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### The Lawyer's Monopoly – What Goes and What Stays

Benjamin H. Barton

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# **The Lawyer's Monopoly—What Goes and What Stays**

**Benjamin H. Barton**

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## THE LAWYER'S MONOPOLY—WHAT GOES AND WHAT STAYS

*Benjamin H. Barton\**

*We live in a time of unprecedented changes for American lawyers, probably the greatest changes since the Great Depression. That period saw the creation of the lawyer's monopoly through a series of regulatory modifications. Will we see the same following the Great Recession? Formally, no. This Article predicts that formal lawyer regulation in 2023 will look remarkably similar to lawyer regulation in 2013. This is because lawyer regulators will not want to rock the boat in the profession or in law schools during a time of roil.*

*Informally, yes! We are already seeing a combination of computerization, outsourcing, and nonlawyer practice radically reshape the market for law from one that centers on individualized, hourly work done for clients to a market of much cheaper, commoditized legal products. This trend will accelerate over time. The upshot? Formal lawyer regulation will continue on with little change, but will cover an ever-shrinking proportion of the market for legal services.*

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## INTRODUCTION

My very first law review article was published in 2001.<sup>1</sup> The article contrasted the various economic justifications for lawyer regulation with the regulations themselves.<sup>2</sup> The article reached the then radical conclusion that we should deregulate the profession altogether, except for the regulations that dealt with in-court appearances.<sup>3</sup> I argued that most lawyer regulation was self-interested, anticompetitive, and unnecessary for consumer protection, but that some regulation should remain to protect the courts.<sup>4</sup> I used this paper as my “job talk,” the paper I presented to law schools considering hiring me as a tenure-track professor. Unsurprisingly, I encountered significant resistance and faced some tough audiences. In particular, there was general agreement that, regardless of the merits of my suggestions, there was no chance they would come to fruition. I was told repeatedly that lawyer regulators would *never* pare back their regulatory authority so radically.

Ironically, these critics were *half* right. Lawyer regulators—meaning state supreme courts and bar associations—will not consciously cede so much authority. In fact, half of this Article’s argument is exactly that: in the face of unprecedented change and roil in the market for legal services, lawyer regulators will hunker down and change as little as possible.

Unfortunately for lawyer regulators, just twelve short years after my first law review article called for broad deregulation, the nature of the market for legal services has changed so radically that my proposed solution is likely to become the *de facto* status quo sooner rather than later. Between computerization, outsourcing, insourcing, and nonlawyer workers, lawyers will have to share their turf outside of court, and, as a result, the effect of lawyer regulations will likewise be pared back.

This Article makes five arguments: (1) the market for legal services is changing radically, and the portion of the market reserved for lawyers is shrinking; (2) in the face of these radical changes, lawyer regulators will not want to rock the boat in stormy seas, so the letter of current lawyer regulation will remain substantially the same; (3) maintaining the status quo in regulation will actually result in a substantial deregulation of the market for

1. Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justification for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429 (2001).

2. *See generally id.*

3. *Id.* at 456–63.

4. *See generally id.*

legal services as that market continues to transform around lawyer regulators; (4) lawyer regulation will remain at its most potent for in-court activities and at its weakest for out-of-court, nonlitigation “legal work”; and (5) this will work out wonderfully for consumers of legal services.

The Article proceeds as follows: Part I briefly describes the changes that are occurring in the market for legal services. Part II summarizes the current state of lawyer regulation—who the regulators are and how they have reacted to the market changes. Part III argues that the regulators are unlikely to radically change their approach, which will result in a substantial deregulation of the market for legal services even as lawyers remain heavily regulated. The Article concludes in Part IV by hedging a bit and describing some other possible scenarios, including the nuclear option of a large-scale attempt to enforce prohibitions against the unauthorized practice of law.

#### I. RADICAL CHANGE FINALLY COMES TO THE LEGAL MARKET

British legal futurist Richard Susskind uses the term “bespoke” to describe the way lawyers have practiced law for hundreds of years.<sup>5</sup> Bespoke was originally a tailoring term, denoting made-to-order clothes for individuals. It has since come to be used more broadly to refer to any individualized, custom service. The private practice of law has largely consisted of individual lawyers representing individual clients on individual legal matters. Billing is typically by the hour, or sometimes by the task, but the work itself is individualized, as opposed to commoditized and sold en masse.

Legal practice has changed in tools (consider computers) and in scope (the rise of the massive law firm), but not in kind. Law may have changed less than any other area of the economy over the last 150 years. The same basic product is being sold and the same basic services (e.g., researching the law, drafting legal documents, appearing in court) are being performed.

If the last 150 years have taught us anything, however, it is the relentlessness of technology. In one field of endeavor after another, mechanization, routinization, and commoditization have replaced individualized services. The Industrial Revolution brought mass production to manufacturing. Everything from shoes to clothes to automobiles changed from individually made to factory produced. Over time, these items grew cheaper and better, as mass production allowed for advances in quality and cost. Some bespoke providers remained for the highest-end work, but very few.<sup>6</sup>

Lawyers and other professionals who relied on intellect survived (and thrived) through these changes, as it proved impossible to mechanize complex, brain-heavy activities like practicing law. The information revolution and the continuous growth in the power and speed of computers, however, have started to bring knowledge workers to heel. In multiple areas

5. RICHARD SUSSKIND, *THE END OF LAWYERS?* 36–39 (2008).

6. See Laurel S. Terry, *The Legal World Is Flat: Globalization and Its Effect on Lawyers Practicing in Non-global Law Firms*, 28 *NW. J. INT'L L. & BUS.* 527, 532–47 (2008).

of the economy, computers now handle work once done on an individualized basis by highly paid professionals.

The pattern for these changes was set in the Industrial Revolution and continues today. Bespoke work done by individuals for other individuals on a custom basis is supplanted by standardized work, and then commoditized, mass produced, and sold at a much, much lower cost. The total number of people needed to create the good goes down, as does the average wage earned by those in the industry. The few at the top who control the process or design the product, however, make much more than any former provider of bespoke services ever could. Bespoke services naturally remain for the most complicated and lucrative work. Over time, however, as alternatives to expensive work by well-paid humans get better, the share of the market that is bespoke inevitably shrinks.

The evidence that this process has begun in earnest for lawyers surrounds us. Computerization, outsourcing, insourcing, and nonlawyer workers are all replacing traditional legal work. Lawyers practicing law the old-fashioned way—by the hour, performing individualized work for individual clients—are being replaced by alternate providers or new business models. We are only in the initial stages of this revolution, but if the information age's script holds true, the rest of the story is not hard to see.

#### A. Computerization—Overview

The computerization of legal services is occurring across multiple fronts. As John McGinnis and Russell Pearce's scholarship establishes, we are in the very early stages of the computerization of legal services, and what appears to be state of the art today is likely to seem crude and rudimentary in the near future.<sup>7</sup> Right now, computerization is reaching low-hanging fruit: using predictive coding and search engines to mechanize electronic discovery or using the internet and interactive forms to draft simple legal documents. These relatively basic uses of computing power are already displacing the work of lawyers, but they are really only the tip of the iceberg. The best, or perhaps the worst, is yet to come.

Techno-skeptics note that computerization right now is very mechanical and misses much of the nuance and complexity in legal argumentation. Skeptics also note that it will be a long time before a computer can actually simulate the high-level human thinking necessary to practice law.<sup>8</sup>

Computers do not need to simulate human thinking to handle complicated mental tasks, however. For example, McGinnis and Pearce discuss two recent triumphs of computer intelligence: IBM's Deep Blue defeating chess grand master Garry Kasparov and IBM's Watson defeating *Jeopardy*

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7. John O. McGinnis & Russell G. Pearce, *The Great Disruption: Machine Intelligence & Lawyers' Diminishing Market Power*, 82 FORDHAM L. REV. (2014).

8. See, e.g., Stuart LaRosa, *Why Machines Can't Replace Lawyers*, XEROX BLOGS (June 19, 2012), <http://ediscoverytalk.blogs.xerox.com/2012/06/19/why-machines-can%E2%80%99t-replace-lawyers/>.

champions.<sup>9</sup> In both cases, the computers won not because they imitated human cognition. To the contrary, Big Blue and Watson triumphed by doing what computers do exceptionally well—performing an avalanche of calculations on a mass of data very quickly.<sup>10</sup>

Chess is a complicated game, but it has clear boundaries: a set number of squares, pieces, and rules for how and where each piece can move.<sup>11</sup> Nevertheless, because of the number of possible moves and the length of the game, there are too many possible moves and outcomes for even the most powerful current computer to consider *every* move.<sup>12</sup> Likewise, it is very hard to program a computer to think strategically like a human being.<sup>13</sup>

Deep Blue circumvented these problems with a mix of chess strategy and brute computing power.<sup>14</sup> In order to determine the best move, Deep Blue considered many more moves than any human could and also consulted a database filled with the results of hundreds of thousands of chess games played by grand masters, and could thus choose a move that had been the most likely to be successful in the past.<sup>15</sup> Thus, a human plays not only a computer, but also the ghosts of grand masters past. Deep Blue did not defeat chess masters via superior strategy or tactics; it won by performing so many calculations so quickly on such a mass of data that humans were eventually outmatched.<sup>16</sup>

*Jeopardy* presented a much messier problem for computers. It requires an understanding of puns, natural language, and nuance.<sup>17</sup> Watson followed the Deep Blue playbook for defeating humans. It loaded up more data than a human could memorize and then used a computer capable of searching 200 million pages of text in a second to analyze each *Jeopardy* answer to find the suitable response.<sup>18</sup> Watson worked from about a terabyte of searchable text, including the entirety of Wikipedia, a complete dictionary, a complete thesaurus, the Bible, the Internet Movie Database, and other documents.<sup>19</sup>

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9. McGinnis & Pearce, *supra* note 7, at [4].

10. *Id.* at [4–5].

11. NATE SILVER, THE SIGNAL AND THE NOISE 265–92 (2012); Marshall Barin, *How Was IBM's Watson Computer Able To Answer the Questions on Jeopardy? How Did the Technology Work? How Might It Be Used?*, HOWSTUFFWORKS (Feb. 18, 2011), <http://blogs.howstuffworks.com/2011/02/18/how-was-ibms-watson-computer-able-to-answer-the-questions-on-jeopardy-how-did-the-technology-work-how-might-it-be-used/>; *Deep Blue*, IBM, <http://www-03.ibm.com/ibm/history/ibm100/us/en/icons/deepblue/> (last visited Apr. 26, 2014); *The Science Behind Watson*, IBM, [http://www-03.ibm.com/innovation/us/watson/the\\_jeopardy\\_challenge.shtml](http://www-03.ibm.com/innovation/us/watson/the_jeopardy_challenge.shtml) (last visited Apr. 26, 2014).

12. SILVER, *supra* note 11, at 269.

13. *Id.* at 273.

14. *Id.*

15. *Id.* at 276–85.

16. *Id.* at 279, 283.

17. David Davidian, *IBM Watson Does Not Answer Questions Like Humans*, IBM (Feb. 14, 2011), [https://www-304.ibm.com/connections/blogs/davidian/entry/ibm\\_watson\\_does\\_not\\_answer\\_questions\\_like\\_humans18?lang=en\\_us](https://www-304.ibm.com/connections/blogs/davidian/entry/ibm_watson_does_not_answer_questions_like_humans18?lang=en_us).

18. *Id.*

19. Barin, *supra* note 11.

For each *Jeopardy* answer, Watson searched its database using different algorithms and came to an expected best answer.<sup>20</sup> When Watson was sure enough of an answer (the probability that its answer was correct was high enough), it rang in and answered.<sup>21</sup>

Both Deep Blue and Watson triumphed not by beating humans at their own game, but by doing what computers do well (calculations and searches through large datasets) very quickly. In law the question is not whether a computer can accurately imitate the way humans think. Rather, it is whether brute computing power and speed can allow computers to reach appropriate answers through different routes. In particular, much legal work consists of analyzing legal arguments and predicting future outcomes like the range of results from an ongoing litigation. Insurance companies already use their vast reservoir of data to set settlement amounts, determine legal strategies, and choose which cases to litigate and how. Lex Machina, a legal data and analytics company, claims to do the same for intellectual property litigation.<sup>22</sup> Much of the raw data of legal work (briefs, SEC filings, even oral arguments) are publicly available and thus potentially available for a predictive computer dataset.

Further, computers do not necessarily need to be better than humans to replace humans. Once data is gathered, software is written, and processes are created, computers are much cheaper than humans. The computer programs that now handle document review claim to be at least as accurate as humans. But even if they were less accurate, if they are 10 percent of the price or lower, computers do not need to be better; they just need to be acceptable.

#### B. Computerization's Many Faces

The most obvious examples of computerization in legal services are online forms providers like LegalZoom and Rocket Lawyer. These companies provide both blank and interactive forms to online consumers for matters ranging from entity formation (LLCs, corporations, S-corps), to trademarks, simple contracts, patents, wills and trusts, bankruptcy, and divorce, among many others.<sup>23</sup>

LegalZoom filed an S-1 form with the SEC in 2012 in advance of a possible initial public offering (IPO).<sup>24</sup> The IPO has been shelved for the

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20. *Id.*

21. *Id.*

22. See *Lex Machina Introduces Legal Analytics To Power Data-Driven IP Business Strategy*, LEX MACHINA (Oct. 29, 2013), <https://lexmachina.com/media/press/lex-machina-introduces-legal-analytics-to-power-data-driven-ip-business-strategy/>.

23. See, e.g., *Legal Documents & Legal Forms*, ROCKET LAW., <http://www.rocketlawyer.com/legal-documents-forms.rl> (last visited Apr. 26, 2014); *Our Products & Services*, LEGALZOOM, <http://www.legalzoom.com/products-and-services.html> (last visited Apr. 26, 2014).

24. LegalZoom.com, Inc., Registration Statement (Amendment No. 1 to Form S-1) (June 4, 2012) [hereinafter *LegalZoom Form S-1*], available at



time being,<sup>25</sup> but the S-1 remains the first widely available public data about LegalZoom. As one would expect pre-IPO, it tells a rosy tale of growing revenues and future profits. The overview:

We developed our easy-to-use, online legal platform to make the law more accessible to small businesses and consumers. Our scalable technology platform enables the efficient creation of personalized legal documents, automates our supply chain and fulfillment workflow management, and provides customer analytics to help us improve our services. For small businesses and consumers who want legal advice, we offer subscription legal plans that connect our customers with experienced attorneys who participate in our legal plan network.

We have served approximately two million customers over the last 10 years. In 2011, nine out of ten of the approximately 34,000 customers who responded to a survey we provided said they would recommend LegalZoom to their friends and family. Our customers placed approximately 490,000 orders and more than 20 percent of new California limited liability companies were formed using our online legal platform in 2011. We believe the volume of transactions processed through our online legal platform creates a scale advantage that deepens our knowledge and enables us to improve the quality and depth of the services we provide to our customers.<sup>26</sup>

This description helps lay out the full scope of the threat to traditional lawyers. LegalZoom generated 20 percent of the new LLC filings in California in 2011.<sup>27</sup> Some of these customers may not have been able to afford a lawyer in the first instance, but drafting LLC forms or incorporating businesses has long been a staple of legal practice. That 20 percent of new LLC filings in California went to LegalZoom is not a promising sign for traditional lawyers. Moreover, LegalZoom (and its many competitors) seem unlikely to stall at only 20 percent of that business.

LegalZoom and Rocket Lawyer are for-profit, but there are significant free sources of legal forms as well. For example, the Legal Services Corporation has started a website of publicly available free legal forms,<sup>28</sup> and some state court systems have as well.<sup>29</sup> Chicago-Kent College of Law has created the "A2J Author" project, an interactive platform meant to spur the online

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<http://www.sec.gov/Archives/edgar/data/1286139/000104746912006446/a2209713zs-1a.htm>.

25. Olivia Oran, *LegalZoom IPO Delayed*, REUTERS (Aug. 2, 2012, 4:40 PM), <http://www.reuters.com/article/2012/08/02/legalzoom-idUSL2E8J2EZF20120802>.

26. LegalZoom Form S-1, *supra* note 24, at 1.

27. *Id.*

28. *Fill Out Legal Forms Faster*, L. HELP INTERACTIVE, <https://lawhelpinteractive.org/> (last visited Feb. 27, 2014).

29. See, e.g., *Family Law Forms Index*, MD. COURTS, <http://mdcourts.gov/family/forms/index.html> (last visited Apr. 26, 2014); *Online Court Assistance Program*, UTAH ST. COURTS, <http://www.utcourts.gov/ocap/> (last visited Apr. 26, 2014).

provision of free legal documents for the poor.<sup>30</sup> While these forms are often aimed at the indigent, anyone with an internet connection and a printer can examine or use them.

Online forms providers claim that they do not provide legal advice.<sup>31</sup> However, there are lawyer-form hybrids, where the customer fills in the legal forms and a licensed lawyer “reviews” them. Richard Granat was a pioneer in this field with his fixed-fee divorces in Maryland at [mdfamilylawyer.com](http://mdfamilylawyer.com).<sup>32</sup> SmartLegalForms offers legal forms and legal advice by a lawyer in a packaged deal, with an explicit dig at LegalZoom, calling it a more expensive “non-lawyer document preparation service” and “the old way” of internet law.<sup>33</sup> LegalZoom and Rocket Lawyer have responded by also offering lawyer review of their documents, as well as discounted deals for actual legal advice.<sup>34</sup>

Many small firms’ and solo practitioners’ offices are occupying another middle space, essentially operating as a front for online forms providers. For example, the National Law Foundation offers “fully-editable form(s)” to lawyers for “as low as \$19,” covering virtually every type of legal drafting.<sup>35</sup> Similarly, state bar associations are creating online databases of interactive forms for use by their members, with an explicit eye towards “competition from web-based companies like LegalZoom and Rocket Lawyer.”<sup>36</sup>

There are also websites offering free or very inexpensive legal advice. For instance, there is the truly free provision of advice in online communities like MetaFilter.<sup>37</sup> The acronyms “IANAL” (“I am not a lawyer”) and “IAALBNYL” (“I am a lawyer, but not your lawyer”)<sup>38</sup> are common introductions to question-and-answer sessions on legal matters. The advice

30. *A2J Author*, IIT CHI.-KENT C.L., <http://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology/a2j-author> (last visited Apr. 26, 2014).

31. See, e.g., LEGALZOOM, <http://www.legalzoom.com> (last visited Apr. 26, 2014) (stating under the heading “Disclaimer” that “[w]e are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies”).

32. *Fixed Fee Online Legal Services*, MDFAMILYLAWYER.COM, <http://www.mdfamilylawyer.com/> (last visited Apr. 26, 2014).

33. *SmartLegalForms vs. LegalZoom*, SMARTLEGALFORMS, <http://www.smartlegalforms.com/smartlegalforms-vs-legalzoom.html> (last visited Apr. 26, 2014).

34. *Find an Attorney You Can Trust for Your Family*, LEGALZOOM, <http://www.legalzoom.com/attorneys-lawyers/legal-plans/personal.html> (last visited Apr. 26, 2014); *Get Connected with an on Call Lawyer: Members Save Thousands of Dollars with Pre-negotiated Rates*, ROCKET LAW., <http://www.rocketlawyer.com/find-a-lawyer.rl> (last visited Apr. 26, 2014).

35. *Practical Forms for Attorneys*, NAT’L L. FOUND., <http://www.nlfforms.com/> (last visited Apr. 26, 2014).

36. John G. Locallo, *Behind the Technology Curve? The ISBA Can Help*, 100 ILL. B.J. 124 (2012).

37. For a great discussion of this site, see Cassandra Burke Robertson, *The Facebook Disruption: How Social Media May Transform Civil Litigation and Facilitate Access to Justice*, 65 ARK. L. REV. 75, 84–85 (2012).

38. *IAALBNYL*, METAFILTER (Dec. 21, 2007, 11:15 AM), <http://metatalk.metafilter.com/15513/IAALBIANYL>.

is general and informal, but is permanent, searchable, and available to the public.

Other websites attempt to leverage free legal advice into business for the lawyers who answer the requests for advice. Avvo is a website that serves as an attorney evaluation service and offers free legal advice.<sup>39</sup> Users post questions and attorneys answer them publicly.<sup>40</sup> Avvo works like “Ask.com” or other crowdsourcing question-and-answer sites: the answers are stored, browsable, and searchable.<sup>41</sup> Avvo also has listings of lawyers, with a controversial (at least among lower-ranked lawyers), multifactor rating system.<sup>42</sup> Avvo makes money through advertising on the site and selling “Avvo Pro,” a subscription service for lawyers to track their Avvo profile.<sup>43</sup> Avvo thus leverages its ratings and traffic to draw lawyers into giving free advice with the hope of gaining paid work. Avvo draws traffic and potential clients to the site with free advice or ratings.

LawPivot offers more formal and confidential free legal advice. Lawyers answer specific and detailed questions for free, again with an eye towards generating business.<sup>44</sup> Rocket Lawyer recently acquired LawPivot.<sup>45</sup> Rocket Lawyer has kept LawPivot as a freestanding business, but also plans to adopt its question-and-answer method on its own site.<sup>46</sup>

Online Dispute Resolution (ODR) is another source of competition. Colin Rule directed the eBay and PayPal ODR systems from 2003 to 2011.<sup>47</sup> eBay and PayPal are natural sites for ODR: they have lots of low-dollar transactions that occur across state and even international lines, making litigation cost prohibitive or simply impossible.<sup>48</sup> The eBay process proved exceptionally successful, handling up to 60 million disputes per year, and settling approximately 90 percent of them with no human input on the company side.<sup>49</sup>

39. *About Us*, AVVO, [http://www.avvo.com/about\\_avvo](http://www.avvo.com/about_avvo) (last visited Apr. 26, 2014).

40. *Id.*

41. *Id.*

42. *Id.*; see also Adam W. Lasker, *AVVO Launches Controversial Lawyer Bidding Service*, 101 ILL. BAR J. 68 (2013) (discussing the controversy).

43. Stephen Fairley, *Using Avvo To Market Your Law Firm on the Internet*, RAINMAKER BLOG (May 12, 2010), <http://www.rainmakerblog.com/2010/05/articles/law-firm-marketing-1/using-avvo-to-market-your-law-firm-on-the-internet/>.

44. Leena Rao, *Rocket Lawyer Acquires LawPivot To Add a Quora-Like Q&A Platform to Online Legal Services Site*, TECH CRUNCH (Jan. 14, 2013), <http://techcrunch.com/2013/01/14/rocket-lawyer-acquires-lawpivot-to-add-a-quora-like-qa-platform-to-online-legal-services-site/>.

45. *Id.*

46. *Id.*

47. Julia Wilkinson, *Colin Rule: From eBay Conflicts to Global Peace Initiatives*, ECOMMERCEBYTES.COM (June 26, 2011), <http://www.ecommercebytes.com/cab/abu/y211/m06/abu0289/s05>.

48. *Id.*

49. U.S. DEP'T OF HEALTH & HUMAN SERVS., POLICY ISSUES RELATED TO PATIENT REPORTED DATA 8 (2012), available at <http://www.healthit.gov/sites/default/files/archive/FACA%20Hearings/2012-06->

Colin Rule and others licensed the eBay software and launched Modria, an ODR system for hire.<sup>50</sup> Modria sells a “fairness engine” that attempts substantive as well as financial settlement of disputes. It starts with a “diagnosis module” that gathers relevant information.<sup>51</sup> A “negotiation module” summarizes areas of agreement and disagreement and makes suggestions for solving the issue.<sup>52</sup> If these steps do not result in settlement, a “mediation module” with a neutral third party begins.<sup>53</sup> The final step is arbitration.<sup>54</sup> Modria claims that the “vast majority” of claims are settled in the first two steps without a human ever becoming involved.<sup>55</sup> Nor does Modria see itself only as a small claims alternative for e-business: it is targeting bigger-ticket disagreements, as well as complicated issues like patent disputes.<sup>56</sup>

Modria regularly notes the expense of in-court litigation and court backlogs as selling points for its services.<sup>57</sup> Online divorce mediation is a particularly hot area. Modria and LawMediaLabs have created DivorceMediationResources.com,<sup>58</sup> an online program meant to change contested divorces into uncontested divorces, i.e., to change divorces from work for lawyers to work for online retailers.

The model has been so successful that UNCITRAL, the U.N. working group on international law, has sought to make it industry standard for cross-border e-commerce and business to business disputes.<sup>59</sup> Like all of these technological advances, ODR is radically cheaper than using humans to resolve disputes, so if it continues to succeed, it will naturally drift up from lower-value disputes to higher-value ones.

This brief overview of some of the new developments in the market for computerized legal services establishes that we are still in the early stages of the revolution, and that there is substantial uncertainty about which

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08%20Policy%3A%20Meaningful%20Use%20WG%20Patient%20Generated%20Health%20Data%20Hearing/dullabh\_testimony\_hitpe\_060812.pdf.

50. Wilkinson, *supra* note 47.

51. *Our Modular Dispute Resolution System*, MODRIA, <http://www.modria.com/resolution-center/> (last visited Apr. 26, 2014).

52. *Id.*

53. *Id.*

54. *Id.*; see also Thomas Claburn, *Modria's Fairness Engine: Justice on Demand*, INFORMATIONWEEK (Nov. 16, 2012, 6:46 PM), <http://www.informationweek.com/cloud-computing/platform/modrias-fairness-engine-justice-on-deman/240142275>.

55. *About*, MODRIA, <http://www.modria.com/about/> (last visited Apr. 26, 2014).

56. Eric Johnson, *Modria Wants You To Settle Your Workplace Problems (and Even Patent Disputes) Online*, ALL THINGS D (Nov. 24, 2012, 9:00 AM), <http://allthingsd.com/20121124/modria-wants-you-to-settle-your-workplace-problems-and-even-patent-disputes-online/>.

57. Humayun Khan, *Modria Launches Dispute Resolution Tool To Scale Former eBay and PayPal Tech*, BETAKIT (Nov. 19, 2012), <http://betakit.com/modria-launches-dispute-resolution-tool-to-scale-former-ebay-and-paypal-tech>.

58. DIVORCEMEDIATIONRESOURCES.COM, <http://divorcemediationresources.com/> (last visited Apr. 26, 2014).

59. See Jill Gross, *Vikki Rogers on UNCITRAL's Working Group III on Online Dispute Resolution*, ADR PROF BLOG (July 30, 2012), <http://www.indisputably.org/?p=3754>.

approaches will prove successful and lucrative long term. The sheer volume of the activity and the type of venture capital involved, however, suggests that technology companies feel confident they can disrupt the current market and replace expensive human labor with cheaper information technology.

### C. Outsourcing

Outsourcing takes two different forms. The first, more obvious form, is finding cheaper lawyers overseas to do corporate legal work. Pangea3 is a fast growing “legal process outsourcing” (LPO) firm that employs English-speaking and common law-trained lawyers in India to do legal work like document review or due diligence that used to be done in the United States.<sup>60</sup> Pangea3 claims to have grown between 40 and 60 percent per year since its founding in 2004 and currently employs 850 lawyers.<sup>61</sup> Pangea3 was successful enough to be purchased by legal information giant Thomson Reuters in 2010.<sup>62</sup> As of yet, LPO work has passed muster under state prohibitions of the unauthorized practice of law because the LPO provider is working under a licensed lawyer, who is ultimately responsible for the work.<sup>63</sup> Pangea3 has not moved outside of corporate legal work yet, but as outsourcing proves workable, it seems likely that wills drafted in India for American jurisdictions will become more prevalent.

Computerized LPO vendors are offering a completely different version of the product: replacing routine and large-scale discovery and due diligence work that has previously been done by imperfect humans with powerful computers. Both the *Atlantic* and the *Wall Street Journal* have highlighted the advantages in accuracy and cost of using computers to do large-scale discovery work.<sup>64</sup> The computer programmers claim that these programs are radically cheaper *and* more accurate than humans.<sup>65</sup> Using predictive search and artificial intelligence for e-discovery is the simplest and most basic

60. Niraj Seth & Nathan Koppel, *With Times Tight, Even Lawyers Get Outsourced*, WALL ST. J., Nov. 26, 2008, at B1.

61. Anuj Agrawal, *In Conversation: Sanjay Kamlani and David Perla, Co-CEO's of Pangea3*, B. & BENCH (June 27, 2012, 4:28 PM), [http://barandbench.com/content/conversation-sanjay-kamlani-and-david-perla-co-ceos-pangea3#.Uxt-K\\_aV9YA](http://barandbench.com/content/conversation-sanjay-kamlani-and-david-perla-co-ceos-pangea3#.Uxt-K_aV9YA).

62. Ashby Jones, *True Believer: Thomson Reuters Betting Big on LPO Boom*, WALL ST. J. (Nov. 19, 2010, 9:21 AM), <http://blogs.wsj.com/law/2010/11/19/true-believer-with-purchase-thomson-reuters-bets-big-on-lpo-market/>.

63. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008) (discussing lawyers' obligations when outsourcing legal and nonlegal support services), *available at* <http://www.aapipara.org/File/Main%20Page/ABA%20Outsourcing%20Opinion.pdf>.

64. See Joe Palazzolo, *Why Hire a Lawyer? Computers Are Cheaper*, WALL ST. J., June 18, 2012, at B1; Jordan Weissmann, *ILawyer: What Happens When Computers Replace Attorneys?*, ATLANTIC (June 19, 2012, 1:31 PM), <http://www.theatlantic.com/business/archive/2012/06/ilawyer-what-happens-when-computers-replace-attorneys/258688/>.

65. Joe Palazzolo, *How a Computer Did the Work of Many Lawyers*, WALL ST. J. (Jan. 17, 2013, 4:44 PM), <http://blogs.wsj.com/law/2013/01/17/how-a-computer-did-the-work-of-many-lawyers>.

application of computer power. Programmers are already working on computer generated legal briefs or research memos.<sup>66</sup>

#### D. Insourcing

Corporate law departments have grown larger and more powerful. The general counsel, and not outside counsel, is now the main source of legal counsel and advice to corporate leadership and is in charge of divvying out the work.<sup>67</sup> The *Harvard Business Review* (HBR) has noted the change in the nature and stature of in-house counsel. These offices no longer are staffed by former big-law generalists, but by a bevy of high-quality specialists, headed up by a general counsel who is involved at all levels of corporate decisionmaking.<sup>68</sup> The HBR's upshot? Larger and better in-house counsel means "a smaller total legal spend (inside plus outside) for the company."<sup>69</sup>

This is partially because in-house corporate offices are frequently staffed with cheaper paralegals to perform routine tasks.<sup>70</sup> Likewise, corporations are increasingly comfortable with computerization and outsourcing, diverting funds that used to go to large corporate law firms.<sup>71</sup>

#### E. Nonlawyers

Cheaper nonlawyers are also starting to horn in on legal work. Professor Bill Henderson looked at the U.S. Census data for "law office employment" and compared it to what the Census Bureau calls "all other legal services."<sup>72</sup> Law office employment has actually shrunk since 1998, while all other legal services have grown 8.5 percent annually and 140 percent over the entire period.<sup>73</sup> The workers in the other legal services category are much cheaper. The average job in a law office pays \$80,000.<sup>74</sup> The average other legal services job pays \$46,000.<sup>75</sup> There are still many, many more employees in law offices than in other legal services (1,172,748 versus 23,504), but the growth and the trend in favor of nonlawyers is clear.<sup>76</sup>

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66. Cf. Eric A. Engle, *An Introduction to Artificial Intelligence and Legal Reasoning: Using xTalk To Model the Alien Tort Claims Act and Torture Victim Protection Act*, 11 RICH. J.L. & TECH. 2 (2004).

67. For an excellent discussion of these trends, see THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 112–23 (2010).

68. Ben W. Heineman, Jr., *The Rise of the General Counsel*, HARV. BUS. REV. (Sept. 27, 2012, 1:00 PM), [http://blogs.hbr.org/cs/2012/09/the\\_rise\\_of\\_the\\_general\\_counsel.html](http://blogs.hbr.org/cs/2012/09/the_rise_of_the_general_counsel.html).

69. *Id.*

70. *Id.*

71. *Id.*

72. William D. Henderson, *From Big Law to Lean Law* 8 (Ind. Univ. Maurer Sch. of Law, Working Paper No. 271, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2356330](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2356330).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

Examples of this growth in practice are settlement mills. In these “law firms,” a few lawyers sit atop a pyramid of paralegals who do virtually all of the work. Consider Nora Freeman Engstrom’s outstanding work on settlement mills.<sup>77</sup> She notes ten hallmark features of the settlement mills (in comparison to more traditional plaintiff’s side practice):

Settlement mills necessarily (1) are high-volume personal injury practices that (2) engage in aggressive advertising from which they obtain a high proportion of their clients, (3) epitomize “entrepreneurial legal practices,” and (4) take few—if any—cases to trial. In addition, settlement mills generally (5) charge tiered contingency fees; (6) do not engage in rigorous case screening and thus primarily represent victims with low-dollar claims; (7) do not prioritize meaningful attorney-client interaction; (8) incentivize settlements via mandatory quotas or by offering negotiators awards or fee-based compensation; (9) resolve cases quickly, usually within two-to-eight months of the accident; and (10) rarely file lawsuits.<sup>78</sup>

Plaintiff’s side lawyers carry heavy caseloads, frequently as many as seventy open files at a time.<sup>79</sup> But traditional plaintiff’s attorneys are pikers in comparison to the settlement mill counterpart: settlement mill attorneys carry upwards of 200 to 300.<sup>80</sup> How is it possible to carry such a high caseload? Paralegals interview the clients and prepare the settlements with as little involvement from the lawyers as possible.<sup>81</sup> Settlement mills have thus taken some cases that would have been handled in a bespoke manner by a lawyer working on a contingency fee and transferred them to nonlawyers. Immigration law firms likewise tend to be paralegal heavy.<sup>82</sup>

#### F. The Upshot

The upshot is that lawyers—from big law firms to solo practitioners—have started to see a slow bleed of business to nonlawyers. The spate of layoffs at large law firms and the continued shrinkage in solo practitioner earnings are all evidence of this process. And unfortunately for lawyers, the process is just beginning. Information technology improves exponentially as additional data and computing power becomes available.

The scariest thing about LegalZoom and its kin is not that it is much cheaper than a live lawyer, but rather that it may soon be cheaper *and* better. LegalZoom may eventually do a volume of business that will allow it to surpass the quality of individualized work. As LegalZoom puts it: “The high volume of transactions we handle and feedback we receive from customers

77. See Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011); see also Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485 (2009) [hereinafter Engstrom, *Run-of-the-Mill*].

78. Engstrom, *Run-of-the-Mill*, *supra* note 77, at 1491–92.

79. *Id.* at 1492.

80. *Id.*

81. *Id.* at 1493–95.

82. Ann Juergens, *Valuing Small Firm and Solo Law Practice: Models for Expanding Service to Middle-Income Clients*, 39 WM. MITCHELL L. REV. 80, 103 (2012).

and government agencies give us a scale advantage that deepens our knowledge and enables us to further develop additional services to address our customers' needs and refine our business processes."<sup>83</sup> The feedback loop of providing forms, receiving customer and court feedback, and redesign may allow LegalZoom and others to operate at a level no single human lawyer can match.

Nevertheless, protections against the unauthorized practice of law (UPL) mean that at least one realm will remain lawyers only: the in-court practice of law. This is because UPL is easiest to enforce in court before individual judges. As long as judges continue to insist that only lawyers may represent clients in court, litigants will need to proceed pro se or pay for a lawyer.

## II. CURRENT LAWYER REGULATION

State supreme courts control lawyer regulation in all fifty states.<sup>84</sup> Many state supreme courts have claimed an exclusive "inherent authority" to regulate lawyers, barring legislative encroachment.<sup>85</sup> The "inherent powers" doctrine is an outgrowth of the constitutional separation of powers between the legislative and judicial branches.<sup>86</sup> The inherent authority cases hold that a state constitution's creation of a judicial branch presupposes certain uniquely "judicial" powers, including the regulation of lawyers.<sup>87</sup>

State supreme court inherent authority over lawyer regulation has been predictably advantageous to lawyers. Courts have used their inherent authority to create unified bars in multiple states (in these states all licensed lawyers must belong to the state bar association), to prosecute the unauthorized practice of law, to adopt the American Bar Association's (ABA) Rules of Professional Conduct, and to require bar passage and attendance at an ABA-accredited law school.<sup>88</sup>

Generally speaking, state supreme courts have not proven particularly interested in the nuts and bolts of lawyer regulation. As a result, they have either formally or informally delegated much of their regulatory authority to bar associations.<sup>89</sup> For example, the ABA drafts the rules of professional responsibility in the first instance and, in unified bar states, the bar associations run most aspects of lawyer regulation.<sup>90</sup>

Thus, American lawyers have a unique claim to self-regulation. All other professions, from doctors to hairdressers, are regulated in the first instance

83. LegalZoom Form S-1, *supra* note 24, at 2.

84. BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* 105 (2011).

85. See Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 6–16 (1989).

86. See, e.g., *In re Nenno*, 472 A.2d 815, 819 (Del. 1983) (holding that the Delaware Supreme Court "alone, has the responsibility for" lawyer regulation and that the "principle is immutable").

87. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 22–32 (1986).

88. *Id.* at 24.

89. BARTON, *supra* note 84, at 105–59.

90. See *id.* at 122–26, 154–59.



by state legislatures. Lawyers, by contrast, are regulated by other lawyers—the justices of their state supreme courts.

*A. The Unauthorized Practice of Law*

UPL is prohibited in all fifty states.<sup>91</sup> The definition of the “practice of law” and the levels of enforcement differ from state to state,<sup>92</sup> but at a minimum in no state may a nonlawyer appear in court on behalf of another party.<sup>93</sup> Likewise, nonlawyers may not give “legal advice.” State bars have long allowed the publication of “forms books” despite the UPL strictures, but have drawn the line at the provision of advice along with forms.<sup>94</sup>

Internet forms providers present a hybrid UPL case. A human does not offer advice along with the forms or fill the forms out for someone else, but the websites are packed with instructions and suggestions that look a lot like advice. LegalZoom, for example, sells both blank forms for customers to fill in themselves, which courts have found to be virtually identical to a formbook,<sup>95</sup> and interactive forms, where the customers answer questions and LegalZoom builds out the forms.<sup>96</sup>

Nevertheless, lawyer regulators have yet to launch an all out assault on computerization. LegalZoom debuted in 2001 and has only faced three real UPL challenges. The Washington State attorney general investigated LegalZoom for UPL in 2010. LegalZoom settled by paying \$20,000 in costs and agreeing not to violate Washington law, while continuing to operate in the state with no changes in its business practices.<sup>97</sup> In 2011, a private lawyer in Missouri filed a class action UPL suit against LegalZoom.<sup>98</sup> The case was

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91. Tanina Rostain, *The Emergence of “Law Consultants,”* 75 *FORDHAM L. REV.* 1397, 1407 n.53 (2006).

92. Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 15 (1981).

93. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2589 (1999). This rule is relaxed in some administrative settings. See, e.g., Drew A. Swank, *Non-attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 *S. ILL. U. L.J.* 223, 233 (2012).

94. See, e.g., Fla. Bar v. Stupica, 300 So. 2d 683, 686 (Fla. 1974) (finding that providing divorce forms with advice was UPL); State ex rel. Ind. State Bar Ass’n v. Diaz, 838 N.E.2d 433, 448 (Ind. 2005) (finding that providing immigration forms with advice was UPL).

95. See, e.g., Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1062–63 (W.D. Mo. 2011).

96. *Id.*

97. Press Release, LegalZoom, LegalZoom Enters into Agreement with State of Washington (Sept. 16, 2010), available at <http://www.globenewswire.com/newsroom/news.html?d=201745>. For the settlement itself, see Assurance of Discontinuance, *In re LegalZoom.com, Inc.*, 10-2-02053-2 (Super. Ct. Wash. Sept. 15, 2010), available at [http://www.atg.wa.gov/uploadedFiles/Home/News/Press\\_Releases/2010/LegalZoomAOD.pdf](http://www.atg.wa.gov/uploadedFiles/Home/News/Press_Releases/2010/LegalZoomAOD.pdf).

98. Nathan Kopel, *Seller of Online Legal Forms Settles Unauthorized Practice of Law Suit*, *WALL ST. J.* (Aug. 23, 2011, 11:47 AM), <http://blogs.wsj.com/law/2011/08/23/seller-of-online-legal-forms-settles-unauthorized-practiced-of-law-suit/>.

settled before trial when LegalZoom agreed to a small payment and some unspecified changes in its business practices.<sup>99</sup> LegalZoom lost its summary judgment motion and a Missouri federal district court held that interactive forms constitute the unauthorized practice of law.<sup>100</sup> The CEO of LegalZoom stated that they settled the suit “with little change in [the] business, agreeing mainly to pay lawyers’ fees”<sup>101</sup> and LegalZoom operates the same in Missouri as it does in other states.

LegalZoom has actually brought suit against the state bar in North Carolina, seeking a declaratory judgment that it is not engaging in UPL.<sup>102</sup> So far LegalZoom has survived a motion to dismiss, but the district court has not ruled on the central UPL issue.<sup>103</sup>

#### *B. Why So Little UPL Activity?*

There are several reasons for the relative lack of UPL challenges brought by lawyer regulators against these new operators. Lawyers have been a little like a frog in a pot of slowly heating water. They did not notice the threat that computerized legal services presented until it was too late. At first, LegalZoom and other internet providers were no competition at all. The forms themselves were rudimentary and not even jurisdiction specific, and LegalZoom’s clients likely could not afford a lawyer anyway. This is especially likely because hiring a lawyer is too expensive for most Americans to afford.<sup>104</sup>

As the forms have improved and public acceptance has risen, however, people who could otherwise afford a lawyer have started using online providers. For example, a colleague of mine recently decided to update his will. He called the lawyer who had written the first will ten years ago and was so stunned by the cost that he built a new will on LegalZoom for roughly one-tenth the price.

Given LegalZoom’s rise, scrutiny will likely increase.<sup>105</sup> Nevertheless, at this point, LegalZoom is a famous company with a large advertising

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99. *Id.*

100. *Janson*, 802 F. Supp. 2d at 1064–65.

101. Daniel Fisher, *Silicon Valley Sees Gold in Internet Legal Services*, FORBES (Oct. 5, 2011, 12:02 PM), <http://www.forbes.com/sites/danielfisher/2011/10/05/silicon-valley-sees-gold-in-internet-legal-services/>.

102. Craig Jarvis, *Online Legal Firm in Bar Fight*, CHARLOTTE NEWS OBSERVER (Oct. 5, 2011), <http://www.newsobserver.com/2011/10/05/1540408/online-firm-in-bar-fight.html>.

103. Nate Raymond, *LegalZoom Lawsuit Against NC Bar May Proceed*, THOMPSON REUTERS NEWS & INSIGHT (Aug. 29, 2012), <http://www.webcitation.org/6EkcXBVa9>. For the order itself, see *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2012 WL 3678650 (N.C. Super. Ct. Aug. 27, 2012).

104. Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129 (2010).

105. See, e.g., Jonathan G. Blattmachr, *Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve*, 36 ACTEC J. 1, 19–23 (2010) (arguing that LegalZoom service is the unauthorized practice of law and describing his personal, negative experience with LegalZoom).

budget.<sup>106</sup> Any effort to put it out of business in any particular state would bring significant negative attention to that state's lawyer regulators. For example, in the late 1990s, the State Bar of Texas successfully prosecuted an offline program called "Quicken Family Lawyer" for UPL, only to be briskly overruled by the Texas legislature.<sup>107</sup>

Likewise, in the early 2000s, the ABA sought to create a model definition of the practice of law,<sup>108</sup> likely as a precursor to increased UPL enforcement. The U.S. Department of Justice and the Federal Trade Commission quickly sent the ABA a comment letter objecting to the proposed definition as overbroad and anticompetitive.<sup>109</sup> Given that the ABA settled an antitrust investigation over its accreditation of law schools in 1995,<sup>110</sup> this letter was a shot across the bow on UPL.

There is also a broader enforcement problem: even if UPL challenges could destroy LegalZoom, what about the websites that promise that a lawyer "reviews" the documentation? These sites are priced competitively with LegalZoom and are much cheaper than a traditional lawyer, so the problem would persist even with aggressive UPL enforcement.

In the corporate law arena, UPL challenges are also unlikely to succeed, because as long as a lawyer supervises the work (i.e., inside counsel or a big firm), the work has generally not been considered UPL. Lawyer regulators have also historically left corporate law firms to their own devices: state bar complaints or investigations are extremely rare, as are UPL prosecutions.<sup>111</sup>

### III. FORMAL LAWYER REGULATION WILL LIKELY REMAIN LARGELY THE SAME

In 2008, Rahm Emanuel reminded us that we should never let a crisis go to waste,<sup>112</sup> and proponents of changes in lawyer regulation have taken that

106. See LegalZoom Form S-1, *supra* note 24, at F-17 (listing \$36.4 million as advertising costs in 2011).

107. *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956, 956 (5th Cir. 1999) (vacating the district court's injunction banning Quicken Family Lawyer after the Texas Legislature amended its unauthorized practice of law statute).

108. See LISH WHITSON, TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT (2003), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce\\_rpt\\_803\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_803_authcheckdam.pdf).

109. Memorandum from the Dep't of Justice & the Fed. Trade Comm'n to the Task Force on the Model Definition of the Practice of Law (Dec. 20, 2002), available at <http://www.justice.gov/atr/public/comments/200604.pdf>.

110. Press Release, Dep't of Justice, Justice Department and American Bar Association Resolve Charges That the ABA's Process for Accrediting Law Schools Was Misused (June 27, 1995), available at [http://www.justice.gov/atr/public/press\\_releases/1995/0257.pdf](http://www.justice.gov/atr/public/press_releases/1995/0257.pdf).

111. See Symposium, *How Should We Regulate Large Law Firms? Is a Law Firm Disciplinary Rule the Answer?*, 16 GEO. J. LEGAL ETHICS 203 (2002).

112. Gerald F. Seib, *In Crisis, Opportunity for Obama*, WALL ST. J. (Nov. 21, 2008, 12:01 AM), <http://online.wsj.com/news/articles/SB122721278056345271>.

**Comment [A1]:** To maintain uniformity throughout the Symposium, we have used the names as listed on the bar association's official website.

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advice to heart. There have been increased calls for the slackening of UPL,<sup>113</sup> allowing nonlawyers to provide simple legal services,<sup>114</sup> and the corporate ownership of law firms.<sup>115</sup> Likewise, Richard Posner, Deborah Rhode, and others have criticized the utility of the third year of law school.<sup>116</sup>

Nevertheless, even in the teeth of great change in the legal profession, it seems likely that lawyer regulators will stand pat. Why? The changes at hand are so profound, the possible effects of any changes so unclear, the antipathy of the public towards lawyer self-interest so deep, and the profession sufficiently divided and demoralized that the regulatory status quo will appear the safest route.

#### A. Disruptive Innovations and Market Uncertainty

Clayton Christensen's book *The Innovator's Dilemma* presents a model for disruptive technologies that readily applies to lawyers.<sup>117</sup> Christensen argues that disruptive technologies tend to come from the lower end of the market.<sup>118</sup> The competitors start by focusing on a segment of the market that is lower margin, frequently offering a worse product to these customers at much cheaper prices.<sup>119</sup> The producers at the top of the market who are providing the higher-margin goods are at first unconcerned.<sup>120</sup> Why would they worry about losing the low end of the market when they are dominating the higher-margin work? At first this strategy actually *improves* profitability, as market leaders abandon low-margin work to focus on the most profitable areas.<sup>121</sup> Further, the high-end producers do not want to compete with the

**Comment [A2]:** In FN: We took out the "1997" from original book because the source uses 2011, and we thought that the reader may be confused by what the original 1997 book referred to.

113. DEBORAH L. RHODE, ACCESS TO JUSTICE 88 (2004); Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1692–95 (2008).

114. Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 J. PROF. LAW. 79, 128–29.

115. Stephen Gillers, *How To Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 396–97 (2013).

116. See Mitu Gulati et al., *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235 (2001); Deborah Rhode, *Legal Education: Rethinking the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437 (2013); Richard Posner, Editorial, *Let Employers Insist If Three Years of Law School Is Necessary*, L.A. DAILY J., Dec. 15, 1999, at 6.

117. See CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA: THE REVOLUTIONARY BOOK THAT WILL CHANGE THE WAY YOU DO BUSINESS (First Harper Bus. Paperback ed. 2011) [hereinafter CHRISTENSEN, THE INNOVATOR'S DILEMMA]. Christensen has turned the original book into something of a cottage industry, including new books entitled CLAYTON M. CHRISTENSEN & CURTIS W. JOHNSON, DISRUPTING CLASS: HOW DISRUPTIVE INNOVATION WILL CHANGE THE WAY THE WORLD LEARNS (2011); CLAYTON M. CHRISTENSEN & HENRY J. EYRING, THE INNOVATIVE UNIVERSITY: CHANGING THE DNA OF HIGHER EDUCATION FROM THE INSIDE OUT (2011); and CLAYTON M. CHRISTENSEN & MICHAEL E. RAYNOR, THE INNOVATOR'S SOLUTION (2003). Ray W. Campbell applies Christensen's work more fully to the legal services market. See Ray W. Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J.L. & BUS. 1 (2012).

118. See CHRISTENSEN, THE INNOVATOR'S DILEMMA, *supra* note 117, at xviii.

119. *Id.*

120. *Id.* at xx.

121. *Id.*

low-end producers: the disruptive product is worse, much cheaper, and lower margin, so competing with the disruptive technology might even cannibalize more profitable sales.<sup>122</sup>

But the producers in the lower end of the market eventually master the low-margin work and gradually work their way up the chain to compete for the higher-margin work.<sup>123</sup> Thus, what appears to be the best strategy short term turns out to be disastrous long term, as the disruptive technology eventually captures most or all of the market.<sup>124</sup>

Established providers tend to double down on what they have always done, rather than try to compete with the innovative technology.<sup>125</sup> Uncertainty also tends to breed inertia.<sup>126</sup> Lastly, it is hard to teach old dogs new tricks. The legacy industry is expert at one way of doing business, but the disruptive innovation presents a radically different model.<sup>127</sup>

The reaction of lawyers to their changed circumstances has been straight out of this playbook: they ignored computerization at first. Then they dismissed it. Now they deride it as substandard, but have largely failed to meet the competition head on. This provides a market opportunity for the lawyers that have adopted virtual and online law practices. But it presents a significant challenge to everyone else. Frequently these sorts of challenges have been met by inertia rather than radical change.

#### *B. The Public Will Not Stand for a UPL Revolution*

LegalZoom and other computerized providers of legal services have grown prevalent and profitable enough to present a strong challenge to any UPL enforcement effort. Generally speaking, UPL enforcement has been at its most robust when aimed against individuals. For example, one of the more notable UPL cases against a computerized form punished the individual who filled an electronic will form for an elderly neighbor, rather than the form provider itself.<sup>128</sup> Similarly, publishers of legal forms have had more success fighting UPL than individual nonlawyer scriveners.<sup>129</sup> This is because individuals often lack the funds or political power to defend themselves. So UPL prosecutions of small legal websites are more likely to proceed and succeed than any prosecution large enough to slow the current tide.

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122. *See id.*

123. *See id.* at xviii–xx.

124. *See id.*

125. *See id.* at xxiii–xxvi.

126. *See id.* at xxv.

127. *See generally id.* at xi–xxxii.

128. Mathew Rotenberg, Note, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 709–10 (2012).

129. Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 822–836 (2002).

*C. Bar Associations and State Supreme Courts  
Still Run Lawyer Regulation*

The two subsections above explain why a large-scale UPL attack on nonlawyers and computers is unlikely. This section explains why other regulatory changes are likely to flounder.

The first reason is that many of the current demands for change are responses to general, longstanding problems and not a response to the current challenge to lawyer hegemony. For example, there has been a renewed effort to push law schools to provide more practical training.<sup>130</sup> Nevertheless, teaching law graduates the basics of actually practicing law has been an obvious need since law schools and the case method replaced apprenticeships for lawyer training.<sup>131</sup> Graduating practice-ready lawyers might help an individual school's students compete in a tough market, but it does nothing to address the baseline problem: due to changes in the market, there are too few jobs. It also begs the question of what "practice ready" means in a radically shifting market.

Second, barring turnover in who regulates law schools (the ABA and state supreme courts), no large changes are likely to happen in the near term. Why? Because any large-scale changes would cost a lot of money, reduce tuition, or increase competition in a crowded market. State supreme courts and the ABA control admission to the profession and the accreditation of American law schools. These bodies have proven predictably responsive to their main constituencies (lawyers and law schools),<sup>132</sup> so for any proposed solution one should ask "would ABA members or law school faculties and administrators object to this change?" If the answer is yes, the change is unlikely to occur.

Take the idea of a two-year law school program. Northwestern University Law School offers a two-year program, but those students pay full tuition and attend school full-time through two or three summer sessions.<sup>133</sup> That two-year program is just a three-year program squeezed into two full years. A true two-year program would require fewer credit hours and would be cheaper and faster. That would result in more law graduates, fewer total students per year, or both. In short, an ABA-accredited, two-year program would be a disaster for already struggling law schools and a saturated job market. Even if state supreme courts and the ABA thought these ideas were

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130. See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

131. See, e.g., ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 281 (1921) ("The failure of the modern American law school to make any adequate provision in its curriculum for practical training constitutes a remarkable educational anomaly.").

132. I wrote a whole book about this. BARTON, *supra* note 84.

133. Dan Slater, *Law School in 2 Years (Same \$\$?)—Assessing Northwestern's Program*, WALL ST. J. (June 20, 2008, 11:06 AM), <http://blogs.wsj.com/law/2008/06/20/law-school-in-2-years-same-price-assessing-northwesterns-program/>.

worth pursuing, the opposition from law school deans and the rank and file would be excruciating.

Likewise, consider the failure of the ABA Commission on Ethics 20/20 to address the prohibition of nonlawyer ownership of law firms. William Henderson has rightly called the prohibition a “farce” that keeps lawyers from engaging with the world of nonlegal entities that are entering the field.<sup>134</sup> Nevertheless, bar associations have asked the band to play on as the ship sinks around them, arguing over ethics rules that only bind a very limited group of lawyers.<sup>135</sup>

There has been quite a bit of controversy over a recent ABA Task Force on the Future of Legal Education report, which called for liberalizing or eliminating a number of accreditation standards.<sup>136</sup> The recommendations have proven controversial,<sup>137</sup> and time will tell if they have much effect when they reach the broader membership of the ABA.

Similarly, based on the Washington State “limited license legal technicians”<sup>138</sup> (LLLT) program described more fully in Laurel Rigertas’s paper,<sup>139</sup> there is much hope that nonlawyers may finally be able to compete with lawyers in providing legal services. The Washington program is less than it appears, however. It does not loosen UPL restrictions. To the contrary, it attempts to extend regulatory authority to nonlawyers in the field.

In Washington State, nonlawyers will be licensed and allowed to draft legal instruments in limited areas (at first, just domestic relations) and offer related advice.<sup>140</sup> The LLLTs will not be allowed to appear in court.<sup>141</sup> At first blush, this appears to be a significant and unexpected concession by the Washington Supreme Court. There have been unsuccessful efforts to loosen UPL to address access to justice concerns for years. Deborah Rhode led a very persuasive and successful one-woman charge against UPL in the 1970s and 1980s.<sup>142</sup> In 1995, the ABA Commission on Nonlawyer Practice was finally persuaded, releasing a report describing the legal work that legal

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134. William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 490 (2012).  
135. See Ted Schneyer, “Professionalism” As Pathology: *The ABA’s Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities*, 40 FORDHAM URB. L.J. 75 (2012).

136. See *ABA Task Force on the Future of Legal Education Issues Draft Report on Proposed Reforms to Pricing, Accrediting and Licensing*, A.B.A. NEWS (Sept. 20, 2013), [http://www.americanbar.org/news/abanews/aba-news-archives/2013/09/aba\\_task\\_force\\_onth.html](http://www.americanbar.org/news/abanews/aba-news-archives/2013/09/aba_task_force_onth.html).

137. See, e.g., Matt Bodie, *Notice to All Law Faculty: Read This Report*, PRAWFSBLAWG (Sept. 20, 2013), <http://prawnsblawg.blogspot.com/prawnsblawg/2013/09/notice-to-all-law-faculty.html>.

138. *Supreme Court Adopts Limited License Legal Technician Rule*, WASH. ST. B. ASS’N, <http://www.wsba.org/News-and-Events/News/Supreme-Court-Adopts-Limited-License-Legal-Technician-Rule> (last visited Apr. 26, 2014).

139. See generally Laurel A. Rigertas, *The Legal Profession’s Monopoly: Failing To Protect Consumers*, 82 FORDHAM L. REV. (2014).

140. WASH. ADMISSION TO PRACTICE R. 28(F).

141. *Id.* R. 28(G)(3)(a).

142. See Rhode, *supra* note 92; Ralph C. Cavanagh & Deborah L. Rhode, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976).

paraprofessionals already safely performed and suggesting that the ABA reconsider its ethics rules and its description of the unauthorized practice of law to allow greater freedom.<sup>143</sup> The ABA ignored the reports and many local bar associations ramped up UPL enforcement afterwards.<sup>144</sup>

So maybe Washington's action is a significant deregulation? Not so much. First, the Washington State Bar Association (and not the Supreme Court) will license and regulate LLLTs in the first instance, making any radical new competition from nonlawyers unlikely.<sup>145</sup> Second, the rules for becoming an LLLT are quite stringent, including years of school<sup>146</sup> and apprenticeship,<sup>147</sup> making a flood of new entrants unlikely. Third, in some ways the regulations are already stricter for LLLTs than lawyers. LLLTs must carry malpractice insurance, for example.<sup>148</sup> Last, the new program is not a loosening of UPL. To the contrary, it is an attempt to regulate *more* of the market for legal services, by essentially regulating paralegals. Thus, the entire program may be a stalking horse for greater tightening of lawyer control.

#### IV. A CONCLUSION WITH SOME HEDGING

Hard times can bring bad regulation. The Depression was the last time that the American legal profession faced an existential threat. State supreme courts and the ABA responded by ratcheting up entry regulations and heavily prosecuting UPL.<sup>149</sup> If the protectionist approach repeated itself today, it would reverse much of what I have argued elsewhere is a helpful loosening of the market for legal services.<sup>150</sup>

The relevant question is whether bar associations and courts will remain relatively passive as the market for legal services changes (or collapses) around them. If the market for lawyers continues to shrink, bar associations and state supreme courts may want to do *something*.

An alternative to large-scale changes or aggressive UPL enforcement may be lower-profile moves like quietly adjusting the bar passage rate downwards or disaccrediting some law schools. Low-profile tightening seems much more likely than any loosening or radical changes.

**Comment [A3]:** Generally, *Fordham Law Review* style does not enumerate Introduction or Conclusion. We understand that the hedging is the important part of the conclusion, so we've phrased this part slightly different to conform with *Law Review* style. Of course, we're open to any changes you may wish.

**Comment [A4]:** Is this book forthcoming? It will change the typeface according to *Bluebook* conventions.

143. ABA COMMISSION ON NONLAWYER PRACTICE: NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS (1995), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/Non\\_Lawyer\\_Activity\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/Non_Lawyer_Activity_authcheckdam.pdf).

144. Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747, 764–65 (2001).

145. WASH. ADMISSION TO PRACTICE R. 28(B)(9), (C)(1).

146. *Id.* R. 28(D)(3).

147. *Id.* R. 28(E)(2).

148. *Id.* R. 28 app. (2013) (Regulation 12), available at <http://www.wsba.org/~media/Files/WSBA-wide%20Documents/LLLT/Rules%20and%20Regulations/20130903%20Appendix%20APR%2028%20Regulations%20112.ashx>.

149. BARTON, *supra* note 84, at 122.

150. BENJAMIN H. BARTON, GLASS HALF FULL: AMERICA'S LAWYER CRISIS AND ITS UPSIDE (forthcoming 2014) (on file with author).



The likeliest result is that regulations for law schools and lawyers stay basically the same, but grow less relevant, as everything except for in-court and other bespoke legal work is swamped by competition from computers, outsourcing, and nonlawyers. Rather than try to regain lost ground, lawyers and law schools will try to hold on to what they still have, even as it shrinks around them. I think of it as a sand castle facing a rising tide: the outer walls will be lost, but perhaps the citadel can be maintained.

There is the possibility for some targeted deregulation to allow lawyers to compete more effectively with the explosion of nonlawyer services on the internet. Right now, regulatory sluggishness is keeping many lawyers on the sideline while unregulated nonlawyers are rushing in. For example, the ABA and most state bar associations continue to drag their feet on changes to ABA Model Rule of Professional Responsibility 5.4, which bars nonlawyer ownership of law firms and sharing legal fees with nonlawyers.<sup>151</sup> As Bill Henderson has noted, this ban is allowing nonlawyers to provide legal-type services in multiple guises and with creative financing, while leaving law firms hamstrung.<sup>152</sup> Gillian Hadfield has argued that loosening Rule 5.4 would also greatly increase access to justice, because nonlawyer owners could leverage economies of scale and logistics to streamline the types of representation needed by the poor and middle class.<sup>153</sup>

Regulatory bans on multijurisdictional law practice likewise make it hard for licensed lawyers to compete on the internet. LegalZoom and Rocket Lawyer are available in all fifty states. A lawyer-run virtual law practice, however, must satisfy licensing requirements of each jurisdiction, making a national virtual law firm competitor a very difficult proposition.<sup>154</sup>

The alternative—a full-scale attempt to bring nonlawyers, outsourcing, and computerization to heel via UPL or more aggressive regulation—would require a great deal of political will and capital from state supreme courts. Truly aggressive moves would be likely to draw federal antitrust and congressional attention. If push came to shove, state supreme courts and lawyer regulators would face a potentially existential crisis: attempting to maintain their inherent authority to regulate lawyers against an angry populace and an engaged federal government. It is well beyond the scope of

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151. Chris Bonjean, *ISBA Submits Resolution Regarding ABA's Ethics 20/20*, ILL. ST. B. ASS'N (June 20, 2012), <http://iln.isba.org/blog/2012/06/20/isba-submits-resolution-regarding-abas-ethics-2020>.

152. Bill Henderson, *Connecting the Dots on the Structural Shift in the Legal Market*, LEGAL WHITEBOARD (Aug. 3, 2012), <http://lawprofessors.typepad.com/legalwhiteboard/2012/08/connecting-the-dots-on-the-structural-shift-in-the-legal-market.html>.

153. Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the Corporate Practice of Law* (Ctr. in Law, Econ. & Org. Research Paper Series No. C12-16, Legal Studies Research Paper Series No. 12-26, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2183978](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2183978).

154. See Stephanie L. Kimbro, *Regulatory Barriers to the Growth of Multijurisdictional Virtual Law Firms and Potential First Steps to Their Removal*, 13 N.C. J.L. & TECH. ONLINE 165 (2012).

this Article to determine whether federal supremacy would overrule bedrock state constitutional law in such a showdown. Simply describing the parameters of the potential showdown helps explain why lawyer regulators have and will continue to tread lightly.

The most likely result is little formal change amidst massive informal changes. This will have a negative impact on the legal profession, which will need to find new sources of business or will face significant shrinkage. It will be outstanding news for the public at large. In 2001, I joined a distinguished chorus of legal scholars—Deborah Rhode, Stephen Gillers, and David Luban—in calling for large-scale deregulation of the legal profession. It appears my hopes for massive changes in lawyer regulation will remain unfulfilled. My hope for a deregulated market for legal services, however, is coming true before our eyes. Given that much lawyer regulation is protectionist and not aimed at benefitting the public and that most Americans cannot afford a lawyer for even relatively basic legal needs, if this deregulation continues unabated, the broader public will be the beneficiaries.