

Unauthorized Practice of Law Claims Against LegalZoom—Who Do These Lawsuits Protect, and is the Rule Outdated?

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INTRODUCTION

Hypothetical 1: It is a rainy day and you need to get from your apartment to an appointment quickly. You could go outside, brave the elements, and look for a taxi. But it might be awhile until you spot one. And even then, when you think you've found one, the light might not be on—it could be busy. Not to mention the fact that taxis can be expensive, and the rates go up with traffic. Alternatively, you could order an Uber. The Uber has an upfront price, it will come straight to your door, and you do not need to embarrassingly flail your arms and sprint in the streets to hail it.

Hypothetical 2: You have just come up with an amazing invention in a not-so-great economy and want to get a patent as soon as possible. You could try to find a patent lawyer, asking around for recommendations and doing research on qualified lawyers in your area. This could take a while. And even if you do find one you like the lawyer could be too busy to take you on as a client. Not to mention the fact that lawyers can be expensive, and that you might incur a substantial amount of unanticipated charges. Alternatively, you could use LegalZoom. LegalZoom provides a set price for registering a patent, you can do it from your couch, and best of all, you do not need to interact with a lawyer.

The hypotheticals above are meant to illustrate how developments in technology have drastically changed the ways many businesses operate and how consumers have come to demand more easily accessible and less expensive services.¹ Perhaps most apparently, these changes have affected simple business models like transportation in Hypothetical 1, food delivery, and booking a spin class. But they also have touched complex industries where business is typically conducted by licensed professionals, like the legal services described in

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1. See Jochen Wirtz, *How Tech and the Focused Service Model Are Transforming the Service Sector*, FORBES, (Mar. 12, 2018), <https://www.forbes.com/sites/nusbusinessschool/2018/03/12/how-tech-and-the-focused-service-model-are-transforming-the-service-sector/#7722ebb2397a> [<https://perma.cc/Z3YW-KVM3>].

Hypothetical 2.² Unsurprisingly then, numerous companies are trying to use technology to disrupt the legal industry to provide cheaper and more convenient legal services to consumers. A recent study conducted by Harris Poll of over 2,000 adults in the United States showed that 76% of respondents aged 18–54 said “they were willing to use online legal services for legal issues if it would save them money.”³

Based on the facts above, one might think that lawyers working on less complex matters for smaller clients will inevitably be edged out by these online legal services. However, Rule 5.5 of the Model Rules of Professional Conduct published by the American Bar Association, the restriction on the unauthorized practice of law, has served as a roadblock, halting the complete overthrow of traditional legal services,⁴ and highlights some of the ethical issues surrounding whether these online legal services are an adequate substitute to traditional legal services. Although there are multiple providers of online legal services,⁵ this Note will look specifically at LegalZoom, which has faced a number of unauthorized practice of law challenges.⁶ The different lawsuits regarding this issue that LegalZoom has faced and continues to face raise interesting questions of whom the restriction on the unauthorized practice of law is meant to protect, what the rule seeks to achieve, and whether it has been successful in its goals.

This Note examines three recent unauthorized practice of law allegations involving LegalZoom, which have involved dissimilar parties opposing LegalZoom and which have unfolded in very different ways. The first lawsuit discussed is *LegalZoom v. North Carolina State Bar*.⁷ In this case, LegalZoom brought an action against the North Carolina State Bar in response to their cease and desist letters to LegalZoom on the basis that it was operating illegally and engaged in the unauthorized practice of law.⁸ The second case discussed is *Janson v.*

2. Another example of a complex industry where business is typically conducted by licensed professionals is financial advising. A growing number of financial services companies are providing consumers the option to use robo-advisors to create and manage their stock portfolios. See Tara Siegel Bernard, *Robo-Advisers for Investors Are Not One-Size-Fits-All*, N.Y. TIMES, (Jan. 26, 2016), <https://www.nytimes.com/2016/01/23/your-money/robo-advisers-for-investors-are-not-one-size-fits-all.html> [<https://perma.cc/ATP3-NXE5>].

3. ALM Media, *Survey: 69 Percent of People Would Use Online Legal Services Over Attorneys*, YAHOO FINANCE (Dec. 12, 2018), <https://finance.yahoo.com/news/survey-69-percent-people-online-163048715.html> [<https://perma.cc/PNK9-HRMF>].

4. Cf. Emily McClure, *LegalZoom and Online Legal Service Providers: Is the Development and Sale of Interactive Questionnaires That Generate Legal Documents the Unauthorized Practice of Law?*, 105 KY. L.J. 563, 573 (2017) (discussing a number of cases where unauthorized practice of law claims have been brought against online legal providers).

5. Other companies that provide legal services comparable to those provided by LegalZoom include RocketLawyer, Bridge US, and Modria. Margaret Hagan, *The User Experience of the Internet as a Legal Help Service: Defining Standards for the Next Generation of User-Friendly Online Legal Services*, 20 VA. J.L. & TECH. 394, 413 (2016).

6. McClure, *supra* note 4, at 573.

7. *LegalZoom.com v. N.C. State Bar*, No. 11CVS15111, 2011 WL 8424700 (N.C. Super. Ct. Sept. 30, 2011).

8. *Id.* at *2-5.

LegalZoom, which was a class action brought in Missouri by customers of LegalZoom against the company for charging consumers while allegedly engaged in the unauthorized practice of law.⁹ The third case examined is *LegalForce v. LegalZoom*, a case brought by a California IP firm against LegalZoom as well as codefendants United States Patent & Trademark Office, the State Bar of California, the State Bar of Arizona, and the State Bar of Texas.¹⁰ In this still ongoing lawsuit, the plaintiffs assert that LegalZoom is engaged in large scale unauthorized practice of law and that regulators have turned a blind eye.¹¹

After the discussion of the unauthorized practice of law cases against LegalZoom, this Note will discuss two policy issues related to the unauthorized practice of law. The first issue addressed is who the ban on the unauthorized practice of law rule actually protects. The second issue is whether the rules should be updated to allow for technological companies like LegalZoom to provide consumers with certain legal services.

Part I of this Note will provide relevant background information on how LegalZoom's online legal services work, as well as provide a basic overview on restrictions of the unauthorized practice of law. Part II of the Note will examine the aforementioned unauthorized practice of law lawsuits against LegalZoom in North Carolina, Missouri, and California. Part III will compare and contrast the policy concerns raised in these different cases, and which concerns have the most merit.

I. A BRIEF BACKGROUND

This background is meant to provide a very rudimentary understanding of the way that LegalZoom's services function, as well as explain the purpose and background of ABA Model Rule 5.5's restriction on the unauthorized practice of law.

A. HOW DOES LEGALZOOM WORK?

LegalZoom was founded in 1999, when the rising popularity of the internet inspired many individuals to utilize new technologies and the web to create new types of business models.¹² LegalZoom's platform offers online interactive legal documents, subscription legal plans, and registered agent services.¹³ LegalZoom's services were designed to be an affordable alternative to traditional legal services for small businesses and individual consumers.¹⁴

9. *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1053 (W.D. Mo. 2011).

10. *LegalForce RAPC Worldwide v. LegalZoom.com*, No. 5:17-cv-7194, 2017 WL 6505183, at 2 (N.D. Cal. Dec. 19, 2017).

11. *Id.* at 96-104.

12. See *About Us*, LEGALZOOM, <https://www.legalzoom.com/about-us> [<https://perma.cc/6PSS-VXTD>] (last visited Jan. 15, 2019).

13. LegalZoom.com, Inc., Registration Statement p. 1 (Form S-1) (May 10, 2012).

14. See *About Us*, LEGALZOOM (last visited Jan. 15, 2019), <https://www.legalzoom.com/about-us> [<https://perma.cc/6PSS-VXTD>].

The interactive legal document service is a large portion of LegalZoom's business.¹⁵ For small businesses, LegalZoom provides interactive legal documents that consumers can use for incorporation of their business, registering business names, applying for patents and copyrights, amongst other things.¹⁶ For individual consumers, some of the interactive legal documents LegalZoom provides include last will and testament, power of attorney, living will, living trust, uncontested divorce, and name change.¹⁷ The interactive legal documents are created through a three-step process.¹⁸ First, "customers complete an online questionnaire that uses conditional, rules-based logic to personalize questions based on earlier responses."¹⁹ Second, LegalZoom employees review the customer's "responses for spelling, grammar, and completeness."²⁰ Third, the LegalZoom software "generates a final document tailored, as applicable, to the appropriate federal, state, or local jurisdiction" and prints the final copy to send to the customer or the appropriate government agency when a filing is required.²¹ The system automatically notifies customers of the status of their documents.²²

While a user of LegalZoom's services might understandably construe the interactive document service as a form of legal advice, in its Terms of Use, LegalZoom proffers numerous disclaimers on why its services cannot be relied upon for that purpose:

At no time do we review your answers for legal sufficiency, draw legal conclusions, provide legal advice, opinions or recommendations about your legal rights, remedies, defenses, options, selection of forms, or strategies, or apply the law to the facts of your particular situation. LegalZoom is not a law firm and may not perform services performed by an attorney. LegalZoom, its Services, and its forms or templates are not a substitute for the advice or services of an attorney LegalZoom strives to keep its legal documents accurate, current and up-to-date. However, because the law changes rapidly, LegalZoom cannot guarantee that all of the information on the Site or Applications is completely current. The law is different from jurisdiction to jurisdiction, and may be subject to interpretation by different courts. The law is a personal matter, and no general information or legal tool like the kind LegalZoom provides can fit every circumstance. Furthermore, the legal information contained on the Site and Applications is not legal advice and is not guaranteed to be correct, complete or up-to-date. Therefore, if you need legal advice for your specific problem, or if your specific problem is too complex to

15. See LegalZoom.com, Inc., Registration Statement p. 1 (Form S-1) (May 10, 2012).

16. *Id.* at p. 65.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

be addressed by our tools, you should consult a licensed attorney in your area.²³

In the Terms of Use, LegalZoom purports that the company does not offer legal advice or any services meant to be performed by an attorney.²⁴ However, simply stating this policy does not necessarily make it true, and obvious tensions exist between the fine print and how a rational consumer would expect to rely on LegalZoom. This will be discussed more in the Part III discussion on policy.

B. UNAUTHORIZED PRACTICE OF LAW RULES: ORIGINS AND RATIONALE

In assessing whether LegalZoom engages in the unauthorized practice of law, it is important to understand ABA Model Rule 5.5(b) and what it seeks to achieve. ABA Model Rule 5.5(b) holds that:

A lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.²⁵

For over a century, the American legal profession has placed restrictions on who may practice law.²⁶ This rule was initially concerned with individuals fraudulently representing themselves as lawyers, but it has also evolved in response to technological changes which threatened to disrupt the channels of legal advice in far-reaching ways.²⁷

Advancements in technology seem to create new anxieties surrounding the unauthorized practice of law, and one early example of this took place when the radio became popular in America.²⁸ In the 1930s, NBC broadcast a national radio show called *The Good Will Court* where individuals brought their legal issues to a panel of judges who would respond to these inquiries with legal advice.²⁹ Although the show disclaimed to listeners that the legal advice on the show should not be treated as a replacement for advice from a lawyer, the ABA Committee on Professional Ethics and Grievances denounced the program.³⁰

23. *Terms of Use*, LEGALZOOM, <https://www.legalzoom.com/legal/general-terms/terms-of-use> [https://perma.cc/2QUA-T983] (last visited on Jan. 15, 2019).

24. *Id.*

25. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2016).

26. Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 579–80 (1989) (“At least as early as 1899, the New York Penal Code prohibited anyone from practicing as an attorney or making it a business to practice as such ‘without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state.’”).

27. See Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 147–48 (1999).

28. *Id.* at 200.

29. *Id.* at 202.

30. *Id.* at 210.

They condemned the show, saying that listeners would detrimentally rely on legal counsel from the show when in reality the advice might be inappropriate for listeners' specific legal situations.³¹ These lawyers brought their complaints about The Good Will Court to the New York Appellate Division, which responded by prohibiting lawyers and judges from appearing on the show which effectively ended the broadcast program.³² Although The Good Will Court did not survive, the case signaled that the future of the legal profession would be full of challenges posed by technologies that disrupted traditional modes of providing legal advice. The case also illustrated the dual motivations behind unauthorized practice of law rules: concern with protecting the public from unqualified legal advice and to act as an anti-competition safeguard for lawyers.

There are many legitimate policy reasons for the restrictions against the unauthorized practice of law. These reasons include "preserving and strengthening the lawyer-client relationship"³³ and protecting "the public from being advised and represented in legal matters by unqualified and undisciplined persons over whom the judicial department could exercise slight or no control."³⁴ The functioning of the legal system would not be possible without the privileges afforded to and obligations imposed on lawyers when they enter into a formal attorney-client relationship. The formation of an attorney-client relationship subjects a lawyer to "duties of care, loyalty, confidentiality, and communication, duties enforceable by the client and through disciplinary sanctions."³⁵ An individual receiving legal advice from an individual or entity not authorized to practice law would therefore not be afforded the protections of an attorney-client relationship, which is a serious reason why the unauthorized practice of law could end up being problematic for people seeking legal advice. The other chief reason behind the policy requiring a license to practice law is to ensure that an individual rendering legal services is competent and that the public is not injured by individuals who are not qualified to provide the services for which they are charging people.³⁶

Despite the legitimate interests that unauthorized practice of law statutes protect, some critics have rebuked these rules for several reasons. One chief reason is that these rules inhibit innovation in the legal industry.³⁷ Another major critique is that the bar's purpose in the promulgation of these rules has more to do with protecting lawyers' economic interests than with concerns for the public.³⁸

31. *Id.* at 204–07.

32. *Id.* at 212.

33. Duke University School of Law, *Unauthorized Practice of Law: Supreme Court Holds States Cannot Restrict Authorized Activities of Nonlawyer Patent Office Practitioner Source*, 1964 DUKE L.J. 190, 192–93.

34. *W. Va. State Bar v. Earley*, 109 S.E.2d 420, 424 (W. Va. 1959).

35. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 2, intro. note (AM. LAW INST. 2000).

36. *Earley*, 109 S.E.2d at 436.

37. See Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1695 (2008).

38. See Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 154 (2010).

It is ironic, given the zealous policing of unauthorized practice of law, that there is not a strong consensus for defining what the practice of law actually is. Comment 2 to Rule 5.5 in the *Model Rules* says that the definition of practice of law is jurisdiction specific and therefore a flexible construct.³⁹ This amorphous standard makes sense given the fact that “the boundaries of the practice of law are unclear and have been prone to vary over time and geography,”⁴⁰ and also because the multifaceted nature of providing legal services makes it difficult to render an exhaustive list of everything the lawyer does in one definition.⁴¹ However, overly broad or vague definitions of the practice of law can be detrimental in that they allow lawyers to monopolize certain activities for their own gain⁴² and stifle the innovation of affordable alternatives in the world of legal services.⁴³

II. UNAUTHORIZED PRACTICE OF LAW CHALLENGES TO LEGALZOOM

Numerous plaintiffs have challenged LegalZoom in court, alleging that the company engages in the unauthorized practice of law. Because each state promulgates its own rule regarding the unauthorized practice of law, there is no universal consensus on the issue and courts have taken broad discretion in deciding these matters. Accordingly, LegalZoom has been involved in a “whack-a-mole” type of litigation, having to face each challenger that pops up in a new jurisdiction. The following examples about actions that took place in North Carolina, Missouri, and California demonstrate how different constituents interpret unauthorized practice of law statutes, and how they have sought to protect their interests against LegalZoom.

A. NORTH CAROLINA

One of LegalZoom’s unauthorized practice of law disputes took place in North Carolina in an action against the State Bar of North Carolina.⁴⁴ In 2003, the bar first looked into LegalZoom but brought no action.⁴⁵ Then, in 2007 it reopened an

39. MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 2 (AM. BAR ASS’N 2018) (“The definition of the practice of law is established by law and varies from one jurisdiction to another.”).

40. DEP’T OF JUSTICE & FED. TRADE COMM’N, Comment Letter on the American Bar Association’s Proposed Model Definition of the Practice of Law (Dec. 20, 2002), at 2, <https://www.justice.gov/atr/comments-american-bar-associations-proposed-model-definition-practice-law> [<https://perma.cc/5B63-PZ5D>].

41. State Bar of Ariz. v. Ariz. Land Title & Tr. Co., 366 P.2d 1, 8–9 (1961), *opinion supplemented on denial of reh’g*, 371 P.2d 1020 (1962).

42. DEP’T OF JUSTICE & FED. TRADE COMM’N, Comment Letter on the American Bar Association’s Proposed Model Definition of the Practice of Law (Dec. 20, 2002), at 3, <https://www.justice.gov/atr/comments-american-bar-associations-proposed-model-definition-practice-law> [<https://perma.cc/5B63-PZ5D>].

43. Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y. U. J.L. & BUS. 1, 51 (2012).

44. See *LegalZoom.com v. N.C. State Bar*, No. 11CVS15111, 2011 WL 8424700 (N.C. Super. Ct. Sept. 30, 2011).

45. Daniel Fisher, *LegalZoom Settles Fight with North Carolina Bar over Online Law*, FORBES (Oct. 22, 2015), <https://www.forbes.com/sites/danielfisher/2015/10/22/legalzoom-settles-fight-with-north-carolina-bar-over-online-law/#1080b74d3eb2> [<https://perma.cc/2N4T-FDWX>].

investigation and in 2008 issued a cease and desist letter asserting that LegalZoom's activities in the state constituted the unauthorized practice of law and therefore the company was operating illegally.⁴⁶ LegalZoom did not stop its activities, and subsequently filed an action against the Bar for relief because the Bar had refused to register the company's prepaid legal plans.⁴⁷

In the ensuing litigation, the Superior Court of North Carolina considered whether LegalZoom's activities constituted the practice of law, looking specifically into whether their services fell into two well-known exceptions to this rule.⁴⁸ The first exception considered was the "self-help" exception, and the court examined whether LegalZoom is merely a tool for people engaged in self-representation.⁴⁹ The second exception that the court assessed was the "scrivener's exception," which allows unlicensed individuals to record information provided by another individual without engaging in the unauthorized practice of law "as long as they do not also provide advice or express legal judgments."⁵⁰ The State Bar argued that LegalZoom's activities did not fall into these exceptions because its software system, which contained conditional logic based on earlier responses, does require professional legal judgment, and compared LegalZoom's questionnaires to a lawyer interviewing a client and choosing follow-up questions based on the client's response.⁵¹ In its opinion in 2014, the North Carolina court did not reach a definitive conclusion based on these arguments, holding that a more developed factual record was necessary to reach a decision on the unauthorized practice of law.⁵²

Around the same time that the North Carolina court was considering the LegalZoom-State Bar dispute, another case of particular interest to LegalZoom, which also originated in North Carolina, was making its way to the Supreme Court, *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.⁵³ This case involved the issue of whether the North Carolina State Board of Dental Examiners, a statutorily created agency that regulated the practice of dentistry in the state, was in violation of federal antitrust laws when it issued cease and desist letters to non-dentists offering teeth whitening services.⁵⁴ LegalZoom filed an *amicus curiae* brief in support of the Federal Trade

46. Complaint at 26, *LegalZoom.com v. N.C. State Bar*, No. 11CVS15111, 2011 WL 8424700 (N.C. Super. Ct. Sept. 30, 2011).

47. Complaint at 1, *LegalZoom.com v. N.C. State Bar*, No. 11CVS15111, 2011 WL 8424700 (N.C. Super. Ct. Sept. 30, 2011).

48. *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11CVS15111, 2014 WL 1213242 at *12 (N.C. Super. Ct. Mar. 24, 2014).

49. *Id.*

50. *Id.*

51. *Id.* at *5.

52. *Id.* at *10.

53. *N.C. State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101 (2015).

54. *Id.* at 1104.

Commission.⁵⁵ The Supreme Court cited the precedent *Parker v. Brown* for the proposition that state regulatory bodies are immune from antitrust actions when a state acts to regulate activity within its boundaries.⁵⁶ However, when a regulatory body is made up of market participants, their actions are lawful only so much as they further state policy, and they can only claim immunity if they are subject to active supervision by the state.⁵⁷ Because the Board of Dental Examiners was a non-state regulatory body that was not subject to active supervision, they were not immune to antitrust actions.⁵⁸ Riding the coattails of this case, in 2015 LegalZoom filed a federal antitrust lawsuit against the North Carolina State Bar for its refusal to register prepaid legal plans.⁵⁹

Shortly after LegalZoom filed the antitrust lawsuit, the two parties went to the bargaining table where they developed a consent agreement in an attempt to end their years-long dispute.⁶⁰ The compromise that was reached required LegalZoom to agree to three things: (1) to have North Carolina lawyers evaluate all the documents they offer in the state; (2) to allow customers to view the full text of blank document templates before being charged; and (3) to inform customers that forms are not substitutes for an attorney.⁶¹ The Bar then agreed to support a state law to clarify some ambiguities regarding the definition of unauthorized practice of law.⁶² The General Assembly of North Carolina did subsequently pass in 2015 “An Act to Further Define the Term ‘Practice Law’ For the Purpose of Protecting Members of the Public From Harm Resulting From the Unauthorized Practice of Law,” codified in North Carolina General Statute section 84-2.2.⁶³ This section provides that the definition of the practice of law “does not include the operation of a Web site by a provider that offers consumers access to interactive software that generates a legal document based on the consumer’s answers to questions presented by the software. . . .”⁶⁴ The rule also imposes the same conditions that the consent agreement required from LegalZoom, such as to have a North Carolina licensed attorney review the templates before offering them, disclosing that the services are not a substitute for an attorney, etc.⁶⁵

55. Brief for Legalzoom.com, Inc. as Amici Curiae Supporting Respondent, N.C. State Bd. of Dental Examiners v. FTC., 135 S. Ct. 1101 (2015) (No. 13-534).

56. *N.C. State Bd. of Dental Examiners*, 135 S. Ct. at 1104–05.

57. *Id.* at 1116–17.

58. *Id.* at 1103.

59. See Fisher, *supra* note 45.

60. *Id.*

61. *Id.*

62. See *id.*

63. N.C. GEN. STAT. §84-2.2.

64. *Id.*

65. *Id.*

B. MISSOURI

LegalZoom also faced a legal dispute in Missouri.⁶⁶ The case was settled out of court, with LegalZoom allowed to keep operating after meeting certain requirements to change its business.⁶⁷ However, the trial court's denial of LegalZoom's motion for summary judgment on the issue of unauthorized practice of law demonstrated that it was very plausible that LegalZoom could have been found guilty of the plaintiffs' allegations. The plaintiffs in the Missouri case, *Janson v. LegalZoom*, were not lawyers or a bar association, but rather a class of individuals who had purchased services from LegalZoom and sued for unauthorized practice of law. The plaintiffs did not allege that LegalZoom's documents were defective,⁶⁸ but rather asserted that the money the plaintiffs paid LegalZoom "was not used for their benefit because LegalZoom is not authorized to engage in the lawful practice of law in the State of Missouri."⁶⁹

In this case, the court once again analyzed the theory that LegalZoom's services fell under the self-help exemption regarding the unauthorized practice of law, that their services were simply a tool for consumers to engage in *pro se* representation.⁷⁰ The court recognized that this exemption could apply when consumers downloaded and printed LegalZoom's forms to fill out themselves but drew a distinction when consumers used the online software.⁷¹ The court noted the representations that LegalZoom made in advertisements and its website remove it from the realm of self-help, discussing the nature of the online document preparation:

LegalZoom says: 'Just answer a few simple online questions and LegalZoom takes over. You get a quality legal document filed for you by real helpful people.' . . . Thus, LegalZoom's internet portal sells more than merely a good (i.e., a kit for self help) but also a service (i.e., preparing that legal document). Because those that provide that service are not authorized to practice law in Missouri, there is a clear risk of the public being served in legal matters by 'incompetent or unreliable persons.'⁷²

As stated in the excerpt above, the Missouri court paid particular attention to the role that humans play at LegalZoom and noted the various stages where LegalZoom employees intervene in these self-help services, asserting that this human intervention, and not the internet medium, created the unauthorized

66. *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053 (W.D. Mo. 2011).

67. Debra Cassens Weiss, *LegalZoom Can Continue to Offer Documents in Missouri Under Proposed Settlement*, ABA JOURNAL (Aug. 23, 2011), http://www.abajournal.com/news/article/legalzoom_can_continue_to_offer_documents_in_missouri_under_proposed_settle/ [<https://perma.cc/BDV9-39H7>].

68. *Janson*, 802 F. Supp. 2d at 1057.

69. *Id.*

70. *Id.* at 1063.

71. *Id.*

72. *Id.* at 1064.

practice of law issue.⁷³ The first major aspect in which individuals are involved is when an employee creates the template itself, and the court said there is no difference between the LegalZoom document preparation and “a lawyer in Missouri asking a client a series of questions and then preparing a legal document based on the answers provided and applicable Missouri law.”⁷⁴ The court also pointed out the human intervention that occurs after the consumer has filled out the form: employees review files for completeness, spelling and grammar, consistency, factual issues, formatting, and printing and shipping the form.⁷⁵ The court asserted that this human involvement by those unauthorized to practice the law poses a risk that an incompetent or unqualified person may be involved in the creation of this legal document to the detriment of the consumer.⁷⁶

In its denial of summary judgment in favor of LegalZoom, the court held that, under LegalZoom’s then business model, a reasonable juror could find that LegalZoom engaged in the unauthorized practice of law. However, before the trial court ruled on the merits, the case was settled, and LegalZoom agreed to provide compensation to plaintiffs and agreed to make certain business modifications.⁷⁷

C. CALIFORNIA

One of LegalZoom’s most recent disputes regarding whether it engages in the unauthorized practice of law is in *LegalForce v. LegalZoom*.⁷⁸ In December 2017, an IP lawyer filed a lawsuit against LegalZoom asserting that by engaging in the unauthorized practice of law, and by evading the regulatory costs associated with the traditional practice of law, LegalZoom is essentially able to be a monopoly.⁷⁹ One of LegalZoom’s services is IP related, and includes trademark and copyright registration services.⁸⁰ The complaint also names the United States Patent & Trademark Office and the state bars of California, Arizona, and Texas as “necessary defendants,” alleging that they essentially abet LegalZoom’s monopoly by allowing it to operate.⁸¹

73. *See id.*

74. *Id.* at 1065.

75. *Id.* at 1064.

76. *Id.*

77. The specific business modifications were not apparent in the public record, but presumably are similar to the modifications agreed to in the North Carolina case. *See Weiss, supra* note 67.

78. *LegalForce RAPC Worldwide v. LegalZoom.com*, No. 5:17-cv-7194, 2017 WL 6505183 (N.D. Cal. Dec. 19, 2017).

79. Samson Habte, *IP Firm Files \$60M Antitrust Suit vs. LegalZoom, State Bars*, BLOOMBERG LAW (Dec. 20, 2017), <https://biglawbusiness.com/ip-firm-files-60m-antitrust-suit-vs-legalzoom-state-bars> [<https://perma.cc/YHN4-KRG2>].

80. *See Intellectual Property*, LEGALZOOM, <https://www.legalzoom.com/business/intellectual-property/> [<https://perma.cc/8SBN-AK9C>] (last visited Jan. 15, 2019).

81. *See Habte, supra* note 79.

LegalForce's complaint makes an appeal to the court based on the investments, hurdles, and requirements necessary for an individual to be authorized to practice law, pointing out the inequity in the fact that LegalZoom is allowed to offer the same service yet bypass these onuses: "Attorneys who have spent years going through law school, taking a difficult bar exam . . . and performing conflict checks cannot effectively compete against non-law firm competitors like LegalZoom on an even playing field."⁸² The complaint also notes the compliance costs that LegalZoom is able to avoid, such as not having to purchase malpractice insurance or conduct conflict checks.⁸³

LegalForce is seeking \$60 million in damages and declaratory relief that would allow LegalForce to file patents similarly to LegalZoom, in essence, to remove red tape without liability for the unauthorized practice of law.⁸⁴ Some specific examples of what LegalForce is looking for in declaratory relief is that non-lawyer assistants at the firm be allowed to perform certain tasks regarding patent filing that would otherwise be the unauthorized practice of law, to not have to check for conflicts, and to sell forms for consumers to fill out themselves similarly to LegalZoom.⁸⁵

Although the *LegalForce* complaint raised many novel issues regarding LegalZoom and the unauthorized practice of law, resolution of this dispute will not take place in the court system.⁸⁶ This case is currently being arbitrated as the court found that when the plaintiff purchased services from LegalZoom (even for mere investigatory purposes), it became bound by the company's arbitration clause.⁸⁷

III. WHAT TO MAKE OF THESE CASES

Although all three of the cases above included unauthorized practice of law allegations against LegalZoom, these cases are extremely different and highlight some of the competing interests incident to the rule against the unauthorized practice of law. Two key issues raised are: (1) who is the unauthorized practice of law rule actually protecting, and (2) whether the current rules are appropriate in our modern society.

82. Complaint at ¶ 63, *LegalForce RAPC Worldwide v. LegalZoom.com*, No. 5:17-cv-7194, 2017 WL 6505183 (N.D. Cal. Dec. 19, 2017).

83. *Id.* at ¶ 83.

84. *See* Habte, *supra* note 79.

85. Complaint at Prayer for Relief Section, *LegalForce RAPC Worldwide v. LegalZoom.com*, No. 5:17-cv-7194, 2017 WL 6505183 (N.D. Cal. Dec. 19, 2017).

86. Kat Greene, *LegalZoom Can Arbitrate IP Firm's Ad, Competition Claims*, LAW360 (Apr. 10, 2018), <https://www-law360-com.proxygt-law.wrlc.org/articles/1032015/legalzoom-can-arbitrate-ip-firm-s-ad-competition-claims> [<https://perma.cc/3BT9-PXJZ>].

87. *Id.*

A. WHO IS THE BAN ON UNAUTHORIZED PRACTICE OF LAW PROTECTING?

The cases above against LegalZoom include a number of different players, including bar associations, independent lawyers, and consumers of legal services themselves. Despite their different motives and interests, they all brought unauthorized practice of law claims against LegalZoom.

Lawyers who bring unauthorized practice of law claims might sometimes be viewed as doing so for selfish purposes.⁸⁸ That is, that the rule gets invoked not to protect consumers, but rather to protect the bar's monopoly.⁸⁹ Both *North Carolina State Bar* and the *LegalForce* complaint involved lawyers asserting unauthorized practice of law claims against LegalZoom, and they demonstrated that the rule is essentially entangled with self-interest.⁹⁰ The *LegalForce* complaint reveals a large element of lawyer self-interest, as it asserts antitrust claims on the basis that by engaging in the unauthorized practice of law, LegalZoom can edge out competition.⁹¹ The concerns the plaintiff raises about why a LegalZoom monopoly should be prevented are primarily based on inequity to lawyers' investments, rather than out of a concern for the public.⁹² These claims also ignore the notion that competition in the legal market might be beneficial to the public by increasing the supply of legal resources available to consumers and driving down prices. This bolsters the proposition that "[t]he belief that lawyers are somehow above 'trade' is an anachronism."⁹³

Whether rules against unauthorized practice of law are effective anti-competitive measures is another issue. Indeed, this is illustrated in the distinctions between the *North Carolina State Bar* and *LegalForce* disputes. In *North Carolina State Bar*, LegalZoom accused the North Carolina Bar of being monopolistic for not letting it operate,⁹⁴ while in *LegalForce*, plaintiffs asserted in their complaint that LegalZoom was becoming a monopoly because the bar did not crack down on them for the unauthorized practice of law.⁹⁵ The differences in these two cases also demonstrate that bar associations might not always be protective towards traditional lawyering.

88. See Julee Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 144 (2000).

89. See *id.* at 122.

90. See *LegalForce RAPC Worldwide v. LegalZoom.com*, No. 5:17-cv-7194, 2017 WL 6505183 (N.D. Cal. Dec. 19, 2017); *LegalZoom.com v. N.C. State Bar*, No. 11CVS15111, 2011 WL 8424700 (N.C. Super. Ct. Sept. 30, 2011).

91. See *LegalForce RAPC Worldwide v. LegalZoom.com*, No. 5:17-cv-7194, 2017 WL 6505183 (N.D. Cal. Dec. 19, 2017).

92. *Id.*

93. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 350 (1977).

94. See *LegalZoom.com v. N.C. State Bar*, No. 11CVS15111, 2011 WL 8424700 (N.C. Super. Ct. Sept. 30, 2011).

95. See *LegalForce RAPC Worldwide v. LegalZoom.com*, No. 5:17-cv-7194, 2017 WL 6505183 (N.D. Cal. Dec. 19, 2017).

The more conventionally recognized beneficiaries of unauthorized practice of law rules, however, are consumers and the public at large. As discussed in Part I, there are a number of compelling policy reasons why strong unauthorized practice of law rules are necessary for the public benefit.⁹⁶ Two of these considerations that could potentially be undermined by services like LegalZoom are that (1) there is no real lawyer-client relationship, which creates trust as well as obligations on the lawyer's behalf; and (2) an unqualified individual might provide the legal services.⁹⁷ The *Janson* case against LegalZoom was brought by a class of individuals who had purchased the company's products and claimed to be harmed by the fact LegalZoom was engaged in the unauthorized practice of law.⁹⁸ The facts of that case are interesting when considering the policy intentions of the rule, because plaintiffs admitted that the documents had not been defective,⁹⁹ so the hazards associated with the second public policy reason for the unauthorized practice of law rule is not clearly met. Although the case was not decided on the merits, perhaps one could speculate that the plaintiffs' allegations that they were harmed by LegalZoom's engagement in the unauthorized practice of law does implicate the first policy consideration regarding lawyer-client relationships. That is, that plaintiffs were damaged by paying for legal services that did not provide the benefits of the lawyer-client relationship traditionally afforded to individuals who purchases legal services. Notably, because LegalZoom does not seem to have an ascertainable track record of harming the public in ways that the unauthorized practice of law rule seeks to prevent, assessing what public policy dangers might arise from LegalZoom's activities are largely hypothetical.

These different cases show that the unauthorized practice of law rules can be used by different types of parties to seek different ends. While the rule may conventionally be thought to be about protecting the public from incompetent legal service, it would be naïve not to recognize that the rule also is wielded as a weapon by lawyers to protect their own economic interests.

B. DO UNAUTHORIZED PRACTICE OF LAW RULES NEED TO BE UPDATED FOR THE TECHNOLOGICAL ERA?

As discussed in Part I, many states' unauthorized practice of law rules are very broad and not friendly to technological advancements. Critics have suggested this much about the *Model Rules* in general, asserting that "[t]he existing language and content of the Model Rules is outdated and does not account for technological advancement."¹⁰⁰ Additionally, both *North Carolina State Bar* and the *LegalForce* complaint reveal that rules against unauthorized practice of law must

96. See Part I.

97. *Id.*

98. *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1057 (W.D. Mo. 2011).

99. *Id.*

100. Katherine Medianik, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1497, 1501 (2018).

be updated or clarified in response to new technology, as they are inadequate in their current states.¹⁰¹

The Federal Trade Commission has also been a proponent of updating practice of law definitions in ways that would allow consumers to use technology that would otherwise be prohibited.¹⁰² As the agency entrusted with consumer protection, it noted that “overbroad scope-of-practice and unauthorized-practice-of-law-policies can potentially inhibit new ways of delivering legal services that may benefit consumers.”¹⁰³ In fact, when the North Carolina rule to update the definition of practice of law was proposed in the wake of the LegalZoom case there, the Federal Trade Commission, along with the Antitrust Division of the U.S. Department of Justice, wrote a comment letter that in general supported the General Assembly’s effort to allow the use of technology for certain legal services.¹⁰⁴ They suggested that updating the definition of the practice of law to exclude interactive software that generates legal documents can benefit consumers by being more cost effective, pressuring lawyers to reduce their costs, promoting more efficient and convenient legal services, and increasing access to legal services in general.¹⁰⁵ However, they also recognized certain risks to consumers by allowing this type of technology, and stated that express disclosures that the software is not a substitute for a lawyer are necessary.¹⁰⁶

The passing of North Carolina’s rule that included an exception to the practice of law definition demonstrated one way that updates to rules against the unauthorized practice of law can allow for consumers to use technology like LegalZoom for their simple legal needs. However, while a number of states have added exceptions to allow for interactive technologies like LegalZoom, most states do not provide these exceptions.¹⁰⁷ It can be expected that without updates to these rules, many more unauthorized practice of law claims will be brought against LegalZoom and its peers.

The *LegalForce* case suggests that updating unauthorized practice of law rules could also benefit more traditional law firms, in addition to companies like LegalZoom. The plaintiff in *LegalForce* said in an interview with Bloomberg Law that one goal of the lawsuit is for the law firm to be able to adopt

101. See *LegalForce RAPC Worldwide v. LegalZoom.com*, No. 5:17-cv-7194, 2017 WL 6505183 (N.D. Cal. Dec. 19, 2017); *LegalZoom.com v. N.C. State Bar*, No. 11CVS15111, 2011 WL 8424700 (N.C. Super. Ct. Sept. 30, 2011).

102. See Cristina L. Underwood, *Balancing Consumer Interests in A Digital Age: A New Approach to Regulating the Unauthorized Practice of Law*, 79 WASH. L. REV. 437, 445 (2004) (“The Federal Trade Commission (FTC) has also criticized state use of broad practice of law definitions for its failure to accommodate access to emerging technologies.”).

103. DEP’T OF JUSTICE & FED. TRADE COMM’N, Comment Letter on North Carolina HB 436 at 10 (June 10, 2016), <https://www.justice.gov/atr/file/866666/download> [https://perma.cc/3GR9-956H].

104. See *id.*

105. *Id.* at 2.

106. *Id.*

107. Underwood, *supra* note 102, at 446.

LegalZoom's model.¹⁰⁸ The complaint even "asks the court to declare that lawyers can sell form documents, like trademark applications, and 'employ non-lawyer assistants to recommend and advise' buyers on how to customize them" without being in violation of unauthorized practice of law rules.¹⁰⁹ This case thus shows that if unauthorized practice of law rules are amended to be less hostile to technology, it is not inevitable that traditional firms will go out of business because everyone will use services from LegalZoom. Rather, traditional law firms can also cut costs and increase efficiency that will enable them to compete with LegalZoom, which will ultimately benefit consumers.

There are a few arguments, however, for why unauthorized practice of law rules should not be updated to allow for companies like LegalZoom to operate. One of the strongest arguments is that some consumers may rely on these services without understanding that the documents they purchase may be of a lesser quality and less reliable than what they would get from a traditional lawyer. While LegalZoom explicitly states in its Terms of Use that legal documents purchased on their site may not be accurate, it is not likely that people are aware of this since very few people read the fine print.¹¹⁰ For this reason, even unauthorized practice of law rules that require certain disclosures be provided by online document providers regarding their sufficiency, such as the rule in North Carolina, may fail to protect consumers from relying on LegalZoom-type documents to their detriment.

The *Janson* case raises another consideration as to why updating unauthorized practice of law rules to allow services like LegalZoom to operate might have detrimental consequences: that employees involved in the creation of interactive legal documents might not be competent.¹¹¹ Requiring individuals to be competent and qualified when rendering legal services is the essential purpose on the restrictions of unauthorized practice of law.¹¹² Because no qualifications or licenses are necessary to be involved in the creation and quality checking of LegalZoom documents, there is a risk of incompetency or even dubious ethics. This risk is exacerbated by the fact that LegalZoom limits its liability in its Terms of Use, providing little option for recourse for customers that would be harmed by erroneous legal documents.¹¹³ Additionally, LegalZoom has an arbitration

108. See *Habte*, *supra* note 79.

109. *Id.*

110. A 2017 Deloitte study found that over 90% of people don't read terms of service and legal conditions before accepting. Caroline Cakebread, *You're Not Alone, No One Reads Terms of Service Agreements*, BUSINESS INSIDER (Nov. 15, 2017), <https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11> [<https://perma.cc/5AAP-HTGY>].

111. See McClure, *supra* note 4, at 581.

112. *Id.* ("The purpose of regulating the unauthorized practice of law is . . . to protect the public from incompetent or unreliable persons offering legal advice.").

113. *Terms of Use*, LEGALZOOM, <https://www.legalzoom.com/legal/general-terms/terms-of-use> [<https://perma.cc/2QUA-T983>] (last visited on Jan. 15, 2019).

clause for customers that purchase their services.¹¹⁴ Since LegalZoom and similar companies are not technically practicing law, they would not be liable for malpractice claims. This raises a hazard which has been called the “malpractice gap” which is “created when technology companies practice law without being held to the same standard of care as the rest of the practicing legal community.”¹¹⁵

The benefits associated with updating unauthorized practice of law statutes to be friendlier to companies like LegalZoom must be considered against the aforementioned risks. A paramount consideration is that allowing companies like LegalZoom to operate does help increase access to civil justice. It does so by providing cheap and convenient legal services. It is recognized in the current legal economy that many people who have legal needs are unable to find appropriate legal services.¹¹⁶ For this reason lawyers are able to charge extremely costly fees for their services and there are limited alternatives for consumers in need of legal services that are affordable.¹¹⁷ Recognizing this need, one way to counteract the risks could be to update unauthorized practice of law statutes to allow the LegalZooms of the world to operate, but impose on them regulations regarding explicit disclosures and restricting limits on liability.

CONCLUSION

There is little doubt that advancements in technology will affect the ways that legal services are offered to the public. The cases against LegalZoom show, however, that there is often resistance to these changes that stem from the ethical issues surrounding them. The rule against the unauthorized practice of law has been invoked as a barricade to companies like LegalZoom, based on legitimate concerns about how the public may be harmed by new technology in the legal industry, and perhaps also based on lawyers’ resistance to economic competition. While some genuine public policy dangers are raised by allowing companies like LegalZoom to operate, many unauthorized practice of law rules that are hostile to technological innovation may hinder efficiency and access to justice.

114. *Id.*

115. David Andrew Kobilka, *Backs to the Future: How the Legal Profession Has Ignored the Malpractice Gap Created by Technology*, 20 J. CONSUMER & COM. L. 130, 131 (2017).

116. Deborah L. Rhode et al., *Access to Justice Through Limited Legal Assistance*, 16 NW. J. HUM RTS. 1, 2 (2018).

117. See Zachary C. Zurek, *The Limited Power of the Bar to Protect Its Monopoly*, 3 ST. MARY’S J. LEGAL MALPRACTICE. & ETHICS 242, 251 (2013).