for the unauthorized practice of law); *Greenspan v. Third Fed. Sav. & Loan Ass'n*, 912 N.E.2d 567, 568 (Ohio 2009) (hearing a claim that nonattorney personnel prepared documents related to mortgages in violation of Ohio law); *Wyandt & Silvers*, 838 N.E.2d at 657 (finding the defendants engaged in the practice of law illegally); *Toledo Bar Ass'n v. Chelsea Title Agency of Dayton, Inc.*, 800 N.E.2d 29, 30 (Ohio 2003) ("Although the deed contained language specifying that it was prepared by an attorney, it was neither reviewed by nor prepared under the supervision of an attorney."); *Crain v. Unauthorized Practice of Law Comm.*, 11 S.W.3d 328, 331 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (determining, among other questions, "whether the preparation and filing of lien affidavits and mechanic's liens constitutes the unauthorized practice of law").

51. See Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 123 ("Where tax issues prevent legal uncertainties, accountants arguably engage in the authorized practice of law."); see also Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney–Accountant Tax Turf War*, 36 ST. MARY'S L.J. 1, 98 (2004) (revealing while state courts have ruled the practice of tax equivalent to

Congress and the courts are at odds regarding what constitutes the unauthorized practice of law by accountants.⁵² Questions remain regarding where to allocate blame and what the standard of liability should be should something go awry with an accountant's work.⁵³

Attorneys have faced defeat in the realm of nonlawyer representation before administrative agencies; thus, it is well established this nonlawyer activity is permissible in most agencies.⁵⁴ But again, if these nonlawyers can engage in what many consider the practice of law, should they not be held to the same malpractice standards as those actually licensed to practice?⁵⁵

Finally, legal document preparation by companies such as LegalZoom raises one of the most hotly contested issues regarding the unauthorized practice of law.⁵⁶ In this battle, attorneys are once again on the losing

the practice of law, "federal courts are split on the issue, but generally hold that [it] is the practice of accounting, even when performed by an attorney").

52. See Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 122 (pointing out the existence of certain federal regulations that allow for "the authorized practice of law" by accountants that preempt the state courts from enforcing their own UPL laws).

53. See *id.* at 124–25 (arguing a rule holding accountants to the same standard of care as an attorney would benefit the public). "The first criterion for allowing nonlawyers to practice tax would be the demonstration of exceptional knowledge, and it should be defined in terms of current standards required by the courts. However, in establishing this standard, it should apply to attorneys practicing tax as well." Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney-Accountant Tax Turf War*, 36 ST. MARY'S L.J. 1, 91 (2004).

54. See 16 TEX. ADMIN. CODE § 1.65 (2013) (R.R. Comm'n of Tex., Representative Appearances) (authorizing nonlawyer representation); 30 *id.* § 80.9 (Tex. Comm'n on Envtl. Quality, Representation at Hearings) (allowing nonlawyer representation before certain administrative agencies); see also Fla. Bar v. Brower, 402 So. 2d 1171, 1173 (Fla. 1981) (permitting "lay representation before non-judicial governmental agencies"); *Galloway*, 369 N.W.2d at 843 (deferring to legislative intent when concluding nonattorneys can represent their employer-clients at referee hearings); Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH ADMIN. L.J. 115, 120 (2007) (concluding a majority of bar members who joined the discussion agreed an act should include a qualified nonlawyers provision).

55. See Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH ADMIN. L.J. 115, 140 (2007) (advocating for the imposition of competence and ethics requirements for nonlawyers as a way to protect consumers and the administrative law system).

56. See *Lowry v. LegalZoom.com, Inc.*, No. 4:11CV02259, 2012 WL 2953109, at *5–6 (N.D. Ohio July 19, 2012) (granting LegalZoom's motion to dismiss after concluding it was not violating any UPL laws); *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1068–69 (W.D. Mo. 2011) (discussing whether LegalZoom is a permissible business under UPL laws); *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905, 907 (Fla. 2010) (ruling on a cause of action involving document preparation services); *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2012 WL 3678650, at *5 (N.C. Super. Ct. Aug. 27, 2012) (weighing in on LegalZoom in the realm of UPL statutes); *Ohio State Bar Ass'n v. Dalton*, 924 N.E.2d 821, 822 (Ohio 2010) (concluding the

side.⁵⁷ Ironically, the founders of LegalZoom are attorneys.⁵⁸ Their familiarity with the law undoubtedly aids the business's ability to skirt past UPL laws. While the bar cannot prevent these different practices from continuing, there are certainly arguments as to why such practices should be stopped, reformed, or trigger greater accountability.⁵⁹

defendants engaged in the unauthorized practice of law by creating real estate documents and forging an attorney's signature); *Greenspan v. Third Fed. Sav. & Loan Ass'n*, 912 N.E.2d 567, 568 (Ohio 2009) (centering on mortgage and lien document preparation and recognizing a UPL cause of action was not an available remedy during the alleged offense); *Miami Cnty. Bar Ass'n v. Wyandt & Silvers, Inc.*, 838 N.E.2d 655, 657 (Ohio 2005) (considering document preparation services in the UPL context); *Toledo Bar Ass'n v. Chelsea Title Agency of Dayton, Inc.*, 800 N.E.2d 29, 31 (Ohio 2003) (resolving a document preparation issue); *Crain v. Unauthorized Practice of Law Comm.*, 11 S.W.3d 328, 334 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (upholding the trial court's permanent injunction to prohibit defendant from preparing and filing affidavit liens).

57. See *Lowry*, 2012 WL 2953109, at *4 (determining "[b]ased upon the [c]ourt's research and the thorough briefing provided by the parties, the law has not changed," and "Legalzoom has [not] engaged in the unauthorized practice of law"). Compare TEX. GOV'T CODE ANN. § 81.101 (West 2013) (drawing attention to what is now defined as the practice of law in Texas and stressing it "does not include the . . . sale by means of an Internet web site, of . . . forms, 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" (emphasis added)), with LEGALZOOM, <http://www.legalzoom.com> (last visited May 12, 2013) ("We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies."), and John Levin, *Yes, Virginia. Computers Can Practice Law. Sort of.*, CBA REC., Oct. 2011, at 50, 51 (noting courts have "relied heavily" on "LegalZoom's own language in its advertising and the web site describing the services it performs"). In response, "LegalZoom has addressed many of these issues in the 'disclaimer' language on the web site, in which LegalZoom specifically states that it is not giving legal advice and not practicing law." *Id.*

58. See *About Us*, LEGALZOOM, <http://www.legalzoom.com> (last visited May 12, 2013) (providing a background of LegalZoom's founders); *Brian S. Lee*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/person.asp?personId=11685814&privcapId=79724421&previousCapId=11677383&previousTitle=LEGALZOOMCOM%20INC> (last visited May 12, 2013) (explaining Lee's work and educational background); *Legalzoomcom Inc (LGZ: New York): Brian Liu*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/people/person.asp?personId=11685781&ticker=LGZ&previousCapId=11677383&previousTitle=LEGALZOOMCOM%20INC> (last visited May 12, 2013) (detailing Liu's work and educational background); *Legalzoomcom Inc (LGZ: New York): Edward R. Hartman*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/people/person.asp?personId=11685876&ticker=LGZ&previousCapId=11677383&previousTitle=LegalZoom.com%2C%20Inc> (last visited May 12, 2013) (listing Hartman's work and educational background); ROBERT SHAPIRO, <http://robertshapiro.com> (follow "ENTER SITE" hyperlink) (last visited May 12, 2013) (explaining Shapiro's work and educational background).

59. See Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney–Accountant Tax Turf War*, 36 ST. MARY'S L.J. 1, 91 (2004) (proposing a higher standard of qualification for "nonlawyers to practice tax"); Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 124–25 (discussing the problems existing in the area of tax law with nonlawyer practitioners); Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before*

A. *Certified Public Accountants*

At first thought, if asked whether accountants engage in the practice of law in their everyday course of work, one might easily respond, “No, of course not, they just crunch numbers.”⁶⁰ Upon closer examination, however, Certified Public Accountants (CPAs) do much more than crunch numbers. Today, CPAs work in professional structures similar to attorneys. Like attorneys, CPAs join forces to create firms through Limited Liability Partnerships, Professional Corporations, and Professional Limited Liability Companies. Similar to law firms, CPA firms combine accountants with different skill sets and backgrounds to offer a wide range of services.⁶¹

Consequently, as these services expand, so does the friction with UPL laws. The more accountants step away from their traditional role of crunching numbers and step into the role of advising and consulting, the more likely they are to find themselves as defendants in a UPL cause of action.⁶² The pervasive debate and confusion surrounding an accountant’s ability to perform quasi-legal services is understandable considering the lack of a uniform definition for the practice of law among

Texas Administrative Agencies and Recommendations for the Future, 8 TEX. TECH ADMIN. L.J. 115, 140 (2007) (advocating for a higher standard of qualification and increased liability for nonlawyer agency representatives).

60. See Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney–Accountant Tax Turf War*, 36 ST. MARY’S L.J. 1, 3 (2004) (acknowledging the tenuous mental connection between the work of an attorney and that of an accountant).

61. See *Services*, BRADLEY & DAVIS CPAS, <http://www.bradleyanddaviscpas.com/Services> (last visited May 10, 2013) (listing “Litigation Support,” “Assurance and Advisory Services,” and “Estate and Trust Planning and Tax Preparation” as some of the services offered by the firm); *Services*, MECK NOONAN & CO., L.L.C., CERTIFIED PUB. ACCTS., <http://www.meckcpaaustin.com/services.php> (last visited May 12, 2013) (cataloguing “New Business Formation” and “Financial Planning/Estates/Trusts” as some of the services the firm provides); *Services*, PADGETT STRATEMANN, <http://www.padgett-cpa.com/services> (last visited May 12, 2013) (advertising “mergers and acquisitions” and “litigation support” under its consulting services); *Solutions*, PANNELL KERR FORSTER OF TEX., P.C., <http://www.pkftexas.com/solutions/> (last visited May 12, 2013) (specifying “Litigation and Bankruptcy Solutions” and “Consulting Solutions” as some of the solutions the firm provides); *Services*, WAGNER, EUBANK, & NICHOLS, L.L.P., <http://www.wencpa.com/services> (last visited May 12, 2013) (specializing in “[r]epresentation before the IRS or other tax authorities”).

62. See *In re Estep*, 933 A.2d 763, 773–74 (Del. 2007) (affirming an accountant had engaged in the unauthorized practice of law and should be subject to sanctions because he drafted legal documents, gave legal advice on probate matters, and acted in a representative capacity); *Gardner v. Conway*, 48 N.W.2d 788, 798 (Minn. 1951) (determining the layman defendant engaged in the unauthorized practice of law); *Columbus Bar Ass’n v. Verne*, 788 N.E.2d 1064, 1065 (Ohio 2003) (affirming the unauthorized practice of law included an accountant’s guidance regarding the business structure his clients should use).

various state UPL laws.⁶³ Considering the definition of the *practice of law* in Texas, one may argue an accountant provides 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” in the midst of performing certain services, especially when working on tax-related matters.⁶⁴

1. Disputed Territory: Tax Practice

Tax assistance, preparation, and consultation provide especially fertile ground for a UPL cause of action because taxes are based upon the Internal Revenue Code—a complex code supplemented by a compilation of regulations, procedural rules, and administrative agency rulings.⁶⁵ Accordingly, any tax services rendered require the interpretation and application of this body of law.⁶⁶ Such an application by accountants often entails writing opinion letters and “defend[ing] clients before an administrative agency and ultimately before courts of original jurisdiction and courts of appeals.”⁶⁷ Despite the square fit of these activities into what many states define as the practice of law, there has been little success in reaching a general consensus on whether an accountant’s tax services constitute the unauthorized practice of law.⁶⁸ This gray area troubles

63. See Catherine J. Lanctot, *Does LegalZoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 262 (2011) (noting recent, concentrated attempts to develop a “more workable definition for the practice of law” have not been successful). The ABA’s preparation and thorough dedication to a workable definition resulted in it defining the practice of law in 2002 as:

(1) [g]iving advice or counsel to persons as to their legal rights or responsibilities or to those of others; (2) [s]electing, drafting, or completing legal documents or agreements that affect the legal rights of a person; (3) [r]epresenting a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or (4) [n]egotiating legal rights or responsibilities on behalf of a person,

Id. at 263 (quoting AM. BAR ASS’N, TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT TO THE HOUSE OF DELEGATES (2002), as reprinted in John Gibeaut, *Another Try: ABA Task Force Takes a Shot at Defining the Practice of Law*, 88 A.B.A. J. 18, 19 (Dec. 2002)). However, the result was a resounding objection from lawyers and nonlawyers, as well as “a forceful objection from the Department of Justice and Federal Trade Commission that the proposed rule would inhibit economic competition and hurt consumers.” *Id.*

64. TEX. GOV’T CODE ANN. § 81.101 (West 2013).

65. Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney–Accountant Tax Turf War*, 36 ST. MARY’S L.J. 1, 3 (2004) (describing the Internal Revenue Code as lengthy and complex and explaining the Code is supplemented by an overwhelming number of regulations and administrative agency rulings and procedures that are equally complicated and verbose).

66. *See id.* (highlighting the duties associated with tax services).

67. *Id.*

68. *See id.* (“It is hard to imagine that anyone would flunk this question [whether an

those attempting to block accountants from the practice of law.

While some case law recognizes an accountant's performance of tax services as the unauthorized practice of law,⁶⁹ the decisions have had little impact on how accountants practice, as many are "flaunted and not enforced."⁷⁰ Additionally, Congress passed a law recognizing a tax-advice privilege, which has further muddied the waters.⁷¹ This law caused confusion among the courts as to whether the performance of tax services constitutes the practice of law or a permissible service performed by attorneys and nonlawyers alike.⁷² Adding to the confusion, many believe the holding in *Sperry v. Florida ex rel. Florida Bar*⁷³ gave accountants the right to practice before the IRS.⁷⁴ However, this is an incorrect

accountant's performance of tax services constituted the practice of law] if given as a law school final essay. It seems to be a textbook definition of the practice of law."). Legal scholars also acknowledge the absence of a common decision among the courts regarding this question. *Id.*

69. See *State Bar Ass'n of Conn. v. Conn. Bank & Trust Co.*, 140 A.2d 863, 871 (Conn. 1958) (affirming if a nonlawyer engaged in "either the preparation of the tax returns or the matters dealt with involved tax law problems of a type such that their solution would be 'commonly understood to be the practice of law,' [the court] would hold that the acts performed constituted the unlawful practice of law" (quoting *Grievance Comm. v. Payne*, 22 A.2d 623, 626 (Conn. 1941))); *Nebraska ex rel. Neb. State Bar Ass'n v. Frank*, 363 N.W.2d 139, 140 (Neb. 1985) (recognizing it is clearly the practice of law when one engages in a proceeding for the purpose of determining an inheritance tax); *In re N.J. Soc'y of Certified Pub. Accountants*, 507 A.2d 711, 712 (N.J. 1986) (per curiam) (clarifying the preparation and filing of inheritance tax returns falls under the practice of law); *In re Roel*, 144 N.E.2d 24, 28 (N.Y. 1957) ("A specialized area of competence does not, however, entitle [accountants] to engage in the business of giving legal advice based on their knowledge of the subjects."); *In re Bercu*, 78 N.Y.S.2d 209, 211, 216 (N.Y. App. Div. 1948) (deciding respondent exceeded the scope of his accounting practice and crossed into UPL territory when he gave tax advice to his clients); *In re Standard Tax & Mgmt. Corp.*, 43 N.Y.S.2d 479, 480 (N.Y. App. Div. 1943) (maintaining a company's practice of counseling clients about tax laws and preparing related forms and materials constituted the unauthorized practice of law); see also Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney–Accountant Tax Turf War*, 36 ST. MARY'S L.J. 1, 16–17 (2004) (noting accountants have expanded their tax services despite courts deeming certain tax matters as the practice of law).

70. Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney–Accountant Tax Turf War*, 36 ST. MARY'S L.J. 1, 98 (2004).

71. See *id.* at 5 ("In response to the strong CPA lobby, Congress, in 1998, gave taxpayers a 'privilege' that allows taxpayers to consult with qualified tax advisors in the same manner that they would consult with tax lawyers.").

72. See *id.* (describing the ensuing confusion as federal courts interpreted the tax-advice privilege law).

73. *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379 (1963).

74. See Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney–Accountant Tax Turf War*, 36 ST. MARY'S L.J. 1, 3 (2004) (describing impressions left by the *Sperry* decision); see also *Sperry*, 373 U.S. at 402–04 (differentiating between a patent practitioner's practice before the Patent Office and the practice of law within a state, and thereby vacating an order enjoining a nonlawyer from practicing before the Patent Office).

interpretation of the Supreme Court's decision.⁷⁵ In this UPL suit against a patent agent, the Court vacated an injunction because it prevented a nonlawyer, who had registered to appear before the United States Patent Office, "from performing tasks which are incident to the preparation and prosecution of patent applications."⁷⁶ The decision does not change the rule that the role of CPAs in a hearing before the IRS is to "practice accounting (e.g.,[.] explain the financial statements they had to prepare)."⁷⁷

Due to the lack of agreement regarding whether the performance of tax services constitutes the practice of law and the sparse number of decisions that affirmatively answer this question, accountants continue to perform tax services mostly uninterrupted.⁷⁸

2. CPA Ethical Standards vs. Attorney Ethical Standards

With accountants providing tax services and other services that many argue comprise the practice of law (e.g., "the practice of attestation engagements of Management's Discussion and Analysis . . . sections of corporate filings"),⁷⁹ a resulting inequity is readily apparent.⁸⁰ Attorneys

75. See Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney-Accountant Tax Turf War*, 36 ST. MARY'S L.J. 1, 3-4 (2004) (explaining *Sperry* is commonly misinterpreted as authorizing accountants to practice before the IRS). Additionally, "[t]he Secretary of the Treasury stated that CPAs could come before the IRS to practice accounting (e.g.,[.] explain the financial statements they had prepared) but nothing contained in the Code of Federal Regulations was to be construed to allow a nonlawyer to practice law." *Id.* at 4; see also *Sperry*, 373 U.S. at 402 ("[P]atent practitioners are authorized to practice only before the Patent Office, [and] the State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives.").

76. *Sperry*, 373 U.S. at 404.

77. Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney-Accountant Tax Turf War*, 36 ST. MARY'S L.J. 1, 3-4 (2004) (citing 31 C.F.R. § 10.32 (2004)).

78. See *id.* at 98 (pointing to the disparity in opinions between state and federal courts on the question of whether tax is the practice of law and advocating that the high demand of tax services warrants allowing accountants to continue performing these services).

79. Susan B. Schwab, Note, *Bringing Down the Bar: Accountants Challenge Meaning of Unauthorized Practice*, 21 CARDOZO L. REV. 1425, 1425 (2000). One commentator further examines the conflict between an accountant's performance of MD&A attestations and UPL laws:

Accountants performing these types of attestations render reports or opinions discussing the accuracy of forward-looking statements made by corporate management. These attestation engagements serve the same purpose as lawyers' opinion letters, in which lawyers discuss the financial status of corporations. Although the Auditing Standards Board . . . has approved this expansion, neither the courts, the legislatures, nor the American Bar Association . . . has determined whether these services constitute the unauthorized practice of law.

Id. at 1426 (citations omitted). An MD&A attestation engagement involves three assurances: (1) the accuracy of historical amounts based on the entity's financial statements; (2) the inclusion of SEC-

must abide by strict ethical rules and are subject to malpractice liability,⁸¹ yet accountants escape such forms of accountability when performing the same activities. If the performance of these services continues uninterrupted, accountants should be required to meet elevated licensing qualifications and be held to a higher standard of liability.⁸²

One proposal requires CPAs to provide notice to their clients, advising them to seek attorney review of the more intricate services rendered;⁸³ however, this measure sidesteps the problem completely. CPAs who provide notice to their clients will be able to perform services and then conveniently seek shelter from liability by claiming they recommended attorney review.⁸⁴

The American Institute of Certified Public Accountants (AICPA) “promulgated a Code of Professional Conduct and Statements on Responsibility in Tax Practice,”⁸⁵ but as they stand, an infraction only results in losing AICPA membership, not losing one’s license.⁸⁶ The public would benefit from a uniform rule requiring attorneys and accountants to conform to a similar standard of professional liability when

required elements; and (3) whether underlying information provides a “reasonable basis” for disclosures. *Id.* at 1453. “[W]hile assurances involving the accuracy of historical amounts do not constitute the practice of law, assurances involving compliance with SEC rules and application of safe harbor rules do, and should therefore be reserved exclusively to lawyers.” *Id.* at 1431–32.

80. See Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney–Accountant Tax Turf War*, 36 ST. MARY’S L.J. 1, 6 (2004) (commenting on the double standard created by UPL cases that result in nonlawyers handling non-legal issues while holding lawyers to the courts’ ethical standards).

81. See generally MODEL RULES OF PROF’L CONDUCT Preamble & Scope (2012) (explaining the rules of professional conduct and specifying how the violation of certain rules carries disciplinary consequences for attorneys).

82. See Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney–Accountant Tax Turf War*, 36 ST. MARY’S L.J. 1, 91–98 (2004) (proposing a higher standard for nonlawyers in the area of tax law); Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 122–25 (describing some issues with allowing nonlawyers in the area of tax law); Susan B. Schwab, Note, *Bringing Down the Bar: Accountants Challenge Meaning of Unauthorized Practice*, 21 CARDOZO L. REV. 1425, 1465–67 (2000) (advocating for a higher degree of liability and qualification for CPAs if they are allowed to continue services that are arguably considered the practice of law).

83. Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 123 (citing a New Jersey case in which the court assumed CPAs will recommend legal consultation when dealing with particularly complex inheritance tax issues).

84. See *id.* at 124 (“If a mistake is made, use of the written disclosure form may allow the CPA to escape liability, and the burden of the harm may fall upon the client.”).

85. Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney–Accountant Tax Turf War*, 36 ST. MARY’S L.J. 1, 85 (2004). *But see id.* (noting the standards promulgated are not mandatory for CPAs).

86. *Id.* at 47.

engaging in legal or quasi-legal services; moreover, a uniform rule would place attorneys and accountants on equal footing.⁸⁷ Additionally, for services that are more complex than ordinary tax preparation, some believe there should be a specialized profession with its own qualifications and a regulatory bar to govern it.⁸⁸

While many debate the precise solution to the imbalanced liability problem between attorneys and accountants, most agree a solution is needed.⁸⁹ Unfortunately, a valid solution is unlikely; even the best attempt to limit an accountant's infiltration into the practice of law would be futile when legal scholars and practitioners disagree about what constitutes the practice of law versus the practice of accounting.⁹⁰

B. *Nonlawyers Practicing Before Administrative Agencies*

1. Permissible Nonlawyer Law Practice

Another arena nonlawyers now occupy is that of administrative agencies,

87. Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 124–25.

88. Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney–Accountant Tax Turf War*, 36 ST. MARY'S L.J. 1, 96 (2004). When contemplating the idea of a “Tax Practitioner,” consider the following:

We propose creating a new classification which could be called “Tax Practitioner.” Tax Practitioners could have a background in either law or accounting, but would become certified as a Tax Practitioner only after satisfactory completion of course work in specific areas and an examination demonstrating competency in the numerous areas of taxation, including related law. An experience requirement could also be imposed before the practitioner could practice on his own. To ensure continuing competency, a requirement of re-testing every five years or completion of a number of hours of continuing education could be imposed. These new practitioners would have the same requirements of character imposed upon members of the bar and would be subject to supervision and discipline by the courts. In effect, a new “bar association” could be created for Tax Practitioners.

Id.

89. See *id.* at 91–98 (advocating for a solution to the nonlawyer issues in the tax law realm); Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87, 122–25 (highlighting some of the issues in the area of tax law posed by nonlawyers); Susan B. Schwab, Note, *Bringing Down the Bar: Accountants Challenge Meaning of Unauthorized Practice*, 21 CARDOZO L. REV. 1425, 1465–67 (2000) (concluding a solution is needed to the accountant–attorney turf war over certain services).

90. See *In re Op. of Justices*, 194 N.E. 313, 318 (Mass. 1935) (explaining an accounting practice may “lie close to the border line and may easily become or be accompanied by the practice of law”), *abrogated by* Real Estate Bar Ass’n for Mass., Inc. v. Nat’l Real Estate Info. Servs., 946 N.E.2d 665 (Mass. 2011); Susan B. Schwab, Note, *Bringing Down the Bar: Accountants Challenge Meaning of Unauthorized Practice*, 21 CARDOZO L. REV. 1425, 1430 (2000) (acknowledging the difficulty in distinguishing the lines between the practice of accounting and the practice of law).

where in many circumstances nonlawyers are able to represent clients in a judicial-like setting. One of the most common places where this representation occurs is Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) claims⁹¹ before the Social Security Administration (SSA). The claims are tried in a manner that is uncannily similar to the definition of the practice of law.⁹² Social Security claims representatives advocate for their clients before the SSA, file a myriad of paperwork, draft client letters, analyze the social security “listings”⁹³ alongside the facts of the client’s particular situation, and even argue their client’s case before judges.⁹⁴ Both lawyers and nonlawyers pursue these Social Security cases because, upon a favorable decision, the federal government disburses payment for services rendered.⁹⁵ Therefore, payment does not require the fee-hounding common to many areas of law.⁹⁶ In addition to Social Security claim representation, there are many

91. See *Difference Between Social Security Disability and SSI Disability, FAQ Home*, SOC. SEC. ADMIN., http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/245/-/difference-between-social-security-disability-and-ssi-disability (last updated Jan. 2, 2013, 10:31 AM) (explaining the SSI and SSDI and how they differ).

92. Compare TEX. GOV’T CODE ANN. § 81.101 (West 2013) (defining the practice of law in Texas as 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”), with *About Us*, SOC. SEC. DISABILITY SPECIALIST, INC., <http://www.obtaindisability.com/aboutus.htm> (last visited May 12, 2013) (describing the company’s service as “non-attorney *Legal* Representat[ion] that specialize[s] in . . . claims before the [SSA]. Our professional *legal* staff will assist our client[s] in conquering the confusing maze of overwhelming paperwork . . . ! We handle SSI & Disability claims at the Initial claims level, Reconsiderations, [and] Administrative Law Judge *Hearing* Requests” (emphasis added)).

93. Listing of Impairments, 20 C.F.R. Pt. 404, Subpt. P, App. 1 (2012).

94. See SOC. SEC. ADMIN., POMS SECTION: GN 03970.050, OFFICE OF DISABILITY ADJUDICATION AND REVIEW (ODAR) DECISION ON THE CHARGES, *available at* <https://secure.ssa.gov/poms.nsf/lnx/0203970050> (explaining the right one has to nonlawyer representation for Social Security claims and what nonlawyer representatives can do for a claimant); see also *About Us*, DISABILITY SPECIALIST, INC., <http://www.disabilityspecialist.net/process.html> (last visited May 12, 2013) (describing the company’s services in the Social Security claim process, including assistance in filling out required forms, explanations of applicable law, and submission of written arguments supporting claims).

95. See *SSA’s Fee Authorization Processes: Direct Payment of a Fee to a Representative*, SOC. SEC. ADMIN., <http://www.ssa.gov/representation/overview.htm#a0=3> (last visited May 12, 2013) (“When the SSA or a Federal court authorizes a representative’s fee based on an approved fee agreement or a fee petition, SSA will withhold up to 25 percent of the claimant’s title II and/or title XVI past-due benefits for payment of all or part of the authorized fee . . .”).

96. See Edward Poll, *Getting Paid: A New Look at Fee Collection*, L. PRAC. TODAY, A.B.A. L. PRAC. MGMT. SEC. (Sept. 2006), <http://apps.americanbar.org/lpm/lpt/articles/fin09061.shtml> (emphasizing the difficulty collecting client fees and the financial harm that may result if fee collection is unsuccessful).

other administrative agencies permitting nonlawyer representation.⁹⁷

The regulations permitting representation before these agencies⁹⁸ often list a variety of people who may appear at a hearing, including “[r]eputable individuals,”⁹⁹ meaning “[a]ny reputable individual of good moral character.”¹⁰⁰ Explicitly allowing nonlawyer representation is directly at odds with UPL laws and is consequently a major point of debate for the drafters of administrative agency legislation.¹⁰¹ When this issue was encountered at the state level, states like Texas deferred resolving the contradiction, choosing instead to allow each agency to determine who may represent claimants in hearings;¹⁰² the majority of state and federal

97. Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. U. L.J. 223, 235 (2012) (identifying other federal agencies permitting nonlawyers to represent claims, including the Department of Labor); cf. Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH ADMIN. L.J. 115, 119 (2007) (“In Texas, agencies are responsible for the regulation and supervision of railroads and trucks, banking, finance, taxation, securities, corporations, insurance, labor, occupational and professional licensing, civil service, liquor control, highways, conservation, fisheries, water resources, public health and public welfare.”) (quoting *Administrative Government in Texas: An Introduction*, 47 TEX. L. REV. 808, 809 n.11 (1969)).

98. See 45 C.F.R. § 205.10(a)(3)(iii) (2012) (recognizing applicants have the right to be “represented by an authorized representative, such as legal counsel, relative, friend, or other spokesman, or he may represent himself”); see also 5 C.F.R. § 1201.31(b) (2012) (listing prerequisites for the Merit Systems Protection Board); 8 C.F.R. § 292.1 (2012) (providing a list of who qualifies as an authorized representative and describing requisites of each category regarding Immigration and Naturalization Services); 29 C.F.R. § 18.34 (2012) (referring to representation before the Department of Labor); 37 C.F.R. § 1.31 (2012) (addressing representation before the Patent and Trademark Office).

99. 8 C.F.R. § 292.1(a)(3) (2012).

100. *Id.* Note the lack of definition or clarification regarding what constitutes “good moral character.” *Id.*

101. See Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH ADMIN. L.J. 115, 120 (2007) (“Of particular interest to the Texas Bar in discussing the proposed [Administrative Procedure Act] was ‘[t]he question of whether practice before administrative boards and bureaus should be limited to duly licensed attorneys of the Bar, or whether provision should be made for the admission of certain enumerated personnel.’” (quoting Charles D. Mathews, *Administrative Procedure Act*, 15 TEX. B.J. 330, 332 (1952))).

102. See *id.* (indicating although the Texas Bar disagrees with nonlawyers’ ability to practice before state administrative agencies, the legislature allows the individual agency to make the decision). When the Administrative Procedure Act was enacted in 1946, it allowed agencies to choose who was suitable to be a representative before it in hearings. Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. U. L.J. 223, 235 (2012). Texas, like many other states, integrated this Act into its state legislation to resolve the question of who may practice before state agencies. Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH ADMIN. L.J. 115, 120 (2007).

administrative agencies chose to allow nonlawyer representation.¹⁰³ A significant reason for this decision is the lack of available attorneys¹⁰⁴ needed to match the high volume of agency hearings that regularly take place.¹⁰⁵ Because of the majority support, and the absence of a clear rule defining who may practice before the agencies that have not made a choice to allow nonlawyer representation,¹⁰⁶ the clash between nonlawyer agency representation and the unauthorized practice of law has generally subsided.

Today, with an influx of attorneys and a small number of law-firm job opportunities,¹⁰⁷ agency representation is an area of potential job growth. However, agencies have passed regulations allowing nonlawyer representation,¹⁰⁸ which provide those appearing before an agency with the option of bypassing expenses related to attorney representation—an option they will likely choose. Therefore, without reform, the prospect of job creation for licensed attorneys in this area is slim.

103. See Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH ADMIN. L.J. 115, 120 (2007) (pointing to numerous agencies allowing nonlawyer representation of claimants).

104. See *id.* at 122 (“The existing pool of lawyers [was] inadequate to meet . . . [the] needs for representation of low and moderate income persons.’ The area of administrative law was particularly hard-hit. ‘A large number of individuals involved in federal mass justice agency proceedings [had] unmet needs for assistance.’” (quoting Zona Fairbanks Hostetler, *Nonlawyer Assistance to Individuals in Federal Mass Justice Agencies: The Need for Improved Guidelines*, 1986 ADMIN. CONF. OF THE U.S. 47, 50, reprinted in 2 ADMIN. L.J. 85 (1988))).

105. See *id.* (noting many agencies experienced an increase in claims following the Industrial Revolution, and accordingly, people began to consider restrictions on nonlawyers as contrary to public interest).

106. Gregory T. Stevens, Note, *The Proper Scope of Nonlawyer Representation in State Administrative Proceedings: A State Specific Balancing Approach*, 43 VAND. L. REV. 245, 246 (1990) (“The inability of the individual states to establish an adequate regulatory system largely can be traced to separation of powers concerns regarding the proper regulatory body to govern representation in quasi-judicial proceedings before state administrative agencies.”).

107. See Carl Bialik, *Job Prospects for Law Grads? The Jury's Out*, WALL ST. J. (Mar. 17, 2012, 12:45 AM), <http://online.wsj.com/article/SB10001424052702304692804577283691965596610.html> (discussing the imbalance between the number of jobs and the number of law school graduates).

108. See 45 C.F.R. § 205.10 (2012) (explaining claimants “may be represented by an authorized representative, such as legal counsel, relative, friend, or other spokesman, or he may represent himself”); see also 5 C.F.R. § 1201.31 (2012) (reciting “any representative” may be chosen by a party); 8 C.F.R. § 292.1 (2012) (allowing “[a]ny reputable individual of good moral character” to be a representative); 29 C.F.R. § 18.34 (2012) (stating a party may be represented “by other representative”); 37 C.F.R. § 1.31 (2012) (permitting a power of attorney for a representative nonlawyer in patent hearings).

2. Discussion on Ethical Standards and a Model Solution

Although nonlawyer administrative agency representation is necessary in some circumstances, thus justifying lax UPL statute enforcement,¹⁰⁹ the reason for UPL laws—to ensure adequate services to those choosing representation¹¹⁰—is left wanting. Regardless of demand, as long as regulations permit nonlawyers to represent claimants before agencies, measures must be in place to safeguard citizens represented by nonlawyers. Professional incompetence by nonlawyer representatives causes problems, including diminished quality of representation in general or a failure to preserve error for appeal; such problems can leave claimants without recourse.¹¹¹

For example, looking back to the SSA, it is sharply criticized for its “complete, abject failure” to “actually enforc[e] its ethical rules.”¹¹² To quantify the need for greater competency and ethical standards in terms of nonlawyers, it is worth noting the SSA keeps records of those who are suspended or disqualified from representation,¹¹³ and statistics indicate “non-attorney representatives are seven times more likely to be suspended or disqualified than attorneys.”¹¹⁴

The U.S. Patent and Trademark Office (USPTO) may hold a possible

109. See Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH ADMIN. L.J. 115, 122 (2007) (emphasizing the imbalance in demand for agency representation and supply of available attorneys as a reason for allowing nonattorney representation before agency hearings).

110. See *Lowell Bar Ass'n v. Loeb*, 52 N.E.2d 27, 31 (Mass. 1943) (“The justification for excluding from the practice of law persons not admitted to the bar is to be found . . . in the protection of the public from being advised and represented in legal matters by incompetent and unreliable persons, over whom the judicial department could exercise little control.”); Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH ADMIN. L.J. 115, 121–22 (2007) (noting the importance of protecting the public from inadequate nonlawyer representation).

111. Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH ADMIN. L.J. 115, 128 (2007).

112. Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. U. L.J. 223, 242 (2012). Especially noteworthy is the fact that the author of the cited work is a former administrative law judge for the SSA. *Drew A. Swank*, DISABILITYJUDGES.COM, <http://www.disabilityjudges.com/state/virginia/richmond/drew-a-swank> (last visited May 12, 2013).

113. SOC. SEC. ADMIN., POMS SECTION: GN 03970.050, OFFICE OF DISABILITY ADJUDICATION AND REVIEW (ODAR) DECISION ON THE CHARGES, *available at* <https://secure.ssa.gov/poms.nsf/lnx/0203970050>.

114. Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. U. L.J. 223, 242 (2012).

case model for a solution to the lack of competency and ethical standards.¹¹⁵ To qualify as a representative before the USPTO, a potential representative is required, among many other things, to prove “scientific and technical qualifications;” pass an examination to establish competency; and prove “good moral character and reputation.”¹¹⁶ This qualifying process is similar to the process an attorney must undergo to gain admittance to the bar.¹¹⁷ In addition to implementing standards for qualification as set out by the USPTO,¹¹⁸ requiring a nonlawyer representative to post a bond as a prerequisite to representative status would allow a means of recourse for claimants who fall victim to inadequate representation; such a requirement is similar to an attorney carrying malpractice insurance.¹¹⁹ Substituting concrete standards in agencies with less stringent criteria, such as the SSA, would help claimants by ensuring higher quality representation.¹²⁰

115. See Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH ADMIN. L.J. 115, 138 (2007) (pointing out the success certain federal agencies, such as the Patent and Interstate Commerce Commissions, have had in ensuring nonlawyer competence by requiring certification and examination prior to practice); see also Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. U. L.J. 223, 249 (2012) (“The Patent and Trademark Office, as shown by *Sperry v. Florida*, had already embraced the logic of the unauthorized practice of law doctrine over fifty years ago by having a program to ensure the competency and ethical behavior of all their representatives, whether attorney or non-attorney.”).

116. 37 C.F.R. § 11.7 (2012).

117. Compare *id.* (stating the representative qualification requirements for the Patent and Trademark Office), with TEX. GOV'T CODE ANN. § 82.024 (West 2013) (detailing the “Law Study Requirements” for attorneys), *id.* § 82.028 (West 2013) (listing the moral character requirements for attorneys), and Rule II: *General Eligibility Requirements for Admission to the Texas Bar*, TEX. BD. L. EXAMINERS, <http://www.ble.state.tx.us/Rules/NewRules/ruleii.htm> (last visited May 12, 2013) (providing the requirements of attorney licensing in Texas).

118. 37 C.F.R. § 11.7 (2012).

119. See Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. U. L.J. 223, 249 (2012) (proposing an idea used by some states that mandates nonattorney representatives post security bonds, providing “for potential causes of action by ‘any fraud, misstatement, misrepresentation, unlawful act or omission,’ or failure on the part of the non-attorney representative to provide contracted services” (quoting Charles H. Kuck & Olesia Gorinshteyn, *Immigration Law: Unauthorized Practice of Immigration Law in the Context of Supreme Court's Decision in Sperry v. Florida*, 35 WM. MITCHELL L. REV. 340, 350 (2008))).

120. See *id.* at 250 (asserting the importance of policing non-attorney representatives to ensure the protection of the public and the system).

C. LegalZoom and Legal Document Preparation

Legal document preparation is the area of nonlawyer activity drawing the most heat for infringing upon the practice of law.¹²¹ Litigation over this issue stems from unclear boundaries separating permissible practices by nonlawyers from the unauthorized practice of law.¹²² Most of these document-preparation lawsuits involve property law issues,¹²³ which often can go wrong when a nonlawyer facilitating a real estate transaction forgoes outsourcing services (e.g., the drafting of complex contracts and mortgage instruments)¹²⁴ and prepares the documents without legal assistance.¹²⁵

211. See *Lowry v. LegalZoom.com, Inc.*, No. 4:11CV02259, 2012 WL 2953109, at *1 (N.D. Ohio July 19, 2012) (illustrating LegalZoom's document preparation services); *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1069 (W.D. Mo. 2011) (deciding a case relating to LegalZoom's document preparation services); *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905, 908 (Fla. 2010) (discussing a company's document preparation services in the context of the unauthorized practice of law); *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2012 WL 3678650, at *3 (N.C. Super. Ct. Aug. 27, 2012) (weighing in on the North Carolina State Bar's cease and desist letter issued to LegalZoom in response to its document preparation services); *Ohio State Bar Ass'n v. Dalton*, 924 N.E.2d 821, 822 (Ohio 2010) (exploring whether a title company engaged in the unauthorized practice of law when it provided document preparation services); *Greenspan v. Third Fed. Sav. & Loan Ass'n*, 912 N.E.2d 567, 569 (Ohio 2009) (discussing document preparation in the context of a UPL lawsuit); *Miami Cnty. Bar Ass'n v. Wyandt & Silvers, Inc.*, 838 N.E.2d 655, 657–58 (Ohio 2005) (centering on an accountant's document preparation services); *Toledo Bar Ass'n v. Chelsea Title Agency of Dayton, Inc.*, 800 N.E.2d 29, 31 (Ohio 2003) (deciding whether a corporation's document preparation services constituted the unauthorized practice of law); *Crain v. Unauthorized Practice of Law Comm.*, 11 S.W.3d 328, 332–34 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (referencing the common subject matter of document preparation among recent UPL cases).

212. One example of this narrow line can be explained in real estate contracts. For example, under Texas law, a real estate agent or broker may use form contracts prepared by an attorney, as provided by the Texas Real Estate Commission or the Texas Association of Realtors, for real estate sales or leases, or they may use a contract prepared by the property owner. TEX. OCC. CODE ANN. § 1101.155 (West 2012). However, an attorney must draft the contract if a suitable attorney-prepared form contract cannot be found or if the property owner has not made one; otherwise they risk running afoul of UPL laws. Compare *id.* (stating the “Rules Relating to Contract Forms”), with TEX. GOV'T CODE ANN. § 81.101 (West 2013) (defining the practice of law).

213. See generally *Goldberg*, 981 So. 2d at 551 (concerning promissory notes, mortgages, and deeds); *King v. First Capital Fin. Servs. Corp.*, 828 N.E.2d 1155, 1159 (Ill. 2005) (relating to mortgage documents); *Hargis v. JLB Corp.*, 357 S.W.3d 574, 576 (Mo. 2011) (pertaining to mortgage documents); *In re Mid-Am. Living Trust Assocs., Inc.*, 927 S.W.2d 855, 856 (Mo. 1996) (regarding trust documents); *Ohio State Bar Ass'n v. Newburn*, 892 N.E.2d 431, 432 (Ohio 2008) (discussing easements); *Ohio State Bar Ass'n v. Cohen*, 836 N.E.2d 1219, 1220 (Ohio 2005) (addressing bankruptcy); *Toledo Bar Ass'n*, 800 N.E.2d at 30 (relating to deeds).

214. See *King*, 828 N.E.2d at 1167–70 (affirming the drafting of mortgage documents was the unauthorized practice of law); *Dalton*, 924 N.E.2d at 824–25 (reiterating the drafting of deeds was the unauthorized practice of law); *Newburn*, 892 N.E.2d at 432–33 (indicating the drafting of easements was the unauthorized practice of law); *Toledo Bar Ass'n*, 800 N.E.2d at 31 (acknowledging the drafting of deeds was the unauthorized practice of law).

215. Shane L. Goudey, Comment, *Too Many Hands in the Cookie Jar: The Unauthorized*

Recently, however, UPL discussions regarding document preparation have centered on LegalZoom.¹²⁶

LegalZoom is one of many¹²⁷ legal document creation websites offering customers a variety of services, such as: creating an LLC; trademarking a business name; and drafting wills, powers of attorney, prenuptial agreements, and pet protection agreements.¹²⁸ While LegalZoom is just one website offering this service, it is undoubtedly the most well-known.¹²⁹

Practice of Law by Real Estate Brokers, 75 OR. L. REV. 889, 902–03 (1996). Despite the understanding that a nonlawyer may not draft complex legal documents related to real estate transactions, crossing this line can be tempting as “[b]rokers desire to provide such . . . services to their clients as a free accommodation[] in order to expedite the process and eschew the likelihood that lawyer involvement may delay or kill the deal by discovery of potential problems.” *Id.*

126. See *Janson*, 802 F. Supp. 2d at 1054–56 (concerning LegalZoom’s services in the context of the unauthorized practice of law); *N.C. State Bar*, 2012 WL 3678650, at *2–3 (regarding the North Carolina State Bar’s accusation that LegalZoom was engaging in the unauthorized practice of law); *Lowry*, 2012 WL 2953109, at *2 (highlighting LegalZoom and the unauthorized practice of law); Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? The Risks of Do-It-Yourself Estate Planning*, ALI-ABA EST. PLAN. COURSE MATERIALS J., Apr. 2011, at 27, 27–30 (discussing LegalZoom and the unauthorized practice of law as well as the company’s effect upon consumers); Bruce H. Kobayashi & Larry E. Ribstein, *Law’s Information Revolution*, 53 ARIZ. L. REV. 1169, 1195 (2011) (examining LegalZoom’s effect upon the legal profession); Catherine J. Lancot, *Does LegalZoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 257 (2011) (considering LegalZoom, the UPL, and the First Amendment); Lindzey Schindler, Comment, *Skirting the Ethical Line: The Quandary of Online Legal Forms*, 16 CHAP. L. REV. 185, 202–07 (2012) (scrutinizing LegalZoom’s ramifications on the legal profession and whether its business constitutes engaging in the unauthorized practice of law); John Levin, *Yes, Virginia. Computers Can Practice Law. Sort of.*, CBA REC., Oct. 2011, at 50, 50 (exploring the recent cases involving LegalZoom).

127. ALLLAW.COM, <http://www.alllaw.com/legalcenter/docprep/default.htm> (last visited May 12, 2013); FINDLEGALFORMS.COM, <http://www.findlegalforms.com/forms/partner/TopTen/> (last visited May 12, 2013); LAWDEPOT.COM, <http://www.lawdepot.com/?pid=affiliate-H7DYEFV831-generaltextlink> (last visited May 12, 2013); LEGALDOCS.COM, <http://www.legaldocs.com> (last visited May 12, 2013); LEGALHELPMATE.COM, <http://www.legalhelpmate.com> (last visited May 12, 2013); LLC MADE EASY, <http://www.llc-made-easy.com> (last visited May 12, 2013); MEGADOX.COM, http://www.megadox.com/?a_id=213 (last visited May 12, 2013); PUBLICLEGALFORMS.COM, <http://www.ilrg.com/forms/index.html> (last visited May 12, 2013); ROCKETLAWYER.COM, http://www.rocketlawyer.com/incorporate-for-free.r?AID=10706111&PID=5408919&SID=ti16381331&utm_source=107&partner=107&sku=commissionjunction (last visited May 12, 2013); USLEGALFORMS.COM, <http://partners.uslegalforms.com/enter5.cgi?topten> (last visited May 12, 2013); VOLOLEDO.COM: VIRTUAL ONLINE L. OFF. LEGAL DOCUMENTS, <http://www.premack.com/VOLO/VOLOhome.htm> (last visited May 12, 2013).

128. See *Our Products & Services*, LEGALZOOM.COM, <http://www.legalzoom.com/products-and-services.html> (last visited May 12, 2013) (listing available services).

129. See Catherine J. Lancot, *Does LegalZoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 257 (2011) (touting LegalZoom’s extraordinary success with nearly 400 employees and more than one-million satisfied clients).

Similar to LegalZoom in notoriety and success is “We The People,”¹³⁰ a document preparation business, which “[a]t its pinnacle . . . boasted more than 1,000 franchises in thirty states.”¹³¹ Despite its apparent success, the company filed for bankruptcy after the business model proved obsolete, and it later became a point of litigation in many states for UPL accusations related, ironically, to its bankruptcy services.¹³² Unlike LegalZoom, We The People predominately functioned via physical retail locations where employees worked with customers in person—a mark against them in UPL lawsuits.¹³³ We The People also lacked a user-friendly website, such as the one advertised by LegalZoom.¹³⁴

LegalZoom’s online model works by taking a consumer’s answers to a series of questions; reviewing those answers and using them to complete the document using a “document assistant” (who contacts the consumer if clarification or more information is necessary); and, finally, upon satisfaction of the consumer’s review and payment, printing the completed documents, sending them to the consumer, and filing them with “the appropriate government agency” if necessary.¹³⁵ LegalZoom uses this process to create all of its offered documents and charges consumers a fraction of the price of an attorney.¹³⁶ This differential in pricing makes

130. WE THE PEOPLE, <http://www.wethepeopleusa.com> (last visited May 12, 2013).

131. Catherine J. Lancot, *Does LegalZoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 258 (2011) (citing Richard Acello, *We the Pauper*, A.B.A. J. (May 1, 2010, 2:00 AM), http://www.abajournal.com/magazine/article/we_the_pauper/).

132. *See id.* (describing how We The People became entangled in multistate UPL litigation and subsequently filed for bankruptcy after experiencing a loss of about \$2.5 million).

133. *See, e.g.*, Fla. Bar v. We The People Forms & Serv. Ctr. of Sarasota, Inc., 883 So. 2d 1280, 1283 (Fla. 2004) (per curiam) (“[A] nonlawyer who has direct contact with individuals in the nature of consultation, explanation, recommendations, advice, and assistance in the provision, selection, and completion of legal forms engages in the unlicensed practice of law.” (citing Fla. Bar v. Catarcio, 709 So. 2d 96 (Fla.1998) (per curiam))).

134. *See* Catherine J. Lancot, *Does LegalZoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 258 (2011) (noting We The People prepared documents for customers at its offices’ physical locations).

135. *How It Works*, LEGALZOOM, <http://www.legalzoom.com/about-us/how-it-works> (last visited May 12, 2013).

136. *See Our Products & Services*, LEGALZOOM, <http://www.legalzoom.com/products-and-services.html> (last visited May 12, 2013) (providing links to various services with prices ranging from \$99–\$359 for creating an LLC, \$99–\$369 for company incorporation, \$169–\$189 for trademarking services, \$69–\$79 for last will and testament creation, \$299 for a divorce, \$249 for a living trust, \$35–\$45 for a financial power of attorney, and \$39–\$49 for a living will). To contrast the savings, the median hourly rate of a Wills–Trusts–Probate attorney is about \$200. STATE BAR OF TEX.: DEP’T OF RESEARCH & ANALYSIS, 2009 HOURLY FACT SHEET 7, *available at* http://www.texasbar.com/AM/Template.cfm?Section=Research_and_Analysis&Template=/CM/ContentDisplay.cfm&C

using LegalZoom an obvious choice for the frugal consumer whose legal needs lack complexity; consequently, it is a perceived threat to the legal profession.¹³⁷ This is likely a major reason¹³⁸ why LegalZoom has come under fire for violating UPL laws.¹³⁹

1. Recent Cases

In *Lowry v. LegalZoom.com, Inc.*,¹⁴⁰ the plaintiff brought suit against LegalZoom in the United States District Court for the Northern District of Ohio for engaging in the unauthorized practice of law after he used its services to draft a will.¹⁴¹ The court easily decided the issue, granting

ontentID=11240; see also Christine Larson, *A Need for a Will? Often, There's an Online Way*, N.Y. TIMES (Oct. 14, 2007), <http://www.nytimes.com/2007/10/14/business/yourmoney/14wills.html?pagewanted=all> (noting the ABA vice chairman's estimate of \$800 to \$1,000 for preparation of a will by a licensed attorney).

137. See Richard Acello, *We the Pauper*, A.B.A. J. (May 1, 2010, 2:00 AM), http://www.abajournal.com/magazine/article/we_the_pauper/ ("Do-it-yourself legal clinics have been toxic to attorneys, especially solos and small firms who compete for the same kinds of work: divorce, wills, incorporations and bankruptcies."); Jonathan G. Blattmachr, *Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve*, 36 ACTEC L.J. 1, 41 (2010) ("Technology is also eroding the exclusive domain of lawyers to render services that likely otherwise would be performed by an attorney, such as with LegalZoom."); see also Rachel M. Zahorsky, *Facing the Future: Kickoff Event Features Old and New in 6-Minute Bites*, A.B.A. J. (June 1, 2012, 1:30 AM), http://www.abajournal.com/mobile/article/facing_the_future_kickoff_event_features_old_and_new_in_6-minute_bites (describing how LegalZoom is endangering small firms' and solo practitioners' market shares); cf. Brock Rutter, *Preparing for the Increasing Pace of Technological Change*, VT. B.J., Fall 2012, at 35, 35–36, available at <http://content.yudu.com/A1yzq1/Fall2012/resources/3.htm> (proposing it is difficult to pinpoint the effect LegalZoom has upon the legal profession). This difficulty exists because "on the one hand the millions of dollars being spent on services such as LegalZoom might represent money taken from the pockets of general practitioners. On the other hand, it's possible that the customers of such systems would never have been able to afford traditional legal services." *Id.* at 35.

138. Catherine J. Lanctot, *Does LegalZoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 261 (2011) (noting LegalZoom's General Counsel recognized the company's success made it a target for increased litigation).

139. See *Lowry v. LegalZoom.com, Inc.*, No. 4:11CV02259, 2012 WL 2953109, at *1 (N.D. Ohio July 19, 2012) (involving a class action suit against LegalZoom); *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1064–65 (W.D. Mo. 2011) (holding LegalZoom's services constituted the unauthorized practice of law); *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2012 WL 3678650, at *2 (N.C. Super. Ct. Aug. 27, 2012) (discussing the cease and desist letter sent to LegalZoom); see also Catherine J. Lanctot, *Does LegalZoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 258–62 (2011) (describing how LegalZoom faced several UPL suits in states such as North Carolina, Ohio, Connecticut, Pennsylvania, Missouri, and Washington).

140. *Lowry v. LegalZoom.com, Inc.*, No. 4:11CV02259, 2012 WL 2953109 (N.D. Ohio July 19, 2012).

141. *Id.* at *1.

LegalZoom's motion to dismiss because, under Ohio law, a UPL violation may not be charged against a defendant until the Ohio Supreme Court has determined the particular practice qualifies as the unauthorized practice of law.¹⁴² Although the Ohio Supreme Court has not yet heard this issue, it does have established precedent in the UPL area.¹⁴³ The court has stated, "The unauthorized practice of law occurs when a person provides legal services to another in this state without admission to the practice of law or certification for limited practice pursuant to the Supreme Court. . . . This includes the preparation of legal documents for others."¹⁴⁴ Based on this precedent, a UPL finding seems likely if the Ohio Supreme Court hears the issue.

In another recent decision, the United States District Court for the Western District of Missouri ruled LegalZoom engaged in UPL acts in *Janson v. LegalZoom.com, Inc.*¹⁴⁵ In *Janson*, a group of consumers brought a class action lawsuit alleging LegalZoom participated in the unauthorized practice of law by providing them with the company's ordinary services.¹⁴⁶ In the court's analysis of whether LegalZoom's services fit the definition of the practice of law as set out in the Missouri UPL laws,¹⁴⁷ the level of interaction between the LegalZoom staff and the consumer was

142. See *id.* at *2 ("Once the Supreme Court of Ohio has exercised its exclusive jurisdiction to determine that a specific party has engaged in the unauthorized practice of law, an aggrieved person may seek damages in a civil action against that specific party arising from such conduct."); see also OHIO REV. CODE ANN. § 4705.07 (LexisNexis 2006) ("No person who is not licensed to practice law in this state shall . . . [c]ommit any act that is prohibited by the supreme court as being the unauthorized practice of law. . . . Only the supreme court may make a determination that any person has committed the unauthorized practice of law . . .").

143. See *Geauga Cnty. Bar Ass'n v. Haig*, 955 N.E.2d 352, 354 (Ohio 2011) (per curiam) (holding defendant engaged in the unauthorized practice of law by preparing pleadings for foreclosure cases); *Ohio State Bar Ass'n v. Lienguard, Inc.*, 934 N.E.2d 337, 340 (Ohio 2010) (per curiam) (ruling defendant engaged in the authorized practice of law when creating mechanic's liens for another party); *Cincinnati Bar Ass'n v. Foreclosure Solutions, L.L.C.*, 914 N.E.2d 386, 391 (Ohio 2009) (per curiam) (concluding respondent engaged in the unauthorized practice of law by representing homeowners in foreclosure proceedings); *Dayton Bar Ass'n v. Stewart*, 878 N.E.2d 628, 629 (Ohio 2007) (per curiam) (finding respondents engaged in the unauthorized practice of law by incorporating, organizing, and dissolving companies for third parties); *Toledo Bar Ass'n v. Chelsea Title Agency of Dayton, Inc.*, 800 N.E.2d 29, 30–31 (Ohio 2003) (per curiam) (holding defendant engaged in the unauthorized practice of law by preparing general warranty and quitclaim deeds).

144. *Geauga Cnty. Bar Ass'n*, 955 N.E.2d at 353.

145. *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1065 (W.D. Mo. 2011).

146. *Id.* at 1057.

147. Compare MO. ANN. STAT. § 484.020 (West 2004) (barring the practice of law without a license), with *id.* § 484.010 (defining "law business" as "the advising or counseling for a valuable consideration . . . as to any secular law[,] or the drawing or the procuring . . . for a valuable consideration of any paper, document[,] or instrument affecting or relating to secular rights").

a pivotal factor.¹⁴⁸ The court drew many comparisons between LegalZoom's services and do-it-yourself kits, in which the consumer receives no consultation or advice from a nonlawyer advisor, and acknowledged the latter was permissible; but the court ultimately held LegalZoom's services crossed the line.¹⁴⁹

Anticipating this dichotomy, part of LegalZoom's defense was to fit itself into the category of a do-it-yourself product.¹⁵⁰ However, the court rejected that argument when it decided LegalZoom provided a service and not a product.¹⁵¹ The court reasoned that because LegalZoom takes the reins in completing the legal document after the consumer makes a minimal contribution by answering questions, its services are no different than "a lawyer in Missouri asking a client a series of questions and then preparing a legal document based on the answers provided and applicable Missouri law."¹⁵² Further clarifying its stance on the matter, the court rebutted a common argument—that a computer cannot practice law—by highlighting that a person is at the root of the service, and "[a] computer sitting at a desk in California cannot prepare a legal document without a human programming it to fill in the document using legal principles derived from Missouri law."¹⁵³ Although a federal court made this

148. See *Janson*, 802 F. Supp. 2d at 1064 (ruling the human element, and not the Internet-based forum, made LegalZoom's practices improper). The Missouri court's analysis in *Janson* reflects that of the Florida court in the case against We The People. See, e.g., Fla. Bar v. We The People Forms & Serv. Ctr. of Sarasota, Inc., 883 So. 2d 1280, 1283 (Fla. 2004) (citing the direct contact between nonlawyer advisor and consumer as a reason in finding the business engaged in the unauthorized practice of law).

149. See *Janson*, 802 F. Supp. 2d at 1064 (comparing LegalZoom's services to a do-it-yourself legal document kit). The court further stated:

The kit in *Thompson* offered page upon page of detailed instructions but left it to the purchaser to select the provisions applicable to their situation. The purchaser understood that it was their responsibility to get it right. In contrast, LegalZoom says: "Just answer a few simple online questions and LegalZoom takes over. You get a quality legal document filed for you by real helpful people." Thus, LegalZoom's [I]nternet portal sells more than merely a good (i.e., a kit for self help) but also a service (i.e., preparing that legal document). Because those that provide that service are not authorized to practice law in Missouri, there is a clear risk of the public being served in legal matters by "incompetent or unreliable persons."

Id. (citations omitted).

150. *Id.* at 1059.

151. *Id.* at 1064.

152. *Id.* at 1065. Anticipating a rebuttal argument, the court also noted the fact that even though "the Missouri lawyer may also give legal advice does not undermine the analogy because legal advice and document preparation are two different ways in which a person engages in the practice of law." *Id.*

153. *Id.*; see John Levin, *Yes, Virginia. Computers Can Practice Law. Sort of.*, CBA REC., Oct. 2011, at 50, 50–51 (analyzing the *Janson* decision and agreeing if a lawyer programs a computer with

decision, it is noteworthy that the court was under the obligation to apply Missouri state law.¹⁵⁴ Nevertheless, the court's analysis regarding whether a computer may practice law can be severed, and it may shed light upon how future federal courts might rule on the issue.

Other states ruled similarly to *Janson* in deciding LegalZoom engaged in the unauthorized practice of law: North Carolina,¹⁵⁵ Ohio,¹⁵⁶ Connecticut,¹⁵⁷ Pennsylvania,¹⁵⁸ and Washington¹⁵⁹ issued opinions classifying LegalZoom's services as the unauthorized practice of law. Some states, however, ruled in favor of LegalZoom. For example, Texas's statutory definition of the practice of law carves out an exception for websites and services such as LegalZoom.¹⁶⁰ The last paragraph of the Texas statute stresses "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . of written materials, books, forms, computer software, or similar products if the products

a decision tree resulting in a legal conclusion through document preparation, it would appear the computer engages in the practice of law).

154. See *Janson*, 802 F. Supp. 2d at 1062 ("[T]he Court must decide whether a reasonable juror could conclude that LegalZoom did engage in the unauthorized practice of law, as it has been defined by the Missouri Supreme Court." (emphasis added)).

155. See, e.g., *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2012 WL 3678650, at *3 (N.C. Super. Ct. Aug. 27, 2012) (detailing the resulting lawsuit, which LegalZoom commenced after it received a cease-and-desist letter from the North Carolina State Bar). The court ultimately deferred ruling on LegalZoom's lawsuit, which asserted the bar association's actions constituted "a violation of the Monopoly Clause of the North Carolina State Constitution, denial of Equal Protection, and commercial disparagement." *Id.*

156. See Catherine J. Lanctot, *Does LegalZoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 259 (2011) (relaying Ohio's choice to issue a decision similar to North Carolina with regard to LegalZoom's unauthorized practice of law).

157. See *id.* at 259–60 (explaining how the Connecticut Bar Association Committee on the Unauthorized Practice of Law issued an opinion characterizing LegalZoom's services as the unauthorized practice of law).

158. See *id.* at 260 (describing how the Pennsylvania Bar Association Committee on the Unauthorized Practice of Law issued a formal opinion asserting preparation of legal documents is a legal service because it requires the knowledge and application of legal doctrine).

159. See *id.* at 261 ("[R]ecently, the Washington [S]tate Attorney General negotiated a settlement agreement with LegalZoom in September 2010, requiring the company to stop comparing its services to those of licensed attorneys, and to refrain from providing Washington consumers with individualized legal advice concerning a self-help form." (citing Debra Cassens Weiss, *Wash. AG's Settlement with LegalZoom Bars Fee Comparisons Absent Disclosure*, A.B.A. J. (Sep. 21, 2010, 8:06 AM), http://www.abajournal.com/news/article/wash._ags_settlement_with_legalzoom_bars_fee_comparisons_absent_disclosure/)).

160. See TEX. GOV'T CODE ANN. § 81.101(c) (West 2013) (excluding from the practice of law the "publication, distribution, display, or sale by means of an Internet web site[] of written materials, books, forms, 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").

clearly and conspicuously state that the products are not a substitute for the advice of an attorney.”¹⁶¹ Many states have not drafted their statutes in this manner, and most have not issued opinions on whether LegalZoom and other document preparers are engaging in the unauthorized practice of law.

2. Questions on Competency, Ethics, and Recourse

Aside from the issue of whether LegalZoom or other online legal document preparers engage in the unauthorized practice of law, the questions of competency and recourse remain. Some critics are concerned that consumers are not “getting what they thought they paid for, and that the online provider is not likely to have malpractice [insurance].”¹⁶² For example, an estate-planning attorney tried out the site’s services using a relatively normal family make-up and estate goal and found the results “would have cost him ‘tens of thousands in probate fees and potentially hundreds of thousands in taxes.’”¹⁶³ Additionally, without attorney–client human interaction to analyze a client’s questions, body language, and level of experience with the requested services, a distinct possibility remains that the client may need another legal form or service not identified by the standard set of questions asked by LegalZoom and other document preparation websites.¹⁶⁴

Furthermore, should a consumer face non-financial repercussions, LegalZoom’s complete satisfaction guarantee¹⁶⁵ may not make the consumer whole. Non-financial repercussions that cannot be solved by a refund, or by complimentary document preparation services, will likely beget lawsuits. This result is problematic for the average consumer because

161. *Id.*

162. Richard Acello, *We the Pauper*, A.B.A. J. (May 1, 2010, 2:00 AM), http://www.abajournal.com/magazine/article/we_the_pauper/ (quoting Bob Fellmeth, who founded the Center for Public Interest Law at the University of San Diego School of Law).

163. Lindzey Schindler, Comment, *Skirting the Ethical Line: The Quandary of Online Legal Forms*, 16 CHAP. L. REV. 185, 193–94 (2012) (quoting David A. Hiersekorn, *So, What’s So Bad About LegalZoom, Anyway?*, at 4, <http://www.kctrustlaw.com/files/Download/Legalzoom.pdf>).

164. See Richard Acello, *We the Pauper*, A.B.A. J. (May 1, 2010, 2:00 AM), http://www.abajournal.com/magazine/article/we_the_pauper/ (“There’s a question as to whether the person seeking the information doesn’t know what they don’t know—when you avoid the attorney, you’re not getting the question asked that might lead you to an entirely different form.”); Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? The Risks of Do-It-Yourself Estate Planning*, ALL-ABA EST. PLAN. COURSE MATERIALS J., Apr. 2011, at 27, 30 (highlighting the value of personal interaction with clients to evaluate their comprehension of the issues).

165. See *The LegalZoom Satisfaction Guarantee*, LEGALZOOM, <http://www.legalzoom.com> (last visited May 12, 2013) (offering a refund, credit, or correction of the problem if a client is unsatisfied with LegalZoom’s services).

maintaining a successful lawsuit against a company of such stature is a difficult task. LegalZoom perpetuates this difficulty by disclaiming liability for its services at the outset in a twenty-three paragraph “Terms of Use” agreement.¹⁶⁶ In contrast, the rules of professional conduct prohibit an attorney from offering such a waiver because it operates as a prospective limitation of the attorney’s liability to the client.¹⁶⁷ However, this is not the only area where LegalZoom is able to skirt attorney ethics rules. In general, as a company maneuvering outside activity classified as the practice of law, LegalZoom operates free from the confines of ethical rules enforceable upon attorneys.¹⁶⁸

One proposed solution to the lack of personal interaction and professional consultation is to require LegalZoom to integrate its optional “Legal Advantage Plus” add-on to all of its services.¹⁶⁹ The add-on advertises a list of benefits¹⁷⁰ that include linking the consumer with an

166. *Terms of Use*, LEGALZOOM, <http://www.legalzoom.com/legal/general-terms/terms-of-use> (last visited May 12, 2013). The disclaimer addresses potential confusion of the consumer’s relationship with the site by explaining:

This Site and Applications are not intended to create any [attorney–client] relationship, and your use of LegalZoom does not and will not create an [attorney–client] relationship between you and LegalZoom. Instead, you are and will be representing yourself in any legal matter you undertake through LegalZoom’s legal document service.

Id. The site also includes a substantial arbitration and indemnification agreement with limiting language: “YOU WILL HOLD LEGALZOOM AND ITS OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS HARMLESS FOR ANY INDIRECT, PUNITIVE, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGE, HOWEVER IT ARISES (INCLUDING ATTORNEYS’ FEES AND ALL RELATED COSTS AND EXPENSES OF LITIGATION AND ARBITRATION, OR AT TRIAL OR ON APPEAL . . .).” *Id.* See also Lindzey Schindler, Comment, *Skirting the Ethical Line: The Quandary of Online Legal Forms*, 16 CHAP. L. REV. 185, 190 (2012), for a description of LegalZoom’s lengthy Terms of Use.

167. TEX. DISCIPLINARY RULES PROF’L CONDUCT R. 1.08(g), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (West 2013) (TEX. STATE BAR R. art. X, § 9) (prohibiting agreements prospectively limiting a lawyer’s potential malpractice liability to a client unless otherwise “permitted by law and the client is independently represented in making the agreement”).

168. MODEL RULES OF PROF’L CONDUCT Preamble & Scope (2012) (explaining the rules of professional conduct only apply to attorneys and judges and certain rules carry the consequence of discipline when breached).

169. Lindzey Schindler, Comment, *Skirting the Ethical Line: The Quandary of Online Legal Forms*, 16 CHAP. L. REV. 185, 208 (2012) (recommending LegalZoom’s plus package be extended to all interactions with its customers).

170. The Legal Advantage Plus add-on offers “Attorney support,” “Annual legal checkup with an attorney,” “Unlimited revisions to your last will through LegalZoom,” “Secure storage and delivery of your last will,” “Unlimited access to LegalZoom downloadable legal forms,” “25% savings on additional attorney services,” and a “10% savings on any LegalZoom legal documents.” *Last Will and Testament Pricing*, LEGALZOOM, <http://www.legalzoom.com/legal-wills/wills-pricing.html> (last visited May 12, 2013). None of these services is available if customers only purchase the “basic” package. *Id.*

experienced attorney on a recurring basis to ensure the prepared documents accurately reflect the consumer's desires, and providing consumers with the opportunity to consult an attorney on "other new legal matters."¹⁷¹ In addition to the enhanced support, clarification, and error review, bringing an attorney into every transaction will provide a simpler means of recourse for a consumer should something go amiss.¹⁷²

Regarding the inequity in applying a standard of ethics, one possible solution is for the drafters of the rules of professional responsibility to widen the scope of applicability to encompass legal document preparers and legal document preparation businesses.¹⁷³ Pulling these companies into the realm of liability for a breach of professional responsibility¹⁷⁴ would result in a higher expectation of service. More specifically, if the rules of professional responsibility applied to LegalZoom, it would be forbidden from preemptively disclaiming liability.¹⁷⁵ Additionally, removing its disclaimer barrier would offer consumers more avenues for recourse should they experience negative effects resulting from inadequate service.¹⁷⁶ This solution would also raise the stakes for poor performance; consequently, document preparers like LegalZoom would invest more precaution in providing its services to consumers.

D. *Other Nonlawyers Potentially Practicing Law*

One final example of an activity that might be considered the unauthorized practice of law consists of nonlawyer radio show hosts who

171. *Id.*; see Lindzey Schindler, Comment, *Skirting the Ethical Line: The Quandary of Online Legal Forms*, 16 CHAP. L. REV. 185, 208 (2012) (exploring the benefits of requiring the "Legal Advantage Plus" features for all LegalZoom services).

172. By working with an attorney, a consumer would have the option of seeking recourse against an individual rather than a large company should a problem arise with the services provided. Although a large company may have more assets to collect from, it will also have scores of attorneys to support its case and will often mandate arbitration, where an award would likely be much less. Additionally, the attorney would very likely have malpractice insurance and be subject to the rules of professional conduct.

173. See Lindzey Schindler, Comment, *Skirting the Ethical Line: The Quandary of Online Legal Forms*, 16 CHAP. L. REV. 185, 209 (2012) (proposing a revision of the model rules as a possible solution to the issue).

174. MODEL RULES OF PROF'L CONDUCT Scope ¶ 19 (2012) ("Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.").

175. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.08(g); see Lindzey Schindler, Comment, *Skirting the Ethical Line: The Quandary of Online Legal Forms*, 16 CHAP. L. REV. 185, 209 (2012) (advocating for a new Model Rule that would prevent companies with practices like LegalZoom's interactive document preparation from prospectively limiting their liability).

176. See Lindzey Schindler, Comment, *Skirting the Ethical Line: The Quandary of Online Legal Forms*, 16 CHAP. L. REV. 185, 209 (2012) (highlighting that absent disclaimers of liability, many consumers would have greater confidence in their legal right to file suit for negligence).

give legal advice to callers; for instance, the Rule of Law Radio Show broadcasting from Austin, Texas.¹⁷⁷ The show uses a call-in question and answer format in which the host answers callers' legal questions.¹⁷⁸ The host usually gives very detailed advice on the caller's particular situation, ranging from what to say during a traffic stop to which motions to file and how to plead in a particular case.¹⁷⁹ Similar shows exist in a number of locations across the United States;¹⁸⁰ however, usually the hosts of those shows are attorneys, while the Rule of Law Radio's hosts have no reservation in informing their listeners that they are not attorneys.¹⁸¹ Rule of Law's hosts are well-educated individuals who have studied the law on their own, but have no formal legal education.¹⁸² According to the Texas statutory definition of the practice of law, this radio program is likely engaging in the unauthorized practice of law.¹⁸³ However, Texas is rather conservative in its enforcement of UPL provisions,¹⁸⁴ and if a suit is filed against the show, First Amendment protections and an argument that the advice is for entertainment purposes only might favor the show's defense.

While the show's audience is relatively small, the program could divert callers who otherwise would consult an attorney. Those who pay to watch the show's periodic seminars on legal issues may also be less inclined to pay for an attorney.¹⁸⁵ If more programs of this variety appear across the

177. RULE OF LAW RADIO, <http://ruleoflawradio.com> (last visited May 12, 2013).

178. *See id.* (offering a line for listeners to call and interact with the hosts).

179. *See Our Hosts*, LOGOS RADIO NETWORK, http://www.logosradionetwork.com/search.cgi?action=host_search&app=host&crpp=100&sortby=host_lastname&reverse=no&session=session (last visited May 12, 2013) (explaining one of the hosts searches for the source of the problem and its possible solution, then presents it on the air to the audience).

180. *See THE LAW SHOW*, <http://www.thelawshow.com> (last visited May 12, 2013) (referencing a radio show with an attorney-radio host who gives legal advice to callers); OLSEN LAW GROUP, <http://www.orlandofloridalawpractice.com/olsen-on-law.html> (last visited May 12, 2013) (discussing a call-in legal advice radio show hosted by an attorney).

181. *See Our Hosts*, LOGOS RADIO NETWORK, http://www.logosradionetwork.com/search.cgi?action=host_search&app=host&crpp=100&sortby=host_lastname&reverse=no&session=session (last visited May 12, 2013) (“[The host] is an average American, who is no judge, prosecutor, police officer[,] or public official of any kind. He isn't even a lawyer! He is a singular sovereign citizen in this free country and that is more than enough!”).

182. *See id.* (advertising one of the hosts spent more than ten years performing research on various Texas codes, including the Texas Transportation Code).

183. *See* TEX. GOV'T CODE ANN. § 81.101 (West 2013) (including “the giving of advice or the rendering of any service requiring the use of legal skill or knowledge” in its definition of the “practice of law”).

184. *See* THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 77–78 (2010) (narrating the difficulties the Texas Bar experienced in attempting to enforce UPL provisions).

185. *Seminars & Videos*, RULE OF LAW RADIO, <http://ruleoflawradio.com/upcoming>

country, attorneys could endure a noticeable decline in their profits.

Even assuming the hosts are as competent, if not more so, as some attorneys in giving advice on legal issues, the same issues in terms of lack of competency, ethics, and available recourse exist—just as in the other major areas discussed above.

III. WHERE DOES THIS ISSUE LEAVE ATTORNEYS TODAY?

Because UPL laws provide minimal protection from the encroachment of those engaging in quasi-legal services, attorneys must differentiate themselves to compete in an oversaturated legal market that is experiencing outside pressure from nonlawyers. Attorneys can do little to alter the encroachment of CPAs and nonlawyer administrative agency representatives whose practices are engrained in the legal system and are on a relatively even playing field with that of an attorney. In essence, clients have a choice between two business professionals; so aside from the usual steps necessary to stay competitive in an industry,¹⁸⁶ such as proper business practices, service quality differentiation, competitive pricing, and marketing, there are few unique proactive steps an attorney can take.

However, with regard to online document preparers—where a choice exists between working in person with an individual or working on a computer when convenient—the battle for attorneys is more arduous. In this area, the best course of action for attorneys is to “cut into the market share of the LegalZooms” by “leverag[ing] the technology.”¹⁸⁷ As one attorney suggests:

In order to “compete” with sites such as LegalZoom, law firms may be required to adopt some of the systems that the online sites offer. For example, a firm may allow clients or prospective clients to enter the firm’s website and access information regarding the firm’s services or to download information relevant to his or her circumstances and the products he or she may require. The law firm could then review the client’s information and the documents requested and seek to meet either in person, over the telephone, or electronically to implement the client’s plan. Through this stream-lined procedure, the law firm’s time spent on production would be

seminars.htm (last visited May 12, 2013).

186. See Citigroup, *Top 10 Actions Small Businesses Take to Stay Competitive*, YAHOO! FINANCE (Dec. 13, 2012 4:17 PM), <http://finance.yahoo.com/news/top-10-actions-small-businesses-211700814.html> (listing the top ten actions business owners take to stay competitive, including staying up to date on changes in technology, maintaining good relationships with clients, and diligently following updates in their field of practice).

187. Richard Acello, *We the Pauper*, A.B.A. J. (May 1, 2010, 2:00 AM), http://www.abajournal.com/magazine/article/we_the_pauper/.

reduced, as would the fee charged to the client.¹⁸⁸

This proposal may be accomplished through an online question and selector system similar to LegalZoom's format, and it should reveal the average price range of the service based on the selectors.¹⁸⁹ This process will give consumers a better idea of what an attorney's services actually cost, rather than leaving consumers with the assumption that an attorney would be out of their price range—a problem that likely diverts potential clients. The program could also be entirely anonymous at the outset and offer no legal advice, thereby solely serving the purpose of allowing consumers to gauge their fit with a given attorney. This might avoid the pitfall of unintentionally commencing an attorney–client relationship, which could thereby expose the attorney to legal malpractice claims. Of course, this proposal is not free from concern because any time a lawyer does not have direct control over information given to a client, the possibility of malpractice increases.¹⁹⁰

A simpler strategy is to publish an online newsletter with the goal of increasing website traffic, a method every attorney may easily implement in practice.¹⁹¹ An educational online newsletter can update potential clients on new legislation affecting the attorney's target client base and inform potential clients of changes in the firm. This strategy will help build a sense of credibility with prospective clients and make the firm or attorney appear more approachable.

Finally, to capitalize on the convenience factor, attorneys should consider giving clients the option of meeting via video conference,¹⁹²

188. Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? The Risks of Do-It-Yourself Estate Planning*, ALI-ABA EST. PLAN. COURSE MATERIALS J., Apr. 2011, at 27, 32.

189. There is an inherent danger in giving a price quote in the legal profession, but the range could be broad enough to anticipate unexpected costs incurred. In addition, the quote could also reiterate that it is only an initial quote and it would be subject to a meeting with an attorney on the matter.

190. See Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? The Risks of Do-It-Yourself Estate Planning*, ALI-ABA EST. PLAN. COURSE MATERIALS J., Apr. 2011, at 27, 32 (“Many lawyers may resist the idea . . . due to malpractice concerns, the complexity of the matter[,] and the possibility of not obtaining critical information needed to adequately serve the client. If a lawyer simply allowed a client to use his or her forms, he or she could potentially be subject to a malpractice claim if something goes wrong.”).

191. Jonathan G. Blattmachr, *Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve*, 36 ACTEC L.J. 1, 50 (2010) (suggesting attorneys create an online newsletter to attract a greater number of potential clients).

192. See *id.* at 61 (predicting in future law practice, “[i]n person meetings will diminish and be substituted by video and then virtual meetings in part because full immersion audio visual virtual reality will be developed”).

using programs such as Skype.¹⁹³ The widespread availability of video-conferencing technology would assist suburban and rural clients, who are located far from most firms' physical locations near the downtown city courthouse, by freeing them from the expense and trouble of a long commute; certainly, eliminating this deterrent would provide an incentive to clients seeking convenience.

The bottom line is attorneys must develop an online presence and harness technological advances to make services for clients more convenient and cost-effective wherever possible. This practice is not only prudent, but also necessary in an industry that will likely face more LegalZoom-type competitors in the future.

IV. CONCLUSION

The legal field is very competitive as it stands,¹⁹⁴ and this competitiveness is further complicated due to the growing ineffectiveness of UPL laws and their enforcement.¹⁹⁵ Certain nonlawyer practices are slipping through the cracks and adding to the competition. In some instances, nonlawyer activities that are technically the practice of law do not pose the threat that initially gave rise to the enactment of UPL laws.¹⁹⁶ In areas such as nonlawyer agency representation, enforcing UPL laws appears to be motivated purely by those interested in maintaining the dwindling attorney monopoly; an exception in these circumstances would do more good for the public than UPL law enforcement. However, even in these situations, a uniform standard of liability, ethics, and certification should be developed to ensure a balanced group of practitioners is available to the public.

In other areas, state courts should examine nonlawyer activities that flirt with the practice of law to weigh the potential for harm and determine whether these practices truly serve the public. The bar's ability to protect its monopoly is diminishing, and in some cases, it is best for the public.

193. See SKYPE, <http://www.skype.com/en/> (last visited May 12, 2013) (offering Internet calls, "calls to phones and mobiles," video calls, instant messaging, and video chat services).

194. See *A Less Gilded Future*, *ECONOMIST*, May 5, 2011, available at <http://www.economist.com/node/18651114> (discussing the decrease in available legal employment).

195. See Susan D. Hoppock, Current Development, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 *GEO. J. LEGAL ETHICS* 719, 720–21 (2007) (discussing the shortcomings in UPL enforcement).

196. Robert R. Ries, *The Unauthorized Practice of Law in Texas*, 60 *TEX. B.J.* 37, 38 (1997) ("The paramount purpose of UPL law is the protection of the people from the inexperienced and unlearned who attempt to practice law without first qualifying themselves through a course of study and training or who may be morally unfit to enjoy the privileges of a legal practice.").

Whatever the result, attorneys must prepare for a future legal practice that might expand its composition to include more practicing nonlawyers and more consumers expecting even greater convenience and value.¹⁹⁷

197. Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 399 (2004) (“Americans are attempting to address their legal needs without professional assistance, and [with] the increase in information and services available to help them Today’s consumer has thousands of options.”).