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## A New Era of Legal Services: The Elimination of Unauthorized Practice of Law Rules to Accompany the Growth of Legal Software

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A NEW ERA OF LEGAL SERVICES: THE  
ELIMINATION OF UNAUTHORIZED PRACTICE OF  
LAW RULES TO ACCOMPANY THE GROWTH OF  
LEGAL SOFTWARE

JULIAN MORADIAN\*

ABSTRACT

*Since the inception of bar associations in the early twentieth century, states have promulgated rules that prohibit unlicensed individuals from providing legal services. These unauthorized practice of law rules have created a monopoly on legal services, which in turn has inflated the price of obtaining legal services to a point where a significant percentage of individuals who need such services are unable to obtain them. Legal software has the potential to disrupt the market for legal services and make such services available to the mass market. However, for innovation and widespread use of legal software to gain traction, these unauthorized practice of law rules must be eliminated. In their place, various guards must be adopted by state and federal legal authorities to ensure consumers are protected following the elimination of unauthorized practice of law rules, including but not limited to the expansion of current false advertising and malpractice law.*

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## INTRODUCTION

In modern society, it would certainly seem as though to purchase legal services, one would need to speak to a licensed attorney. However, with the proliferation of technology, new avenues of obtaining legal services have emerged.<sup>1</sup> It may come as a surprise that before the twentieth century, individuals did not always need to have a law degree to provide legal services.<sup>2</sup> Through the passing of unauthorized practice of law (“UPL”) rules, states created a monopoly on legal services under the facade of protecting the consumer from mediocre representation.<sup>3</sup> Instead, states created a gap in justice where those individuals most in need of legal services, such as low-income households, are unable to access those services because of monopoly prices.<sup>4</sup> That is where legal software comes in.<sup>5</sup>

Legal software is able to cut down the cost of legal services, thereby allowing more consumers to enter the market.<sup>6</sup> However, UPL rules have disturbed the proliferation of the software from entering the market and created uncertainty regarding its future.<sup>7</sup> This Note dives into the history of UPL rules and their effect on the market, and the prevalence of legal software. Part I explores the history and origination of UPL laws and their development over the decades and through different states. Part II discusses the drawbacks and effects of UPL laws on the legal market and related software and advocates for their elimination. Part III discusses possible avenues of consumer protection when UPL rules are

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<sup>1</sup> See, e.g., LEGALZOOM, <https://www.legalzoom.com/personal/estate-planning/living-trust-overview.html> [<https://perma.cc/6AX6-GKUX>].

<sup>2</sup> RUSSELL G. PEARCE ET AL., PROFESSIONAL RESPONSIBILITY, A CONTEMPORARY APPROACH 27 (3d. ed. 2017).

<sup>3</sup> Mathew Rotenberg, Note, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 714–15 (2012).

<sup>4</sup> See Cynthia L. Fountaine, *When Is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment*, 71 U. CIN. L. REV. 147, 148 (2002).

<sup>5</sup> Paul F. Kirgis, *The Knowledge Guild: The Legal Profession in an Age of Technological Change*, 11 NEV. L.J. 184, 196 (2010) (reviewing RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2008)).

<sup>6</sup> See William H. Brown, Comment, *Legal Software and the Unauthorized Practice of Law: Protection or Protectionism*, 36 CAL. W. L. REV. 157, 160 (1999).

<sup>7</sup> See PEARCE ET AL., *supra* note 2, at 39.

eliminated, while Part IV discusses the effects of monopolies and the economics of a free market without such monopolies.

I. THE EVOLUTION AND APPLICATION OF UNAUTHORIZED  
PRACTICE OF LAW RULES

Although it would seem that lawyers have held a tight grip on the practice of law since the inception of the profession, the scope of the monopoly on legal services has varied over time.<sup>8</sup> In fact, until the twentieth century, non-lawyer-run businesses and non-profits often provided transactional and litigation services, retaining an attorney only when it was necessary to appear in court on behalf of the organization or client.<sup>9</sup>

Following their creation in the early twentieth century, numerous bar associations began to adopt the goal of conditioning bar membership on certain educational requirements.<sup>10</sup> The New York County Lawyers Association took the lead on this movement and appointed the first committee in 1914 on the unauthorized practice of law in response to a growing business industry that was overlapping with legal work.<sup>11</sup> After New York, numerous state bar associations followed suit in the decades following and created their own UPL statutes or even broadened the scope of UPL laws they already had.<sup>12</sup> In 1930, the American Bar Association (ABA) created its own committee on the unauthorized practice of law.<sup>13</sup> By 1938, over 400 similar committees had been established across the nation.<sup>14</sup> Once state courts began implementing versions of the Model Rules of Professional Conduct into their UPL rules during the second half of the twentieth century, UPL regulation became more standard across the country.<sup>15</sup>

However, although the Model Rules prompted widespread adoption of UPL rules, the definition of the practice of law itself

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<sup>8</sup> *Id.* at 27.

<sup>9</sup> *Id.*

<sup>10</sup> Rotenberg, *supra* note 3, at 713.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 713–14.

<sup>13</sup> *Id.* at 714.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

chosen by each jurisdiction has become anything but uniform.<sup>16</sup> The Model Rules themselves fail to provide a standard definition, stating instead, “[t]he definition of the practice of law is established by law and varies from one jurisdiction to another.”<sup>17</sup> Further, these various definitions themselves are not always derived from statutes.<sup>18</sup> In some states, the definition of what constitutes the practice of law is found instead through case law.<sup>19</sup>

Another problem rests with interpreting these rules—“While almost all states ... currently have statutes that purport to define the practice of law, in reality these statutes tend to be vague in scope and contain broad qualifiers.”<sup>20</sup> These qualifiers fail to provide concrete guidance to courts and state bar agencies on what can confidently be labeled as the practice of law.<sup>21</sup> For example, in Texas, the UPL statute provides, “[t]he definition in this section is not exclusive and does not deprive the judicial branch of the power and authority ... to determine whether other services and acts not enumerated may constitute the practice of law.”<sup>22</sup> Open-ended definitions such as this confuse entities attempting to apply the rules to different activities that seem legal.<sup>23</sup> As a result, different interpretations have emerged attempting to encircle what acts constitute the practice of law.<sup>24</sup>

One such interpretation states that the practice of law entails those acts that were “traditionally performed” by lawyers, with some exceptions.<sup>25</sup> Another test revolves around whether an attorney-client relationship (explained below) has been created by law.<sup>26</sup> What is clear from these split interpretations is that it

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<sup>16</sup> See *id.*; see also U.S. Dep’t of Just. & Fed. Trade Comm’n, Comment Letter on American Bar Association’s Proposed Model Definition of the Practice of Law (Dec. 20, 2002), <https://www.justice.gov/sites/default/files/atr/legacy/2008/03/26/200604.pdf> [<https://perma.cc/DN56-FUQD>] [hereinafter Comment Letter].

<sup>17</sup> Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 812 (2002).

<sup>18</sup> See PEARCE ET AL., *supra* note 2, at 28.

<sup>19</sup> *Id.*

<sup>20</sup> See Comment Letter, *supra* note 16.

<sup>21</sup> See *id.*

<sup>22</sup> TEX. GOV’T CODE ANN. § 81.101(b) (West 1999).

<sup>23</sup> See Comment Letter, *supra* note 16.

<sup>24</sup> See *id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

is inherently difficult to define the practice of law and the scope of activities that are traditionally held by lawyers.<sup>27</sup>

Another difficulty with UPL rules has been applying the varying interpretations to different activities:

[T]here are an increasing number of situations where nonlawyers are providing services that are difficult to categorize under current statutes and case law as being, or not being, the delivery of legal services. This growing gray area may be partially responsible for the spotty enforcement of unauthorized practice of law statutes across the nation and [arguably] an increasing number of attendant problems related to the delivery of services by nonlawyers.<sup>28</sup>

In the seminal case of *Florida Bar v. Brumbaugh*, the Supreme Court of Florida delineated certain activities being performed by a secretary as engaging in the unauthorized practice of law.<sup>29</sup> The secretary had been preparing legal documents in uncontested marriage dissolutions.<sup>30</sup> The court stated that while performing services like printing standardized forms is not improper, these activities cross the line into the unauthorized practice of law when the preparer assists parties on how to fill out the form or advises consumers on possible remedies specific to their situation.<sup>31</sup> The fine line between constituting the practice of law was drawn by the court when there is a consultation that directly addresses the client's situation, but not when a preparer standardizes or creates his or her product without such advising.<sup>32</sup> The court's ruling exemplified this principle when the court held that the secretary was allowed to copy the information on legal forms that she obtained from her former business but could not directly advise the client on how to prepare the form.<sup>33</sup>

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<sup>27</sup> PEARCE ET AL., *supra* note 2, at 28.

<sup>28</sup> Comment Letter, *supra* note 16 (quoting A.B.A., CHALLENGE STATEMENT: MODEL DEFINITION OF THE PRACTICE OF LAW (Aug. 14, 2018), [https://www.americanbar.org/groups/professional\\_responsibility/task\\_force\\_model\\_definition\\_practice\\_law/model\\_definition\\_challenge/](https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_challenge/) [<https://perma.cc/XV3E-DQ8M>]).

<sup>29</sup> 355 So. 2d 1186, 1194 (Fla. 1978).

<sup>30</sup> *Id.* at 1189.

<sup>31</sup> *Id.* at 1194.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

The same principle in *Brumbaugh* was present in *Dacey v. New York County Lawyers' Association*.<sup>34</sup> In *Dacey*, New York's highest court agreed with the dissent opinion of the lower court,<sup>35</sup> which held that a legal advice book titled *How to Avoid Probate!* did not violate any UPL rules.<sup>36</sup> Specifically, regarding a legal help book sold to the general public, Justice Stevens stated in his dissent, "[t]here is no personal contact or relationship with a particular individual. Nor does there exist that relation of confidence and trust so necessary to the status of attorney and client."<sup>37</sup> Justice Stevens elaborated on the idea that such a freely purchased medium that purports to offer advice on common problems does not create the level of personal reliance that is present in an attorney-client relationship.<sup>38</sup>

"As computer technology advances at an astonishing rate, the law often struggles to keep pace with the corresponding development of new issues of law or, at the very least, new twists to existing law."<sup>39</sup> *Brumbaugh* and *Dacey* made clear that a level of intimate personal relationship had to be present between a client and the source of legal aid to violate UPL rules.<sup>40</sup> Such a relationship did not exist between either a consumer and a book sold to the public, or between a client and a secretary providing un-tailored copy and print services of legal documents.<sup>41</sup>

However, a different situation arises when the provider of legal services is instead computerized software that provides particularized legal documents tailored to a consumer's input of information.<sup>42</sup> One of the first cases on this topic came from Texas: *Unauthorized Practice of Law Committee v. Parsons Technology*.<sup>43</sup> This case involved the Quicken Family Lawyer software, which

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<sup>34</sup> See PEARCE ET AL., *supra* note 2, at 35.

<sup>35</sup> See N.Y. Cnty. Lawyers' Ass'n v. Dacey, 234 N.E.2d 459, 459 (N.Y. 1967).

<sup>36</sup> See N.Y. Cnty. Lawyers' Ass'n v. Dacey, 28 A.D.2d 161, 174-75 (N.Y. App. Div. 1967) (Stevens, J., dissenting).

<sup>37</sup> *Id.* at 174.

<sup>38</sup> See *id.* at 174-75.

<sup>39</sup> Steve French, Note, *When Public Policies Collide ... Legal "Self-Help" Software and the Unauthorized Practice of Law*, 27 RUTGERS COMPUT. & TECH. L.J. 93 (2001).

<sup>40</sup> See Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1194 (Fla. 1978); PEARCE ET AL., *supra* note 2, at 35-36.

<sup>41</sup> See PEARCE ET AL., *supra* note 2, at 34-35.

<sup>42</sup> See *id.* at 37-38.

<sup>43</sup> No. Civ. A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999).



“offer[ed] over 100 different legal forms[, ]such as employment agreements[ or] real estate leases ... along with instructions on how to fill out [the] forms.”<sup>44</sup> The software itself worked by asking preliminary questions and then provided tailored documents specific to each consumer’s situation.<sup>45</sup> The Texas district court explained that this dynamic went beyond a simple book instruction guide and constituted the practice of law, and the court consequently enjoined the sale of the software.<sup>46</sup>

Similar to the Quicken software, a more modern software and service from LegalZoom has come under scrutiny from the courts for its intrusion into the legal market.<sup>47</sup> The LegalZoom software provides various legal forms in numerous areas, including Limited Liability Company (LLC) formation, estate planning, trademark, and even bankruptcy.<sup>48</sup> Applying the principles from *Brumbaugh*, LegalZoom providing blank legal documents does not run afoul of UPL rules.<sup>49</sup> Where LegalZoom runs into trouble is with its tailored legal services.<sup>50</sup> At the consumer’s request, the program will convey questionnaires to a client and return completed legal documents that integrate the answers provided from the questionnaires.<sup>51</sup> After the consumer completes the questionnaires, LegalZoom’s document assistants review the answers on the generated document for consistency and accuracy.<sup>52</sup> Going a step further, once the document has been reviewed and printed, LegalZoom then sends the document to the consumer with specific instructions on how to finalize the document.<sup>53</sup>

Numerous jurisdictions have taken a hostile position and asserted that LegalZoom’s consumer-tailored model constitutes the unauthorized practice of law.<sup>54</sup> In North Carolina, the State

<sup>44</sup> *See id.* at \*1.

<sup>45</sup> *See id.* at \*1–2.

<sup>46</sup> *Id.* at \*6.

<sup>47</sup> PEARCE ET AL., *supra* note 2, at 39.

<sup>48</sup> LEGALZOOM, <https://www.legalzoom.com/> [<https://perma.cc/5BMF-R3MN>]; *see* Isaac Figueras, Comment, *The LegalZoom Identity Crisis: Legal Form Provider or Lawyer in Sheep’s Clothing?*, 63 CASE W. RESV. L. REV. 1419, 1423 (2013).

<sup>49</sup> *See* PEARCE ET AL., *supra* note 2, at 28.

<sup>50</sup> *See generally* LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 15111, 2014 WL 1213242, at \*1–2 (N.C. Bus. Ct. Mar. 24, 2014).

<sup>51</sup> *Id.* at \*6.

<sup>52</sup> *Id.*

<sup>53</sup> PEARCE ET AL., *supra* note 2, at 41.

<sup>54</sup> *Id.* at 39; *see LegalZoom.com, Inc.*, 2014 WL 1213242, at \*1–2.

Bar put teeth to this argument by prohibiting the program from offering its services to the state.<sup>55</sup> In response, LegalZoom filed suit, arguing the State Bar exceeded its statutory powers by taking such action, with the State Bar counterclaiming on the grounds of the UPL.<sup>56</sup> Once all pleadings were submitted, the trial court denied the state bar's request for judgment on the pleadings.<sup>57</sup> The court found that although LegalZoom's program did not constitute a form of self-representation, it was unsure whether to apply the *Brumbaugh* principles to LegalZoom.<sup>58</sup> In other words, the court was unsure about whether to label LegalZoom as a program that provides express or tailored legal judgment using input from information provided by a client.<sup>59</sup>

The case came to an abrupt halt when the parties signed a consent judgment that deemed LegalZoom not to have violated UPL rules so long as it (1) provided a North Carolina consumer of LegalZoom a means to see the blank template or finalized template before purchase; (2) retained an attorney licensed to practice in North Carolina to review the blank templates being offered; (3) made an explicit communication to consumers that the forms and templates are not a substitute for the services of an attorney; (4) disclosed its legal name and physical location; (5) did not disclaim any warranties or liabilities and did not limit the recovery of damages; and (6) did not force a consumer in North Carolina to agree to jurisdiction or venue in any state other than North Carolina should any dispute arise.<sup>60</sup>

As technology evolves, UPL rules may even infringe on the future of smart contracts.<sup>61</sup> The smart contract is a digital agreement that self-executes after the completion of a certain function, similar to how a vending machine dispurses a drink after coins have been entered into the machine.<sup>62</sup> Specifically, “[t]he

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<sup>55</sup> See PEARCE ET AL., *supra* note 2, at 39.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See *LegalZoom.com, Inc.*, 2014 WL 1213242, at \*14; PEARCE ET AL., *supra* note 2, at 39.

<sup>59</sup> PEARCE ET AL., *supra* note 2, at 39.

<sup>60</sup> *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2015 WL 6441853 (N.C. Bus. Ct. Oct. 22, 2015).

<sup>61</sup> See Sarah Templin, *Blocked-Chain: The Application of the Unauthorized Practice of Law to Smart Contracts*, 32 GEO. J. LEGAL ETHICS 957, 957 (2019).

<sup>62</sup> *Id.* at 959.

blockchain allows for automation of the execution of the contract, with the contract embodied within the code of the blockchain....”<sup>63</sup> This ingenuity may infringe on the practice of law as non-lawyers such as coders may be able to prepare contracts while securing legal rights for consumers of smart contracts in the performance of the contract.<sup>64</sup>

Looking towards the future, the application of UPL rules on advancing technology can be intimidating with the uncertainty stemming from not only broad definitions of the practice of law, but also the mixed reactions given to activities that might encroach on these definitions.<sup>65</sup>

## II. THE EFFECTS OF UPL RULES ON THE LEGAL MARKET AND LEGAL SOFTWARE

The question to be asked regarding the up-and-coming prominence of legal software is what purpose do UPL rules serve? The most common rationale is that these regulations protect the public from ineffectual legal services.<sup>66</sup> “According to the ABA Model Rules, “[l]imiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.”<sup>67</sup> According to this theory, untrained individuals performing legal services for a consumer can lead to the client’s harm while also causing further expense and litigation as a result.<sup>68</sup> However, the strongest of these arguments is that unlicensed individuals who perform legal services are not subject to rules concerning confidentiality, conflicts of interest, and attorney-client privilege.<sup>69</sup>

While the arguments supporting the relevance of UPL rules are valid, there may be other arguments for why they exist underneath the facade of public policy.<sup>70</sup> “Unauthorized practice

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 968.

<sup>65</sup> *See Fla. Bar v. Brumbaugh*, 355 So. 2d 1186, 1194 (Fla. 1978) (Karl, J., concurring specially).

<sup>66</sup> Rotenberg, *supra* note 3, at 714.

<sup>67</sup> *Id.* at 714–15 (citing MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 1 (AM. BAR ASS’N 1995)).

<sup>68</sup> *Id.* at 715.

<sup>69</sup> *Id.*

<sup>70</sup> *See id.*

statutes unquestionably shield the profession from most external competition.... [I]t is clear from empirical study that public policy concerns were not the only driving forces behind the expansion and strengthening of unauthorized practice of law statutes.”<sup>71</sup> This rationale is not without its support from legal scholars.<sup>72</sup> According to Professor Catherine Lanctot from Villanova University Law School, “Lawyers historically have used the unauthorized practice of law statutes to protect against perceived incursions by real estate agents, bankers, insurance adjusters, and other groups that seemed to be providing legal services.”<sup>73</sup> Even the prominence of smart contracts created through blockchain poses this threat, as the creation of self-executing and self-enforcing contracts to secure legal rights will thus intrude on what was traditionally a function of an attorney.<sup>74</sup>

The significance of UPL rules has consistently come into question.<sup>75</sup>

Denial of access to justice is not merely a theoretical defect in the administration of justice; it has deep practical ramifications. Lacking effective representation, poor persons often see the law not as a protector, but as an enemy which evicts them from their flat, victimizes them as consumers, cancels their welfare payments, binds them to usury, and seizes their children.<sup>76</sup>

Criticism has also come from the federal government.<sup>77</sup> In a joint letter from the Department of Justice and the Federal Trade Commission, both agencies urged the American Bar Association not to adopt the overbroad definition it proposed to implement for it ran the risk of constraining competition between lawyers and nonlawyers providing similar services to the public.<sup>78</sup> As stated by the agencies, “There is no evidence before the

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<sup>71</sup> *Id.* at 715–16.

<sup>72</sup> Comment Letter, *supra* note 16, at 3.

<sup>73</sup> *Id.* (quoting *Possible Anticompetitive Efforts to Restrict Competition on the Internet: Federal Trade Commission Public Workshop* (Oct. 9, 2002) (statement of Catherine J. Lanctot)).

<sup>74</sup> See Templin, *supra* note 61, at 969.

<sup>75</sup> See Brown, *supra* note 6, at 170.

<sup>76</sup> *Id.* at 161 (quoting Jerome J. Shestack, *Will Justice Be Rationed?*, 80 MARQ. L. REV. 727, 727 (1997)).

<sup>77</sup> Comment Letter, *supra* note 16, at 16.

<sup>78</sup> *Id.* at 4.

ABA of which we are aware that consumers are hurt by this competition and there is substantial evidence that they benefit from it. Consequently, we recommend that the proposed Model Definition be substantially narrowed or rejected.”<sup>79</sup>

With the validity of UPL rules existing on thin ice,<sup>80</sup> it is more appropriate to examine the effect of these rules as they bear on the demographic they were created by legal authorities to protect, the legal consumer.<sup>81</sup> UPL statutes unfairly and overwhelmingly affect populations of limited means or income.<sup>82</sup> The problem only aggregates when considering that there is not enough availability of pro bono lawyers to meet the needs of these individuals and families.<sup>83</sup>

The necessity of making legal services accessible to populations of limited means is an area of extensive study.<sup>84</sup> LegalZoom’s own 2012 prospectus states, “Despite the enormous amount spent on legal services, we believe that small businesses and consumers have not been adequately served by the options traditionally available to them.”<sup>85</sup> A report by the American Bar Association in 1995 concluded that 70–80% or more of low-income individuals could not access legal assistance when they needed or wanted it.<sup>86</sup> Further, in 2017, the Legal Services Corporation (LSC) estimated that low-income Americans would “approach LSC-funded legal aid organizations for support with an estimated 1.7 million problems.... [While] receiv[ing] only limited or no legal help for more than half of these problems because of a lack of resources.”<sup>87</sup> A study by Temple University found that in Florida, the legal system addressed less than one-third of legal problems

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<sup>79</sup> *Id.* at 3.

<sup>80</sup> *See id.* at 16.

<sup>81</sup> Brown, *supra* note 6, at 172.

<sup>82</sup> Derek A. Denckla, Response, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581 (1999).

<sup>83</sup> *See id.*

<sup>84</sup> *See id.*

<sup>85</sup> Figueras, *supra* note 48, at 1421 (quoting LegalZoom.com, Inc., Registration Statement (Form S-1), at 1 (May 10, 2012)).

<sup>86</sup> Fountaine, *supra* note 4, at 147.

<sup>87</sup> *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans*, LEGAL SERVS. CORP. (June 2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-ExecutiveSummary.pdf> [<https://perma.cc/4JTG-NAJV>].

among low- and moderate-income families.<sup>88</sup> Cost concerns were the most common barrier to accessing legal services.<sup>89</sup> This gap in access to legal services by those who need them does not affect low-income households solely:

The justice gap—that is, the gap between legal needs and services available—has the greatest implications for the United States’ most vulnerable populations: those at greatest risk under the policies announced by the incoming administration. On the civil side, people of color, women, immigrants, the elderly, people with disabilities, and lesbian, gay, bisexual, and transgender, or LGBT, people are more likely to live in poverty and more likely to need legal assistance. Claiming protections under the Americans with Disabilities Act, for example, often requires, at a minimum, legal advice, and at most, litigation.<sup>90</sup>

The unfortunate result of the justice gap is that it not only severely affects populations struggling in poverty, but also perpetuates that poverty.<sup>91</sup> The question to ask is whether maintaining a monopoly on legal services through UPL rules is worth the inaccessibility of legal services by households that desperately need them.

Despite the imbalance of access to legal services, in 2016, a staggering 89.3% of households in the United States owned a computer in their home.<sup>92</sup> The proposed solution is clear with these statistics: eliminate UPL rules and allow legal software to enter the market to help reduce the justice gap.<sup>93</sup>

It is no new development that legal services are expensive.<sup>94</sup> On the contrary, self-help channels to legal services are

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<sup>88</sup> Brown, *supra* note 6, at 159.

<sup>89</sup> *Id.*

<sup>90</sup> Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. FOR AM. PROGRESS (Dec. 8, 2016, 9:03 AM) (internal citations omitted), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal/> [<https://perma.cc/6UCL-RZE6>].

<sup>91</sup> *Id.*

<sup>92</sup> *Percentage of Households in the United States with a Computer at Home from 1984 to 2016*, STATISTA (Aug. 2018), <https://www.statista.com/statistics/214641/household-adoption-rate-of-computer-in-the-us-since-1997/> [<https://perma.cc/J43H-SQXU>].

<sup>93</sup> See Buckwalter-Poza, *supra* note 90 (defining the justice gap); Brown, *supra* note 6, at 160 (stating that legal self-help materials can help reduce the justice gap).

<sup>94</sup> See Brown, *supra* note 6, at 159.

relatively cheap and increase access to justice.<sup>95</sup> Legal software specifically can address the deficiencies regarding access to services in a multitude of fields.<sup>96</sup> For example, regarding end-of-life decision-making or no-contest divorces, there is no need to pay monopoly prices to an attorney if software is able to complete the same mundane tasks.<sup>97</sup> As *LegalZoom.com, Inc. v. North Carolina State Bar* showed, there is a growing acceptance towards legal software entering the legal services market.<sup>98</sup> By rescinding UPL rules, the barriers to access can be eliminated by legal authorities on a nationwide basis without having to fight isolated battles in each state that end in settlements with no clear greenlight for legal software to proliferate.<sup>99</sup> Indeed, even LegalZoom itself is at odds with its own software.<sup>100</sup> Although LegalZoom clearly indicates that it is not a law firm and is not a substitute for the advice of an attorney, the company accedes to concerns that it may be practicing law.<sup>101</sup> In doing so, LegalZoom provides caution that its services may not be legal depending on the jurisdiction and evolution of UPL rules.<sup>102</sup> Uncertainty is the bane of business, and removing UPL rules will remove uncertainty in a business model similar to how LegalZoom conducts its business.<sup>103</sup>

### III. PROTECTING THE CONSUMER WITHOUT UPL RULES

Of course, it is noteworthy to state that UPL laws are not useless pieces of legislation created without purpose.<sup>104</sup> Becoming an attorney licensed to practice law is no easy task; it requires, in most states,<sup>105</sup> completing law school as one of the preliminary

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<sup>95</sup> *Id.* at 159–60.

<sup>96</sup> *See id.* at 160–61.

<sup>97</sup> *See id.*

<sup>98</sup> *See* PEARCE ET AL., *supra* note 2, at 39–41.

<sup>99</sup> *See id.* at 44.

<sup>100</sup> *See* Figueras, *supra* note 48, at 1424.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1424–25.

<sup>103</sup> *See id.* at 1425.

<sup>104</sup> *See* Rotenberg, *supra* note 3, at 714–15.

<sup>105</sup> Zachary Crockett, *How to Be a Lawyer Without Going to Law School*, PRICEONOMICS (Jan. 6, 2017), <https://priceonomics.com/how-to-be-a-lawyer-without-going-to-law-school/> [<https://perma.cc/7C58-89VH>].

steps.<sup>106</sup> From there, a law student needs to pass both a Multi-state Professional Responsibility Examination (MPRE) and bar exam to become a fully licensed attorney.<sup>107</sup> Therefore, it is rational to state that those individuals who provide legal services have a background and education to help them provide a degree of quality legal work and a code of ethics apart from those who have not surpassed such trials.<sup>108</sup>

Further, attorneys have an obligation to behave professionally even after the hurdles of the MPRE and bar exam.<sup>109</sup> Although a lawyer's character is evaluated to gain admittance to the practice, those same ethical standards must be consistently maintained by the lawyer to continue to practice.<sup>110</sup> Individuals who exhibit bad conduct or poor judgment at any point while being licensed may be disbarred or punished depending on the severity of their actions.<sup>111</sup> These standards help ensure an adherence to a professional code of conduct in the legal profession.<sup>112</sup>

As mentioned, UPL laws then, in effect, attempt to protect the public from individuals who have not achieved the level of specialized education of a licensed lawyer or who do not have to conform to a professional standard of conduct.<sup>113</sup> Indeed, commentary to the District of Columbia rule on the unauthorized practice of law provides four general purposes for the rule: (1) protecting members of the public from unqualified representation; (2) ensuring individuals who identify themselves as lawyers or their services as legal are held to the D.C. Bar's disciplinary system; (3) maintaining efficiency and integrity within the justice system and regulation of lawyers; and (4) ensuring the D.C. Bar is financially supported by those who are members of the D.C. Bar.<sup>114</sup>

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<sup>106</sup> *Becoming a Lawyer*, LEGAL CAREER PATH, <https://legalcareerpath.com/becoming-an-attorney/> [<https://perma.cc/EJ2S-PK6T>].

<sup>107</sup> *Id.*

<sup>108</sup> *See* Denckla, *supra* note 82, at 2581.

<sup>109</sup> *See id.* at 2582.

<sup>110</sup> *See id.*

<sup>111</sup> *Id.*

<sup>112</sup> *See id.*

<sup>113</sup> Rotenberg, *supra* note 3, at 714–15.

<sup>114</sup> Michael E. Rosman, *Is It Time to Revisit the Constitutionality of Unauthorized Practice of Law Rules?*, 20 FEDERALIST SOC'Y REV. 74, 76 (2019).



These arguments are certainly viable.<sup>115</sup> However, they are also subject to pitfalls.<sup>116</sup> The assumption that protecting the consumer public by ensuring that “unqualified parties” do not provide legal services assumes that those who are not qualified would provide incompetent, or less effective, legal services.<sup>117</sup> This is a flawed assumption.<sup>118</sup> Although licensed lawyers do have specialized knowledge, that does not mean they are otherwise more qualified to perform certain tasks.<sup>119</sup> For example, “nonlawyer advocates who advise tenants on a daily basis about how to trek through the thicket of New York City’s housing court often help train lawyers who are volunteering their services to poor tenants pro bono.”<sup>120</sup> It is difficult to argue that providing services such as printing standardized forms tailored to individuals, as was the case in *Brumbaugh*, requires any more than basic training.<sup>121</sup> If these services can be provided to consumers at a much more affordable price while still maintaining the integrity of the work’s quality,<sup>122</sup> there is little reason to maintain a monopoly of legal services in favor of licensed lawyers.

The protections offered to consumers regarding ethical and moral rules imposed on a lawyer are subject to the same scrutiny.<sup>123</sup> Although there is an intricate framework of rules and regulations that govern a lawyer’s code of conduct, studies of the attorney discipline system reveal that lawyers are rarely reprimanded by the legal system for their shortcomings or incompetence.<sup>124</sup> According to one Professor, if non-lawyers were able to practice law, “[t]he law of malpractice, contract and fiduciary limits on fee charges, and agency rules requiring loyalty to a principal would probably protect clients almost as well [as the lawyer discipline system].”<sup>125</sup> Indeed, while there has been a growing

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<sup>115</sup> See Denckla, *supra* note 82, at 2593.

<sup>116</sup> See *id.* at 2594–95, 2597.

<sup>117</sup> *Id.* at 2594.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1189 (Fla. 1978).

<sup>122</sup> See Brown, *supra* note 6, at 159–61.

<sup>123</sup> See Denckla, *supra* note 82, at 2594–95.

<sup>124</sup> *Id.* at 2594.

<sup>125</sup> *Id.* at 2595 (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 831 (Practitioner’s ed. 1986)).

movement in the business world for corporations to adhere to a code of business ethics, commentaries have suggested that the opposite has been present within the legal community, where a decline in professionalism has been observed.<sup>126</sup>

One would think that UPL rules, championing the protection of the consumer, would garner public support for their existence. However, numerous incidents exemplify that this is not the case.<sup>127</sup> “[N]ational organizations with large membership bases, such as the American Association of Retired Persons, have campaigned to end UPL restrictions because the consumer public is not being served effectively by lawyers and should have a choice as to who represents them.”<sup>128</sup> In Arizona, citizens had an opportunity to vote through a referendum on whether to approve of UPL rules.<sup>129</sup> The result ended with a majority of the votes in favor of rejecting those rules.<sup>130</sup>

To adequately protect consumers in a society without UPL rules, the legal landscape must continue to hold bad and negligent actors liable. Legal malpractice claims exist to redress an injury an individual has received from a licensed lawyer’s negligence or intent to harm the consumer.<sup>131</sup> The same protections would need to include *any* provider of legal services and ensure non-lawyers are also potentially liable for legal malpractice suits.<sup>132</sup> Specifically, legal malpractice claims would need to provide a private right of action to consumers of legal services against parties that *provide legal services* rather than specifically against licensed attorneys.<sup>133</sup>

For this to be successful, the expansion of legal malpractice would have to be mostly parallel in its structure when applied to unlicensed individuals or entities providing legal services.<sup>134</sup> Legal malpractice, although varying from state to state,<sup>135</sup> typically

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<sup>126</sup> Denckla, *supra* note 82, at 2595.

<sup>127</sup> *See id.* at 2596.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Legal Malpractice*, JUSTIA, <https://www.justia.com/injury/legal-malpractice/> [<https://perma.cc/3V7L-W8BH>] (last updated Apr. 2018).

<sup>132</sup> *See* Rotenberg, *supra* note 3, at 726–27.

<sup>133</sup> *See id.*

<sup>134</sup> *Id.* at 726.

<sup>135</sup> *See Legal Malpractice*, *supra* note 131.

requires (1) an existing attorney-client relationship that “placed a duty upon the attorney to exercise reasonable professional care, skill, and knowledge in providing legal services[,] ... (2) a breach of that duty[,]” and (3) harm or damage caused by a breach of that duty.<sup>136</sup> The issue between expanding legal malpractice claims to non-lawyers arises from the existence of an attorney-client relationship and the breach of the duty that relationship imposes.<sup>137</sup>

The attorney-client relationship is a fundamental principle in the legal field that serves to protect the interests of the party seeking legal services.<sup>138</sup> This “duty,” placed upon an attorney to his clients, is encoded within the American Bar Association Model Rules of Professional Conduct and provides, among other protections, that the attorney will keep certain communications between the attorney and the client private and that the attorney will provide competent representation.<sup>139</sup> The attorney-client relationship can be formed by an attorney with even prospective clients.<sup>140</sup> Although the exact definition varies from state to state,<sup>141</sup> failure to uphold the duty can lead to legal malpractice claims against the attorney.<sup>142</sup>

Where the expansion of legal malpractice claims to non-attorneys will need to diverge from the traditional factors is regarding this attorney-client relationship.<sup>143</sup> As mentioned earlier, the attorney-client relationship is imposed on an attorney

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<sup>136</sup> Moore v. Grau, 193 A.3d 272, 277 (N.H. 2018) (quoting Yager v. Clauson, 101 A.3d 6 (2014)).

<sup>137</sup> Rotenberg, *supra* note 3, at 726–27.

<sup>138</sup> Micah Schwartzbach, *The Attorney-Client Privilege*, NOLO, <https://www.nolo.com/legal-encyclopedia/attorney-client-privilege.html> [<https://perma.cc/Q7ML-BCHW>].

<sup>139</sup> See *id.*; MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS’N 2020), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_6\\_confidentiality\\_of\\_information/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/) [<https://perma.cc/YM29-ABY8>].

<sup>140</sup> MODEL RULES OF PRO. CONDUCT r. 1.18 (AM. BAR ASS’N 2020), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_18\\_duties\\_of\\_prospective\\_client/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_18_duties_of_prospective_client/) [<https://perma.cc/G8C8-YJ5D>].

<sup>141</sup> Schwartzbach, *supra* note 138.

<sup>142</sup> *Breach of Attorney-Client Confidentiality Can Torpedo Your Case*, GLICKMAN & GLICKMAN (Mar. 26, 2015), <http://www.glickman-law.com/blog/2015/03/breach-of-attorney-client-confidentiality-can-torpedo-your-case.shtml> [<https://perma.cc/Q5ES-55NT>].

<sup>143</sup> Denckla, *supra* note 82, at 2594–95.

by professional codes of conduct that hold the attorney liable for failing to uphold the minimum standards of conduct.<sup>144</sup> Since this relationship or the state's code of professional conduct does not bind a non-lawyer, the first element requiring an attorney-client relationship would have to instead impose a *general* professional duty on the provider of the legal service rather than an "attorney" client privilege.<sup>145</sup> This professional duty is not a new phenomenon or one that is not already present in other fields; the first element in medical malpractice requires this exact relationship.<sup>146</sup> Risks are associated with seeking legal services from a provider not licensed to practice law, as state professional codes of conduct do not bind these providers as they do lawyers.<sup>147</sup> However, these risks are inherent with choosing legal software or unlicensed individuals over a licensed attorney, and certainly do not automatically represent any less quality services.<sup>148</sup>

Another avenue of recourse for a party would be through false advertising claims.<sup>149</sup> With an end on the legal monopoly, bad actors who would mislead consumers on the nature or quality of their services may enter the market.<sup>150</sup> In order to provide a smooth transition following the elimination of UPL statutes, protections for consumers against these actors in the market need to exist to ensure that the quality of legal services do not mislead consumers.<sup>151</sup> There are both state and federal laws on false advertising, and, in the states that do not have specific false advertising avenues, common law fraud is a cause of action to reprimand these actors.<sup>152</sup>

An abundance of case law restricts law firms and lawyers from making false claims on the type or expertise of their services,<sup>153</sup> and this same line of reasoning should be applied to

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<sup>144</sup> See GLICKMAN & GLICKMAN, *supra* note 142.

<sup>145</sup> Denckla, *supra* note 82, at 2594–95.

<sup>146</sup> B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467 CLINICAL ORTHOPEDICS & RELATED RSCH., No. 2, 339, 342 (2008).

<sup>147</sup> Denckla, *supra* note 82, at 2493–94.

<sup>148</sup> *Id.* at 2594–95.

<sup>149</sup> See *infra* note 153 and accompanying text.

<sup>150</sup> *False Advertising Laws*, GIBBS L. GRP., LLP., <https://www.classlawgroup.com/consumer-protection/false-advertising/laws/> [<https://perma.cc/7JZU-G8MU>].

<sup>151</sup> Rotenberg, *supra* note 3, at 738–40.

<sup>152</sup> GIBBS L. GRP., LLP., *supra* note 150.

<sup>153</sup> See *In re* Petition of Felmeister & Isaacs, 518 A.2d 188, 188–89 (N.J. 1986); *Carter v. Lovett & Linder, Ltd.*, 425 A.2d 1244, 1245–46 (R.I. 1981).

any legal service provider rather than only lawyers or law firms.<sup>154</sup> For instance, regarding attorney advertising, New Jersey held that these types of advertisements need to be predominantly informational, whereas drawings, animations, music, and lyrics are limited to television advertising.<sup>155</sup> Meanwhile in Rhode Island, listing areas of expertise is restricted when lawyers or law firms advertise.<sup>156</sup> In *Carter v. Lovett & Linder, Ltd.*, the Supreme Court of Rhode Island upheld a decision by the disciplinary board against a law firm that listed specific areas of expertise when advertising the firm.<sup>157</sup> In that case, the court clarified that this restriction applies even in instances in which an individual can perceive an area of expertise, even if it is not explicitly stated in the advertisement.<sup>158</sup> These varying state principles must have a parallel application to any legal service provided by non-lawyers to create an effective avenue of protecting consumers in a world without UPL rules.<sup>159</sup>

Federal false advertising law is another avenue to protect consumers.<sup>160</sup> The Lanham Act enables parties to pursue civil lawsuits for advertisements that “‘misrepresent[] the nature, characteristics, qualities, or geographic origin’ of goods or services.”<sup>161</sup> Implementing similar rigid protections that safeguard consumers at the advertising stage can minimize and, over time, hopefully eliminate the potential drawbacks of eliminating UPL statutes.<sup>162</sup>

#### IV. THE ECONOMICS OF A MONOPOLY ON THE LEGAL MARKET

“Senator Henry Clay was right when he told the U.S. Senate in 1832, ‘[o]f all human powers operating on the affairs of mankind, none is greater than that of competition.’”<sup>163</sup> As stated

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<sup>154</sup> Rotenberg, *supra* note 3, at 738–40.

<sup>155</sup> *In re Petition of Felmeister & Isaacs*, 518 A.2d at 188–89.

<sup>156</sup> *Carter*, 425 A.2d at 1245–46.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Rotenberg, *supra* note 3, at 738–40.

<sup>160</sup> *False Advertising*, JUSTIA, <https://www.justia.com/consumer/deceptive-practices-and-fraud/false-advertising/> [<https://perma.cc/YLJ9-V2MM>].

<sup>161</sup> *Id.* (quoting 15 U.S.C. § 1125(a)).

<sup>162</sup> Denckla, *supra* note 82, 2599.

<sup>163</sup> Wolfgang Kasper, *Competition*, LIBR. ECON. & LIBERTY, <https://www.econlib.org/library/Enc/Competition.html> [<https://perma.cc/HM7R-72FT>].

earlier, UPL rules have created a monopoly on legal services.<sup>164</sup> Absent government intervention, a monopoly can choose any price for its goods or services, and it will do so in a manner that will yield the highest possible profits.<sup>165</sup> A monopoly can charge prices above what they would be when other competitors are able to enter the market.<sup>166</sup> “When the monopolist raises prices above the competitive level in order to reap his monopoly profits, customers buy less of the product, less is produced, and society as a whole is worse off. In short, monopoly reduces society’s income.”<sup>167</sup> Unfortunately, this becomes an issue of public policy when a monopoly dominates in a market whose services are critical to the public, such as legal services, and a portion of the public is unable to access these services because of high prices.<sup>168</sup> However, the solution to ending this monopoly is simple on its face: eliminate UPL rules.

Monopolies similar to the one present in the legal market are not a new phenomenon devoid of solutions and debate.<sup>169</sup> In the field of medicine, prominent twentieth century economist Milton Friedman argued that state licensing procedures limited entry into the medical profession.<sup>170</sup> This barrier allowed licensed doctors to charge fees higher than what would be the case had the competition been more open.<sup>171</sup>

The very notion of a closed market in this fashion distorts basic principles of supply and demand.<sup>172</sup> In the process of private contracting and the exchange of goods and services, information is signaled through prices.<sup>173</sup> In a normal free market scenario, sellers cut prices to attract buyers, whereas buyers signal their preferences for specific goods and services by increasing

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<sup>164</sup> See Rotenberg, *supra* note 3, at 713–14.

<sup>165</sup> George J. Stigler, *Monopoly*, LIBR. ECON. & LIBERTY, <https://www.econlib.org/library/Enc/Monopoly.html> [<https://perma.cc/G3CK-ZQA2>].

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> See Brown, *supra* note 6, at 157, 159.

<sup>169</sup> Milton Friedman, LIBR. ECON. & LIBERTY, <https://www.econlib.org/library/Enc/bios/Friedman.html> [<https://perma.cc/LHT2-PAYE>].

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Kasper, *supra* note 163.

<sup>173</sup> *Id.*

what they are willing to pay for such products.<sup>174</sup> When the “price[] exceed[s the] cost[], sellers make a profit.”<sup>175</sup> This has the effect of drawing competitors to the specific market, thus driving down prices due to a supply increase in what is known as price competition.<sup>176</sup> Resultingly, when access to a market by sellers is barricaded, price competition is not able to flourish due to the limited number of sellers.<sup>177</sup>

Lower prices are not the only benefit from an open market.<sup>178</sup> Competitors often improve their products and services to gain an advantage over rivals.<sup>179</sup> “Competitive rivalry among suppliers and buyers is a powerful incentive to search for knowledge. Self-interest motivates ceaseless, widespread, and often costly efforts to make the best use of one’s property and skills.”<sup>180</sup> This is the process of innovation that brings new products to consumers or improves upon currently existing ones.<sup>181</sup> In this sense, the possibilities for innovation in the legal market are endless. Products similar to LegalZoom may enter the market in droves, not only providing similar services but driving down prices to grab more of a market share.<sup>182</sup> Lower prices will shrink the justice gap allowing more and more consumers to fulfill their legal needs.<sup>183</sup> Innovation in the market would open the possibility of expanding the services offered by such products, thus not only increasing the number of legal services offered by technology, but further driving prices down as roles traditionally attributed to attorneys become digital.<sup>184</sup> However, decreasing prices should not cause alarm about overall revenue in the market.<sup>185</sup> Lower prices mean more consumers are able to participate in the market, and the revenue will instead flow from the original monopoly

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *See id.*

<sup>182</sup> *See id.*

<sup>183</sup> Brown, *supra* note 6, at 159.

<sup>184</sup> *See* Kasper, *supra* note 163.

<sup>185</sup> *Id.*

holders towards sellers who can provide the best quality products at the best available price.<sup>186</sup>

Monopolies disrupt the delicate balance between supply and demand.<sup>187</sup> The difficulty is ending the consolidation of market share owned by monopoly forces. Over the long term, monopolies survive as a result of government protection.<sup>188</sup> There is a certain irony when the legal market's protection comes from legal authorities themselves.<sup>189</sup> As a result, this reality makes it difficult to break the grip on market share by the entities promulgating UPL rules.<sup>190</sup> However, as most economists agree, it is important to protect competition in the marketplace as unrestrained competition is a public good and essential to the wealth of a nation.<sup>191</sup> Indeed, protection of the open market drives political action in the fields of union power, antitrust, and other free market principles.<sup>192</sup> This same mentality and drive towards action should be mirrored in the legal market.

What is clear is that once UPL rules are eliminated by the respective legal authorities, other players will be able to enter the market; this inevitably will have the effect of driving down prices and eliminating monopoly power.<sup>193</sup> LegalZoom itself was born amid a thriving UPL-dominated market.<sup>194</sup> Should the barriers to access be eliminated, innovation and competition will surely pour into the market and build upon what LegalZoom has started.<sup>195</sup> From there, innovation is a reasonable expectation in the marketplace for legal services,<sup>196</sup> and with that innovation society can finally provide effective legal representation and services to a population that it has long since ignored.<sup>197</sup>

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<sup>186</sup> *See id.*

<sup>187</sup> *See id.*

<sup>188</sup> *Id.*

<sup>189</sup> *See id.*

<sup>190</sup> Rotenberg, *supra* note 3, at 713–15.

<sup>191</sup> *See* Kasper, *supra* note 163.

<sup>192</sup> *Id.*

<sup>193</sup> *See* Stigler, *supra* note 165; Rotenberg, *supra* note 3, at 713–15.

<sup>194</sup> *See* PEARCE ET AL., *supra* note 2, at 39.

<sup>195</sup> *See* Stigler, *supra* note 165.

<sup>196</sup> Michael Riordan, *No Monopoly on Innovation*, HARV. BUS. REV. (Dec. 2005), <https://hbr.org/2005/12/no-monopoly-on-innovation> [<https://perma.cc/6YUB-PB3N>].

<sup>197</sup> *See* Brown, *supra* note 6, at 157.



## CONCLUSION

UPL laws have been propagated and sold as an effective measure of consumer protection for legal services, specifically, “the need of the public for integrity and competence of those who undertake to render legal services.”<sup>198</sup> Their rise in the early twentieth century was indeed premised by their creators on this notion,<sup>199</sup> and today they are widespread throughout every state.<sup>200</sup>

However, as technology progressed, the purported purpose of UPL rules began to lose credibility.<sup>201</sup> This is exemplified by the alarming statistics that the monopoly on legal services by lawyers has created: a disjunction between parties who desperately need legal services and access to those services.<sup>202</sup> The mechanism used to “protect members of the public from unqualified representation” instead has become a hindrance to members of the public from obtaining any representation at all.<sup>203</sup>

Legal software has the potential to fill in the gap where justice is void.<sup>204</sup> By providing legal services to communities at a lower cost, the justice gap will effectively be narrowed by increased access to such services.<sup>205</sup> But it cannot be done efficiently with the existence of UPL rules, which on their face, bar the activities of legal software and unlicensed representation and have created an era of uncertainty on the future of legal software.<sup>206</sup>

Once UPL statutes are no longer a barrier to entry, an influx of sellers will drive down market prices.<sup>207</sup> Even further, players in the market will attempt to innovate on existing legal

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<sup>198</sup> See Denckla, *supra* note 82, at 2593 (quoting MODEL RULES OF PRO. CONDUCT EC 3-1 (1981)).

<sup>199</sup> See *id.*; Rotenberg, *supra* note 3, at 714–15.

<sup>200</sup> See Rotenberg, *supra* note 3, at 714.

<sup>201</sup> Compare Rosman, *supra* note 114, at 77 (critiquing UPL rules’ effects on lawyers working remotely in different states they are not licensed in), with Brown, *supra* note 6, at 160 (exploring common legal problems that can be addressed with legal software).

<sup>202</sup> Brown, *supra* note 6, at 160.

<sup>203</sup> Rosman, *supra* note 114, at 76.

<sup>204</sup> See Brown, *supra* note 6, at 157.

<sup>205</sup> *Id.*

<sup>206</sup> PEARCE ET AL., *supra* note 2, at 39.

<sup>207</sup> Kasper, *supra* note 163.

goods and services to increase their own profits, leading to better quality representation at a more affordable price for consumers.<sup>208</sup> The solution is quite simple on its face then, eliminate UPL rules and allow the free market to innovate the future of legal services. To the current players in the legal monopoly, this is a handful to accept.<sup>209</sup> With control of monopoly prices leading to extraordinary gains,<sup>210</sup> the current monopolists of the legal world will have a tough time allowing other competitors to enter the market.<sup>211</sup> Given that the gatekeepers of the monopoly power on legal services are lawyers, judges, and other individuals in the legal field themselves, it will be challenging to truly eliminate UPL statutes without resistance.<sup>212</sup>

Should UPL rules be successfully eliminated, it is important to provide protections to consumers. This should begin with an expansion of legal malpractice to include any form of legal work regardless of whether the service is provided by a licensed attorney, an unlicensed player, or legal software.<sup>213</sup> In doing so, it will be important to distinguish a critical element of current malpractice law, the attorney-client relationship, to adapt to the new malpractice standards successfully.<sup>214</sup>

Additionally, it is important to expand false advertising law to encompass otherwise misleading and inaccurate portrayals of legal services by new players in the legal market.<sup>215</sup> The basis for these claims are already cemented into federal and state law.<sup>216</sup> However, to be effective when new technology and competitors enter the legal market, the same principles that apply to law firms and lawyers regarding false advertising claims will have to apply to the new market similarly.<sup>217</sup> This means that

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<sup>208</sup> *See id.*

<sup>209</sup> *Id.*

<sup>210</sup> Stigler, *supra* note 165.

<sup>211</sup> Rotenberg, *supra* note 3, at 715.

<sup>212</sup> *Id.* at 713–15.

<sup>213</sup> *Legal Malpractice*, *supra* note 131.

<sup>214</sup> *See Moore v. Grau*, 193 A.3d 272, 277 (N.H. 2018) (quoting *Yager v. Clauson*, 166 A.3d 6 (N.H. 2014)) (describing the elements of legal malpractice).

<sup>215</sup> *False Advertising*, *supra* note 160.

<sup>216</sup> *See In re Petition of Felmeister & Isaacs*, 518 A.2d 188, 188–89 (N.J. 1986); *Carter v. Lovett & Linder*, 425 A.2d 1244, 1246 (R.I. 1981); *False Advertising*, *supra* note 160.

<sup>217</sup> Rotenberg, *supra* note 3, at 736.

any restriction or regulation affecting current players will have to apply to unlicensed attorneys and legal software.<sup>218</sup> It is crucial that with such a leap to an open market for legal services, equal protections follow to ensure a smooth and efficient transition.

In an increasingly technological and global society, it is finally time to let the leashes go on the legal monopoly.<sup>219</sup> In doing so, it is wise to follow the new players in the market while also staying wary of the legal implications that will follow. However, in society's interest and those who have been most adversely affected by UPL statutes,<sup>220</sup> it is best to welcome this change with open arms.

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> Brown, *supra* note 6, at 159–60.