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SOME EARLY THOUGHTS ON LIABILITY STANDARDS FOR ONLINE PROVIDERS OF LEGAL SERVICES

Benjamin H. Barton*

I. INTRODUCTION

This Article discusses a classic intersection of law, science, and technology. Just like common law courts adjusted the “mailbox rule” to cover fax machines, courts will have to adjust their existing approach to liability for harmful legal services, given the existence of new providers of legal services online. The result is a clash of cultures between one of America’s most conservative institutions—its common law courts—and some of its most aggressively forward looking ones—internet entrepreneurs.

If you do not believe that America’s courts are conservative by nature, consider Chief Justice Roberts’s comments on technology in his 2014 Year End Report on the Federal Judiciary. Chief Justice Roberts begins the report by mocking the hot technology of yesteryear: pneumatic tubes. He then notes that, by 1971, what was once shiny and new was grossly outdated. He uses this story to launch a defense of common law court technophobia, noting that “courts will often choose to

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1. I do not use the term “legal malpractice” here on purpose because it is not yet clear whether legal malpractice principles will apply to online purveyors of legal services at all.

2. By “conservative” I mean averse to change or innovation and holding traditional values, and not conservative politically.

be late to the harvest of American ingenuity.” But, to use modern parlance, Chief Justice Roberts thinks this is not a bug, but a feature! He states: “Courts are simply different in important respects when it comes to adopting technology, including information technology.” Given that Chief Justice Roberts is the titular head of the federal judiciary, his attitude towards technology and his celebration of its slow adoption tells you all you need to know about American courts and technology.

By comparison, American internet entrepreneurs are rushing ahead to transform the market for legal services. Between computerization, outsourcing, globalization, and the arrival of the “do it yourself” (“DIY”) movement in law, we are in the greatest period of change since the deregulation of the legal profession during Jacksonian democracy in the mid-nineteenth century. The revolution in law is part of a larger upheaval in knowledge industries. For years, knowledge occupations resisted mechanization and standardization and reaped the financial benefits of charging by the hour or by the job for individualized services. But time waits for no one, and the rise of the Internet and the explosion in computing power have meant that services, which were once offered for sale only on a costly and individualized basis, are now offered online via computer programs and at vastly reduced prices.

Wondering about the speed of change in the market for legal services? Just fifteen short years ago, Americans who wanted to incorporate a business or file an uncontested divorce would either have to hire a lawyer or buy a forms book and try to hack it out on their own. To see how many Americans handle those problems on their own today, log onto LegalZoom or Rocket Lawyer and read their advertised list of services and prices. And, of course, right now these websites are only offering the very lowest hanging fruit: relatively rote legal forms like

4. ROBERTS, supra note 3, at 1-3.
5. Id. at 3.
8. See infra Part II.
those necessary for incorporation or uncontested divorces. As time goes by, and such companies take advantage of economies of scale and the now familiar internet data feedback loop on their services, the forms they offer will be improved, and they will also offer other new services. LegalZoom, for example, started its business with only printable forms, then moved to interactive forms, and is now aggressively trying to sell legal advice plans.

As such online providers become more common, instances of injured parties and lawsuits for damages will inevitably arise. Like death and taxes, tort lawsuits are an indelible feature of American life. And yet, for now, it is unclear what law will apply in lawsuits against online providers. The American law of traditional legal malpractice is several hundred years old and relatively well-developed. In contrast, courts will write standards of liability for online providers of legal services like LegalZoom or Rocket Lawyer on a relatively blank slate. LegalZoom is the oldest and most established of these websites and has existed since only 2001. As of yet, there are no reported cases of lawsuits against LegalZoom or Rocket Lawyer for defective legal forms, so we are in the earliest possible stage. The growth of this area of the law will be fascinating as a matter of doctrinal expansion, but even more so as a meeting between the tortoise and the hare in the courtroom. This Article takes a first stab at laying out some of the issues that courts will face if and when these lawsuits arise.

Part II offers a brief and non-exhaustive description of the types of legal services available online. This overview attempts to categorize

10. See Economies of Scale and Scope, ECONOMIST (Oct. 20, 2008), http://www.economist.com/node/12446567 (defining “economies of scale” as “factors that cause the average cost of producing to fall as the volume of its output increases” and describing how those factors drove corporate gigantism in the 20th century); Thomas Goetz, Harnessing the Power of Feedback Loops, WIRED (June 6, 2011, 9:45 AM), http://www.wired.com/2011/06/ff_feedbackloop (explaining that “feedback loops” are an effective tool for changing behavior).


15. See infra Part II.
the current offerings, from the most basic, non-interactive legal forms, to interactive forms, online legal advice, virtual law firms, and even the science fiction future—which may be very near—where computer programs will have the capacity to write briefs and answer complicated legal questions. The point of this overview is not full coverage of this roiling and rapidly changing market. Instead, Part II tries to separate online legal services into broad categories so that we can begin to speculate on how courts might treat lawsuits in each segment.

Part III discusses my search for evidence of harm arising from online legal services. It starts with the arguments from lawyers and bar associations that non-lawyer online legal services are faulty and even dangerous. Part III also discusses a Consumer Reports article that recommends against using online services for any complicated legal issues.

Despite these warnings, there is limited evidence of actual faulty documents or injured consumers. As of April 1, 2015, Westlaw searches uncovered no lawsuits by injured parties against LegalZoom or Rocket Lawyer, the two biggest online forms providers. However, there are reasons why there might not be any lawsuits. One is that these sites have very extensive arbitration clauses and the injuries from faulty wills or incorporation papers might appear at a significant time lag. But, the nearest analogue to online forms is old-fashioned forms books from Nolo Press or Stevens-Ness Publishing. These forms books have existed for forty years or so and are not subject to mandatory arbitration, so if these forms harmed consumers, we would expect to see lawsuits. There are also no lawsuits where individuals alleged harmful work by these companies. This could mean that legal forms are not dangerous or that legal forms cause such small harms that bringing a lawsuit is not worth it, but it does not support any broad claims that DIY law is harmful.

The dearth of lawsuits also undercuts the common bar association justifications for the prosecution of the unauthorized practice of law ("UPL"). Notably, while there are no suits alleging specific harms to

16. See infra Part II.
17. See infra Part II.
18. See infra Part III.
19. See infra notes 83-87 and accompanying text.
20. See infra text accompanying notes 88-90.
22. For an example of a forms book, see DENIS CLIFFORD, SIMPLE WILL BOOK: HOW TO PREPARE A LEGALLY VALID WILL (Stephen Elias ed., 1986).
23. See Derek A. Denckla, Nonlawyers and the Unauthorized Practice of Law: An Overview
specific customers, there have been multiple suits for UPL.\textsuperscript{24} This suggests that Deborah Rhode has been right all along: UPL is more for protection of the lawyers' monopoly than the protection of the public.\textsuperscript{25}

Part IV very briefly lays out the four possible legal regimes that might cover lawsuits against online providers of legal services: legal malpractice; products liability; negligence; and breach of contract.\textsuperscript{26} Part IV also notes that some online legal services, like the virtual law offices of licensed lawyers, are obviously traditional legal services and will be covered by the existing legal malpractice system.\textsuperscript{27} Other parts of the online provision of legal services, like free or low cost legal advice, or websites that act as lawyer referral sites, are fuzzier. Part IV predicts that when non-lawyers engaged in such services are eventually sued, courts will apply the highest possible standard of care (the reasonable lawyer standard or its equivalent), rather than a "reasonable website" standard or other standard.\textsuperscript{28} Lawyers are very familiar with how exacting the reasonable lawyer standard can be. Nevertheless, Part IV argues that courts will not import the procedural and causation protections (like the "case-within-a-case" requirement) lawyers enjoy in legal malpractice actions.\textsuperscript{29} Thus, the most likely result is a negligence structure with a heightened duty requirement, although the other possibilities cannot be eliminated until some relevant cases arise.

\section{A Brief Overview of Online Legal Services}

First, note that this overview is not comprehensive. Nor will it be timely as you read this, because the online provision of legal services is in explosive flux. As late as 2011, Professor Gillian Hadfield was asking "where are the 'garage guys' in law?"\textsuperscript{30} The last few years have answered this question quite emphatically. In 2012, legal technology startups took in an estimated $66 million in venture capital.\textsuperscript{31} In 2013,
that amount was $458 million.32 Growth apparently slowed in 2014,33 but the general point stands—as computers grow more powerful and ubiquitous, legal work will continue to drift online in different and evolving formats.

For the purpose of considering liability for harms, it is helpful to separate the current offerings into broad categories. Therefore, this Part divides existing relevant products into six categories.34 The first category covers the provision of legal forms that a user can print out and fill in.35 These forms are very similar to legal forms books that have existed for years. The second category, interactive online forms, has no clear non-computerized analogue, unless you count an offline scrivener service where a non-lawyer asks questions and then fills in a pre-printed form with the answers.36 The third category is legal services plans.37 The fourth category is the online provision of legal advice.38 The fifth category consists of, so-called, “virtual law offices.”39 The last category is the science fiction category, in which computers can perform some or all of a lawyer’s tasks.40 Some technology startups are trying to apply artificial intelligence to legal work by creating programs that draft briefs or answer complicated legal questions.41 These applications are a ways from the market, but are surely coming down the pike.

A. Non-Interactive Legal Forms

The most basic type of legal service available via the Internet is the ability to obtain and print non-interactive legal forms. Websites like LegalZoom or U.S. Legal Forms offer a number of different legal forms that users can purchase, download, and use as a template.42 The user enters her information into the downloaded form, prints it out, and uses it. LegalZoom claims that it offers over 160 different forms covering every possible type of document from agency agreements, to leases, and

32. Id.
34. See infra Part II.A–F.
35. See infra Part II.A.
36. See infra Part II.B. “Scrivener” is defined as “[a] writer, [especially], a professional drafter of contracts or other documents.” Scrivener, BLACK’S LAW DICTIONARY (9th ed. 2009).
37. See infra Part II.C.
38. See infra Part II.D.
39. See infra Part II.E.
40. See infra Part II.F.
41. See infra Part II.F.
LegalZoom offers unlimited access to the forms for $7.99 a month. There are many competitors. For example, Blumberg Forms Online offers its forms at $9.00 per order for up to nine forms, although the price goes down if you buy in bulk.

This may seem very inexpensive, but it is actually quite expensive comparatively. Many of the forms that LegalZoom and others sell are already available free or basically free on the Internet, often provided by state supreme courts or local legal aid societies. For example, nycourts.gov, the website of the New York Courts System, offers a long list of free DIY legal forms, including forms for divorces, child custody, and name changes. Rocket Lawyer has noted this and offers its customers the first legal document for “free.” LegalZoom was not amused by such an offering and has, in response, sued Rocket Lawyer claiming false advertising, which is surely a sign of the effectiveness of Rocket Lawyer’s approach.

These forms are very close cousins to the DIY legal forms that publishers like Nolo Press have provided since the 1970s. The computerized forms are more flexible than the printed forms because they are easier to customize and may include some type of customer service for questions, but overall, they are very similar to a product that has existed for decades.

**B. Interactive Legal Forms, With or Without Attorney Review**

The next level of sophistication is interactive legal forms. Rather than downloading a form and filling in the required information, interactive legal form programs take users through a series of questions and then use their answers to generate a legal document. Take, for example, the following web pages:

- **Legal Forms**: [Supra note 42; Service Related Agreements, LegalZoom](https://www.legalzoom.com/legalforms/service-related-agreements) (last visited Feb. 15, 2016).
- **Home Page**: [Blumberg Forms Online](https://www.blumberglegalforms.com) (last visited Feb. 15, 2016).
- **About Us**: [Nolo](http://www.nolo.com/about.html) (last visited Feb. 15, 2016).

In fact, Nolo Press has a website that sells its books, as well as software and downloadable forms. See [Home Page, Nolo](http://www.nolo.com) (last visited Feb. 15, 2016).
example, drafting a living will. LegalZoom’s basic living will is $39.00.\textsuperscript{50} The site offers a page that explains what a living will is.\textsuperscript{51} When you click on “Get Started” you answer a series of relevant questions: name, address, county of residence, and others.\textsuperscript{52} Then, the site asks a series of questions about life support. Would you want it if you are unconscious and have a terminal condition with no hope of recovery? What care would you like if life support is withdrawn? Do you have any additional comments or instructions? Next, you decide whether to appoint a healthcare agent and what powers you wish to grant the agent. It closes by asking for your burial wishes. After spending $39.00, LegalZoom creates a document from your answers and then prints it out and mails it to you. The process is simple, inexpensive, and quick. Not every interactive document is as inexpensive. The basic last will and testament is $69.00,\textsuperscript{53} and the basic living trust is $249.00.\textsuperscript{54}

The list of LegalZoom interactive documents covers almost every type of non-court document you can imagine, including entity formation documents, trademark search forms, contracts, leases, patents, and promissory notes, just to name a few. All told, LegalZoom’s “Products & Services” page lists more than seventy interactive documents.\textsuperscript{55} Rocket Lawyer offers a similar number.\textsuperscript{56} LegalZoom and other websites also offer interactive forms, plus lawyer review of those forms, which is advertised for as low as $39.00.\textsuperscript{57}

C. Legal Services Plans

LegalZoom and Rocket Lawyer have also started legal services plans. LegalZoom offers users “attorney support” from its “Legal Plan” attorneys for as low $9.99 a month for personal matters and $23.99 a month for businesses.\textsuperscript{58} The plan offers document review by lawyers and


\textsuperscript{51} Introduction to Living Wills, LEGALZOOM, \url{https://www.legalzoom.com/knowledge/living-will/topic/lw-advance-healthcare-directive} (last visited Feb. 15, 2016).

\textsuperscript{52} The remainder of the facts in this paragraph come from the author’s personal experience of using LegalZoom on April 1, 2015.


\textsuperscript{54} Living Trust, LEGALZOOM, \url{http://www.legalzoom.com/living-trusts/living-trusts-overview.html} (last visited Feb. 15, 2016).

\textsuperscript{55} See Our Products and Services, supra note 9.


\textsuperscript{58} Attorneys You Can Trust for Your Business, LEGALZOOM, \url{https://www.legalzoom.com/}
brief legal consultations with a licensed lawyer in your state. If more work is needed, especially in the context of litigation, the user will have to contract separately with the lawyer, although LegalZoom promises a discount on the lawyer’s typical hourly rate.

Rocket Lawyer offers “free” forms to try to hook users on a similar model. The first week of membership to Rocket Lawyer is free and thereafter a monthly charge of $39.95 kicks in. Rocket Lawyer’s membership includes unlimited access to their interactive forms. Like LegalZoom, work beyond legal advice or reviewing forms requires an extra payment of pre-negotiated, discounted fees.

D. Online Legal Advice

The heart of the legal services plans described above is the provision of legal advice by licensed lawyers. Other than document review, the main perk to these plans appears to be the ability to schedule an appointment to talk to an actual, live lawyer and get legal advice. Other websites offer online, written answers to legal questions, often for free or at a very low cost. For example, eHow.com offers legal advice as part of its “eHow Now” expert advice platform. Users can pay by the question or pay $9.99 per month for a monthly subscription. Both the questions and the answers are posted online.

Avvo is a website that offers an attorney rating system, a paid service for attorney advice, and some free legal advice. For the free advice, users post questions anonymously and attorneys answer them publicly. Past questions and answers are also stored on the site and are


61. See Create Legal Documents & Forms, supra note 56 (explaining the “free” first document policy); Plans and Pricing, supra note 9 (explaining the one week free trial).


63. How It Works, supra note 9; Legal Plan Contract, supra note 60.


65. Id.

66. Id.


searchable, so users may find that their question has already been answered. Avvo encourages lawyer interaction by providing a “contributor level” that rises as a lawyer answers more questions.

Avvo also has listings of lawyers, with a controversial—at least among lower-ranked lawyers—multi-factor rating system. A few lawyers have unsuccessfully sued Avvo over low rankings. Avvo earns profits through advertising on the site and selling “Avvo Pro,” a subscription service for lawyers to track their profiles. Avvo thus leverages its ratings and traffic to draw lawyers into giving free advice with the hope of gaining paid work. Avvo draws traffic and potential clients to the site with free advice and lawyer ratings.

E. Virtual Law Firms

The term “virtual law firm” means different things to different people, but essentially it describes lawyers operating their practices primarily through an online portal, rather than in person or through telephonic contact. Such law firms allow lawyers to automate some or all of their document drafting, client contact, and other support services. Theoretically, this framework allows lawyers to save money while servicing more clients more efficiently, although actual results have varied. For our purposes though, virtual law firms are identical to brick and mortar firms. The difference is in how the services are delivered, but these are still law firms or solo practices, staffed by lawyers who are subject to the same standards of legal malpractice and professional rules as any other lawyers.

69. Id.
75. Id. at 25-27.
76. For example, the virtual law firm Clearspire was once hailed as a market disruptor to the “big law” market, before closing its doors in 2014. See Jennifer Smith, Clearspire’s Technology Outlives ‘Virtual’ Law Firm, WALL STREET J.: L. BLOG (June 6, 2014, 6:04 PM) http://blogs.wsj.com/law/2014/06/06/clearspires-technology-outlives-virtual-law-firm. Other virtual law firms, including Axiom Law, have continued on to rosy projections. See Erin Coe, Despite Clearspire’s End, Virtual Firms See Bright Future, LAW 360 (June 16, 2014, 4:07 PM), http://www.law360.com/articles/547163/despite-clearspire-s-end-virtual-firms-see-bright-future.
F. Artificial Intelligence

John McGinnis predicts a future where computers will be used to draft briefs, contracts, and other legal documents on their own.\(^{77}\) Computers are already able to write simple news articles based upon common data like changes in stock prices or box scores from sporting events. Narrative Science has created Quill, a "natural language generation platform" that turns data into readable natural language articles.\(^{78}\) One of Quill’s first clients was the Big Ten Television Network, which used the program to provide computer-generated news coverage of previously neglected sports like women’s softball.\(^{79}\) Basically, the program takes the raw statistics from the box score and generates a story recapping the game.\(^{80}\) Wired Magazine reports that as much as ninety percent of all journalism will eventually be automated.\(^{81}\)

The trend has not spread to legal writing yet, but it is an obvious next use of this technology, especially because many legal documents are template-based. Note that the interactive forms of LegalZoom and others are actually early examples of computer programs drafting simple legal documents from provided information.

Computer programs may also take legal research beyond simply finding applicable statutes and cases the way Westlaw, LexisNexis, or even Google does, to synthesizing these sources and answering complicated questions. Bill Henderson reports that Plexus, an Australian law firm, is offering an artificial intelligence program that can determine whether an advertisement is legal under applicable Australian law.\(^{82}\)

In short, computers are now capable of doing more than very simple legal work. Even complicated work, like brief writing or contextualized legal analysis, may someday be automated. As the programs get better, computers grow more powerful, and datasets become richer, computers may replace humans in completing relatively high-level legal work.

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80. Id.
81. See id.
III. CLAIMED DANGERS AND ACTUAL DANGERS

As described above, computers are now replacing humans in some areas of legal work. Over time, computers may even become a dominant player in the area, handling all but the most individualized and complicated work. But will the public be safe?

A. Claimed Dangers

Bar associations and lawyers certainly do not think the public will be safe. For example, Rania Combs, who runs a Texas virtual law office and website called Texas Wills and Trusts Law Online, posted a scathing review of LegalZoom’s will-writing program.83 Rob Graham did the same in the Nevada Lawyer Magazine.84 Intellectual property lawyer Kelley Keller shares similar thoughts on LegalZoom’s trademark services.85 Jonathan Sparks offers warnings about using online services for business formation.86 Bar associations have likewise decried the dangers of UPL by internet providers.87

Some skeptics (especially non-lawyers) will reject these warnings as self-interested and suspect. The September 2012 issue of Consumer Reports offers a more neutral take on the issue.88 Consumer Reports tested online legal services provided by LegalZoom, Rocket Lawyer, and Nolo Press. The testers used these services to create a will, a car bill of sale, a home lease, and a promissory note. The magazine then took these documents to law professors for a quality test. The professors found the forms to be lacking, and in some cases even dangerous. Consumer Reports’s conclusion? It advised consumers to use these services rather than trying to draft legal documents on their own, but also that for complicated matters, a lawyer is better.89

88. Legal DIY Websites Are No Match for a Pro, CONSUMER REP., Sept. 2012, at 13, 13. All other facts in this paragraph come from this source.
89. Id.
These results are unsurprising, but not because the professors involved are protectionist or anti-consumer. I know the reputations of the professors that Consumer Reports used, and nothing could be farther from the truth. The results are expected because law professors make their living contemplating complexities and finding problems with legal documents. For a true test of the safety of online documents, Consumer Reports should have done a blind test comparing documents drafted by local lawyers against their online competitors. Having read my share of the work of local lawyers, I strongly predict that law professors would find some or many of the same problems with lawyer-drafted documents.

B. Evidence of Actual Danger: Suits Against LegalZoom and Rocket Lawyer

The most obvious way to determine what courts might do when an injured consumer sues an online provider of legal services is to look for cases brought by injured consumers. This is, indeed, where I started my research. Unfortunately for me—but fortunately for LegalZoom and Rocket Lawyer—I could not find any such cases.

An April 1, 2015, Westlaw “allcourts-federal” search for the term “LegalZoom” returned a total of thirty-three documents. Most of these documents are inapposite, and none of the cases involve an injured consumer suing LegalZoom. Two cases are class actions against LegalZoom for UPL: Janson v. LegalZoom.com in Missouri and Lowry v. LegalZoom.com in Ohio. In neither case did the plaintiffs allege any specific harm to a named plaintiff, or to anyone else, other than LegalZoom’s alleged UPL. There were no allegations that a particular legal form is faulty, for example, or that a LegalZoom incorporation document failed under state law.

The Ohio case was dismissed because only the Ohio Supreme Court has jurisdiction over UPL. The Missouri case proceeded past summary
judgment with the court strongly suggesting that LegalZoom was engaged in UPL, and LegalZoom then settled. The other cases involve a contract dispute between LegalZoom and some bankruptcy lawyers, LegalZoom serving as a registered agent for a corporation, LegalZoom assisting in filing a copyright and trademark application, and LegalZoom’s peripheral involvement in federal criminal cases.

The same search in the “allcourts-State” database on Westlaw brings up twenty-two documents. None of them involve a suit between an aggrieved LegalZoom client and LegalZoom. All of the cases where LegalZoom is a named party are UPL cases, and in none of those cases is any specific harm from faulty legal work alleged.

A search for “Rocket Lawyer” in the same databases raises only two cases, which are not against Rocket Lawyer for any alleged harm.

In sum, it may be true that online providers of legal forms and services are providing poor quality or even dangerous legal work, but the

100. Third Party Verification, Inc. v. SignatureLink, Inc., No. 6:06-cv-415, 2007 WL 1288361, at *7 (M.D. Fla. May 2, 2007); Vitality Anti-Aging Ctr. & Med Spa, LLC v. La Bella Donna Advanced Laser Med-Spas of N. Am., LLC, No. 5:08cv108, 2009 WL 348217, at *1-2 (W.D.N.C. Feb. 11, 2009). In Third Party Verification, Inc., the LegalZoom customer, SignatureLink, was excoriated by the judge for various malfeasances in the discovery process. 2007 WL 1288361, at *2. As an aside, the judge notes that LegalZoom filed “or perhaps mistitled” a copyright application on behalf of SignatureLink. Id. at *7.
lawsuit trail does not support such a claim. There are reasons why no such claims may exist. Both LegalZoom and Rocket Lawyer have extensive “terms and conditions” that disclaim any warranties and also require arbitration of any disputes. In recent years, the U.S. Supreme Court has extended the reach of these arbitration clauses. For example, in *AT&T Mobility v. Concepcion*, the Court held that an arbitration clause governed over state contract law related to unconscionability and struck down a state class action against AT&T Mobility in favor of individual arbitration cases. This suggests that even common law matters like legal malpractice or negligence for faulty online legal advice that would typically be handled by state or federal courts may end up in arbitration instead. Nevertheless, in the Missouri UPL class action described above, the federal court refused to follow LegalZoom’s terms of service and allowed the case to proceed in court, so the arbitration clause was not foolproof in that case. The Supreme Court of Arkansas, by contrast, recently held the opposite and dismissed a UPL class action case in favor of arbitration.

Another possible explanation is that the harms are time-delayed because faulty wills or incorporation papers take years to come to light, or because they have just been filed and have no decisions for Westlaw to find. Or, it could be that LegalZoom and Rocket Lawyer have injured their clients, but the clients’ injuries are too small to make a lawsuit worth filing (although if there were a lot of such small claims we would expect to see class actions, as we have for UPL).

Nevertheless, the lack of lawsuits is evidence that the Cassandra-like claims of harm are not yet coming to fruition. As a comparison, note that legal malpractice claims have been rising in number and aggregate damages since the recession, so it is not as if legal services by lawyers are not harming customers or generating lawsuits. The lack

of lawsuits is obviously not definitive evidence of safety, but it should be enough to give pause when lawyers make broad claims about the danger of online legal services.110

C. Evidence of Actual Danger: Suits Against Nolo Press and Stevens-Ness Publishing

LegalZoom and other sites sell printable forms that are quite analogous to self-help forms books that have existed since the 1970s. Perhaps some of the dangerous self-help forms from the past have resulted in lawsuits. Forms books from the 1970s would have had plenty of time for harms to come to light and would be unlikely to have the type of airtight arbitration clauses that are now commonplace on the Internet.

Nevertheless, Westlaw searches using the “allcourts-federal” and “allcourts-state” qualifiers for injured plaintiffs suing Nolo Press or Stevens-Ness Publishing—two of the bigger providers of self-help legal books—similarly come up dry. Most of the cases are again about UPL in one way or another.111

The lack of lawsuits does not mean that all DIY forms, whether published in a book or online, are safe. Nevertheless, the lack of reported lawsuits suggests that injuries large enough to sue over are infrequent. There is also the irony that many of the cases that do exist are for UPL. Deborah Rhode has argued for years that UPL laws and prosecutions are more for the protection of the profession than the public, and the trail of the case law for these companies certainly supports her other empirical evidence.112

110. See, e.g., Graham, supra note 84, at 26-28 (discussing the harms to consumers caused by DIY wills); Sparks, supra note 86 (discussing the dangers and pitfalls of using LegalZoom for business documents).

111. See, e.g., In re Bush, 275 B.R. 69, 71 (Bankr. D. Idaho 2002); In re Farness, 244 B.R. 464, 466 (Bankr. D. Idaho 2000); Or. State Bar v. Smith, 942 P.2d 793, 794 (Or. Ct. App. 1997); In re Nolo Press/Folk Law, Inc., 991 S.W.2d 768, 769 (Tex. 1999). There is an unreported case where the judge dismissed a pro se case, captioned Alexandra v. Nolo Press/Folk Law, Inc., but there is no way to tell whether the theory of the case is legal malpractice or not. No. 96-CV-839, 1997 WL 53314, at *1 (N.D.N.Y. Jan. 7, 1997). The docket list on Westlaw suggests that the plaintiff may have been somewhat unhinged, as there are innumerable letters to the court objecting to everything and requesting hearings.

IV. WHAT LAW WILL GOVERN IF AND WHEN THE LAWSUITS ARRIVE?

A few caveats are noteworthy at the outset. First, we are still in the very beginning stages of the internet revolution in law, so some of the predictions in this Part will be firmer than others. Second, I start from the assumption that, in these suits, judges will likely be relatively kind to lawyers and relatively unkind to online non-lawyers. This is because, as I have argued at length elsewhere, American judges, all former lawyers themselves, are more sympathetic to lawyers than non-lawyers.\textsuperscript{113} It is also because American judges tend to range from techno-skeptics to technophobes,\textsuperscript{114} so they will be naturally skeptical of online legal services. If you disagree with these premises, you may not agree with the predictions below.

A. Online Services by Licensed Lawyers

The easiest prediction to make is that when aggrieved individuals sue a licensed lawyer for services they received over the Internet, the cases are very likely to be handled through existing legal malpractice law. Consider virtual law offices. Using computers to replace back-office workers and to communicate with clients and courts does not change the essential nature of the work. Virtual law offices provide legal work by lawyers, and lawsuits will handle them as such. For example, in \textit{Swanson v. 3M Co.}, the Minnesota Supreme Court analyzed a conflict of interest issue within a virtual law firm with no particular attention to the differences in technology or the type of firm at issue.\textsuperscript{115} Even if some of the legal work is automated or done by non-lawyers, if a lawyer is the point person on the work, legal malpractice will control.\textsuperscript{116}

The same will likely prove true for the online provision of legal advice. Most online provision of legal advice by lawyers explicitly disclaims a lawyer-client relationship or liability for faulty advice.\textsuperscript{117} Students of legal malpractice know, however, that a lawyer-client relationship, and thereby potential liability for legal malpractice, can be created unintentionally and sometimes despite disclaimers.\textsuperscript{118} Similarly,

\begin{itemize}
  \item \textsuperscript{113} See generally Benjamin H. Barton, \textit{The Lawyer-Judge Bias in the American Courts} (2011).
  \item \textsuperscript{114} See sources cited \textit{supra} notes 3-4.
  \item \textsuperscript{115} 845 N.W.2d 808, 815-17 (Minn. 2014).
  \item \textsuperscript{116} This is generally true under the existing law governing paralegals employed by lawyers. See Christene Beck Lisitsyn, \textit{What’s in a Name? Should Paralegals Be Liable for Legal Malpractice}, 15 PROF. LAW., no. 4, 2005, at 2, 2.
  \item \textsuperscript{117} Avvo’s terms and conditions of use are a good example. See Terms and Conditions of Use, AVVO, http://www.avvo.com/support/terms (last updated Jan. 6, 2015).
  \item \textsuperscript{118} See David S. Caudill, \textit{The Roles of Attorneys as Courtroom Experts: Revisiting the
even initial consultations that do not result in a further relationship (like the kind that Rocket Lawyer and LegalZoom arrange every day) could create some legal malpractice liability.\textsuperscript{119} The point here is not to guess how each individual case will be handled. The point is to note that when licensed lawyers are involved, there is already a ready-made source of legal rights and duties—legal malpractice—and that is where courts will turn first.

Many commentators, including some in this Symposium, assume that legal malpractice is a harsher legal standard than simple negligence, and maybe even harsher than the modern products liability standard.\textsuperscript{120} This is a popular opinion because lawyers are generally held to a higher duty and standard of care under principles of legal malpractice. Lawyers must do more than behave as a reasonable person would; they must behave in accordance with an ordinary lawyer’s skill and ability.\textsuperscript{121} Nevertheless, what legal malpractice takes away in duty, it gives back in generous rules of “but for” and proximate causation.\textsuperscript{122} The case-within-a-case requirement, and its various non-litigation equivalents, makes it very hard for a plaintiff to win a legal malpractice case.\textsuperscript{123} As such, I expect plaintiffs and defendants to drift towards legal malpractice actions against individual licensed lawyers.

\textbf{B. Non-Lawyer Liability}

There are a number of online legal services that are not associated with a single or recognizable licensed lawyer. The legal forms, whether interactive or non-interactive, offered by LegalZoom, Rocket Lawyer, U.S. Legal Forms, and others, are all examples of this sort of product. Presumably, these forms were designed with some help of a lawyer (or lawyers), but an injured party would have no idea who that lawyer was

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\textsuperscript{120} Cf. Dwayne J. Hermes et al., \textit{Leveling the Legal Malpractice Playing Field: Reverse Bifurcation of Trials}, 36 St. Mary’s L.J. 879, 880-84 (2005) (arguing that legal malpractice actions are so common and so unfair to lawyers that they require special procedural protections to “level the playing field”).
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\textsuperscript{122} Hermes, supra note 120, at 886-92.
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and would be unlikely to sue an individual when they could sue a
wealthy corporation that made the forms available. Similarly, if and
when artificial intelligence becomes more prevalent, those services will
have some underlying involvement of a lawyer, as well as of coders.
But, unlike the lawsuits described in Part IV.A above, the lawsuits
arising in this instance will be against a website or a computer company
rather than a particular licensed lawyer.

When injured parties sue these websites, they will face a list of
terms and conditions stating that they have not received legal services or
legal advice and that, if they have a serious problem, they should seek a
lawyer. Because of these disclaimers, and because plaintiffs will not
attach their suit to any particular lawyer, legal malpractice will not be an
easy fit for such suits. Legal malpractice claims have traditionally
required a lawyer-client relationship as an element of the tort, and
while third-party suits are more common in recent times, courts have
acted differently when it comes to applying legal malpractice principles
against non-lawyers.

Regardless of what courts call the suits, however, every court will
face the question of what duty an online purveyor of legal services owes
its injured customers. Regardless of whether the cases are presented
using theories of negligence or legal malpractice, and regardless of the
lack of a named lawyer-defendant, I predict that eventually online
providers will face the same duty that lawyers face: the duty to act with
the ordinary skill and ability of a licensed lawyer. This is partially
because that standard will even the playing field between lawyers and
websites, and partially because any other standard, such as “to behave as
an ordinarily prudent legal website,” would be more unwieldy and
harder to apply.

Nevertheless, it seems unlikely that an American court will grant
LegalZoom or Rocket Lawyer the protection of the case-within-a-case
doctrine or the other procedural and substantive complexities that help
protect American lawyers. Thus, a wholesale application of legal
malpractice law and procedure also seems unlikely.

124. See supra Part IV.A.
125. See Terms of Use, supra note 104.
126. See Robert M. Jarvis, The Erring Proctor: Admiralty Lawyers and Malpractice Claims,
127. See Thomas D. Morgan, Professional Malpractice in a World of Amateurs, 40 ST.
MARY’S L.J. 891, 899-907 (2009).
128. This is already how at least the Alabama legal malpractice statute handles the issue. Both
lawyers and non-lawyers are considered “Legal Services Providers” and are subject to the same
An easier possibility is to apply simple negligence theories—the baseline for pecuniary liability for harms in the United States—with the heightened duty to behave as a reasonable lawyer would. Negligence also offers the possibility of a different standard of care, such as the "reasonable purveyor of online legal services." As noted above, the higher standard seems more likely to me, but time will tell which will be applied.

There are two other possible prevailing legal regimes: products liability or breach of contract. Some plaintiffs may pursue products liability claims because of the siren song of strict liability and the hope that demonstrating their injury and the defect in the legal documents would be sufficient to establish liability. Proving that a product is "defective," however, is easier said than done and usually requires a showing of fault regardless of products liability law's roots in strict liability.

Moreover, generally speaking, strict products liability is not available against service providers, but only against sellers of products. This distinction has proven particularly elusive in the medical and hospital contexts. Similarly, it will be difficult to decide whether online legal forms are a service or a product. On the one hand, these websites have a set template (interactive or not) that provides legal documents. Because of the rote and mechanized nature of what is sold, it hardly seems like a service.

On the other hand, if one looks at what is actually being provided, it is clearly a replacement for what would traditionally be considered legal services. LegalZoom sells the same thing a solo practitioner does—LLC documents, divorce papers, and so forth. Generating legal documents has always been considered a service, and a plaintiff who attempted to sue a licensed lawyer under products liability principles for a

129. See Boothe-Perry, supra note 121, at 21-23.
130. See supra text accompanying notes 113-14.
131. Under the strict liability standard for products liability claims, courts apply strict liability if a product is "defective by virtue of a design defect, manufacturing defect, or an inadequate warning." See Cooper v. Old Williamsburg Candle Corp., 653 F. Supp. 2d 1220, 1224 (M.D. Fla. 2009).
134. Id. at 878-81.
135. See supra Part II.
defective pleading would not progress past a motion to dismiss in any American court.

Finally, an online provider of legal services might try to avoid tort law altogether and force injured parties to prosecute a breach of contract action, with the very restrictive terms and conditions of use from the website standing in as the governing contract.\textsuperscript{1} Given that courts are often hostile to replacing tort claims with more restrictive contract claims in situations where the “contract” at issue is a terms and conditions page (which, typically, no user reads or understands),\textsuperscript{3} and that judges are likely to be unfriendly to these companies altogether, this possibility seems more remote.\textsuperscript{138}

\section*{C. Lawyer Referral Cases}

There is one last subset of cases. An aggrieved client might try to sue LegalZoom, Rocket Lawyer, or Avvo as a lawyer referral service, because these websites often urge users to contact lawyers. Despite attempts to disclaim liability, it seems likely that the existing case law in the area of “negligent referral” will control these cases, especially if the referral actually looks negligent, such as Avvo referring a user to a known, disbarred lawyer, for example. Negligent referral is a new and changing sub-area of legal malpractice, and not every state has ruled on it or accepted it.\textsuperscript{139} Likewise, just because a lawyer referred by a website injures a client, it does not mean the website making the referral is liable; the referral itself would have to be negligent.\textsuperscript{140} Regardless of the individual details, this is the law that courts or arbitrators will likely apply when such cases arise.

In sum, the cases can be roughly divided into two different categories. In cases that look like traditional malpractice cases with an aggrieved individual suing a particular licensed lawyer, legal malpractice is likely to govern. In cases where the aggrieved person is suing a website or company rather than a lawyer, courts are not likely to import the entirety of legal malpractice, and especially not its procedural and causation protections. Still, the applicable standard of care—the

\begin{thebibliography}{9}
\bibitem{136} See Terms of Use, supra note 104.
\bibitem{138} Depending on the nature of the harm, injured plaintiffs might also consider a consumer fraud or unfair trade practices type claim.
\bibitem{139} For an overview, see generally Emily S. Lassiter, \textit{Liability for Referral of Attorneys}, 24 J. LEGAL PROF. 465 (2000).
\bibitem{140} Id. at 470-71.
\end{thebibliography}
"reasonable lawyer" standard or its equivalent—is a likely import because courts will be loath to treat lawyer competitors more generously than lawyers themselves. Thus, even if a case is classified as a "legal malpractice" case or a "negligence" case, the end result in terms of the standard of care and the applicable procedure is likely the same. Products liability or breach of contract are less likely to govern, but remain possibilities until courts reject them.

V. CONCLUSION

When I agreed to write for this Symposium, I assumed that my role would be to read and synthesize the cases where courts had confronted the question of liability for the online provision of legal services. Read, synthesize, and add a few pithy suggestions—a task I expected to be nice and easy.

What I actually learned was much more interesting. As of yet, there are no relevant cases, despite the existence of deep pocket companies that lawyers hate. Lawyers and bar associations have it out for LegalZoom and Rocket Lawyer, which suggests that if there was widespread injury, there would be lawsuits, publicity, or both.\textsuperscript{141} For UPL skeptics, the silence is deafening.

There are, admittedly, a number of reasons why there might be no cases against LegalZoom. But few of those reasons apply to Nolo Press, and the lack of suits against that company suggests that DIY lawyering may not be particularly dangerous after all, or at least the harms it causes are too low-level to justify an individual lawsuit and too irregular to justify a class action.

This topic also presents a crisp comparison between innovation in legal doctrine and innovation online. The judicial process of determining what type of liability will apply to online legal services is an old-fashioned clash of technology and law, like the rise of the railroad or the printing press. By design and by nature, American common law courts will take their time and work by analogy as they grope their way towards an answer to these new questions.

By comparison, the speed of change online is breakneck and racing well ahead of what courts and even lawyers and law firms can handle. While lawyers are cautiously discussing whether non-lawyers should be allowed to partner with lawyers,\textsuperscript{142} internet entrepreneurs are trying to


\textsuperscript{142} See Paul D. Paton, \textit{Multidisciplinary Practice Redux: Globalization, Core Values, and
create a fifty-state online solution to the access-to-justice problem.  

While lawyer discipline remains largely covered by a cone of silence, Avvo posts all publicly available disciplinary information and client reviews together on a single “Tripadvisor for lawyers” site.

The clash of these two worlds will be fascinating to watch, especially as more lawyers begin to feel the bite of online competition and start complaining to their friends in the judiciary. There is an apocryphal Chinese curse that states “may you live in interesting times.” American lawyers and judges are certainly living through such times.

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Reviving the MDP Debate in America, 78 FORDHAM L. REV. 2193, 2198-203 (2010).

143. See Barton, supra note 6, at 193-210.


145. See In a Nutshell, supra note 71.

146. For a lengthy write-up of the history and provenance of this phrase, see Patricia T. O’Connor & Stewart Kellerman, May You Live in Interesting Times, GRAMMARPHOBIA BLOG (July 5, 2012), http://www.grammarphobia.com/blog/2012/07/interesting-times.html.