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WHEN IS A COMPUTER A LAWYER?: INTERACTIVE LEGAL SOFTWARE, UNAUTHORIZED PRACTICE OF LAW, AND THE FIRST AMENDMENT

INTRODUCTION

Computer technology is changing the way legal services are delivered. Indeed, interactive software products can interview the user and produce documents tailored to fit the user's situation.[1] This innovation in the way legal services can be delivered presents significant implications for the organized bar's control over the provision of legal services. In particular, computer software which allows digital provision of legal services implicates traditional restrictions on the unauthorized practice of law (UPL). Yet, the enormous potential of computer software for providing low cost access to legal information and services, thereby enabling middle and lower income individuals to have wider access to otherwise prohibitively expensive legal information and services, justifies an inquiry into and re-evaluation of the restrictions on the unauthorized practice of law.[2]

A 1995 American Bar Association report concluded "that as many as 70% to 80% or more of low-income persons are unable to obtain legal assistance even when they need and want it," and that significant numbers of middle-income households also lack meaningful access to the justice system.[3] Yet, "in August, 2000, 54 million households, or 51 ***148** percent, had one or more computers."[4] Although the lowest income families are less likely to have computers at home,[5] an estimated 63 percent of middle-income families[6] have home computers.[7] Beyond home computer access, many people have access to computers at public libraries and other locations that provide computers for public use. Thus, for the cost of software—usually less than fifty dollars[8]—individuals who cannot afford high fees charged by many lawyers can have access to information that will enable them to prepare simple wills and other legal documents they need.

Among the most popular interactive legal software programs is Quicken Family Lawyer, which offers various legal forms[9] along with ***149** instructions on how to complete the forms.[10] When the user initiates the software program, the user selects the document to be created, and then the software asks the user a series of questions, the answers to which either prompt additional questions or are automatically entered as the terms of the document. Along with the questions, an informational text box appears and provides relevant information for the user's consideration in answering the questions. In addition, other "help" features are available to provide information regarding the law. Using this innovative software, users can create legal documents that are tailored to their own circumstances.

This article seeks to explore whether, and to what extent, the provision of legal services through the use of interactive

software[11] constitutes the unauthorized practice of law, and to what extent the bar's traditional notions of UPL must change in response to this evolving technology in light of significant First Amendment implications. In Part I, this article sets out the traditional definitions of "the practice of law" and explores the extent to which interactive legal software comes within these traditional definitions and implicates UPL regulations. Part II examines First Amendment concerns implicated by the regulation of interactive legal software providers. Part III examines traditional justifications for restricting the practice of law to licensed lawyers and argues that the traditional rationales do not justify broad prohibitions of interactive legal software, especially in light of the significant First Amendment interests at stake. Finally, Part IV concludes by arguing that the unprecedented opportunities interactive legal software provides for enhancing the provision of legal services to an underserved segment of society, as well as the important First Amendment interests at stake, require finding alternative ways to serve the bar's goals.

*150 I. TRADITIONAL DEFINITIONS OF THE "PRACTICE OF LAW"

Interactive software technology presents the legal profession with a stunning array of issues that threaten to dissolve traditional conceptions of "the practice of law." Yet, computer technology offers an opportunity to improve access to legal services by lower income individuals. Thus, it is necessary to evaluate traditional UPL regulations and their justifications, along with traditional definitions of "the practice of law," and attempt to reconcile them with the incredible potential computer software technology offers in the provision of legal services.

Generally, each state's highest court has inherent power to regulate the practice of law within the state.[12] This power is typically delegated to state bar organizations, which often provide interpretive, investigative, and prosecutorial functions in regulating the practice of law.[13] Along with regulating the practice of law, the organized bar regulates admission to the bar. Through increasingly rigid requirements for admission to the bar and vigorous enforcement of unauthorized practice restrictions, the organized bar has effectively limited the practice of law to those who have satisfied the requirements for admission to the bar.[14] Generally, if particular conduct fits within the definition of "the practice of law," then, under current UPL rules, only a licensed lawyer may engage in that conduct. Conversely, if a non-lawyer engages in the conduct, the non-lawyer is subject to sanctions, including criminal penalties.

***151** The "practice of law" evades precise definition.[15] The ABA Model Rules of Professional Conduct defend restricting UPL,[16] but do not attempt to define "practice of law," leaving it to the various jurisdictions.[17] Thus, defining what constitutes the practice of law is left to state bar associations, courts, and legislatures.[18] What has emerged is a set of diverse definitions that can be categorized as follows: (1) the "traditional practice" test; (2) the "professional judgment" test; (3) the "incidental services" test; and (4) the "laundry list" approach. Often, one jurisdiction will employ several of these tests, even in the same case.[19]

As the remainder of this Part will demonstrate, application of any of these tests would, under traditional UPL concepts, result in a ban[20] on interactive legal software.

*152 *A. The "Traditional Practice" Test*

Some jurisdictions define the practice of law as being what a lawyer commonly does.[21] Under this definition, the question is left for courts, on a case-by-case basis, to determine whether particular acts fall within the realm of what traditional law practice encompasses.

This "lawyer is as lawyer does" approach is woefully inadequate, both as a means of identifying conduct that constitutes the practice of law and as a means of notifying non-lawyers as to which activities they must avoid.[22] This test is so amorphous that it can be interpreted to include virtually any activity lawyers might engage in, regardless of whether and to what extent legal skill is involved in the activity. For example, one court has suggested that, under this definition, lobbying legislative bodies could be considered the "practice of law" because lobbying is an activity engaged in by lawyers in a representative

capacity.[23]

Interactive legal software would undoubtedly fall within the broad definition of the traditional practice test. Many of the tasks that can be undertaken using interactive legal software are tasks that are traditionally undertaken by lawyers, including advice regarding what documents to create.[24] For example, interactive software may be used to create a will. In particular, the legal software will pinpoint the precise type of will that ought to be created based on the user's state of residence and marital and parental status. Will drafting—including the professional determinations regarding how to draft the bequests so as to best satisfy the testator's intent—is an activity traditionally undertaken by lawyers.[25] The same can be said for many of the documents available through the interactive software. Thus, under the broad "traditional practice" definition, interactive software would constitute law practice.

However, under a narrower "traditional practice" definition, interactive legal software could hardly be considered law practice. ***153** Traditionally, law practice has depended on a personal relationship between the attorney and the client. The attorney's fiduciary responsibilities and ethical obligations are all based on the personal interaction and relationship between the attorney and the client.[26] However, interactive legal software does not mimic the attorney-client relationship; it simply enables the user to identify legal documents, decide which ones to create, and learn about basic legal concepts relevant to creating that particular document. Confidentiality is not an issue; the user need not be assured of confidentiality to encourage the user to confide in the computer. Potential conflicts of interest are not a concern; a computer program serves only the person using it at the time. No attorney-client relationship exists; the user does not reasonably believe that the computer is representing the user or that an attorney-client relationship has been created.[27] A computer is not a lawyer. Thus, under a narrow interpretation of the traditional practice test, interactive legal software should not be considered law practice.

B. The Professional Judgment Test

The "professional judgment" test asks whether an activity involves the exercise of a lawyer's professional judgment.[28] For example, the Indiana Supreme Court has observed that "[t]he core element of practicing law is the giving of legal advice to a client and the placing of oneself in the very sensitive relationship wherein the confidence of the client, and the ***154** management of his affairs, is left totally in the hands of the attorney."[29] In addition, the Indiana Supreme Court explained that the mere filling out of legal forms does not involve the exercise of legal judgment,[30] but cautioned that the filling out of certain forms may "involve[] considerations of significant legal refinement, or [if] the legal consequences of the act are of great significance to the parties involved, such practice may be restricted to members of the legal profession."[31] Based on this hazy distinction, the Indiana Supreme Court found that real estate brokers and agents were not practicing law when they filled out instruments involved in real estate transactions except the execution of deeds.[32] In contrast, other jurisdictions using this test have distinguished "mere secretarial services" from preparation of legal forms, holding that the former do not constitute UPL, while the latter do.[33]

Although the conclusion of whether an activity involves the exercise of professional judgment varies among different jurisdictions, applying the professional judgment test to the creation and use of interactive legal software demonstrates that the software designer, and not the end user, is practicing law, if anyone is. The software designer exercised legal judgment, skill, and knowledge in preparing the questions that the software would prompt and programming the software's responses based on the user's responses to the questions. In addition, in programming the software to "flag" particular documents as appropriate for a particular user, given the user's entry of particular information about marital and parental status and other matters, arguably involves professional judgment and advice. Thus, under the professional judgment test, the software designer would arguably be subject to UPL regulation.

In contrast, the professional judgment definition would seem to protect from violation of UPL restrictions a user who uses the software to create legal documents for another person. The software user conducts the interview as prompted by the software, enters the other ***155** person's responses into the computer, and thereby creates a legal document based on the other person's particular fact situation. The user is nothing more than an intermediary, simply reading questions that appear on the computer screen and entering the other person's responses. The user exercises no legal skill or professional judgment, but rather is

acting as a data entry clerk. The task is analogous to the real estate broker filling out forms involved in real estate transactions or to "mere secretarial services," and ought to be outside the scope of UPL regulation. Thus, applying the professional judgment test, the software designer, but not the ultimate user, has practiced law.

C. The Incidental Services Test

Under the incidental services test, drafting documents does not constitute the practice of law when the drafting is "incidental" to the work of a specific occupation.[34] For example, a real estate broker may, under this test, fill out forms incidental to selling real property,[35] and a bank employee may fill out mortgage documents.[36] This test has been used to allow non-lawyers in a variety of occupations[37] to engage in what, under another definition, might constitute the practice of law.

This test, however, is inadequate to provide a comprehensive definition of which acts constitute the practice of law. Some acts which are incidental to a profession are undoubtedly within the practice of law. For example, drafting pleadings arguably could be considered incidental to a paralegal's occupation, but a court is unlikely to conclude that this fact renders the drafting of complaints outside the "practice of law." Indeed, even when courts employ the incidental services test to support the conclusion that particular conduct is not the practice of law, they ***156** frequently distinguish incidental legal services which would require the exercise of legal judgment.[38]

Under this test, the design of interactive legal software arguably would constitute the practice of law and be subject to UPL regulation. The design of interactive legal software is not "incidental" to an occupation and, consequently, would not come within the incidental services test for exemption from UPL regulation. On the other hand, this test would relieve some end users from regulation for some uses of the software. For example, a real estate broker who used the software to create forms incidental to selling real estate would be protected from UPL regulations, just as the real estate broker who uses printed forms would be protected.

D. The Laundry List Approach

Some states define the "practice of law" by reference to a "laundry list" of activities that constitute the practice of law. The theory behind the laundry list approach is that the enumerated tasks constitute the practice of law because they involve the exercise of legal skill and judgment or because the public would be at risk of harm absent prohibitions on non-lawyers engaging in the enumerated activities. Among the most frequently included activities on such lists are giving legal advice, representing others in legal matters, and drafting legal documents.[39]

Despite the superficial simplicity of the laundry list approach, difficulties arise in attempting to define just what acts comprise these activities. For example, while state law might make clear that the giving of legal advice constitutes the practice of law, it is still necessary to determine what constitutes the giving of "legal advice."[40] Consequently, courts have generally used a case-by-case approach to define what activities involve the giving of legal advice.

Nevertheless, some generalities may be drawn regarding what constitutes the practice of law under the laundry list approach. For example, if the state's definition of law practice includes the preparation or drafting of legal documents, then the act of preparing legal documents that are tailored to a person's particular factual situation constitutes the practice of law.[41]

***157** Applying its UPL "laundry list" statute, Texas was the first state to aggressively address the issue of whether computer software that enables users to create and execute complex legal documents constitutes the unauthorized practice of law. The Texas Unauthorized Practice of Law Commission[42] brought suit against Parsons Technology, Incorporated, the company that produces and sells Quicken Family Lawyer (QFL) software, alleging that the product violated the Texas UPL statute.

The Texas UPL statute defined "practice of law" as follows:

> [T]he preparation of a pleading or other document incident to an action or special proceeding or the

> management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.[43]

The federal district court concluded that the sale of the software violated the Texas UPL statute, and permanently enjoined Parsons Technology from selling the QFL product in Texas.[44] In particular, the district court concluded that the interactive nature of the software, which "interviews" the user by asking a series of questions and tailors documents based on the responses, combined with the fact that the software purports to "recommend" which documents are appropriate for the user based on the user's responses to the interview questions and the state in which the user resides, necessitated the conclusion that Parsons Technology violated the Texas UPL statute.[45] In so holding, the district court rejected Parsons Technology's argument that "personal contact" or a "lawyer-client relationship" were required to render an act the "practice of law" within the statute.[46] The district court based its rejection of Parsons Technology's arguments on its interpretation of prior Texas caselaw holding that the sale of will forms and books containing will forms violated the Texas statute.[47]

***158** Promptly, and in direct response to the *Parsons* district court opinion, the Texas legislature amended the statutory definition of UPL.[48] The amendment excluded from the practice of law "the design, creation, publication, distribution, display, or sale by means of an Internet web site, or written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney."[49] Subsequently, the Fifth Circuit vacated the *Parsons* district court's injunction, concluding that the sale of QFL was permitted under the new provision.[50]

Although the Texas legislature exempted interactive legal software from the reach of its UPL statute, the district judge concluded that the software unquestionably fell within the reach of the statute's basic terms.[51] Other jurisdictions will be faced with the same dilemma when applying their own statutes and common law UPL rules. Thus, an inquiry into the First Amendment interests at stake is necessary.

II. THE FIRST AMENDMENT AS A LIMITATION ON UNAUTHORIZED PRACTICE RESTRICTIONS ON DIGITAL LEGAL SERVICES PROVIDERS

This Part discusses whether a UPL restriction as applied to ban the sale or use of interactive legal software violates the First Amendment to the United States Constitution.[52] In order to answer this question, the first inquiry is whether applying UPL regulations to restrict the sale or use of interactive legal software implicates "speech" that is protected by the First Amendment. Second, it is necessary to determine whether UPL restrictions on the sale and use of legal software constitute content-based or content-neutral speech regulations. The content-based versus content-neutral determination is crucial to determine which test applies to assess the validity of the regulation.

***159** *A. Software as Protected Speech*

Most courts that have considered the question have concluded that computer software programs are "speech" that is entitled to First Amendment protection.[53] The basis for this conclusion is the fact that software code[54] is scientific communication that conveys information.[55] Courts have concluded that, like other scientific speech,[56] computer software code is protected by the First Amendment.

However, some have argued that the language in which software is written is not comprehensible to those untrained in the language, and, consequently, software is not "readable" and does not contain communicative content.[57] Closely related to this argument is the notion that, because computer software is functional, it is not speech. The argument is that a "thing" which serves a "function" is not communicative speech within the First Amendment.[58] These arguments center on the Supreme

Court's requirement, first articulated in *Spence v.* ***160** *Washington*[59] and later refined in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[60] that, in order to be considered speech, conduct must convey a message with a great likelihood, in light of the surrounding circumstances, that the message will be understood by those who view it.[61] A "narrow, succinctly articulable message is not a condition of constitutional protection."[62]

Although computer software code is a special language, source code does convey a message. As the Second Circuit has pointed out, "Communication does not lose constitutional protection as 'speech' simply because it is expressed in the language of computer code. Mathematical formulae and musical scores are written in 'code,' *i.e.*, symbolic notations not comprehensible to the uninitiated, and yet both are covered by the First Amendment."[63] Computer software conveys messages that are understood in two ways. First, computer science experts who understand the language of computer software code are able to read and understand source code. Software code is a scientific language that "convey[s] specific and precise meanings within the computer science community as part of that community's discourse."[64]

Second, some computer software communicates with the end computer user.[65] Essentially, the "message" communicated by software source code is a scientific formula designed to create a response by a computer, which response in turn conveys a message to the end user on the computer screen, just like musical compositions are formulae designed to create responses by musicians, which responses in turn convey messages to the listeners.

Another argument leveled against First Amendment protection for software is based on the notion that software consists merely of a set of instructions designed to tell the computer what to do.[66] The argument is that because software is a set of instructions, software is entitled to no more First Amendment protection than would instructions that accompany products and instruct the consumer as to the proper use of ***161** the product.[67] However, "[a] recipe is no less 'speech' because it calls for the use of an oven, and a musical score is no less 'speech' because it specifies performance on an electric guitar."[68] Similarly, computer software code is no less speech because it directs computer functions.

Instructions that direct criminal acts are not entitled to First Amendment protection. For example, the Seventh Circuit has held that the First Amendment does not protect instructions on how to violate tax laws,[69] and the Fourth Circuit has excluded from First Amendment protection a manual containing instruction in soliciting, preparing for, and committing murders.[70] Unlike most computer software code,[71] the ends of these unprotected instructions are illegal acts, and that is the basis for their exclusion from First Amendment protection.

Interactive legal software does not fall outside of First Amendment protection as long as it does not instruct illegal acts. For example, a will can be drafted using interactive legal software. A will is not, in itself, illegal. Whereas following a set of instructions to commit murder[72] results in the illegal act of murder, computer software code that instructs a computer to provide information that enables the user to draft a will results in a legal act: the preparation of a will. When the goal of communication is to instruct, facilitate, or accomplish an illegal act, the communication is outside the scope of First Amendment protection,[73] but when the ends of the communication are legal—such as the creation of legal documents—the communication is entitled to full First Amendment protection. Moreover, beyond simply instructing the computer, computer software code conveys information, as discussed above, both to the computer science community and to the end user of the software. Thus, computer code is speech within the First Amendment. Whether the UPL regulations can be applied to ban this ***162** speech depends on whether the regulations are characterized as content-based or content-neutral regulations.

B. Content-Based versus Content-Neutral

The determination of whether a regulation is content-based[74] or content-neutral is significant because it triggers the applicable level of scrutiny to determine whether the regulation is permissible under the First Amendment. The United States Supreme Court has recognized that "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed."[75] Indeed, "[c]ontent-based regulations are presumptively invalid."[76] In order to overcome this presumption of invalidity, content-based regulations must meet strict scrutiny; that is, the regulation must be narrowly tailored to achieve a compelling governmental interest.[77] Content-neutral regulations, on the

other hand, need only survive intermediate scrutiny; that is, the incidental restriction on speech must be "no greater than is essential to the furtherance of the ***163** government's [substantial] interest."[78] Consequently, a content-neutral regulation is much more likely to be upheld than is a content-based regulation.[79]

As this section demonstrates, applying UPL regulations to restrict the publication of interactive legal software is a content-based regulation. Interactive legal software is singled out for regulation because of its communicative content; the subject matter of the software conveys information about legal documents.

UPL regulation of interactive legal software is subject matter discrimination and, thus, is content-based regulation. The software is susceptible to regulation because of the legal subject matter with which it deals.

In the only case to directly address the clash between the First Amendment and the regulation of interactive legal software under UPL regulations, the district court in *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.* rejected Parsons Technology's argument that enjoining the sale of Quicken Family Lawyer software would violate Parsons Technology's First Amendment rights.[80] The district court concluded that the UPL regulations represented content neutral regulations of speech. Citing *Ward v. Rock Against Racism*,[81] the district court posited that the determination of whether a regulation is content-neutral or content-based is focused on "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[82] The district court went on to note that the state's purpose in restricting the publication of Quicken Family Lawyer was to "eradicat[e] the unauthorized practice of law," and not to intentionally suppress speech.[83] Consequently, the district court held, the regulation was a content-neutral regulation of the non-communicative aspects of speech.[84]

In so holding, the district court rejected Parsons Technology's argument that the UPL regulation was content-based because the state sought only to regulate its legal software and had no intention of prosecuting Parsons Technology based on its publication, distribution, and sale of its non-legal software titles.[85] In rejecting this argument, the ***164** district court reiterated that the focus of the content determination is the purpose of the regulation and whether the state is manifesting disagreement with the message, not whether particular speech or conduct is prohibited.[86]

Accordingly, the *Parsons* district court applied intermediate scrutiny and the four-part *O'Brien*[87] test to determine the constitutionality of regulating Parsons Technology's speech.[88] The Supreme Court, in *United States v. O'Brien*, established a four-part test for content-neutral speech restrictions as follows: (1) the regulation must be "within the constitutional power of the Government"; (2) the regulation must further "an important or substantial governmental interest"; (3) the government interest must be "unrelated to the suppression of free expression"; and (4) the incidental restriction on speech must be "no greater than is essential to the furtherance of the government's interest."[89]

Applying this test, the *Parsons* district court concluded that applying the Texas UPL statute to prohibit the sale of Quicken Family Lawyer software would not impermissibly infringe on Parsons Technology's First Amendment rights.[90] First, the district court noted that the state indisputably had the power to regulate the practice of law, including the power to prohibit the unauthorized practice of law.[91] Second, the district court held that the UPL statute furthered an important governmental interest, finding that the state had "a significant interest in regulating the practice of law and protecting its citizens from being mislead [sic]," and noting that the Supreme Court had recognized states' "substantial interest in regulating the practice of law within the state."[92] Third, the district court concluded that the inquiry as to ***165** whether the governmental interest is unrelated to the suppression of free expression was identical to the inquiry as to whether the regulation was content-based or content-neutral. Thus, the district court held, this prong of the *O'Brien* test was satisfied because "the Statute can be justified on the need to prevent people who are not lawyers from giving legal advice and harming the citizens of Texas."[93] Finally, the district court concluded that the fourth *O'Brien* prong—requiring that the incidental restriction on speech be no greater than is necessary to further the governmental interest—did not require the least restrictive means of regulation, but would permit the statute to stand unless a substantial portion of the burden on speech did not promote the state's content-neutral purpose.[94] Under this standard, the district court, acknowledging that the case was close, found that the statute should be upheld.[95]

The *Parsons* court focused exclusively on the functionality of software in reaching its conclusion that applying the UPL

regulations to prohibit the sale of the software was a content-neutral regulation. The software functioned as a lawyer, the court implicitly reasoned, and thus, it could be regulated under lower-level *O'Brien* scrutiny.[96]

However, as the Second Circuit has pointed out, the "realities of what code is and what its normal functions are require a First Amendment analysis that treats code as combining nonspeech and speech elements, *i.e.*, functional and expressive elements."[97] Applying this notion of combining functional and expressive elements, the Second Circuit reasoned that although DeCSS software code has protected speech qualities, the functional nature of the software meant that governmental prohibitions of DeCSS only had to satisfy intermediate *O'Brien* scrutiny.[98]

Interactive legal software is different, however, from DeCSS software and presents greater speech interests that should lead to a conclusion that the application of UPL regulations to ban interactive legal software is a content-based restriction that can be applied only if strict scrutiny is satisfied. To understand the distinction, one must understand what DeCSS software is and how it functions. DeCSS is software designed to descramble the Content Scramble System (CSS). CSS is an access control and copy prevention system designed to protect movies that are ***166** distributed on Digital Versatile Disks (DVDs). DeCSS is software "that enables users to break the CSS copy protection and hence to view DVDs on unlicensed players and make [high quality] digital copies of DVD movies."[99] DeCSS functions by instructing a computer to descramble CSS. The Second Circuit analogized the functional aspect of the DeCSS software to a skeleton key that could perform the function of unlocking encrypted DVD movies, and held that governmental regulation of DeCSS software was content-neutral "just as would be a restriction on trafficking in skeleton keys identified because of their capacity to unlock jail cells, even though some of the keys happened to bear a slogan or other legend that qualified as a speech component."[100] This functional aspect of DeCSS is not communicative; no understandable message or information is conveyed. The functional aspect of DeCSS software is entirely separate from the communicative aspect of the software, which consists of the code message that is understandable to others in the computer science field.

Interactive legal software functions differently than does DeCSS software; even the functional aspects of interactive legal software have communicative value. Like DeCSS software, interactive legal software consists of a code message that communicates information understandable by others in the computer science field. However, unlike DeCSS software, interactive legal software communicates with the end computer user. The functional aspect of the legal software consists of instructions that cause the computer to display information that is understandable to the user. In fact, the interactive nature of the software demonstrates that information is being conveyed. The software functions by sending information to the user and reacting to the user's input of additional information. This function contains a speech element that was overlooked by the *Parsons* court and that distinguishes interactive legal software from DeCSS software.

The court in *Parsons* found that this communicative impact implicated the Texas UPL regulation. In fact, the reason for the *Parsons* court's conclusion that the Texas UPL statute prohibited the software was because it conveyed information regarding legal matters and enabled the user to create certain legal documents.[101] Clearly, the Texas UPL Commission targeted the Quicken Family Lawyer product because of its content. Likewise, it is precisely this communicative impact that implicates many of the UPL definitions discussed in Part I of this article. ***167** The interactive communication between the software and the user implicates UPL regulations, and, thus, the application of these regulations to restrict the publication or sale of interactive legal software is a content-based regulation that should be subjected to strict scrutiny.

Gentile v. State Bar of Nevada[102] is distinguishable. In that case, the Supreme Court observed that "in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed .... Even outside the courtroom, ... lawyers in pending cases [may be] subject to ethical restrictions on speech to which an ordinary citizen would not be."[103] Consequently, the Court concluded that a lawyer's extrajudicial speech regarding a pending case is subject to regulation if there is a "substantial likelihood of material prejudice."[104] The Court found that this standard was narrowly tailored to achieve the State's legitimate interest in "protect[ing] the integrity and fairness of a State's judicial system"[105] and imposed "only narrow and necessary limitations on lawyers' speech."[106]

However, in reaching the conclusion that a lawyer's extrajudicial speech regarding a pending case could be regulated based on a lower level scrutiny, the Court distinguished lawyers, who represent parties, from media, which provides information

and commentary regarding pending cases.[107] The reasoning behind this distinction was the Court's recognition that the public has an interest in being informed about the criminal justice system and that the media's central role is to convey this information to the public.[108] Thus, the Court noted, the media's speech about a pending trial may not be prohibited without a finding of a "'clear and present danger' that a malfunction in the criminal justice system will be caused."[109]

The standards that the Court articulated in *Gentile* are inapplicable in the interactive legal software context for two reasons. First, the Court in *Gentile* focused on the interests in protecting against prejudice that might result from public comment regarding an ongoing judicial proceeding.[110] No similar special interest is implicated here. This situation presents no danger that the publication of interactive legal software will implicate ongoing judicial proceedings. Second, the ***168** software publisher is engaged in providing needed information to the public—similar to the media—and thus is entitled to heightened First Amendment protection that reflects the public's interest in receiving the information.

Indeed, the public's interest in the information conveyed by the legal software is significant.[111] As noted earlier, a significant portion of the population has an unmet need for legal services.[112] Allowing them access to legal software will enable them to satisfy their own legal needs at an affordable price. Thus, the public's interest in the information provided by legal software is analogous to the public's interest in information about the justice system, which interest was recognized by the Court in *Gentile* as necessitating higher level scrutiny.[113]

Because the application of UPL regulations to prohibit interactive legal software is a content-based regulation that implicates speech that communicates information that is of significant interest to the public, this application of UPL regulations ought to be subjected to strict scrutiny. Thus, it is necessary to evaluate justifications for UPL regulations and whether the application of these regulations to interactive legal software is narrowly tailored to achieve the interests asserted.

III. JUSTIFICATIONS FOR RESTRICTING THE UNAUTHORIZED PRACTICE OF LAW

Having concluded that strict scrutiny must be applied to the application of UPL regulations to restrict the publication of interactive legal software, it is necessary to assess whether a compelling interest exists to support this application of UPL regulations and, if so, whether the regulation is narrowly tailored to achieve the compelling interest. This Part discusses the traditional justifications for restricting the unauthorized practice of law and assesses whether each particular justification amounts to a compelling interest. In addition, this Part discusses less restrictive alternatives and explains how the goals of UPL regulation can be achieved with less interference with the First Amendment rights of legal software publishers.

Several justifications underlie strict UPL regulations and enforcement: (A) to protect the public, (B) to protect the legal system, (C) to protect the ***169** attorney-client relationship, and (D) to protect licensed lawyers from competition. The remainder of this Part analyzes each justification.

A. Protection of the Public

Perhaps the most frequently advanced justification for strict regulation of the practice of law is the notion that such restrictions protect the public from incompetence.[114] Indeed, this was the interest recognized in *Parsons* to justify the application of the UPL restrictions on interactive legal software.[115] The premise behind this justification is that licensed lawyers, due to training, experience, and ongoing professional obligations, will provide legal services more competently than will non-lawyers.

An example of the danger posed by non-lawyers providing legal services is provided by *Unauthorized Practice Committee, State Bar of Texas v. Cortez*,[116] in which the Supreme Court of Texas found that immigration services offered by a non-lawyer constituted the unauthorized practice of law.[117] Specifically, the service offered by the non-lawyer in *Cortez* included interviewing aliens seeking residency visas and filling out forms provided by the Immigration and Naturalization Service (INS)[118] according to INS instructions.[119] Even though interviewing and filling out immigration forms might not have required

legal skill and knowledge, the court concluded, deciding *whether* to fill out and file the forms at all did require legal skill and knowledge.[120] Indeed, the court pointed out that the non-lawyer had frequently filed forms which reflected that an alien was illegally present in the United States and which provided immigration authorities with the alien's address, thus increasing the likelihood of deportation.[121] In addition, the court noted ***170** that if the alien seeking assistance did not qualify for a visa under the form instructions, the non-lawyer would inform the alien that she could not help the alien, thus leaving the alien to think there was no legal help available and no possibility of obtaining legal residence in the United States.[122] The court concluded that it was precisely these dangers that the unauthorized practice regulations sought to avoid: legal services that harmed the client's legal position or that left the client uninformed about available legal options.[123]

Certainly, the interest in protecting the public from unscrupulous and incompetent legal services providers is important and perhaps even compelling. However, UPL rules that prohibit interactive legal software are not narrowly tailored to achieve the objective of protecting the public. Significantly, nothing indicates that the legal information that can be obtained using interactive legal software is inferior to that which could be obtained from a lawyer. Mere licensure of a lawyer does not assure the competence necessary to support the premise that licensed lawyers are, by virtue of their license, more competent to provide legal services than are non-lawyers.[124] For example, the average corporate tax attorney would probably not be any more competent to provide immigration services than was the non-lawyer in *Cortez*. Completing the requirements for licensure—*i.e.*, completing law school and passing a bar examination and a character investigation—does not guarantee competence in every area of law.

However, licensure does obligate the licensed lawyer to follow the rules of professional conduct, which prohibit the lawyer from acting in matters as to which the lawyer lacks competence.[125] The lay provider of legal services has no corresponding professional obligation to act only in areas of competence.[126] Yet, the presence of professional obligations for licensed lawyers does not, by itself, justify broad restrictions on UPL. Indeed, various non-lawyer specialties would be likely to create professional conduct standards of their own to improve the quality and reputation of their particular specialty.[127] In addition, differences in ***171** competence and expertise could play themselves out in the marketplace, just as they do in other areas of the economy. Consumers could expect to pay more for more competence and expertise.

Furthermore, while the threat of professional sanctions might deter licensed lawyers from providing legal services in areas where they lack competence and expertise, claims could be recognized to impose liability on legal software publishers. Traditionally, legal malpractice suits have been maintainable only by a plaintiff who could establish an attorney-client relationship.[128] Although no attorney-client relationship is created between a legal software publisher and the user,[129] a duty could be imposed on software publishers on a products liability theory. The threat of liability will ensure that quality standards are set and satisfied by legal software publishers and have as great, if not greater, a deterrent effect against the incompetent provision of legal services as do the professional obligations imposed on licensed attorneys.[130]

In particular, a legal software publisher could be held to the same high standards of competence to which lawyers are held, enforceable by the availability of suits against the software publishers. The bar ought to take an active role in setting quality standards and monitoring legal software publishers to help protect the public from incompetence. Indeed, holding legal software publishers to exacting competence standards would be a less restrictive alternative to banning the software entirely.

Such competence standards ought to take into account the unique problem of changing legal rules in the face of unchanging software. The problem is this: when a client goes, on January 2, 2002, to a lawyer and asks the lawyer to draft a will, the client gets a will that is, presumably, consistent with the current legal rules applicable to wills on January 2, 2002. However, when a computer user decides, on January 2, 2002, to draft a will using Quicken Family Lawyer '99, the computer user gets a will that is, presumably, consistent with the legal rules applicable to wills ***172** on whatever date the software was written.[131] This is a problem in light of the evolving nature of law. However, it is a problem that can be solved without the need to completely ban interactive legal software. One solution is to require the software publishers to include information advising the user to always check the software publisher's website for updates. Another solution is to require software publishers to, as changes in the law require, send updating software to all registered software owners.[132] Indeed, each time a document is created using the software, the software could prompt a reminder to the user that changes in the law since the software was written might affect the validity of the documents being created. Assuming that software publishers are not asked to

accomplish the impossible—send updated software to users who have failed to register or who have moved without providing a forwarding address— assessing liability for failure to accomplish what *is* possible, including taking appropriate steps to inform the user of potential changes in the law, encouraging the software owner's cooperation in obtaining updated information, and making available updated information for those users who seek it, is a less restrictive alternative to banning the software entirely.

B. Protection of the Legal System

Another justification advanced for broad restrictions on UPL is the argument that non-lawyers will, due to their incompetence and lack of integrity, inflict harm on the courts and other legal institutions.[133] This fear is unfounded, however, and is certainly no larger a threat than that posed by permitting litigants to represent themselves in legal proceedings, a practice that has long been protected—even lauded—in the American legal system.[134] Judges have an ample arsenal of sanctions, including the contempt power and other sanctions available through the ***173** rules of procedure,[135] to keep litigants and their representatives from abusing the court system. In addition, the reach of the professional conduct rules that currently bind only licensed lawyers, could be expanded to apply to anyone who provides legal services.[136]

Moreover, the notion that non-lawyers appearing in court as representatives of litigants would harm the court system does not justify broad restrictions on the practice of law outside the courtroom. A court might maintain restrictions on who may appear before it, limiting the courtroom practice of law to licensed attorneys and unrepresented litigants, but permit litigants to receive assistance from non-lawyers outside the courtroom. Granted, an increased possibility of litigation might result from permitting non-lawyers to provide legal documents and advice, but this is a risk for the consumer and not one that ought to be considered "harm to the legal system."[137] The fact that certain activities might lead to litigation is not, in other contexts, considered a harm to the legal system and should not be in this context. For example, one who enters a contract is more likely to be involved in litigation relating to the breach of the contract than one who never enters a contract. Yet, contracts are not illegal simply because a breach of contract might lead to litigation. Moreover, the mere fact that a person created a contract using interactive legal software does not suggest a greater likelihood of litigation than would exist if a lawyer drafted the contract.[138] The chance of litigation does not justify a blanket prohibition on the unauthorized practice of law in general or a ban on interactive legal software in particular.

C. Protection of the Attorney-Client Relationship

Some commentators have suggested that the restrictions on UPL serve to protect and promote the attorney-client relationship and the duties it imposes.[139] This rationale for UPL restrictions is closely related ***174** to the notion of restricting the practice of law to licensed lawyers in order to protect the public from incompetence.[140] The theory is that the lawyer's professional obligations are designed to protect not only the attorney-client relationship, but also to protect the client's legal interests. Consequently, the argument goes, permitting non-lawyers, who are not bound by these obligations, to provide legal services will undermine the attorney-client relationship and compromise the client's legal interests.

While the ABA Model Rules of Professional Conduct leave the formation of the attorney-client relationship to state law,[141] the Restatement (Third) of the Law Governing Lawyers defines the formation of the attorney-client relationship as follows:

> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the service.[142]

Once an attorney-client relationship has been created, the lawyer's professional duties are implicated.[143] Foremost among these duties are the duty of loyalty (including the lawyer's fiduciary relationship with the client[144] and the lawyer's obligation to identify and avoid conflicts of interest[145]), the duty of confidentiality,[146] and the duty of competence.[147] In addition, restrictions on the lawyer's withdrawal from representing a client[148] form part of the lawyer's duty to the client. Even before the ***175** attorney-client relationship is formalized, the lawyer may have a duty of confidentiality and a duty to avoid conflicts of interest.[149]

Without question, a lawyer undertaking to provide legal services for a client creates an attorney-client relationship. When a client asks a lawyer to draft a will, for example, and the lawyer agrees, an attorney-client relationship is created[150] and corresponding duties are triggered to protect the client's interests. For example, the duty of confidentiality promotes open communication between the lawyer and client about the client's personal familial and financial situation to enable the lawyer to obtain the information needed to draft the will without the client fearing that the communication will be used to harm the client's interests.[151]

However, no attorney-client relationship is created when a computer user uses interactive legal software.[152] Thus, many of the duties imposed and interests protected by the attorney-client relationship are simply not implicated in the legal software context. For example, no conflicts of interest or issues of confidentiality arise due to the absence of a representational relationship.[153] Since no representational relationship ***176** exists between a computer user and computer software, no fiduciary obligations are created. Most of the attorney-client relationship duties arise as a result of agency principles applied in the context of a representational relationship to protect the client's interest. Thus, the goal of protecting the attorney-client relationship cannot be justified in the abstract without reference to the impact on the client's interests. Protection of the attorney-client relationship, in itself without reference to the client's interests,[154] is not a sufficient justification for banning interactive legal software.

D. Protection of Licensed Lawyers From Competition

Protection of the organized bar's monopoly is, without doubt, the least meritorious of the various rationales for UPL regulation. Yet, fear of competition was perhaps the primary motivating rationale for early limitations on entry to the legal profession and UPL regulations,[155] and continues to be suggested as an underlying motivation for aggressive UPL enforcement.[156] UPL regulations enable lawyers to have more clients and charge higher fees. In addition, lawyers have argued that without UPL restrictions, they would be at a competitive disadvantage due to their professional obligations, including limitations on advertising[157] and client solicitation[158] by licensed lawyers.[159] Indeed, if lawyers are subject to ethical limitations in conducting their activities but non-lawyers are not subject to such ethical restraints, licensed lawyers might complain that they are competitively disadvantaged.

However, neither of these arguments justify preserving the bar's monopoly on legal services. Significantly, the absence of competition means that legal services are financially out-of-reach for low-income individuals and that even middle-income people have difficulty affording basic legal services, including will drafting and divorce representation.[160] Consequently, monopolistic behavior by lawyers violates one of the ***177** central goals of the legal profession: to ensure the availability of quality legal services for all individuals.[161] Moreover, the Supreme Court has held that lawyers are not exempt from antitrust laws which restrict anticompetitive behavior.[162] Thus, a simple desire to avoid competition and charge more for legal services is not a valid rationale for applying UPL restrictions to ban interactive legal software publication or use.

In addition, the feared competitive disadvantage resulting from advertising and solicitation restrictions and other professional obligations is unfounded in light of the Supreme Court's holding that lawyers' advertising is entitled to First Amendment protection as commercial speech.[163] While lawyer advertising that is "false, deceptive, or misleading" remains subject to regulation,[164] presumably false, deceptive, or misleading advertising by legal software publishers could be regulated as well,[165] putting lawyers and software publishers on equal footing with regard to advertising. Therefore, lawyers' professional obligations would not be constitutionally permitted to put them at a competitive disadvantage.

In addition, the same ethical obligations that restrict lawyers' activities could be imposed on software publishers.[166] The same governmental interests that permit subjecting lawyers to professional obligations justify requiring legal software to conform to strict quality control standards.

Moreover, even with competition from legal software, licensed lawyers have a great deal to offer, competitively, in the marketplace for legal services. The notion that permitting the public to purchase and use interactive legal software would somehow disadvantage lawyers does not take into account the value of lawyers' training and experience which would continue to give them a competitive edge in the legal services industry. A lawyer's training and experience, rather than monopolistic superiority, will enable the lawyer to maintain the corner on the market for legal services. Protection of the lawyer's monopoly ***178** simply is not a compelling—or even an important— interest that would justify a ban on interactive legal software.

IV. CONCLUSION

Given the substantial unmet need for legal information and services,[167] the unprecedented possibilities provided by interactive legal software for satisfying that need,[168] and the First Amendment interests at stake, states should not attempt to ban interactive legal software by applying UPL regulations. Although interactive legal software arguably fits within the traditional definitions of law practice,[169] the speech interests inherent in the software implicate First Amendment protections. Legal software conveys information in two ways. First, as scientific code, it communicates with computer science experts. Second, the software instructs the computer to convey information to the end user by presenting messages on the computer screen. Both types of communication implicate First Amendment values.

The application of UPL regulations to interactive legal software is a content-based regulation. The UPL regulations apply to the software because of the software's subject matter and the particular information conveyed. Although the software contains a functional aspect—the software code's communication with the computer—the speech interests overwhelm the functional aspects and suggest a need for strict scrutiny. Also, the public's interest in receiving the information communicated by the software makes the software's content high-value speech that may be regulated only if strict scrutiny is satisfied.

Strict scrutiny requires that the regulation be narrowly tailored to a compelling government interest.[170] Of the traditional justifications for strict UPL regulation and enforcement—protection of the public, protection of the legal system, protection of the attorney-client relationship, and protection of licensed lawyers from competition—only protection of the public from incompetence rises to a level that could be considered compelling.[171]

Even if the interest in protecting the public from incompetence is compelling, regulating legal software is not narrowly tailored to meet that goal. There are less restrictive ways to achieve the goal of protecting the public from incompetent legal service providers. ***179** Foremost among these less restrictive alternatives is imposing strict standards for holding the software publishers liable under a products liability negligence theory (similar to legal malpractice) or a fraud theory.

Moreover, the organized bar ought to embrace, rather than resist, the opportunities for public legal education presented by legal software. Rather than trying to suppress the speech interests of software writers and publishers, the bar ought to become involved in setting strict quality standards and reviewing and endorsing products that meet these standards. The bar could be actively involved in designing software, and in educating the public as to how to properly use it and how to avoid improper uses. The bar can best achieve the important goal of assuring access to justice[172] by fostering, rather than thwarting, new and innovative ways to serve the public's need for legal information and services. Interactive legal software opens a door that ought not be slammed in the face of those whose legal needs will go unmet without the access it provides.

Footnotes

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[1] *See, e.g.*, Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 1999 WL 47235, 1-3 (N.D.Tex. 1999) (describing "Quicken Family Lawyer '99" software).

[2] Indeed, a number of jurisdictions have recently urged a reevaluation of the definition of the "practice of law." *See, e.g.*, RESOLUTION ADOPTED BY THE HOUSE OF DELEGATES OF THE NEW YORK STATE BAR ASSOCIATION, June 24, 2000 ("To facilitate enforcement of statutes prohibiting the unauthorized practice of law, New York State should reevaluate and refine to the extent necessary its definition of the 'practice of law.'"); STATE BAR OF TEXAS TASK FORCE PRELIMINARY RECOMMENDATION OF A NEW STATUTORY DEFINITION FOR THE PRACTICE OF LAW, May 2000 (reporting on state bar task force's study of and recommendations regarding non-lawyers providing legal services).

[3] Commission on Nonlawyer Practice, American Bar Ass'n, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS 73-78 (1995); *see also generally* ABA Consortium on Legal Services and the Public, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE 4 ("[A]pproximately half of all low- and moderate-income households in the survey reported facing some situation that raised a civil legal issue and yet ... most of these situations were not brought to the system of justice."); GEOFFREY HAZARD ET AL., THE LAW AND ETHICS OF LAWYERING 1063-71 (2d ed. 1994) (discussing unserved legal needs of the poor); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 711-809 (2d ed. 1995) (discussing distribution of legal services in the United States).

[4] ERIC C. NEWBURGER, U.S. CENSUS BUREAU, *Home Computers and Internet Use in the United States*, August 2000, *at* www.census.gov/prod/2001pubs/p23-207.pdf.

[5] *See id.* at Table, p. 3 (reporting that about 28% of households with annual income of less than $25,000 have home computers).

[6] Defined as households with annual income between S25,000 and S74,999.

[7] *See* Newburger *supra* note 4, at Table, p.3.

[8] Quicken Lawyer 2002 Personal is currently available from Amazon.com for S49.99; Quicken Lawyer 2002 Wills is currently available from Amazon.com for S29.99.

[9] For example, among the documents that can be created by Quicken Family Lawyer '99 for a hypothetical Florida resident include Advance Health Care Directive; Advance Health Care Directive-Revocation; Affidavit of Domicile; Bad Check Notice; Bill of Sale; Bill of Sale—Motor Vehicle; Birth or Death Certificates; Business Entity Planning Worksheet; Change of Beneficiary Form; Child Care Authorization; Child Care Instructions; Codicil to Will; Complaint Letter to a BBB or Attorney General; Complaint Letter to a Company; Confidentiality Agreement; Consulting Agreement; Corporate Proxy; Corporate Records; Challenge to a Denial of Credit; Credit Card Inquiry; Credit Report Challenge; Credit Report Request; Demand for Alimony Payment; Demand for Child Support Payment; Demand for Money Owed; Divorce Worksheet; Do-Not-Resuscitate Guide; Employee Death Benefits Letter; Employment Acceptance Letter; Employment Agreement; Employment Agreement (Short Form); Employment Confirmation Letter; Employment Resignation Letter; Employment Lease; Estate Planning Worksheet; Eviction Notice Worksheet; Exhibit; Power of Attorney; Request for Copy of Tax Form; Change of Address; Application for Employer ID Number; Dependent Care Provider Identification; Withholding Allowance Certificate; Request for Taxpayer ID Number; Free-Form Letter; General Receipt; Health Care Power of Attorney; Health Care Power of Attorney—Revocation; Home Evaluation Worksheet; Home Purchase Worksheet; Home Sale Worksheet; Homeowners' Association Proxy; Intent to Purchase

Real Estate; Landlord's Notice to Enter; Late Rent Notice; Letter to Government Official; Letter to School; License Agreement; Life Insurance Proceeds Letter; Living Trust; Living Trust—Joint; Living Will; Living Will—Revocation; Medical Records Request; Medical Records Transfer Form; Memorial Plans; Minutes; Moving Checklist; Non-Compete Agreement; Notice of Meeting; Organ Donation Form; Organ Donation Form—Refusal; Personal Fact Sheet; Personal Financial Statement; Pour-Over Will; Power of Attorney—Durable General; Power of Attorney—Durable Special; Power of Attorney—General; Power of Attorney—Revocation; Power of Attorney—Special; Premarital Agreement; Promissory Note; Real Estate Lease—Commercial; Real Estate Lease—Quick Form; Real Estate Lease—Residential; Rental Application; Renter's Inspection Worksheet; Response to IRS Notice; Response to IRS Penalty; Response to Payment Request; Security Deposit Refund Letter; Small Claims Worksheet; Social Security Earnings and Benefits Letter; Stock Power; Stop Payment on Check; Sublease Agreement; Survivor Checklist; Trust Letter to Bank or Broker; Trust Letter to Mortgage Lender; Unanimous Consent; Waiver of Notice; Will— Grandparent with Grandchildren's Trust; Will—Married with No Children; Will— Parent with Adult Children; Will—Parent with Minor Children; Will—Remarried with Adult Children; Will—Remarried with Minor Children; Will—Single with No Children; Will—Standard; Work for Hire Agreement.

[10] *See generally* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 1999 WL 47235, at **1-2 (N.D. Tex. Jan. 22, 1999).

[11] In addition to legal software, the internet offers a variety of opportunities for those in need of legal advice and information to obtain it in a variety of forms. Interactive web sites allow someone to obtain legal information and advice, for example, by participating in real time chat rooms or by posting legal questions to which delayed responses are subsequently posted. Non-interactive web sites provide information in a format similar to what one could find in a book or newspaper, but without the cost of purchasing a book or subscribing to a newspaper. A number of legal issues are presented by lawyers and non-lawyers using internet technology to provide legal services, such as UPL issues, issues regarding practicing law in a jurisdiction other than the one in which the lawyer is licensed, whether and to what extent an attorney-client relationship is created when a lawyer responds to an individual's legal question posted on a web site, and many others. These issues are, however, outside the scope of this Article, which intends only to address UPL issues presented by interactive legal software.

[12] *See* CHARLES W. WOLFRAM, REGULATION OF LAWYERS AND THE LEGAL PROFESSION, IN MODERN LEGAL ETHICS § 2.2.1 (1986); *see also In re* Nolo Press/Folk Law, Inc., Relator, 991 S.W.2d 768 (Tex. 1999) (discussing the Texas Supreme Court's inherent power, derived from the Texas Constitution, to "regulate the practice of law for the benefit and protection of the justice system and the people as a whole") (citing VERNON'S ANN. TEXAS CONST. Art. 2, § 1). There appears to be tension in some states between the state courts, which claim exclusive inherent power to regulate UPL, and the state legislature, which might also wish to have a voice in the matter. *See* WOLFRAM, *supra* this note, at § 15.1.3, p. 834, n.58.

[13] *See generally*, WOLFRAM, *supra* note 12, at § 2.3; Erica Moeser, *The Future of Bar Admissions and the State Judiciary*, 72 NOTRE DAME L. REV. 1169 (1997).

[14] For a detailed account of the history of restrictions on the unauthorized practice of law, see Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors or Even Good Sense*?, 1980 AM. B. FOUND. RES. J. 159, 161-201; *see also* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis*, 34 STAN. L. REV. 1, 6-11 (1981); Kathleen Eleanor Justice, Note, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179, 182-185 (1991).

[15] *See* State Bar of Mich. v. Cramer, 249 N.W.2d 1, 7 (Mich. 1976) ("[A]ny attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure."); Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. CIV.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999) ("[A] comprehensive definition of just what qualifies as the practice of law is 'impossible' and 'each case must be decided upon its own particular facts.'") (quoting Palmer v. Unauthorized Practice of Law Comm., 438 S.W. 2d 374, 376 (Tex. App. 1969), *overruled on other grounds by* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (1999); Wolfram, *supra* note 12, at § 15.1.3, at 835 ("On the whole, state law has been characterized by its broad sweep and imprecise definition"). *But see* TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, ABA, DEFINITION OF THE PRACTICE OF LAW (2002).

16 *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter Model Rules], Rule 5.5 comment ("[W]hatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."); *see also* July 11, 2000 ABA House of Delegates Recommendation ("Jurisdictions should retain and enforce laws that generally bar the practice of law by entities other than law firms.").

17 *See* Model Rule 5.5 comment ("The definition of the practice of law is established by law and varies from one jurisdiction to another."). *But cf.*, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (defining the "practice of law" as relating "to the rendition of services for others that call for the professional judgment of a lawyer").

18 Indeed, the Model Rules purport only to regulate lawyers' conduct, *see generally* Model Rules, Scope, and thus only admonish against a lawyer "practic[ing] law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction," and against "assist[ing] a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." Model Rule 5.5. The Model Rules do not instruct non-lawyers to avoid engaging in UPL, but the comment endorses the notion that the practice of law ought to be limited to members of the bar. *Id.* at Comment 1.

19 *See, e.g.*, Miller v. Vance, 463 N.E.2d 250, 253 (1984) (applying both the professional judgment test and the incidental services test to reach the conclusion that bank employees were not practicing law by filling out mortgage documents).

20 What form the regulation takes is based on state law, and is likely to include criminal penalties and an injunction. *See Parsons*, 1999 WL 47235 (enjoining the sale of Quicken Family Lawyer '99 in Texas).

21 *See, e.g.*, People v. Title Guar. & Trust Co., 125 N.E. 666, 670 (1919) (Pound, J., concurring, stating that state UPL regulations were intended to "prohibit the practice of rendering ... services of the character now generally performed by lawyers as part of their ordinary routine"); State Bar Ass'n v. Connecticut Bank & Trust Co., 140 A.2d 863, 870 (1958) (defining "the practice of law [as] the performance 'of any acts ... in or out of court, commonly understood to be the practice of law'") (quoting Grievance Comm. v. Payne, 22 A.2d 623, 626 (1941)).

22 Due process and First Amendment implications of the vague and overbroad definition of the "practice of law" are discussed in Rhode, *supra* note 14, at 47-96.

23 Baron v. City of Los Angeles, 469 P.2d 353 (1970).

24 See *supra* note 9 for a list of documents that can be created using Quicken Family Lawyer '99. In addition to facilitating the creation of a large variety of legal documents, Quicken Family Lawyer '99 makes specific recommendations regarding which specific documents the user ought to consider creating. The recommendations are based on the particular information provided by the user regarding the user's age, place of residence, and marital and parental status.

25 *See, e.g.*, Palmer v. Unauthorized Practice of Law Comm., 438 S.W.2d 374 (Tex. App. 1969).

26 *See generally* Model Rules.

27 The primary factor in determining whether an attorney-client relationship has been established is the client's reasonable belief that the attorney is acting in a representational capacity. *See* RESTATEMENT (3D) OF THE LAW GOVERNING LAWYERS § 14 (1998); *see also* Gramling v. Mem'l Blood Ctrs. of Minn., 601 N.W.2d 457, 460 (Minn. App. 1999) ("[A]n attorney-client

relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice."); Guillebeau v. Jenkins, 355 S.E.2d 453, 458 (Ga. App. 1987) ("An attorney-client relationship cannot be created unilaterally in the mind of a would-be client; a reasonable belief is required."); Meyer v. Mulligan, 889 P.2d 509, 513 (Wyo. 1995) ("Determining the existence of an attorney-client relationship 'depends on the facts and circumstances of each case' and 'may be implied from the conduct of the parties, such as the giving of advice or assistance, or such as failing to negate the relationship when the advice or assistance is sought if the attorney is aware of the reliance on the relationship.'" (quoting Chavez v. State, 604 P.2d 1341 (Wyo. 1979)). *But see* Smithart v. Sweeney, No. 05-97-01901-CV, 2001 WL 804492 at *2 (Tex. App. July 18, 2001) ("The attorney-client relationship is a contractual relationship by which the attorney agrees to render professional services for the client. To establish an attorney-client relationship, the parties must explicitly or by their conduct manifest an intention to create it.").

28 *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, E.C. 3-5 ("Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer."); TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, ABA, DEFINITION OF THE PRACTICE OF LAW (2002). ("The 'practice of law' is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law.").

29 *In re* Perrello, 386 N.E.2d 174, 179 (1979).

30 State v. Ind. Real Estate Assn., Inc., 191 N.E.2d 711, 715 (1963) ("Generally, it can be said that the filling in of blanks in legal instruments, prepared by attorneys, which require only the use of common knowledge regarding the information to be inserted in said blanks, and general knowledge regarding the legal consequences involved, does not constitute the practice of law").

31 *Id.* at 715.

32 *Id.* at 717; *see* Annotation, *Drafting, or Filling in Blanks in Printed Forms, of Instruments Relating to Land by Real-Estate Agents, Brokers, or Managers as Constituting Practice of Law* , 53 A.L.R.2d 788 (1957).

33 *See, e.g.*, People v. Landlords Prof'l Svcs., 215 Cal. App. 3d 1599, 1600 (1989) (holding that eviction services which involved providing specific information and advice addressing the specific concerns of clients exceeded "clerical" services and constituted the practice of law).

34 Miller v. Vance, 463 N.E.2d 250, 253 (Ind. 1984) (noting and following the majority rule by holding that non-lawyer bank employees did not violate UPL restrictions by filling out mortgage documents); Pope County Bar Ass'n., Inc. v. Suggs, 624 S.W.2d 828 (Ark. 1981); State Bar v. Guardian Abstract and Title Co., Inc., 575 P.2d 943 (N.M. 1978); State *ex rel.* Reynolds v. Dinger, 109 N.W.2d 685 (Wis.1961); Ingham County Bar Ass'n. v. Walter Neller Co., 69 N.W.2d 713 (Mich. 1955); LaBrum v. Commonwealth Title Co. of Philadelphia, 56 A.2d 246 (Pa. 1948). *But see* Ky. State Bar Ass'n. v. Tussey, 476 S.W.2d 177 (Ky. Ct. App. 1972) (rejecting the majority view because Kentucky statute required a contrary position).

35 *See, e.g.*, Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998 (Colo. 1957); State Bar of Mich. v. Kupris, 116 N.W.2d 341 (Mich. 1962); Ark. Bar Ass'n v. Block, 323 S.W.2d 912 (Ark. 1959); *see also* Gary S. Moore, *Lawyers and the Real Estate Transaction*, 26 REAL EST. L.J. 351, 355 (1998).

36 *See, e.g.*, Miller v. Vance, 463 N.E.2d 250 (1984) (holding that filling out mortgage documents is incidental to a bank employee's work and, consequently, not the practice of law).

37 Such as social workers, accountants, bank officers, trust companies, insurance agents, business and professional consultants of all

kinds, engineers, ministers, librarians, etc.

38 *See, e.g.*, Pioneer Title Ins. & Trust Co. v. State Bar of Nev., 326 P.2d 408 (Nev. 1958); Title Guaranty Co. v. Denver Bar Ass'n, 312 P.2d 1011 (Colo. 1957).

39 *See, e.g.*, TEX. GOV'T CODE § 81.101 (Vernon's 1998).

40 *See* Rhode, *supra* note 14, at 46.

41 *See, e.g.*, State *ex inf.* Miller v. St. Louis Union Trust Co., 74 S.W.2d 348 (Mo. 1934); Iowa Supreme Court Comm'n on Unauthorized Practice of Law v. Sturgeon, 635 N.W.2d 679 (Iowa 2001); Ohio State Bar Ass'n v. Martin, 642 N.E.2d 75 (Ohio Bd. Unauth. Prac. 1994).

42 The Texas Unauthorized Practice of Law Commission is a panel of nine persons (lawyers, non-lawyers, and judges) charged with monitoring and enforcing the state's UPL statute. TEX. GOV'T CODE ANN. § 81.103 (a), (b) (West 1998).

43 TEX. GOV'T CODE § 81.101 (Vernon's 1998).

44 *See* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. CIV.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999) *overruled by* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (1999).

45 *Id.* at *6.

46 *Id.* at **6-7.

47 *Id.* at *7 (relying on Palmer v. Unauthorized Practice of Law Comm., 438 S.W.2d 374 (Tex. App.-Houston 1969) (holding, over a First Amendment challenge, that the sale of will forms constituted the unauthorized practice of law and could be enjoined), and Fadia v. Unauthorized Practice of Law Comm., 830 S.W.2d 162 (Tex. App.-Dallas 1992) (holding that the sale of a manual entitled "You and Your Will: A Do-It-Yourself Manual" constituted the unauthorized practice of law)).

48 H.B. 1507, 76th LEG., REG. SESS. (Tex. 1999) (entitled "An Act Relating to the Definition of the Practice of Law").

49 *Id.*

50 *See* 179 F.3d 956 (N.D. Tex. 1999).

51 *See* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. CIV.A. 3:97CV-2859H, 1999 WL 47235 at *6 (N.D. Tex. Jan. 22, 1999) *overruled by* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (1999).

52 Others have persuasively argued that UPL restrictions are facially overbroad and vague, due to the lack of definitional precision regarding what acts constitute the "practice of law." *See, e.g.*, Rhode, *supra* note 14. This Article focuses on an "as applied" analysis of the First Amendment implications of regulating legal software under UPL regulations.

53 *See, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429, 446-52 (2d Cir. 2001); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000); Bernstein v. U.S. Dep't. of Justice, 176 F.3d 1132, 1141 (9th Cir. 1999) (concluding that computer software source code is speech within the First Amendment), *reh'g en banc granted and opinion withdrawn*, 192 F. 3d 1308 (9th Cir. 1999); Junger v. Daley, 209 F. 3d 481 (6th Cir. 2000) (overruling Junger v. Daley, 8 F. Supp.2d 708 (N.D. Ohio 1998), which had held that computer software source code was not entitled to First Amendment protection); *see also* Parsons, 1999 WL 47235 (implicitly recognizing that interactive legal software is entitled to First Amendment protection, but concluding that UPL regulations were content neutral and thus did not result in a violation of the First Amendment), *vacated* 179 F.3d 956 (1999). *But see* Karn v. U.S. Dep't. of State, 925 F. Supp. 1, 9 n.19 (D.D.C. 1996) (noting that "the Court makes no ruling as to whether source codes, without the comments, fall within the protection of the First Amendment," but assuming arguendo that computer software source codes were "within the area of protected speech," and ultimately holding that the regulation did not violate the First Amendment). For a thorough and convincing argument that software design and publication are protected by the First Amendment, see Lee Tien, *Publishing Software as a Speech Act*, 15 BERKELEY TECH. L.J. 629 (2000). For an excellent criticism of attempts to simply apply "old" First Amendment doctrine to the "new" problem of computer software source code, resulting in insufficient First Amendment protection for computer software code, see Ryan Christopher Fox, Comment, *Old Law and New Technology: The Problem of Computer Code and the First Amendment*, 49 U.C.L.A. L. REV. 871 (2002).

54 "Simply put, code is the instructions people write to tell computers what to do. Computers operate by executing these instructions." Fox, *supra* note 53, at 873 (defining in detail what computer software code is and how it works).

55 *See, e.g., Universal City Studios*, 273 F. 3d at 446-47.

56 Bd. of Tr's. of Leland Stanford Junior Univ. v. Sullivan, 773 F. Supp. 472, 474 (D.D.C. 1991) ("It is ... settled ... that the First Amendment protects scientific expression ...."); *see also* Miller v. California, 413 U.S. 15, 34 (1973) ("The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value ...."); Roth v. United States, 354 U.S. 476, 484 (1957) (recognizing that the First Amendment protects "[a]ll ideas having even the slightest redeeming social importance, [advancing] truth science, morality, and arts in general.").

57 For a detailed critique of this argument in all its forms, see Tien, *supra* note 53, at 678-84.

58 *See id.* at 684-711 (discussing the "functionality" argument against First Amendment protection for software code).

59 418 U.S. 405 (1974).

60 515 U.S. 557 (1995).

61 *Spence*, 418 U.S. 410-11.

62 *Hurley*, 515 U.S. at 569.

63 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445 (2d. Cir. 2001); *see also* Tien, *supra* note 53, at 677 (comparing software code to Braille, and noting that "[e]ven though few actually comprehend Braille, there is no doubt that Braille holds conventional meanings for its readers").

64 Tien, *supra* note 53, at 655.

[65] Including interactive legal software. *See infra* text accompanying note 101. Some software programs do not, however, communicate with the end user, but simply instruct the computer to carry out a particular function. DeCSS is an example. *See infra* notes 99-100 and accompanying text.

[66] *See, e.g.*, Karn v. U.S. Dep't. of State, 925 F. Supp. 1, 9 n.19 (D.D.C. 1996) ("Source codes are merely a means of commanding a computer to perform a function.").

[67] *See, e.g.*, Marci A. Hamilton & Ted Sabety, *Computer Science Concepts in Copyright Cases: The Path to a Coherent Law*, 10 HARV. J.L. & TECH. 239, 240 n. 1 ("[A] program is the sequence of instructions that are executed by the computer when it performs a desired task."); Frederick Schauer, *Mrs. Palsgraf and the First Amendment*, 47 WASH. & LEE L. REV. 161 (1990) (arguing that instructions for how to operate products are not covered by the First Amendment such that the manufacturer has a First Amendment defense to a products liability claim).

[68] *Corley*, 273 F. 3d at 447.

[69] *See* United States v. Raymond, 228 F.3d 804, 815 (7th Cir. 2000).

[70] Rice v. Paladin Enters., Inc., 128 F.3d 233, 247-49 (4th Cir. 1997).

[71] There are exceptions. For example, the intended objective of some software code is to create a virus that will destroy information stored on the computer's hard drive. This is an illegal objective and this type of software is—at least in its functional aspect—not entitled to First Amendment protection.

[72] *See Rice*, 128 F.3d at 233.

[73] Alternatively, communication intended solely to instruct or facilitate an illegal act could be analyzed as protected but regulable due to the government's compelling interest in preventing crime.

[74] There are two categories of content-based regulation into which a particular regulation might fall: viewpoint discrimination and subject matter discrimination. *See* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 759-63 (1997). The regulation at issue in R.A.V. v. City of Saint Paul, 505 U.S. 377 (1992), provides an example of viewpoint discrimination. In that case, a city ordinance prohibited the placement on public or private property of objects which aroused "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380. The Supreme Court, in an opinion by Justice Scalia, accepted the state's interpretation of the statute as regulating only "fighting words," a category of speech that traditionally has been considered outside the scope of First Amendment protection such that the state can regulate speech that amounts to fighting words. *Id.* at 381; *see* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). For discussion of other categories of speech which the state has traditionally been free to regulate such as obscenity, see *Miller v. California*, 413 U.S. 15 (1973), and for libel, see *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (creating an exception to the state's power to freely regulate libel when the speech concerns a matter of public interest or relates to a public figure). Nevertheless, the *R.A.V.* Court concluded that the regulation at issue "prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech address[ed]." *R.A.V.*, 505 U.S. at 381. The Court reasoned that by prohibiting particular speech that expresses only one viewpoint, while permitting the same type of speech that expresses a different, more favored viewpoint, the regulation amounted to a viewpoint discrimination, and consequently, that it violated the First Amendment. *Id.* at 387-88. Thus, even within a traditionally regulable speech category, such as fighting words, a regulation may not discriminate on the basis of the viewpoint expressed. *Id.*
UPL regulation of interactive legal software is not viewpoint discrimination. All legal software is equally implicated as violative of

traditional UPL restrictions, not because of the view espoused by the software, but simply because the communication relates to legal matters.

75 *R.A.V.*, 505 U.S. at 382 (citations omitted) The Court held an ordinance invalid which criminalized placing on public or private property a symbol or object "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender". *Id.* at 380.

76 *Id.* at 382.

77 *See* Sable Communications of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989).

78 United States v. O'Brien, 391 U.S. 367 (1968); *see also* Turner Broad. Sys. v. F.C.C., 512 U.S. 622 (1994).

79 *See* DANIEL A. FARBER, THE FIRST AMENDMENT 26-27 (1998).

80 1999 WL 47235, at *10.

81 491 U.S. 781, 791 (1989).

82 *Parsons*, 1999 WL 47235, at *7.

83 *Id.* at *8.

84 *See id.*

85 *See id.*

86 *See id.*

87 United States v. O'Brien, 391 U.S. 367 (1968) (holding that a statute prohibiting the destruction of draft cards was a valid content-neutral regulation under which O'Brien could be prosecuted for having publicly burned his draft card in protest of the Vietnam War).

88 *Parsons*, 1999 WL 47235, at **7-8.

89 *O'Brien*, 391 U.S. at 377. This four-part test is similar to a "time, place, or manner" test, which recognizes as valid certain regulations that are justified without reference to the content of the speech. The time, place or manner test has been articulated as involving three inquiries: (1) whether the restriction is justified without reference to the content of the regulated speech; (2) whether the restriction is narrowly tailored to serve a significant governmental interest; and (3) whether the restriction leaves open ample alternative channels of communication. *See* Clark v. Comty. for Creative Non-Violence, 468 U.S. 288, 298 (1984) (noting similarities between the *O'Brien* test and the time, place, or manner test).

90 *Parsons*, 1999 WL 47235, at *10. In addition, the district court went on to conclude that a more stringent test for whether speech rights are violated under the Texas constitution is only applicable when a prior restraint is sought. *Id.* Since the Unauthorized Practice of Law Committee was seeking only to restrain the sale of software which had already been produced, the heightened standard did not apply. *Id.*

91 *Parsons*, 1999 WL 47235 at 9.

92 *Id.*

93 *Id.*

94 *Id.*

95 *See id.*

96 *See id.*

97 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 451 (2001).

98 *See id.* at 454.

99 Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 308 (2000) (thoroughly describing and defining the vocabulary surrounding DeCSS software and its uses).

100 *Corley*, 273 F.3d at 454.

101 *Parsons*, 1999 WL 47235.

102 501 U.S. 1030 (1991).

103 *Id.* at 1071.

104 *Id.* at 1075.

105 *Id.*

106 *Id.*

107 *See id.* at 1070.

108 *See id.*

109 *Id.* at 1070-71.

110 *See id.* at 1071.

111 *See supra* text accompanying note 2.

112 *See supra* note 3 and accompanying text.

113 *See Gentile*, 501 U.S. at 1070-71.

114 *See* MODEL Rule 5.5 at comment ("[L]imiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."); *see also* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 37-38 (1981) (reporting that over half the surveyed bar officials "believed that unauthorized practice poses a threat to the public," and that only a third of those surveyed did not believe that unauthorized practice poses a public threat); WOLFRAM, *supra* note 12, at § 15.1.2, p. 829-32.

115 *See* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. CIV.A. 3:97CV-2859H, 1999 WL 47235, at *9 (N.D. Tex. Jan. 22, 1999) *overruled by* Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (1999).

116 692 S.W.2d 47 (1985).

117 *Id.* at 51.

118 Primarily form I-130 (Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa). *See id.* at 48.

119 *Cortez*, 692 S.W.2d at 48.

120 *See id.* at 50.

121 *See id.*

122 *See id.*

123 *See id.*

124 *See* WOLFRAM, *supra* note 12, at 15.1.2, p. 829-30.

125 *See* Model Rules at Preamble ¶ 3 ("In all professional functions a lawyer should be competent ...."); Model Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and

preparation reasonably necessary for the representation.").

126 Moreover, as illustrated by *Cortez*, the non-lawyer might misjudge the competence required to provide particular legal services.

127 *See* WOLFRAM, *supra* note 12, at § 15.1.2, p. 832 ("[I]f an industry of nonlawyer practitioners were permitted to form, there is as much reason to think that informed guides to competent and trustworthy practitioners would exist in that field as in other technical fields or with similarly technical products.").

128 *See, e.g.*, Saylor v. Nichols, No. 87-08-067, 1988 WL 32992 (Ohio Ct. App. Mar. 28, 1988); Meyer v. Mulligan, 889 P.2d 509, 513 (Wyo. 1995) ("In most claims of legal malpractice, it is essential to establish an attorney-client relationship ... because it creates a professional duty on the part of the attorney."). However, numerous cases have held non-lawyers to the same standard of care in providing legal services as that applied to licensed lawyers. *See* Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958) (holding non-lawyers to a standard of care so high they cannot possibly satisfy it as a means of deterring unauthorized practice); *see also, e.g.*, Williams v. Jackson Co., 359 So. 2d 798 (Ala. Civ. App. 1978); Wright v. Langdon, 623 S.W.2d 823 (Ark. 1981); Torres v. Fiol, 441 N.E.2d 1300 (Ill. App. Ct. 1982); Latson v. Eaton, 341 P.2d 247 (Okla. 1959); Mattieligh v. Poe, 356 P.2d 328 (Wash. 1960).

129 *See supra* text accompanying note 27.

130 Quality standards set and standardized by legal software publishers might have a *greater* deterrent effect against the incompetent provision of legal services because of the increased difficulty and expense software publishers would face in obtaining insurance coverage for this type of liability.

131 The software date implies that the will would be drafted in light of law as it existed sometime in 1999.

132 The software publishers could be required to include a message with the software explaining to the owner the implications of changing law and the need to register the software. Most software already includes registration forms, and registration can be accomplished either electronically or by ordinary mail.

133 *See* WOLFRAM, *supra* note 12, at § 15.1.2, p. 832-33; *see also, e.g., In re* Co-operative Law Co., 198 N.Y. 479, 480, 92 N.E. 15, 16 (1910) (lamenting that "[t]he degradation of the bar is an injury to the state").

134 *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350, 351-352 (1977) (observing "that most legal services may be performed legally by the citizen for himself"); Faretta v. California, 422 U.S. 806, 807 (1975) (recognizing a Sixth Amendment right to self-representation at criminal trials); TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, ABA, DEFINITION OF THE PRACTICE OF LAW (2002) (excepting *pro se* representation from prohibition as UPL).

135 *See, e.g.*, FED. R. CIV. P. 11 (requiring that every pleading, motion, and paper filed in federal court be signed by the attorney of record or, if the party is unrepresented, by the party).

136 *See* WOLFRAM, *supra* note 12, at § 15.1.2, p. 833.

137 Indeed, avoiding the litigation that results from incompetent provision of legal services by non-lawyers is one of the primary concerns of the "protection of the public" rationale, discussed above. See*supra* notes 116-23 and accompanying text.

138 That the outcome of the litigation might be less favorable to the software user than to a client whose contract was prepared by a lawyer is among the concerns of the "protection of the public" rationale. *See supra* notes 128-30 and accompanying text. This risk may be dealt with in ways less intrusive than an outright ban of the software, however. *See supra* note 130 and accompanying text.

139 *See, e.g.*, Catherine J. Lanctot, *Attorney Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 168 (1999); Jett Hanna, *Moonlighting Law Professors: Identifying and Minimizing the Professional Liability Risk*, 42 S. TEX. L. REV. 421 (2001).

140 *See supra* notes 125-27 and accompanying text.

141 Model Rules at Scope:
[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

142 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

143 *See* Miller v. Mooney, 725 N.E.2d 545, 549 (Mass. 2000).

144 *See, e.g.*, Doe v. Roe, 681 N.E.2d 640, 645 (Ill. App. Ct. 1997); Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283, 1290 (Utah Ct. App. 1996).

145 *See* Model Rules 1.7, 1.8, 1.9.

146 *See* Model Rule 1.6.

147 *See* Model Rule 1.5.

148 *See* Model Rule 1.16.

149 *See* Model Rules at Scope (indicating that some of the lawyer's duties arise before a formal attorney-client relationship exists); *see also* Arizona State Bar Comm. on Rules of Prof'l. Conduct, Op. 97-04 (Apr. 7, 1997) (cautioning lawyers against answering specific legal questions posed in Internet chat rooms or news groups because of the difficulties in avoiding conflicts of interest with existing clients and the danger of disclosing confidential information). In addition, it has been persuasively argued that an attorney-client relationship is created when a lawyer responds to an individual's on-line legal question or request for legal information. *See* Lanctot, *supra* note 138, at 176-77 (arguing that requests for responses to specific legal questions, along with responses from lawyers, satisfy the Restatement test for the formation of an attorney-client relationship). The argument is that the individual, by posting a question to a website or in an on-line chat room, "manifests to a lawyer the [individual's] intent that the lawyer provide legal services for the person." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).; Lanctot, *supra* 138 at 170-179. Then, when the lawyer responds with an answer, no matter how general, "the lawyer manifests to the person consent to" provide the legal services sought by the individual. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000); Lanctot, *supra* note 138, at 179-184. A lawyer may be able to successfully guard against the creation of an attorney-client relationship by using disclaimers. *See* Lanctot, *supra* note 138, at 186-98 (discussing the use by

lawyers of disclaimers to avoid creating an attorney-client relationship when responding to individuals' legal questions on the Internet); John C. Yates, *Electronic Commerce and Electronic Data Interchange*, 507 PLI/PAT. 147, 156 (1998) (discussing attorney web site disclaimers). Without effective disclaimers, some or all of the lawyer's duties attach at the time the lawyer answers the individual's question. *But see* Lanctot, *supra* note 138, at 254-55 (that an exception to the lawyer's full panoply of duties ought to be recognized for "brief, specific advice," which exception would relieve the lawyer of the duty to provide complete assistance for the individual's legal situation).

150 *See* Miller v. Mooney, 725 N.E.2d 545 (Mass. 2000); David v. Schwarzwald, Robiner, Wolf & Rock Co., 607 N.E.2d 1173, 1180 (Ohio Ct. App. 1992) ("[W]here a person approaches an attorney with the view of retaining [the attorney's] services, an attorney-client relationship is created."); Palmer v. Unauthorized Practice Comm. of State Bar of Texas, 438 S.W.2d 374, 376 (Tex. App. 1969) ("Drafting and supervising the execution of wills is ... practicing law [because] [b]y a will legal rights are secured [and] [i]n giving instructions, confidential communications regarding family relations are often necessary.").

151 *See Palmer*, 438 S.W.2d at 376.

152 *See supra* text accompanying note 27.

153 *See id.*

154 The duty of competence does relate directly to the quality of legal services and implicates protecting the client's interests. The interest in protecting and ensuring competence is the primary focus of the concern with protection of the public, discussed *supra* notes 125-27 and accompanying text.

155 *See* Christensen, *supra* note 14, at 177 (noting that "overcrowding at the bar" and concerns about competition from outside the bar were central motivating factors for early efforts to raise standards for admission to the bar and to prohibit the practice of law by outsiders).

156 *See, e.g.*, Debra Baker, *Is This Woman A Threat to Lawyers*?, 85-JUN A.B.A. J. 54, 56 (1999) (noting that a number of analysts attribute the Bar's recent aggressive UPL enforcement efforts to "frustration and fear over increased competition" from traditionally non-legal businesses).

157 *See* Model Rule 7.1 & 7.2.

158 *See* Model Rule 7.3.

159 *See* Wolfram, *supra* note 12, at § 15.1.2, p. 833.

160 *See supra* note 3 and accompanying text.

161 *See* Model Rules at Preamble; *ABA House of Delegates Resolution*, July 11, 2000 ("It is in the public interest to preserve the core values of the legal profession, among which are ... [t]he lawyer's duty to promote access to justice."); *see also* 42 U.S.C. § 2996(1) ("there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances").

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

163 Bates v. Ariz. State Bar, 433 U.S. 350 (1978).

164 *Id.* at 383.

165 *See* Model Rule 7.1; *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n., 447 U.S. 557 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (holding that commercial speech is entitled to lower level First Amendment protection and may be regulated if it is false, deceptive, or misleading).

166 *See* WOLFRAM, *supra* note 12, at § 15.1.2 (suggesting that the lawyer's ethical obligations could be imposed on non-lawyers who undertake to provide legal services).

167 *See supra* text accompanying note 3.

168 *See supra* text accompanying notes 4-8.

169 *See supra* notes 20-51 and accompanying text.

170 *See* Sable Communications of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989).

171 *See supra* notes 116-27 and accompanying text.

172 *See supra* note 161.

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