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# REGULATING LEGAL ADVICE IN CYBERSPACE

CATHERINE J. LANCTOT<sup>1</sup>

My first introduction to the complex ethical issues presented by the Internet came in 1995, when some colleagues at Villanova Law School asked me to participate in a continuing legal education presentation entitled “The Internet: Hip or Hype?” At the time, for many people, the jury was still out as to how pervasive the Internet’s effect would be. I am embarrassed to admit that, in those early days, I was one of the skeptics about cyberspace, openly speculating whether the Internet would be yet another technological innovation that would soon be relegated to the dustbins of history, like my eight-track tape player from the Seventies.

Events have proven me wrong, of course. Statistics show that 104 million American adults had access to the Internet as of the second half of 2000, a number that continues to increase.<sup>2</sup> Moreover, the effect of the Internet on law practice has been far-reaching over the last five years, although the profession has yet to adapt itself fully to cyberspace. I hope today to highlight one area where the traditional approaches of the legal profession have begun to conflict with the changes wrought by the Internet, and to suggest what the future might hold.

I want to focus on legal advice in cyberspace. Legal advice is dispensed in cyberspace every day. It is dispensed by lawyers and by non-lawyers. It is dispensed for free and for a fee. Some of it is good advice, and a great deal of it, I suspect, is bad advice.

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<sup>2</sup> See Reid Kanaley, *In Search of the Meaning of (Online) Life*, PHILA. INQUIRER (Mar. 22, 2001); see also Amy Harmon & Felicity Barringer, *Investors May Have Repudiated the Internet, but Consumers Have Not*, N.Y. TIMES, at C2 (July 22, 2002) (reporting recent Pew survey that 66 million people use Internet daily; 11 million Americans said Internet assisted in choosing school or college; 8 million said Internet use helped them through a job transition; and 8 million used Internet to find apartments or homes).

The question that our profession must grapple with today is how to respond to the proliferation of this activity on the Internet. In particular, the legal profession must decide whether it will embrace the new technology, or whether it instead will regulate much of the innovative potential of this technology out of existence.

Although my track record as a prognosticator may be somewhat suspect, I want to make a few observations at the outset about how lawyers might be expected to approach the regulation of legal advice giving in cyberspace. First, the legal profession's track record with respect to technological innovation is less than encouraging. Lawyers as a group generally have been fairly technophobic. This fact sometimes comes as a surprise to those whose work focuses on cyberspace, because they tend by nature to be the first kids on the block to get the latest laptop or the newest version of the Palm Pilot. Law students also may find the concept of technophobia to be alien to their own experience, because this generation has grown up with VCR's, Game Boys, Nintendo, Email, and cell phones. In general, however, although it might be an overstatement to suggest that attorneys are all Luddites, it is fair to say that lawyers are not early adopters of technology. Lawyers by training and by disposition tend to be conservative, risk averse, and cautious about change. My own research on the history of lawyer technophobia has shown that lawyers resisted technology even as early as the introduction of the telephone at the turn of the twentieth century.<sup>3</sup> I think it is likely that the first skirmishes over legal advice giving in cyberspace will reflect, at least in part, this technophobia.<sup>4</sup>

The second factor is the contrast between the pervasive regulation of the legal profession and the relatively unfettered world of cyberspace. Lawyers are subject to a variety of different regulatory constraints, including the ethical rules of their own states, a number of bodies of substantive law, and the unauthorized practice of law statutes. Attempting to take this

<sup>3</sup> I have discussed this issue in greater detail in Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147 (1999).

<sup>4</sup> This is particularly likely because the generation that today provides much of the leadership for the legal profession - the senior partners, the judges, and the bar regulators B may generally have had less experience with the Internet than those who have grown up with computer technology at their fingertips.

vast and somewhat inconsistent body of law and to apply it to legal advice giving on the Internet may prove to be a daunting task. Moreover, there are important constitutional concerns, particularly with respect to the First Amendment's guarantee of freedom of speech, that necessarily will be implicated by any attempt to regulate legal advice in cyberspace. Confronting the changes in legal services that have recently emerged may necessitate adapting the existing law in ways that few would have anticipated just a few years ago.

Third, lawyers as a group are likely to be self-protective if they view certain cyberspace activity as a threat to their economic viability or their status as a learned profession. Lawyers have been assiduous over the years in using the unauthorized practice of law statutes to protect against perceived incursions by real estate agents, bankers, insurance adjusters, and other groups that seemed to be providing something that could be characterized as legal advice. Lawyers are likely to be equally concerned about the future of their profession if the proliferation of legal advice in cyberspace appears to pose such a threat.

I hasten to add that I do not expect the legal profession to attempt to exterminate all legal activity in cyberspace, nor do I anticipate that lawyers will return to the days of parchment paper and quill pens. Even if they wanted to do so, which is unlikely, lawyers would find it impossible to turn the clock back to 1993, when almost no one had heard of the Internet. Indeed, the Internet has already irrevocably altered the way lawyers do business, and the increased use of cyberspace is likely to generate major changes in how legal advice is given in the future. Nevertheless, these changes are unlikely to occur without struggle, if not litigation, over how to define the practice of law in the twenty-first century.

Against this backdrop, let us turn to the question of legal advice giving in cyberspace. How is legal advice being provided on-line today? Lawyers provide legal advice on-line through a variety of vehicles. Some lawyers have individual web sites in which they offer, for a fee, short answers to legal questions emailed to them. Others provide such limited assistance without a fee. There are also web sites operated by non-lawyers that invite lay people to submit legal questions and invite lawyers to

respond to them.<sup>5</sup> Non-lawyers are also providing legal advice on the Internet, although they characterize their service as providing "legal information" in order to avoid admitting that they are engaged in the unauthorized practice of law.<sup>6</sup> This occurs largely through newsgroups and websites where non-lawyers purport to assist other lay people with their legal problems. In addition, many websites now offer personalized legal document preparation, for a fee, in which they prepare simple wills, divorce papers, and other documents.

The regulatory issues created by legal advice giving online differ, depending on whether the person giving the legal advice is a lawyer or a layperson. I first want to address the question of lawyers who give specific legal advice to lay people over the Internet. The danger from that activity is that one of those strangers will be harmed by relying on the advice, and seek recourse either through a civil suit or by filing a complaint against the lawyer with the bar.<sup>7</sup> Although no court to date has ruled on this issue, lawyers must be aware that the act of giving specific legal advice to a layperson, under circumstances in which it would be reasonable for that person to rely on it, may create an attorney-client relationship, with all the professional obligations inherent in that relationship.

Consider for a moment how the law has traditionally addressed the creation of an attorney-client relationship. The Restatement (Third) of the Law Governing Lawyers outlines the principles governing 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.<sup>8</sup>

<sup>5</sup> See *e.g.*, mycounsel.com which allows employers to give employees access and have their legal questions answered.

<sup>6</sup> See *e.g.*, [www.ask-a-lawyer.com](http://www.ask-a-lawyer.com); [forum.freeadvice.com](http://forum.freeadvice.com); [lawguru.com](http://lawguru.com); [prairielaw.com](http://prairielaw.com).

<sup>7</sup> See generally Lanctot, *supra* note 3, at 168-84 (discussing legal basis for formation of attorney client relationship).

<sup>8</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (Lexis 2002)

In cyberspace, a layperson may manifest this intent through email, by expressly asking for legal advice or for assistance in carrying out a particular objective. Although some might consider this contact to be insufficient, keep in mind that an attorney-client relationship can be created without a written agreement and without a fee.<sup>9</sup> Moreover, courts are willing to construe these requirements broadly, to protect lay people who reasonably believed a lawyer was representing them.<sup>10</sup> Even though posting a request for legal advice on the Internet differs in many ways from an office visit, the courts have at times found a viable request for legal services even when the interchange between lawyer and client was brief, or when the lawyer and putative client never met in person.

If we apply the Restatement model to an email exchange between a lawyer and a lay person, we see that the lawyer's act of responding to that request with specific legal advice can constitute consent to provide legal services, and thereby create an attorney-client relationship. As comment e to section 14 of the Restatement explains: "The lawyer may explicitly agree to represent the client, or may indicate consent by action, for example by performing services requested by the client."<sup>11</sup> In an on-line exchange, for instance, a lawyer could explicitly consent to represent the putative client by posting a response or by sending an individual E-mail directly to the questioner that says: "I will represent you in this matter." Indeed, even giving legal advice in less formal situations, such as when a lawyer agrees to advise a pro se litigant, may suffice to create professional obligations.<sup>12</sup>

To create an attorney-client relationship, however, the lawyer's advice must be specific to the facts of the putative client's case.

(outlining when an attorney-client relationship arises).

<sup>9</sup> See *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1317 (7th Cir. 1978) (stating that existence of attorney-client "relationship is not dependent upon the payment of fees nor, . . . upon the execution of a formal contract"), *rev'd sub nom.* *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221.

<sup>10</sup> See *Togstad v. Vesely Otto, Miller & Keefe*, 291 N.W.2d 686, 695 (1980) (upholding jury finding of attorney malpractice).

<sup>11</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt e (Lexis 2002) (discussing necessity of attorney consent before attorney-client relationship arises).

<sup>12</sup> See, e.g., *Seeley v. Seeley*, 514 N.Y.S. 2d 110, 112 (N.Y. App. Div. 1987) (asserting "fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view toward retention of the lawyer, although actual employment does not result.").

Giving specific legal advice in response to a set of particular facts is the hallmark of the practice of law, while offering general information about the law is not. It is reasonable for a putative client to rely on advice that is specifically tailored to his particular request, and the courts are clear that it is the reasonable belief of the client that will govern.<sup>13</sup> The nature of the communication could give the lawyer either actual or constructive knowledge that the questioner intends to rely on the advice or is otherwise depending on the lawyer to protect his or her legal interests. Such a situation would meet the requirements of the Restatement, and could thereby result in liability for an unwary cyberspace lawyer.

The implications of finding an attorney-client relationship in these Internet communications are substantial. Lawyers who provide specific advice to on-line questioners may now owe duties of loyalty, confidentiality, competency, and zealous advocacy to those clients. They may be subject to liability for malpractice if their advice proves to be negligent. They may themselves run afoul of restrictions against unauthorized practice of law if they advise on-line clients in jurisdictions other than those in which the lawyers are licensed to practice. Thus, the proliferation of advice giving in cyberspace by lawyers raises a substantial regulatory concern.

The solution many lawyers seem to favor is the inclusion of a blanket disclaimer on their websites. But, as I have argued elsewhere, this is more placebo than panacea.<sup>14</sup> Neither courts nor bar counsel are likely to be sympathetic to lawyers who have given negligent advice and then try to rely on boilerplate disclaimers to absolve them of responsibility for harm. The courts have been especially protective of lay people when lawyers attempt to enforce contracts against them, and this view is likely to apply with particular force in cyberspace transactions. In addition, once the lawyer gives specific legal advice to someone who asked for it, it is unpersuasive to suggest that the person was unreasonable to rely on it. At some point, the conduct of the

<sup>13</sup> See, e.g., *Keoseian v. Von Kaulbach*, 707 F. Supp. 150, 152 (S.D.N.Y. 1989) (highlighting that courts developed fairly broad test for determining whether attorney-client relationship has formed, rejecting any arguments that indicia of formal relationship are necessary).

<sup>14</sup> See generally *Lanctot*, *supra* note 3, at 186 (discussing in detail use of disclaimers on attorney websites).

lawyer would be so inconsistent with the disclaimer of a professional relationship that the disclaimer would be treated as ineffective. A variety of court cases and bar opinions supports the common-sense notion that an attorney-client relationship, once created, cannot be disclaimed away.

Despite attorney dependence on elaborate written disclaimers, courts may well find it reasonable for lay people to treat such disclaimers as nothing more than “legalese,” particularly if the conduct of the attorney is inconsistent with the disclaimer. Even under principles that permit limiting the scope or objective of the representation, there are problems with blanket disclaimers, because there are core attributes of the attorney-client relationship, such as basic competency, that cannot be bargained away. Indeed, there are inherent difficulties in crafting a disclaimer that will adequately disclose all duties that are owed and then disclaimed. In short, whether or not a lawyer will be able to rely on a disclaimer will hinge on the nature of the request for advice, the conduct of the lawyer in response to the request, and the factual circumstances surrounding the disclaimer. In my view, if the legal advice given is specifically tailored to the factual circumstances presented, that conduct will suffice to create an attorney-client relationship, regardless of what boilerplate disclaimers the lawyer attaches to the advice.

Recent bar opinions that have addressed the phenomenon of lawyers giving advice in cyberspace have taken this same approach. They have suggested that lawyers who give specific legal advice to questioners run the risk of creating an attorney-client relationship, whether or not that was their actual intent.<sup>15</sup>

<sup>15</sup> The most recent such opinion is from the New Mexico State Bar which followed the approach of other bar opinions in advising that “an attorney-client relationship is probably created when a lawyer responds to specific questions from users on the Internet.” NM Adv. Op. 2001-1, *reported at* 70 U.S.L.W. 2187 (Oct. 2, 2001). Other jurisdictions have also addressed this question in recent years. *See, e.g.*, SC Adv. Op. 94-27 *reported at* 2002 WL 1401578 (S.C.Bar.Eth.Adv.Comm.) (permitting on-line legal discussions “solely for the purpose of discussing legal topics generally, without giving of advice or representation of any particular client”); OR Eth. Op. 1994-137 *reported at* 1994 WL 455098 (Or.St.Bar.Assn.) (permitting development of on-line legal data base that would furnish information to inquiries, but would not be staffed by a live person, noting: “if someone at the legal information service were generating legal advice during an on-line session by giving personal advice, that is the practice of law.”); AZ Jud. Adv. Op. 95-17 (recommending that lawyers should “probably not” answer questions raised in chat rooms on-line because of the inability to check for potential conflicts of interest and the risk of disclosing confidential information, and noting: “Ethically, it would follow that lawyers should not answer specific legal questions from lay people through the Internet unless the question presented is of a general nature and the advice given is not fact-



Indeed, courts and bar opinions historically have drawn a distinction between giving general legal information, which has generally been permitted, and giving specific legal advice tailored to an individual's particular problems, which has been largely prohibited even if a disclaimer was given. This has been true with respect to legal advice given on radio talk shows, in newspaper columns, books, seminars, and through 900-number telephone lines.<sup>16</sup> The reason for this is that the act of giving legal advice in response to a particularized inquiry is at the heart of the practice of law.

The fact that there is potential liability for giving casual, negligent, or erroneous legal advice on-line seems to me to be appropriate, rather than problematic. In my view, lawyers should always be cautious when giving legal advice, whether it is generic legal information or the type of specific legal advice that could trigger an attorney-client relationship. It benefits neither the image of the legal profession nor the lay people who need legal services to insulate lawyers from the consequences of carelessness when they give advice. In fact, the focus on disclaimers as a method of avoiding incurring obligations to lay people really begs the question about whether we as a profession ought to revisit the definition of the attorney-client relationship in light of the changes in communication that have been facilitated by the Internet.

One solution that has been recommended is to permit lawyers to limit the scope of representation by "unbundling" various legal duties from the traditional, full-service model of the attorney-client relationship.<sup>17</sup> The idea of "discrete task representation" or "unbundled legal services" has been proposed as a possible

specific."); IL Adv. Op. 96-10 ("lawyers participating in chat-groups or other on-line services that could involve offering personalized legal advice to anyone who happens to be connected to the service should be mindful that the recipients of such advice are the lawyer's clients, with the benefits and burdens of that relationship."); Phila. Eth. Op. 98-6 reported at 1998 WL 112691 (Phila.Bar.Assn.Prof.Guid.Comm.) (lawyer in on-line discussion group must be cautious about not creating, albeit inadvertently, an attorney-client relationship, which begins "when a person would have a reasonable expectation that such a relationship was formed."); NY Eth. Op. 709 reported at 1998 WL 957924 (N.Y.St.Bar.Assn.Comm.Prof.Eth.) (in discussing proposed Internet legal practice, "a conflicts check is not required where the attorney's interaction is limited to providing general information of an educational nature, no confidential information is obtained from a client and no specific advice tailored to a client's particular circumstances is rendered.").

<sup>16</sup> See generally Lanctot, *supra* note 3, at 218-44.

<sup>17</sup> I have discussed this in greater detail at Lanctot, *supra* note 3, at 253-58.

remedy to the national problem of unmet legal needs. The model is that of a menu of legal tasks from which the client selects, in consultation with the lawyer. Under this model, the client purchases only the services that he or she needs and can afford, and the lawyer does not incur the full obligations inherent in a traditional attorney-client relationship. The act of giving specific legal advice to clients on-line, while expressly disclaiming any additional responsibilities, is at least theoretically a cyberspace version of discrete task representation.

Unbundling, however, is not a cost-free solution. There are real risks to the lay public from establishing a type of professional relationship that may not provide them with the legal protection they need, particularly if that relationship is structured to insulate the lawyer against all malpractice liability. In addition, there is the obvious danger of creating a two-tiered model of legal services: full-service for the rich and cut-rate for the not so rich. Nevertheless, the idea of limited representation may be one for the organized bar to explore further, as legal advice in cyberspace becomes more prevalent. In fact, in August 2001, the American Bar Association gave preliminary approval to a recommended change in Model Rule 1.2 that would more explicitly recognize a form of limited representation. Model Rule 1.2(c) would read as follows: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."<sup>18</sup>

The proposed Comment to Model Rule 1.2(c) explains, in part:

Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not

<sup>18</sup> See MODEL RULES OF PROF'L CONDUCT Proposed Rule 1.2 (c) available at <http://www.abanet.org/cpr/e2k-rule12.html> (discussing limitations of attorney-client relationship subject to informed consent).

exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.<sup>19</sup>

Comment 8 to the proposed rule further notes that an agreement to limit representation “must accord with the Rules of Professional Conduct and other law,” citing specifically Model Rule 1.1, which requires competent representation, Model Rule 1.8, which governs a variety of prohibited transactions, and Model Rule 5.6, which prohibits restrictions on the lawyer’s right to practice law.

How would this rule, if broadly adopted by the states, affect advice giving by lawyers in cyberspace? One might argue that this rule simply recognizes a longstanding concept of limited representation under certain circumstances, and that the rule does not work any substantial change in the traditional understanding of the attorney-client relationship. On the other hand, the requirement in the amended rule that the limitation on representation be “reasonable” and a product of “informed consent” could have a significant effect on the use of disclaimers. Over-reliance on boilerplate disclaimers could well be inconsistent with the concept of informed consent. Moreover, a lawyer who purported to give a short email response to a complex Email question, without providing additional assistance, could run afoul of the requirement that limits on representation be “reasonable.” It bears noting that the Comment to the amended Model Rule expressly reiterates that certain core aspects of the attorney-client relationship, such as competency, may not be bargained away.

To conclude my thoughts on regulating legal advice by lawyers in cyberspace, I think it is a good sign that the legal profession finally has begun to focus on this phenomenon. The emergence of bar opinions addressing cyberspace issues, the renewed interest in unbundling legal services, and the proposed amendment to Model Rule 1.2 are the initial steps toward reconciling the traditional requirements of the attorney-client relationship with

<sup>19</sup> See MODEL RULES OF PROF'L CONDUCT Proposed Rule 1.2 (c) cmt. 7 available at <http://www.abanet.org/cpr/e2k-rule12.html> (noting necessity of reasonableness for any limitations on attorney-client relationship).

changes in technology. Whether we will need to rethink the entire professional model in light of the emerging technology is a question that continues to linger as we consider other aspects of cyberspace that have begun to challenge the traditions of the legal profession.

Let me turn now to the other side of the equation—legal advice given by lay people in cyberspace. The question of whether certain activities on the Internet by non-lawyers constitute the unauthorized practice of law is likely to become the focus of future regulatory efforts. One area of particular concern today is the emergence of websites that sell personalized legal documents to lay people. The lay entrepreneurs who operate these sites hope to garner a portion of the market for legal services that traditionally has been underserved by the organized bar. One site that has received a great deal of attention in legal technology circles is the British website called Desktoplawyer.com (“Desktop Lawyer”), which markets a service it calls “Rapidocs,” a method of rapidly preparing legal documents on-line. Consumers are invited to order personalized legal documents in a wide array of areas, including divorce, wills, powers of attorney, and sales of goods.<sup>20</sup> Similar services are available for American consumers as well. Advocates of these websites prefer to characterize them as providing “legal information,” or simply as serving as glorified typing services.

The legal question is deceptively simple. Does filling out a legal form for someone else constitute “legal advice” and therefore the unauthorized practice of law? The answer to that question is not readily apparent, and the implications of how we answer that question may be profound. Beneath the legal issues is a fundamental policy question about whether the legal profession ought to prevent these websites from providing basic wills and other personalized legal documents to consumers, or whether we should instead see this use of the technology as an opportunity to serve the needs of many lower and middle-class people.

One difficulty in determining whether a particular lay activity impermissibly intrudes into the sphere reserved for lawyers is defining what constitutes the practice of law. Our profession may

<sup>20</sup> See [www.desktoplawyer.net](http://www.desktoplawyer.net).

be quite adept at giving legal advice, but it has never been very good at defining it. The 1969 Model Code of Professional Responsibility expressly noted the difficulty of giving a comprehensive definition of the practice of law, but gave the following explanation:

Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. *The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client . . .*<sup>21</sup> (Emphasis added).

The Model Rules of Professional Conduct did not even attempt this much of a definition, stating the obvious: "The definition of the practice of law is established by law and varies from one jurisdiction to another. *Whatever the definition*, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."<sup>22</sup> (Emphasis added). Of course, having a vague definition for the practice of law has had its benefits. It has given the legal profession a great deal of flexibility to ward off any incursions by potential economic competitors, such as real estate agents, bankers, accountants, and insurance adjusters. On the other hand, the ambiguity of the definition may make it difficult to enforce against innovative uses of technology.

Although there is little evidence that the availability of these personalized online document services has yet penetrated the market to any significant extent, it is likely that, in the near future, we will need to consider whether these automated systems for preparing legal documents pose regulatory concerns. I think the profession will have to think seriously about three questions. First, is such activity the "practice of law" under existing precedent? Second, assuming such activity would meet that definition, would application of state laws to such activity pass constitutional muster? Third, even assuming that the activities of these legal information providers could be legally and constitutionally regulated, as a matter of social policy,

<sup>21</sup> MODEL CODE OF PROF'L RESPONSIBILITY, EC 3-5 (Lexis 2002).

<sup>22</sup> MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt 1 (Lexis 2002).

should the organized bar seek to regulate this activity at all?<sup>23</sup>

As to the first question, the courts have consistently taken the position that selecting which form to use, giving advice about which information ought to be included in a form, or soliciting information from a layperson and then making determinations about how to use the information in the form is the equivalent of practicing law. On the other hand, merely serving as a scrivener is not. Indeed, the distinction that courts and bar opinions have drawn with respect to the creation of attorney-client relationships—the difference between general legal information and specific legal advice—is the same one used to define whether a layperson is practicing law.

Although I cannot predict with any degree of certainty how the courts would react to an unauthorized practice of law claim brought against an on-line document preparer, one recent case provides insight on this issue. In *Unauthorized Practice of Law Committee v. Parsons Technology*,<sup>24</sup> a federal district court held that the sale of the CD-ROM “Quicken Family Lawyer” in Texas violated the state’s unauthorized practice of law statute. The CD-ROM enabled consumers to prepare their own wills or other simple legal documents by using the forms and instructions provided. Judge Barefoot Sanders concluded that the software “purports to select” the appropriate legal document, “customizes the documents,” and “creates an air of reliability about the documents, which increases the likelihood that an individual user will be misled into relying on them.”<sup>25</sup> The fact that the product also contained a disclaimer had little influence on the district court. The district court’s order, which barred sale of Quicken Family Lawyer in Texas, sparked immediate controversy,<sup>26</sup> and a vigorous lobbying campaign persuaded the Texas State Legislature to amend its unauthorized practice of

<sup>23</sup> I discuss these issues in greater detail in, Catherine Lanctot, *What Needs Fixing?: Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 826-30 (2002).

<sup>24</sup> 1999 U.S. Dist. LEXIS 813 (N.D. Tex. Jan. 22, 1999), *vacated by* 179 F.3d 956 (5th Cir. 1999).

<sup>25</sup> *Id.* at 18 (noting that based on Texas statute interpretations, this website fell within range of conduct Texas courts determined unauthorized practice of law).

<sup>26</sup> *See, e.g.*, Wendy R. Leibowitz, *Lawyers, \$15.95 A Box*, NAT’L L.J. at A18 (Feb. 22, 1999) (asserting dangers of this practice such as conflict of interest with existing clients; different jurisdictional laws; and inadvertent attorney liability by forming attorney-client relationship).

law statute to permit software like Quicken Family Lawyer.<sup>27</sup> In response, the United States Court of Appeals for the Fifth Circuit vacated and remanded the district court's opinion in *Parsons*.<sup>28</sup>

I expect more cases like *Parsons* to emerge as consumers avail themselves of the new technology to avoid the need to resort to lawyers to obtain basic legal documents. Moreover, the fact that the Texas legislature felt it necessary to amend its unauthorized practice of law statute to insulate *Parsons* from liability suggests that similar statutes in other states could be applied to websites that produce legal documents. In my view, there is ample case law to support the proposition that a layperson that is paid to assist another in making decisions about how to prepare a legal document is engaged in the unauthorized practice of law. Thus, as to the first question I posed, I believe that if bar regulators wanted to, they could use existing statutes and case law to pursue online document providers for engaging in the unauthorized practice of law.

Having said that, however, I hasten to add that the answer to the second question, whether applying such precedent to online activity would be constitutional, is far less clear. The First Amendment has been raised repeatedly in defense of the rights of lay people to provide legal information to others, with some success. Such a constitutional argument was raised in the District court proceedings of the *Parsons* case, and was unsuccessful, although the court admitted that the question was close.<sup>29</sup> I agree that the question is close, but I think it is quite possible that aggressive enforcement of the unauthorized practice of law statutes against online document preparers could run into serious constitutional problems. Resolution of the issue will hinge largely on the distinction between general legal information or opinions about the law, which presumably is

<sup>27</sup> As ultimately adopted, the amendment to sec. 81.101 read as follows: "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] 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." H.B. 1507, 76th Leg., Reg. Sess. (Tex. 1999).

<sup>28</sup> *Unauthorized Practice of Law Committee v. Parsons Tech. Inc.*, 179 F.3d 956 (5th Cir. 1999) (remanding case in light of amended Texas law's new definition of "practice of law").

<sup>29</sup> *Parsons*, 1999 U.S. Dist. LEXIS 813, at \*29 ("While the Court recognizes that the issue is close, it is of the opinion that the Statute does not 'substantially burden' more speech than necessary . . .").

protected by the First Amendment, and specific legal advice tailored to a unique set of facts, which presumably is not.

The bar presumably would contend that selling particularized legal documents to lay people either could be regulated constitutionally as conduct rather than speech, or because such regulation would not be targeted at the content of the speech but rather at the harms to consumers from unlicensed entrepreneurs purporting to provide legal advice. One difficulty that is likely to emerge, however, is that statutes that suppress some free speech ordinarily must be tailored to be no more burdensome than necessary. Here, the historic inability of the bar to define the practice of law may prove to be an insurmountable weakness. Enforcing an unauthorized practice of law statute against an online legal document provider could be difficult if the scope of what constitutes a violation of that statute cannot adequately be defined. These constitutional questions plainly merit additional study and debate, but they may pose substantial barriers to any enforcement efforts brought against advice-givers in cyberspace.

The third question, then, is this: Even assuming that these websites could be suppressed by aggressive enforcement of the unauthorized practice of law statutes, and that those statutes could withstand constitutional attack, should the organized bar pursue such an enforcement strategy? I do not pretend to know the answer to this question, although I believe it merits far more debate than has been heard to date. I worry about the prospect of an unregulated new industry marketing what are clearly legal services to unsuspecting lay consumers. There are real consumer protection issues that we cannot simply ignore by terming all bar attempts to regulate unauthorized practice of law as nothing but economic protectionism. The information given may be false or misleading. The forms may be outdated or not suitable for use for a particular set of facts. There is no follow-up to ensure that the appropriate documents were used, or whether additional assistance was necessary. Consumers themselves may be misled into thinking that they have resolved their legal difficulties without realizing that the documents they have paid for are woefully incomplete. Finally, we have no way of knowing how courts will react five or ten years from now, when the first dot.com wills are probated and turn out to have been inadequate. For these reasons, I believe it is essential for us as a profession to



think seriously about how we are going to address the proliferation of these services.

On the other hand, I often wonder whether we have brought this issue on ourselves by neglecting to provide legal services to large segments of the population. My experience in discussing this issue with lay entrepreneurs who provide legal information on the Internet has been somewhat troubling. Some non-lawyers have openly announced their intent to put many lawyers out of business, particularly solo practitioners, by providing uncomplicated legal services more quickly and more cheaply than lawyers do. Much of this hubris came before the dotcom slowdown of the last year, but I think the mentality remains the same. The persistent theme of those who advocate such a broad change in the delivery of legal services is that the legal profession has essentially abdicated its responsibility to meet the basic legal needs of ordinary people at an affordable rate, and thus has left an unserved market ripe for the picking. These advocates further argue, with some historical justification, that the legal profession's insistence on labeling all kinds of routine activities to be the "practice of law" has been nothing but economic protectionism. The mantra for these advocates has been "empowering consumers" to represent themselves.

Although these critics of the legal profession make some valid points, I continue to question the underlying premise of their argument. The suggestion that the average middle class consumer would be better off representing himself, or herself, in simple legal matters is, in my view, simply wrong. The medical profession also had been pressed in recent years to facilitate patient autonomy, but this has not meant a move to enabling the average layperson to remove his own appendix in the privacy of his own home. Self-representation is hardly an unqualified good, and representation by competent lawyers is hardly an unqualified evil. It seems illogical to suggest that the appropriate societal response to the unmet legal needs of millions of Americans is to tell them to represent themselves. The fact of the matter is that legal principles are often opaque, and factual scenarios often complex, and that using boilerplate legal documents as a one-size-fits-all response to common legal problems is hardly an effective solution to the unmet legal needs of most consumers.

The phenomenon of lay advice giving in cyberspace is only the tip of the iceberg. The larger problem, as we well know, is the ongoing inability of the legal profession to serve the needs of millions of lower income and middle income consumers, who cannot afford the legal services they require. The solution to that problem is not for the legal profession simply to abdicate any responsibility for those needs, and to relegate those people to legal self-help or to purchase boilerplate forms from on-line providers. At a minimum, we ought to consider whether other options short of deregulating the market for basic legal services would be more effective for those consumers, and more protective of their rights and interests.

This overview of how legal advice is being given in cyberspace demonstrates how the emergence of new technology may force the legal profession to reevaluate its function in the twenty-first century. The questions that emerge from this phenomenon go to the very heart of what we do as a profession. In particular, we need to think about what we offer to lay people, and whether the services that traditionally had been performed by lawyers in the past will continue to be performed by lawyers in the future. We will have to explain what it is lawyers offer that cannot be offered faster and more cheaply by lay people. We may be called upon to define the core of what we do.

We are not mere legal content providers. We bring our educated and informed judgment to bear on a set of complex facts. We do so while offering the recipient of that legal advice the promise of loyalty, confidentiality, competency, and unswerving devotion to his or her lawful objectives. It is that role that lawyers have served in the past, and the one that lawyers will continue to serve, even in the brave new world of cyberspace.

