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PROFESSIONAL MALPRACTICE IN A WORLD OF AMATEURS

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My purpose in this article is to have us think about legal malpractice in a world that for lawyers is rapidly changing. Our clients experience change at an accelerating pace and expect us to be able to keep up. Lawyers are simultaneously blessed and cursed by technology that allows us to deliver services faster and in

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more places, but keeps us tethered to our cell phones and e-mail day and night. Work we thought we did well for clients that we have known seemingly forever is threatened by people promising to do the same work better, faster, cheaper, or all of these. Such developments will inevitably affect how we view professional malpractice, if only in adapting the way we understand what constitutes the "competence and diligence normally exercised by lawyers" that the *Restatement of the Law Governing Lawyers* says a lawyer is required to bring to bear on a client's matter.[1] What I want to do in this article is focus on a related question. I want to suggest that one of the changes facing lawyers and their clients has been an increase in nonlawyer delivery of what have traditionally been seen as legal services. It is a trend that I believe is destined only to accelerate. The malpractice question then becomes: To what standard of care and competence should such "amateur" lawyers be held?

I. SOME EXAMPLES TO SET THE SCENE

Three fictional examples may help make concrete the kinds of situations I have in mind.

First, Chemco manufactures chemicals used by other companies to make a wide range of end-products. From time to time, when a consumer is injured by one of the end-products, the plaintiff also joins Chemco as a defendant. Chemco self-insures such claims and has retained a company called QuickSettle to manage and try to settle the claims as they arise. QuickSettle is composed entirely of nonlawyers—most of them former insurance company claims agents. Chemco gives QuickSettle authority to settle cases for up to $50,000. If a case cannot be settled within that limit, it is referred to a lawyer for possible trial, but most of the time, QuickSettle gets good results and Chemco has been very pleased. Recently, however, a QuickSettle employee mistakenly filed a medical report from a case with severe injuries among the records in a different case with injuries that were much less severe. The QuickSettle claims agent did not catch the error and agreed on behalf of Chemco to settle what should have been a low value case for a clearly excessive sum. Chemco wants damages for QuickSettle's negligence.

1. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(1) (2001).

Second, Jerry and Martha James want a divorce.[2] They earn too much to qualify for legal aid but cannot afford to hire private lawyers. No children are involved, and there has been no complication such as domestic violence. But they both believe the marriage was a mistake, and they want out before things get more complicated. Paul Palmer created DivorceMagic for just such situations. Palmer is not a lawyer, nor is anyone on his staff. He was simply upset about how his own divorce was handled, so his DivorceMagic company publishes a 60-page book called *When Your Marriage Was a Mistake*. The book is sold online for $49 and offers checklists and forms that purport to allow lay people to obtain a divorce in any jurisdiction. If a couple wants help filling out the forms, DivorceMagic will provide a nonlawyer employee to do that as well for an additional $99. Jerry and Martha bought the book. They agreed on a property division, that there would be no alimony, and paid the extra $99 for a consultation about how to fill in the forms to record their agreement.

Sure enough, the forms were enough to obtain a speedy divorce. Jerry later learned, however, that a recent court decision in their state would have entitled him to be covered by Martha's health insurance for a year after the divorce, at no additional cost to Martha, if the settlement agreement incorporated in the divorce had so provided. Now it is too late to correct the situation. The court decision had been the subject of CLE programs attended by many divorce lawyers, although it is hard to say that all lawyers in the state would have known about it. In any event, the DivorceMagic book said nothing about the issue and the consultant who helped with the forms was also ignorant. As a result, Jerry had to pay $4,500 out of pocket for his own health insurance and now believes DivorceMagic owes him that sum.

Third, Jose Ramos has been injured on the job and is about to lose his house.[3] His state allows nonlawyers to appear on behalf of claimants before the state Industrial Accident Board seeking workers' compensation benefits. Ramos's union representative

2. This example is based loosely on *State Bar v. Cramer*, 249 N.W.2d 1 (Mich. 1976), which held that written divorce kits with forms are not unauthorized practice. *Id.* at 9. Personal conferences with clients, however, are unauthorized. *Id.*

3. This fact situation is based loosely on *Bland v. Reed*, 67 Cal. Rptr. 859 (Cal. Ct. App. 1968), which held that neither the union nor the advisor is liable for malpractice. *Id.* at 862.

recommended that Ramos consult Maria Castro, a nonlawyer, to file his claim and obtain benefits for him. Castro made the filing in a timely manner and obtained the maximum award available for Ramos's injury. She did nothing, however, either to help Ramos file an additional action for negligence against the third party who caused the injury or to renegotiate his mortgage so that he might have a chance of keeping his house. Nor did Castro help Ramos find a lawyer who might provide such help. Ramos appreciated Castro's help but believes she ultimately committed malpractice.

II. COULD EXAMPLES LIKE THIS EVER HAPPEN?

Do these examples sound plausible? We used to think that prohibitions of the unauthorized practice of law meant that such cases could not arise.[4] Each example involves work lawyers could have done. Each involves applying legal principles to concrete facts involving particular clients, which is the traditional line nonlawyers may not cross.[5] Yet such cases do arise[6] and their

4. *See* Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1193 (Fla. 1978) (stating that despite the possibility that citizens will use legal forms made available by lay persons, courts must assume that "most persons will not rely on these materials in the same way they would rely on the advice of an attorney"); Fla. Bar v. Am. Legal & Bus. Forms, Inc., 274 So. 2d 225, 227 (Fla. 1973) (agreeing that legal forms should be available to the general public but warning that the instruction of how to select and complete a particular form would be the unauthorized practice of law); State v. Buyers Serv. Co., 357 S.E.2d 15, 19 (S.C. 1987) (requiring the examination of titles to be performed by a licensed attorney or a person "under the supervision of a licensed attorney"); Palmer v. Unauthorized Practice Comm., 438 S.W.2d 374, 377 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ) (holding that the sale and distribution of will forms by a lay person is the unauthorized practice of law). *See generally* Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2581 (1999) (noting that the unauthorized practice of law is categorically prohibited by every state, but that definitions of the activity are "by no means uniform"); 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 (2002) (identifying the difficulties in defining the unauthorized practice of law and claiming that there is "little uniformity in the definition . . . among the states"); Joyce Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says "Cease Fire!"*, 31 CONN. L. REV. 423, 438–40 (1999) (claiming that many buyers and sellers turn to nonlawyers in order to facilitate real estate transactions because they perceive that nonlawyers will take less time and cost less money than licensed attorneys).

5. This definition was used in Ethical Consideration 3-5 of the American Bar Association (ABA) Code of Professional Responsibility. MODEL CODE OF PROF'L RESPONSIBILITY EC 3-5 (1983) ("The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client . . . .").

number is likely to increase in the future. Let's think about some reasons why.

First, some of the services described in our three cases have long been held not to violate unauthorized practice of law prohibitions.[7] Writing and selling the DivorceMagic book, for example, is not the practice of law. The leading case permitting such action involved Norman Dacey[8] and his best-seller, *How to Avoid Probate!*, but we can also be sure that many law school casebooks used at St. Mary's are not written by Texas-licensed lawyers, and no one thinks that the books' authors are guilty of practicing without a license.[9]

Likewise, Maria Castro's representation of Jose Ramos before the workers' compensation agency was likely not unauthorized practice. Several states now permit nonlawyer representation before state agencies,[10] and many federal agencies are required to

6. *See Buyers Serv. Co.*, 357 S.E.2d at 19 (holding that title examinations, when performed by a nonlawyer, must be supervised by a licensed attorney); *see also* Or. State Bar v. Gilchrist, 538 P.2d 913, 919 (Or. 1975) (establishing that merely providing a person with divorce forms is lawful while providing consultation about the selection of those forms is the unauthorized practice of law).

7. *See* Henize v. Giles, 490 N.E.2d 585, 587 (Ohio 1986) (holding that representation by a nonlawyer at administrative unemployment compensation hearings is not the unauthorized practice of law); *see also Bland*, 67 Cal. Rptr. at 861 (noting that the representation by non-attorneys before the Industrial Accident Commission was authorized by the legislature); *In re* Thompson, 574 S.W.2d 365, 369 (Mo. 1978) (holding that, as long as the sellers do not give personal advice, the sale of divorce kits is not the unauthorized practice of law); N.Y. County Lawyers' Ass'n v. Dacey, 234 N.E.2d 459, 459 (N.Y. 1967) (agreeing with the dissenting judge in the lower court that the sale of printed matter asserting legal rules coupled with legal forms and instructions on filling out the forms is not the unauthorized practice of law); *Gilchrist*, 538 P.2d at 919 (finding that the defendants were not engaged in the practice of law by advertising and selling their divorce kits, but personal advice and assistance with filling out the forms was the unauthorized practice of law).

8. *Dacey*, 234 N.E.2d at 459; *see also Thompson*, 574 S.W.2d at 369 (holding that as long as the sellers do not give personal advice, the advertisement and sale of divorce kits is not the unauthorized practice of law).

9. Any person, even if licensed in another jurisdiction, is committing the unauthorized practice of law if he is not licensed within that jurisdiction. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5(b) (2008) (stating that, barring certain circumstances, an attorney not admitted to practice within that jurisdiction shall not establish an office or represent that he or she is licensed).

10. *E.g.*, *Bland*, 67 Cal. Rptr. at 861 (providing an example of nonlawyer representation before the Industrial Accident Commission); Harkness v. Unemployment Comp. Bd. of Review, 920 A.2d 162, 164 (Pa. 2007) (holding that a nonlawyer may represent an employer before an unemployment compensation board of review). *But see In re* Advisory Opinion HRS Nonlawyer Counselor, 547 So. 2d 909, 911 (Fla. 1989)

make nonlawyer representation before those agencies possible as well.[11]

Further, while the activities of QuickSettle may be within most states' current prohibition of unauthorized practice, think about what is going on. It is no accident that QuickSettle is composed of former insurance company employees. Nonlawyer claims adjusters have been a staple of the insurance industry for years.[12] We have justified their presence on the grounds that it was the insurance company's money that was at risk, and insurers could hire whomever they wanted to try to protect it. However, in our example, Chemco is a self-insurer. It could have hired the employees of QuickSettle as its own employees to try to dispose of the cases. At many corporations, areas such as environmental, human resources, tax, antitrust, and health and safety programs are often under the direction of nonlawyer compliance officers who have access to lawyers but do not necessarily report to them.[13] It should, therefore, not surprise us when courts start to say that companies may use claims adjusters working through an entity such as QuickSettle.

(holding that nonlawyers may not draft documents and represent government departments in uncontested juvenile dependency proceedings).

11. *See* Exec. Order No. 12,988, 3 C.F.R. 157, 161 (1997), *reprinted in* 28 U.S.C. § 519 (2006) (ordering a review of administrative adjudicatory processes at all federal agencies to increase nonlawyer representation where appropriate).

12. *See* HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION 175 (1990) (asserting there is no evidence that nonlawyer claims adjusters are less effective than attorneys).

13. *See, e.g.*, Susan Hackett, *Inside Out: An Examination of Demographic Trends in the In-House Profession*, 44 ARIZ. L. REV. 609, 616 (2002) (maintaining that in-house counsel's work with non-legal personnel in multidisciplinary problem-solving will lead to a redefinition of legal work in that in addition to legal analysis, law firms may be expected to provide integrated solutions to problems). Professor Kritzer calls such nonlawyers "law workers" and sees them as examples of the kinds of people with whom lawyers are likely to compete with in the future. *See* Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917, 918 (2002) (noting that law workers include tax preparers, unemployment compensation specialists, and those working with welfare and social security appeals); *see also* HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 13 (1998) (noting that lawyers and nonlawyers compete for clients and as advocates in a variety of settings). Kritzer questions these restrictions and notes that many of these tasks, such as drafting simple wills, could be competently handled by unlicensed professionals. *See* HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION 168 (1990) (pointing out that proposals have been advanced to allow nonlawyers to handle the paperwork for simple wills, real estate closings, and uncontested divorces).

Finally, DivorceMagic permits nonlawyers to fill in the blanks on the pre-printed forms. That constitutes unauthorized practice in most states because it involves making judgments about how legal standards apply to Jerry and Martha's specific case.[14] But even that kind of prohibition is soon likely to break down. Think of the typical real estate agent, for example, who routinely fills in the blanks on forms for buyers' offers and sellers' counteroffers. A lot more than Jerry's lost $4,500 turns on getting the terms right. Attorneys in Texas who followed the controversy over Quicken Family Lawyer[15] realize that we are well past the days in most states where even people making the biggest purchase of their lives are required to have a lawyer.[16]

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14. *See, e.g.*, Ohio State Bar Ass'n v. Martin, 118 Ohio St. 3d 119, 2008-Ohio-1809, 886 N.E.2d 827, at ¶ 45 (determining that a franchised company called "We the People" violated the unauthorized practice prohibition when it gave advice about completing legal pleadings and other documents).

15. *See* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. 3:97-CV-2859H, 1999 WL 47235, at *1, *10 (N.D. Tex. Jan. 22, 1999) (enjoining the sale of Quicken Family Lawyer, a software program which purported to help users select and complete legal forms), *vacated*, 179 F.3d 956 (5th Cir. 1999). The Texas legislature then changed the result by statute, and the Fifth Circuit vacated the injunction in light of the statute. *See* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956, 956 (5th Cir. 1999) (overruling the district court through interpretation of the new statutory provision and concluding that the use of computer software that clearly states that it is not a substitute for legal advice does not constitute the unauthorized practice of law). In a similar case, the Ninth Circuit turned to California cases to come to the conclusion that a website, which purported to help the user file for bankruptcy, was the unauthorized practice of law. *See In re* Reynoso, 477 F.3d 1117, 1125–26 (9th Cir. 2007) (holding that a lay seller of web-based software for preparation of bankruptcy forms was subject to regulations imposed on bankruptcy petition preparers and also violated the California unauthorized practice of law prohibition).

16. The leading case discussing whether the preparation and formulation of documents by title companies constitutes the unauthorized practice of law is *State Bar v. Arizona Land Title & Trust Co.*, 366 P.2d 1 (Ariz. 1961), *supplemented by* 371 P.2d 1020 (Ariz. 1962). After the state supreme court held that filling in the blanks on a real estate contract constituted the practice of law, the citizens of Arizona passed a ballot initiative amending the state constitution to reverse the decision. *See* State Bar v. Ariz. Land Title & Trust Co., 371 P.2d 1020, 1021 (Ariz. 1962) (detailing the declaration by Arizona real estate boards that employees of real estate agencies should have the authority to prepare documents without it constituting the unauthorized practice of law). Other states have addressed the issue regarding preparation of documents. *See In re* Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1361–62 (N.J. 1995) (holding that real estate brokers handling the entire closing of a real estate transaction are not engaging in the unauthorized practice of law); *see also* Dressel v. Ameribank, 664 N.W.2d 151, 157 (Mich. 2003) (emphasizing that a mortgage company may charge a fee for preparation and completion of home loan documents as it was not engaged in the unauthorized practice of law when completing documents for a mortgage); Perkins v. CTX

There is an overarching reason, of course, why a lawyer's involvement in traditional lawyer functions is required less frequently than before. That reason is that our profession has tended to do a poor job of meeting many of the needs of potential clients.[17] Lay persons have long been entitled to act pro se, and many do so because they cannot afford several hundred dollars per hour for a lawyer's time.[18] No state requires that its lawyers provide pro bono service,[19] and while some courts continue to defend the legal profession's right to prevent others from providing many kinds of services,[20] other judges recognize that many clients require a careful, caring friend more than a trained lawyer. Chief Justice Kavanagh of Michigan put it well when he said in words that could apply to each of our examples: "'[The]

Mortgage Co., 969 P.2d 93, 100 (Wash. 1999) (authorizing mortgage lenders to prepare documents that do not require legal discretion). *But see generally* Carpenter v. Countrywide Home Loans, Inc., 250 S.W.3d 697 (Mo. 2008) (indicating that a mortgage broker may not charge a fee for preparation of mortgage documents); Franklin v. Chavis, 640 S.E.2d 873, 876 (S.C. 2007) (articulating that the filling in of blanks in a computer-generated will form constitutes unauthorized practice of law). These cases are distinguishable from other cases in which a nonlawyer acts as a conduit for a practicing attorney's advice. *See, e.g.*, Fla. Bar v. Beach, 675 So. 2d 106, 109 (Fla. 1996) (holding that a lawyer who consults with clients of a firm run by paralegals violates prohibitions against assisting in the unauthorized practice of law and sharing legal fees with nonlawyers).

17. *See* Chris Sanders, *Credit Where Credit Is Due*, 74 TENN. L. REV. 241, 241 (2007) (opining that the lack of access to attorneys is, in effect, a lack of justice to individuals in need of legal advice); *see also* Erwin Chemerinsky, *An Encyclopedia on the Sociology of the Legal Profession*, 37 UCLA L. REV. 777, 783 (1990) (reviewing LAWYERS IN SOCIETY (Richard L. Abel & Philip S.C. Lewis eds., 1988)) (stating that the poor and middle-class are overwhelmingly affected by their lack of access to attorneys).

18. *See* Helaine M. Barnett, President, Legal Servs. Corp., Justice for All: Are We Fulfilling the Pledge?, Address at the University of Idaho Bellwood Lecture (Oct. 21, 2004), *in* 41 IDAHO L. REV. 403, 405 (2005) ("[A]ccess to the judicial system usually requires a lawyer; lawyers cost money, and the poor do not have money. Thus, the poor all too often do not have lawyers, even when they desperately need them."); *cf.* Erwin Chemerinsky, *An Encyclopedia on the Sociology of the Legal Profession*, 37 UCLA L. REV. 777, 783 (1990) (reviewing LAWYERS IN SOCIETY (Richard L. Abel & Philip S.C. Lewis eds., 1988)) (criticizing the authors for failing to compare other countries to the United States in terms of methods of providing legal access to the impoverished).

19. *See* Katja Cerovsek & Kathleen Kerr, Current Development, *Opening the Doors to Justice: Overcoming the Problem of Inadequate Representation for the Indigent*, 17 GEO. J. LEGAL ETHICS 697, 706 (2004) (declaring that there is no mandatory pro bono rule in the United States); *see also* Chris Sanders, *Credit Where Credit Is Due*, 74 TENN. L. REV. 241, 244 (2007) (stating that the United States has yet to implement a mandatory pro bono requirement for attorneys).

20. *See, e.g.*, Miami County Bar Ass'n v. Wyandt & Silvers, Inc., 838 N.E.2d 655, 658 (Ohio 2005) (determining that where an accountant provides legal advice about the formation of corporations, the interests of clients may be adversely affected).

closed-shop attitude is utterly out of place in the modern world where claims pile high and much of the work of tracing and pursuing them requires the patience and wisdom of a layman rather than the legal skills of a member of the bar.'"[21]

Furthermore, the line between lawyer and nonlawyer work can be exceedingly fine. Lobbyists, for example, are sometimes lawyers but are often not.[22] Lawyers correctly believe that their malpractice policies cover work they do while lobbying, but even nonlawyers are not enjoined from engaging in lobbying on behalf of others.[23] Sports agents and mediators similarly use skills lawyers possess but are often nonlawyers.[24] In this article, I have used examples of work traditionally handled only by lawyers, but one of the implications of getting into this subject is the realization that more and more situations require multiple skills, and that pressure is likely only to grow to have nonlawyers as well as lawyers available to handle them.

III. TO WHAT STANDARD OF PERFORMANCE SHOULD A NONLAWYER BE HELD?

The purpose of this symposium article, of course, is more than just to convince you of the possibility that nonlawyers might provide what are otherwise considered legal services. The more important question for us is to what standard of performance or care such a nonlawyer should be held. The most obvious possible

21. State Bar v. Cramer, 249 N.W.2d 1, 11 (Mich. 1976) (Kavanagh, C.J., dissenting) (quoting Johnson v. Avery, 393 U.S. 483, 492 (1969) (Douglas, J., concurring)) (arguing that a nonlawyer may not help clients fill in the blanks on forms in a divorce kit). Chief Justice Kavanagh was quoting Justice Douglas's concurring opinion in *Johnson v. Avery*, which affirmed the right of a prisoner to use the help of a jailhouse lawyer. *Johnson*, 393 U.S. at 492.

22. William R. Bruce, *Professional Responsibility of Lobbyists*, 23 MEM. ST. U. L. REV. 547, 547 (1993).

23. *Cf.* James M. Bowie, *Professional Liability Insurance: What Every Lawyer Should Know*, 19 ME. B.J. 112, 114–15 (2004) (asserting that lobbying activities must be specified in the policy and that the attorney should verify with the agent that all related business activities are adequately covered).

24. *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, 93–94 (noting that entities such as sports agencies are increasingly providing assistance with legal matters); *see also* BARBARA ASHLEY PHILIPS, THE MEDIATION FIELD GUIDE: TRANSCENDING LITIGATION AND RESOLVING CONFLICTS IN YOUR BUSINESS OR ORGANIZATION, at xvi (2001) (noting that at the heart of civil litigation and mediation is the goal of dispute resolution).

answer is the one offered in an excellent article by Professor Sande Buhai of Loyola Law School in Los Angeles. "Act Like a Lawyer," Professor Buhai asserts, "Be Judged Like a Lawyer."[25]

There are good arguments in favor of demanding that nonlawyers meet the standard to which a lawyer is held. First, the purpose of unauthorized practice prohibitions is said to protect the public against unqualified practitioners.[26] Clients, we argue, have a right to expect that when they seek help with legal issues, they will get help from someone fully qualified to perform the services. The fact that we might not always require a license to deliver a service should not diminish the client's right to enforce a standard of lawyer-quality work.

Buscemi v. Intachai,[27] a Florida case, illustrates the powerful instinct behind such a rule. Buscemi, a financial planner with a legal education but no license to practice law, advised a couple that it would be in their financial interest—and that of their dependent child—if they obtained a divorce.[28] He helped them fill out the necessary forms and divide their existing property, but he failed to advise the wife about obtaining either alimony or child support.[29] She was understandably upset. The defendant had discouraged the couple from hiring attorneys and the wife said she trusted him because: "'Number one, he's [a] graduate from law school. Number two, he's a financial advisor. . . . I trust him and since he charge[d] two hundred, I think that's reasonable and he said it's easy to get [a] divorce, so I expect him to take care of everything.'"[30] Buscemi said that as a nonlawyer he could not be expected to perform as well as a lawyer.[31] The court disagreed:

25. 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, 87. This subject has only rarely been examined in the scholarly literature, and Professor Buhai deserves great praise for her excellent and thorough review of the cases. Cornelia Wallis Honchar offered an earlier, much shorter review of the issues, but one that also teased out key questions before others appreciated their importance. *See* Cornelia Wallis Honchar, *Evolving Standards of Non-lawyer Liability*, PROF. LAW., May 1995, at 14 (providing a discussion on other applicable laws that may attach to nonlawyer liability).

26. 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, 87–88.

27. Buscemi v. Intachai, 730 So. 2d 329 (Fla. Dist. Ct. App. 1999).

28. *Id.* at 330.

29. *Id.*

30. *Id.*

31. *Id.*

"Appellant overlooks the fact that whether a lawyer or not, if he undertakes to give legal advice, he is subject to a standard of due care."[32]

Second, enforcement of a standard of lawyer-quality performance should tend to deter nonlawyers from undertaking the representation in the first place.[33] Unauthorized practice committees tend to give off a somewhat embarrassing odor of self-interest.[34] If we want to reserve tasks to lawyers without being obvious about what we are doing, one way to do it would be to hold all providers to a standard that lawyers can confidently meet but that nonlawyers sometimes might not.

An argument to this effect is found in *Wright v. Langdon*,[35] where a real estate broker who prepared a contract of sale miscalculated the payments needed to allow the seller to pay off a

32. *Buscemi*, 730 So. 2d at 330. The lawyer-quality standard is the one used in the State of Washington, the jurisdiction that has most fully considered the question. *See, e.g.*, Jones v. Allstate Ins. Co., 45 P.3d 1068, 1070 (Wash. 2002) (holding a claims adjuster who advised an accident victim to the same standard of care as a practicing lawyer); Bowers v. Transamerica Title Ins. Co., 675 P.2d 193, 198 (Wash. 1983) (holding a nonlawyer escrow agent who prepared closing documents to same standard of care as a lawyer). Washington courts go as far as applying the Rules of Professional Conduct to nonlawyers. *See In re* Estate of Marks, 957 P.2d 235, 241 (Wash. Ct. App. 1998) (holding that the rule that prohibits an attorney who drafts a will from designating themselves as a beneficiary applies to lay persons). Courts in Kansas have reached the same result. *See, e.g.*, Ford v. Guarantee Abstract & Title Co., 553 P.2d 254, 264 (Kan. 1976) ("[A] corporation organized for the purpose, among others, of examining and guaranteeing titles to real estate . . . is governed by the principles applicable to attorney and client." (citations omitted)); Webb v. Pomeroy, 655 P.2d 465, 468 (Kan. Ct. App. 1982) (holding that a nonlawyer conveying real estate "is in the same position as a regularly admitted practicing attorney and bound to the same degree of knowledge, skill, dedication, and ethical conduct as the average member of the bar").

33. *Cf.* Susan D. Hoppock, *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, 727–28 (2007) (noting the difficulties in preventing nonlawyers from engaging in unethical conduct because they are not subject to the same rules as licensed attorneys).

34. *See* Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 461–62 (2008) (detailing how nearly every professional group that self-regulates has been dissected to show an underlying self-interest and that the legal profession in particular, being regulated by judges, is regulated by other lawyers at all stages). *See generally* Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008) (giving an overview of the self-serving nature of self-regulation in the legal field and its effect on the market).

35. Wright v. Langdon, 623 S.W.2d 823 (Ark. 1981).

mortgage and the buyer to get good title.[36] In assessing his conduct, the court said: "[R]eason urges that the standard should be no less than that required of a licensed attorney, and conceivably an even higher standard would be appropriate—strict liability, for example, to deter those who might be otherwise tempted to profess a competence they have no right to claim."[37]

IV. NONLAWYERS SHOULD BE HELD TO A STANDARD OF KEEPING THEIR PROMISES

However reasonable the "act like a lawyer, be judged like a lawyer" principle may initially seem, I believe that nonlawyers should not be held to the standard of performance of a lawyer. The primary reason is this: One reason we tend to look the other way when nonlawyers deliver services at all is that lawyers are often too costly for many consumers to afford. No state requires lawyers to provide pro bono service,[38] and the amount of service lawyers voluntarily perform often falls well short of meeting society's needs.[39]

Further, there is little reason to believe that nonlawyers will not do a good job of meeting the needs of most clients. In tax preparation, real estate services, and countless other areas, there are few cases where lack of competence has been a serious problem. As Professor Deborah Rhode has noted, "[I]t is not self-evident that professional certification or supervision insures

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36. *Id.* at 825.

37. *Id.* at 826.

38. ABA Model Rule 6.1, which states the ideal that a lawyer should engage in voluntary pro bono service, is the only rule in which "should" replaces "shall" as the relevant standard. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2008). The ABA House of Delegates has consistently refused to recommend mandatory pro bono service. *See* Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectation*, 77 TUL. L. REV. 91, 92–94 (2002) (detailing the history of proposed revisions to the Model Rules regarding pro bono work and how it has ultimately fallen upon individual states to come up with their own rules). Courts often praise lawyers who do pro bono work, although none have seen fit to require it other than in specific "appointed counsel" cases.

39. *See, e.g.*, Katja Cerovsek & Kathleen Kerr, Comment, *Opening the Doors to Justice: Overcoming the Problem of Inadequate Legal Representation for the Indigent*, 17 GEO. J. LEGAL ETHICS 697, 697–98 (2004) (noting that even in jurisdictions with relatively high pro bono service, the need is so great that it would be impossible for attorneys "'to volunteer enough time to meet the legal needs of its indigents'" (quoting Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y 1, 5 (2003))).

special competence."[40] If we set the performance bar artificially high by imposing damages for not meeting lawyer professional standards, in short, the likely result is not that lawyers will step in to meet the need, but that clients will more likely go unserved.[41]

Instead of holding nonlawyers to a tort standard that treats them as if they were lawyers, I suggest we move toward a contract-based standard that asks what the nonlawyer purported to be competent to do and whether she met a client's reasonable expectations about the services to be provided. The burden of proof would initially be on the plaintiff client, and the nonlawyer defendant could show specific disclaimers of experience or limits on work to be done.

In applying such a standard, nonlawyers should be required to identify themselves as such. Anyone who impersonates a lawyer should be held to the standard of lawyer performance on the basis of an implied promise to deliver the services a lawyer can be expected to provide.[42] Similarly, a client whose work is done by a paralegal or other nonlawyer that the client knows works for or under the supervision of a lawyer should be entitled to expect that the work will be done to the standard the client can expect from the lawyer for whom the paralegal works.

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40. Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 86 (1981).

41. Mine is not the argument sometimes seen that a nonlawyer can never be guilty of legal malpractice. *E.g.*, *In re* Estate of Divine, 635 N.E.2d 581, 588 (Ill. App. Ct. 1994) (holding that paralegals do not practice law and function only as assistants to lawyers); Palmer v. Westmeyer, 549 N.E.2d 1202, 1209 (Ohio Ct. App. 1988) (holding that a paralegal cannot commit legal malpractice). Such cases get stuck on the term *lawyer* instead of focusing on the term *malpractice*. All can agree that nonlawyers are not lawyers without immunizing nonlawyers from liability for their negligence or other malfeasance. On the other hand, in some cases, courts simply hold that nonlawyers, such as those working for a union, have no personal duty to union members complaining about the quality of their representation. *E.g.*, United Steelworkers of Am. v. Craig, 571 So. 2d 1101, 1102 (Ala. 1990) (stating that a duty of fair representation that arises in a union-employee relationship does not create a state cause of action for legal malpractice against a nonlawyer).

42. Professor Buhai addresses this issue by applying the term "unauthorized" practice to such imposters, while reserving the term "unlicensed" practice for practitioners of other disciplines who provide legal services as part of their work. 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, 88. One example of such an imposter-lawyer is found in *Tegman v. Accident & Medical Investigations, Inc.*, in which Tegman signed a fee agreement with a person who turned out not to be an attorney. Tegman v. Accident & Med. Investigations, Inc., 30 P.3d 8, 11 (Wash. Ct. App. 2001), *rev'd*, 75 P.3d 497 (Wash. 2003).

But beyond that, I believe that my proposed standard for self-acknowledged independent nonlawyers doing things lawyers do as well is consistent with the result reached in California's *Biakanja v. Irving*,[43] where a notary public had prepared a will for a client. While I have to concede that the court was ambiguous about the standard it was applying, in upholding the finding of liability the court focused on the fact that the notary had "agreed and undertook to prepare a valid will . . . that . . . was invalid because [the] defendant negligently failed to have it properly attested."[44] In short, liability turned on the fact that the will's invalidity was inconsistent with the notary's "undertaking" or agreement to prepare a valid instrument.

The proposed standard is perhaps best illustrated, however, by *Bland v. Reed*,[45] where an injured steelworker had been represented before the state Industrial Accident Commission by a union-recommended nonlawyer. The representation led to a good award, but neither the nonlawyer nor the union recommended that the worker also sue the company whose negligence caused his injury.[46] In denying a cause of action for the failure to advise the separate lawsuit, the court noted that "Reed was not a lawyer and [the] appellant knew it."[47] The California legislature had expressly permitted nonlawyer representation before the Commission, and the provider did that job well.[48] The court went on to state, "[W]e consider it improper to hold a nonlawyer practicing before the Commission to a lawyer's degree of care—particularly when the negligence charged is not in respect . . . of the claim before the Commission."[49]

Thinking back, then, to the examples with which this article

43. Biakanja v. Irving, 320 P.2d 16 (Cal. 1958). The holding of the case focused on liability of the nonlawyer to the beneficiary of the will in question; one must infer the standard of liability the court contemplated. *Id.* at 18–19; *see also* Buscemi v. Intachai, 730 So. 2d 329, 330 (Fla. Dist. Ct. App. 1999) ("[W]hether a lawyer or not, if [anyone] undertakes to give legal advice, he is subject to a standard of due care."); *cf.* Kronzer v. First Nat'l Bank, 235 N.W.2d 187, 194–95 (Minn. 1975) (holding that even if a bank officer who engaged in unauthorized practice by helping a person prepare a trust can be liable, the bank cannot be held to standard of negligence per se).

44. *Biakanja*, 320 P.2d at 18.

45. Bland v. Reed, 67 Cal. Rptr. 859 (Cal. Ct. App. 1968).

46. *Id.* at 860–61.

47. *Id.* at 861.

48. *Id.* at 862.

49. *Id.*

began, even under my "do what you promise" standard, QuickSettle should be liable to Chemco for the clerical error that led to the excessive payment. Managing paper flow is presumably among the things claims adjusters purport to do best. One need not adopt the standard of performance of a lawyer to find that QuickSettle failed to live up to the standard of performance its client had a right to expect.

My principle is also consistent with *Wright v. Langdon*, the case discussed earlier in which the real estate broker miscalculated the required payments.[50] Lawyers are no better at payment calculation than real estate brokers, and the essence of the case is clearly that the broker failed to do what his clients had every right to expect him to do.

Similarly, the proposed principle explains the previous example in which Maria Castro represented Jose Ramos ably before the compensation commission but failed to alert him to his right to sue to redress the negligence of the third party wrongdoer. Sometimes cases have held that a lawyer must inform the client about matters beyond the express subject about which the lawyer was hired,[51] but what I am arguing is that so long as a nonlawyer does what she promises to do, she should not be liable for failing to do more.

Of course, there is always the problem with a proposal such as mine that clients will not understand what the nonlawyer is promising to do and how that compares to the level of service someone else might provide. *Buscemi v. Intachai*, the Florida case discussed earlier, presents that problem in a particularly poignant form. The financial planner obtained the promised divorce but left the wife without alimony or child support.[52] In that case, the financial planner had specifically required the clients to sign a document saying they knew he was not a lawyer and could not give

50. Wright v. Langdon, 623 S.W.2d 823, 824–25 (Ark. 1981).

51. *E.g.*, Barnes v. Turner, 606 S.E.2d 849, 851 (Ga. 2004) (holding that a lawyer who filed security documents for a client has an implied duty to tell the client that they must file UCC financing statements before full payment is made, even if the client never expressly asked the attorney to handle filing statements); Wood v. McGrath, North, Mullin & Kratz, P.C., 589 N.W.2d 103, 108 (Neb. 1999) (holding that a lawyer who failed to tell the divorcing client she might be entitled to some of her husband's unvested stock options could be found liable). *But see* Darby & Darby, P.C. v. VSI Int'l, Inc., 739 N.E.2d 744, 748 (N.Y. 2000) (holding that a lawyer need not tell a client about the possibility of insurance coverage for the costs of the litigation if they "acted in a manner that was reasonable and consistent with the law as it existed at the time of representation").

52. Buscemi v. Intachai, 730 So. 2d 329, 330 (Fla. Dist. Ct. App. 1999).

legal advice.[53] However, the court held—I believe wisely—that Buscemi in fact gave legal advice and created an expectation he would do so competently.[54]

In short, the burden of proof should be placed on the service provider to live up to the promises he or she explicitly or implicitly makes.[55] It should not be hard to make the promises clear through signs, in engagement agreements, in brochures, and in the course of actual dealings. The level of detail required in explanation should vary depending on the sophistication of the client or the client's representative. A corporate general counsel hiring QuickSettle will need less explanation than an injured employee seeking compensation. Indeed, I believe, contrary to some cases cited here, that as well as informing clients what they will do and what they are not competent to do, if other services may be necessary to protect an unsophisticated client's interests more fully, nonlawyers should be required to say so and suggest who might provide the services.

The hardest example I have posed was that of DivorceMagic whose book and advisor did not discuss the recent decision that could have protected the husband's right to remain covered by his wife's health insurance for an additional year. The hypothetical assumed that the nonlawyers did not know what most divorce lawyers would have known, and my standard would not automatically hold DivorceMagic to the lawyer standard. To that extent, at least, I have to acknowledge the possibility of "second class" service for clients of nonlawyers. One could analogize this situation to *Buscemi*, of course, and say that DivorceMagic had implicitly contracted to provide full service, but I think that would stretch the truth. The fact is that lawyers can often do a sufficiently better job than nonlawyers and my standard may leave some clients with a reduced standard of protection. I suggest—and leave to others' evaluation—however, that nonlawyer representation will, on balance, tend to be better than no

53. *Id.*

54. *Id.*

55. This standard seems to be consistent with the *Restatement (Second) of Torts*, which states that a professional or tradesperson must perform to the standard "normally possessed by members" of the profession or trade in similar circumstances "unless [the person] represents that he has greater or less skill or knowledge." RESTATEMENT (SECOND) OF TORTS § 299(A) (1965).

representation at all. And the latter, I fear, will be many potential clients' only realistic alternative to nonlawyer assistance.

V. A NOTE ON THE BROADER IMPLICATION OF MY PROPOSAL

If the only point of this article was to illuminate a small corner of the world involving practice by nonlawyers, it might not be worth the effort. I believe, however, that the analysis and proposed standard sheds light on what may be an evolving contract standard of malpractice in cases involving lawyers. While a lawyer may not disclaim competence to handle cases, or ordinarily ask a client for a prospective waiver of malpractice liability,[56] under ABA Model Rule 1.2(c), with client consent, a lawyer may limit the scope of representation.[57] If a lawyer wishes to help a client get a divorce but not take responsibility for tax implications of the settlement, for example, Rule 1.2(c) expressly permits that arrangement.[58]

That is a huge analytic exception from the traditional idea of a clear, uniform standard of lawyer performance. It has been necessitated, however, by the increasing specialization of what most lawyers do. None of us are competent in more than a few fields today. In the same way, contract principles even govern client waiver of the requirement that a lawyer hold information confidential,[59] as well as waiver of most conflicts of interest.[60] My point, then, is that the lawyer-client relationship is becoming increasingly based on contract rather than immutable principles.[61]

Even in Washington state, where holding nonlawyers to a lawyer standard is well established, that result works for the courts because both kinds of relationships are now ultimately contract-based.[62] In *Hangman Ridge Training Stables, Inc. v. Safeco Title*

56. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008); MODEL RULES OF PROF'L CONDUCT R. 1.8(h) (2008).

57. MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2008).

58. *See id.* (enabling lawyers to limit the scope of representation between the lawyer and client).

59. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2008) (allowing waiver of confidentiality with informed consent).

60. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2008) (permitting a waiver of conflict of interest that is confirmed by writing).

61. *See* 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 8:7, at 1097–98 (2009 ed.) ("An attorney impliedly contracts to exercise ordinary skill and knowledge in the rendition of professional services.").

62. *See, e.g.*, Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 652 P.2d

Insurance Co.,[63] for example, the clients wanted to borrow money, and to do so they needed to convey real property from their corporation to themselves.[64] Safeco, a company composed of nonlawyers, prepared the necessary deed and accomplished the change of title.[65] Later, the clients learned that engaging in the transaction had tax consequences that the clients had not contemplated, so they sued Safeco for not telling them about those consequences. The clients asserted that a lawyer at least would have had to counsel the clients to get tax advice, but the court answered, "The standard of care or duty of an attorney or non-attorney closer is to close in accordance with their instructions."[66] Neither a lawyer nor a nonlawyer need give advice outside the narrow scope of the representation, the court said.[67] So long as either a lawyer or this nonlawyer did the particular work for which he was hired, that was enough.

Ultimately, then, what I am arguing is that client relationships with nonlawyers should be at least as open to negotiation and reasonable interpretation of the nonlawyer's performance promise as relationships with lawyers are becoming. If that is the same as saying "act like a lawyer, be judged like a lawyer," so be it, but hopefully by the time you reach that conclusion we all will have enriched our understanding of the world clients face today in dealing with both lawyers and nonlawyers.

962, 965 (Wash. Ct. App. 1982) (holding that a nonlawyer was not negligent as the deed was drawn per the specifications of the contract).

63. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 652 P.2d 962 (Wash. Ct. App. 1982).

64. *Id.* at 963.

65. *Id.* at 964.

66. *Id.* at 965.

67. *Id.* at 964.