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Crying Over Spilt Milk: Why the Legal Community is Ethically Obligated to Ensure LegalZoom's Survival in the Legal Services Marketplace

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**CRYING OVER SPILT MILK: WHY THE LEGAL
COMMUNITY IS ETHICALLY OBLIGATED TO ENSURE
LEGALZOOM'S SURVIVAL IN THE LEGAL SERVICES
MARKETPLACE**

*Cody Blades**

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I. INTRODUCTION

It is no secret that many consumers who need legal services do not have access to legal services.¹ In fact, the legal community has grappled with this access issue for over a century.² In the past 50 years, legal services have

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¹ See *infra* text accompanying notes 130–133.

² See *infra* text accompanying notes 103–129.

been allocated to the very wealthy and the very poor, and almost entirely out of reach for all those in between.³ Enter LegalZoom: a slick, user friendly alternative to traditional face-to-face legal services.⁴ LegalZoom provides low- and middle-income consumers an option to easily start and run a business, minimally protect themselves and their families, and perform other routine legal services that would otherwise be economically unattainable.⁵ However, LegalZoom has other, nonmonetary costs.⁶ In most jurisdictions, LegalZoom is engaged in the unauthorized practice of law and does not provide the amount of confidentiality to its customers that is ordinarily required of those practicing law.⁷ While harms are possible, many harms could be avoided through regulation of LegalZoom's services by state bar associations and supreme courts.⁸

The following will argue that despite LegalZoom's shortfalls, the legal community, due to its inability to provide access to all who need it, is ethically obligated to pass regulations which allow LegalZoom to continue. Part III.A provides an overview of the services LegalZoom provides and a brief history of the company. Part III.B discusses the ongoing litigation in which LegalZoom is entangled. Part III.C explains how unauthorized practice statutes and attorney client privilege pose problems to LegalZoom's services, and whether or not there is actually cause for alarm. In Part IV.A the history of the legal community's struggle to provide cost-effective services to all those in need is explained, along with the current state of legal services in Part IV.B. Part IV.C discusses the vacuum created by the availability of legal services to the very rich and the very poor, and some possible causes for the high costs of legal services driving the enlargement of this vacuum. Finally, in Part V, the following explains why it is ethically incumbent upon the legal community to pass regulations so that LegalZoom may continue to provide services to underrepresented populations while still protecting consumer interests.

II. THE ONLINE FORM PROVIDER

LegalZoom is not the first online legal form provider, but it has been the most successful.⁹ The following sections will explore LegalZoom's services, explain LegalZoom's legal troubles, and analyze the potential harms associated with the company's services

³ See *infra* text accompanying notes 103–129.

⁴ See *infra* text accompanying notes 10–20.

⁵ See *infra* text accompanying notes 15–25.

⁶ See *infra* text accompanying notes 65–76, 89–96.

⁷ See *infra* text accompanying notes 65–76, 89–96.

⁸ See *infra* text accompanying notes 176–180.

⁹ See Lindzey Schindler, *Skirting the Ethical Line: The Quandary of Online Legal Forms*, 16 CHAP. L. REV. 185, 186 (2012).

A. *The Service*

Brian Lee and Brian Liu founded LegalZoom in 2001 after leaving corporate law practice.¹⁰ The vision was to create an easy, cost-effective service for consumers so that they may jettison the traditional model of face-to-face legal services.¹¹ LegalZoom allows customers to create a will, incorporate a business, file for bankruptcy and divorce, designate power of attorney, and even change their name, along with “other *common* legal matters.”¹² No matter which legal service is requested, LegalZoom promises to fulfill customers’ requests in three steps: after logging in the customer (1) answers a series of questions specific to the legal document requested, (2) LegalZoom “assistants” (i.e., nonlawyers) review the customer’s answers for “consistency and completeness,” contacting the customer only if “clarification or additional information” is needed, and (3) LegalZoom prints the legal document requested and mails the document along with “simple wrap-up instructions” to the customer.¹³ Through this process LegalZoom guarantees the customer 100% satisfaction.¹⁴

In addition to LegalZoom’s document preparation service, the company also offers Business Legal Plans and Personal Legal Plans beginning at \$23.99/month and \$11.99/month, respectively.¹⁵ These plans are subscription services, which allow a user to choose an attorney in the appropriate state and consult with said attorney on legal matters for 30 minutes at no cost.¹⁶ Each time a subscriber initiates a 30-minute consultation they must have a new, unique legal issue.¹⁷ The subscription also includes an “annual checkup,” which LegalZoom prescribes is limited to

¹⁰ Daniel Fisher, *Entrepreneurs Versus Lawyers*, FORBES (Oct. 5, 2011, 6:00 PM), www.forbes.com/forbes/2011/1024/entrepreneurs-lawyers-suh-legalzoom-automate-daniel-fisher.html [hereinafter *Entrepreneurs*].

¹¹ *About Us*, LEGALZOOM, http://www.legalzoom.com/about_us.html (last visited Sept. 3, 2014).

¹² *Id.* (emphasis added).

¹³ *How it Works*, LEGALZOOM, <http://www.legalzoom.com/about-us/how-it-works> (last visited Sept. 3, 2014).

¹⁴ *See LegalZoom—Easier and Affordable Way to Take Care of Legal Matters*, YOUTUBE, (Sept. 11, 2012), <https://www.youtube.com/watch?v=I1xHweul84w>. *See also Our Satisfaction Guarantee*, LEGALZOOM, <http://www.legalzoom.com/satisfaction-guarantee.html> (last visited Dec. 12, 2014).

¹⁵ *See Legal Plans—Business*, LEGALZOOM, <https://www.legalzoom.com/attorneys-lawyers/legal-plans/business> (last visited Sept. 3, 2014); *see also Legal Plans – Personal*, LEGALZOOM, <https://www.legalzoom.com/attorneys-lawyers/legal-plans/personal> (last visited Sept. 3, 2014). *See generally* LEGALZOOM, <http://www.legalzoom.com> (last visited Sept. 3, 2014).

¹⁶ *See Legal Plans—Business*, *supra* note 15. *See also Legal Plans—Personal*, *supra* note 15.

¹⁷ *See Legal Plans—Business*, *supra* note 15. *See also Legal Plans—Personal*, *supra* note 15.

one hour.¹⁸ The Business Legal Plan provides for an “Attorney-drafted letter on your behalf” of up to two pages, free legal document review for legal documents under ten pages, a 10% discount on any LegalZoom legal document (including personal forms), the registration of one copyright per month, and a 25% discount on any service provided by the subscribers’ LegalZoom attorney that is above-and-beyond the services provided by the plan.¹⁹ The Personal Legal Plan allows for the same benefits, save those relating specifically to business.²⁰

The service appears to be popular with consumers. In 2011, LegalZoom recorded revenues of just over \$150 million, with a net income of approximately \$12 million.²¹ In the 12 years LegalZoom has been in business, the company boasts two million business and personal users.²² In fact, in 2011, LegalZoom filed for an initial public offering (IPO) which valued the company at over \$480 million.²³ Although LegalZoom has since delayed its IPO (a result of discouraging market conditions), LegalZoom’s revenues continue to rise.²⁴ With wills costing just \$69²⁵ and trusts priced at as little as \$249²⁶, it is understandable why consumers are flocking to this web-based alternative.

B. The Litigation

Success is not without consequence. In 2010, LegalZoom faced legal challenges from Missouri residents and the Washington State Attorney General’s office.²⁷ In 2011, lawyers from the DeKalb County Bar Association of Alabama sued LegalZoom, asking the court to enjoin

¹⁸ See *Legal Plans—Business*, *supra* note 15. See also *Legal Plans—Personal*, *supra* note 15.

¹⁹ See *Legal Plan—Business*, *supra* note 15.

²⁰ See *id.*

²¹ Tomio Geron, *LegalZoom Files for IPO of Up To \$120 Million*, FORBES (May 11, 2012, 4:15 PM), www.forbes.com/sites/tomiogeron/2012/05/11/legalzoom-files-for-ipo/.

²² *Home page*, LEGALZOOM, www.legalzoom.com, (last visited Sept. 3, 2014).

²³ Debra Cassens Weiss, *LegalZoom Valued at 40 Times Last Year’s Earnings for IPO*, ABA JOURNAL (July 25, 2012, 9:38 AM) www.abajournal.com/news/article/legalzoom-valued-at-40-times-last-years-earnings-for-ipo/.

²⁴ Reynolds Holding & Antony Currie, *Do-It-Yourself Law Firm IPO Looks a Bit Too Feisty*, SLATE (Jul. 24, 2012) http://www.slate.com/blogs/breakingviews/2012/07/24/do_it_yourself_law_firm_ipo_looks_a_bit_too_feisty.html (noting a 43% improvement in first quarter earnings in 2012).

²⁵ *Last Will & Testament*, LEGALZOOM, <http://www.legalzoom.com/legal-wills/wills-overview.html> (last visited Jan. 11, 2015).

²⁶ *Living Trust*, LEGALZOOM, <http://www.legalzoom.com/living-trusts/living-trusts-overview.html> (last visited Jan. 11, 2015).

²⁷ See generally *Janson v. LegalZoom.com, Inc.*, 727 F.Supp.2d 782 (W.D. Mo. 2010). See also *Washington Attorney General zooms in on LegalZoom’s claims*, WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL (Sept. 16, 2010), www.atg.wa.gov/pressrelease.aspx?id=26466#.UpqghaXGcig [hereinafter Washington Attorney General].

LegalZoom from continuing business.²⁸ In 2012, LegalZoom's services were challenged by the North Carolina State Bar and a resident of Ohio.²⁹ Finally, in 2013, class actions against LegalZoom were filed in both Texas and Arkansas.³⁰ LegalZoom reported a \$5.4 million loss related to the company's legal settlements on their initial public offering.³¹ Most of the cases brought against LegalZoom allege that the company is engaged in the unauthorized practice of law.³²

One of the first lawsuits brought against LegalZoom in 2010, *Janson v. LegalZoom.com, Inc.*, resulted in the district court's denial of LegalZoom's motion for summary judgment.³² The Missouri court explained that LegalZoom's services "go beyond self-help" and "affect secular rights."³³ The *Janson* case involved a class action suit brought by Todd Janson, Gerald Ardrey, Chad Ferrell, and C&J Remodeling.³⁴ The only discernible harm to the plaintiffs in the *Janson* case was the money spent for documents prepared unlawfully by an unlicensed entity.³⁵ But, as critics of the lawsuit note, the plaintiffs in *Janson* did not allege that the services provided by LegalZoom—i.e., the documents prepared—were in any way inadequate.³⁶ In denying LegalZoom's motion for summary judgment, the court distinguished LegalZoom's document preparation from legally approved "self-help" kits, calling the former a "legal document preparation service," which constitutes practicing law, and the latter a mere "good[...]", the sale of which does not constitute practicing law.³⁷ The court found that the practice of law by LegalZoom creates a "clear risk of the public being served in legal matters by incompetent or unreliable persons."³⁸ Finding "little or no

²⁸ See generally Stephanie Rabiner, *LegalZoom Sued by Alabama Bar Group for Unauthorized Practice*, FINDLAW, (July 20, 2011, 5:44 AM), www.blogs.findlaw.com/strategist/2011/07/legalzoom-sued-by-alabama-bar-group-for-unauthorized-practice.html.

²⁹ See generally *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2012 WL 3678650 (N.C. Super. August 27, 2012). See also generally *Lowry v. LegalZoom.com, Inc.*, No. 4:11CV02259, 2012 WL 2953109 (N.D. Ohio July 19, 2012).

³⁰ See generally *Solotko v. LegalZoom.com, Inc.*, No. 03-10-00755-CV, 2013 WL 3724770 (Tex. App. 2013) (denying class certification requirements were met by plaintiff). See also generally *LegalZoom.com, Inc. v. McIllwain*, 429 S.W.3d 261 (2013).

³¹ See *LegalZoom.com, Inc.*, Registration Statement (Form S-1) 7, n. 1 (May 10, 2012).

³² See *Washington Attorney General*, *supra* note 27. See also *LegalZoom Sued by Alabama Bar*, *supra* note 28; *N.C. State Bar*, 2012 WL 3678650 at *1; *Lowry*, 2012 WL 2953109 at *1; *McIllwain*, 429 S.W.3d at 262. See generally *Janson v. LegalZoom.com, Inc.*, 802 F.Supp.2d 1053 (W.D. Mo. 2011).

³³ *Id.* at 1064, 1069.

³⁴ *Janson Compl.* ¶¶ 1–3, Jan. 15, 2010, available at http://ipwatchdogs.com/cases/janson_v_legalzoom_complaint.pdf.

³⁵ *Janson Compl.* ¶¶ 23–25.

³⁶ Daniel Fisher, *Missouri Lawyers Sue to Block Online Competition*, FORBES (May 13, 2011), www.forbes.com/sites/danielfisher/2011/05/13/missouri-lawyers-sue-to-block-online-competition/.

³⁷ *Janson*, 802 F.Supp.2d at 1064.

³⁸ *Id.* (internal quotations omitted).

difference” between LegalZoom and a practicing attorney, the court denied LegalZoom’s motion for summary judgment and allowed the case to go forward.³⁹ LegalZoom quickly settled.⁴⁰

LegalZoom’s legal woes did not end after its settlement in *Janson*. Under LegalZoom’s settlement with the Washington State Attorney General’s office, the company submitted an Assurance of Discontinuance. The Assurance guaranteed, among other things, the site would no longer compare its costs to the costs of a licensed attorney without also providing a disclosure that LegalZoom’s services are not a substitute for an attorney’s or a law firm’s services.⁴¹ In 2007, the North Carolina State Bar issued a Cease and Desist letter to LegalZoom.⁴² LegalZoom did not cease and desist, however, and in November of 2010, LegalZoom attempted to register its services with the North Carolina Bar.⁴² Taking issue specifically with LegalZoom’s prepaid legal services, the North Carolina Bar denied registration.⁴³ When LegalZoom sought a declaratory judgment prescribing that LegalZoom is not engaged in the unauthorized practice of law in North Carolina, the court refused to rule on the issue, holding that the facts were not ripe enough to issue declaratory relief.⁴⁴ While LegalZoom continues to offer its document services in North Carolina, the company is still proscribed from offering prepaid legal plans in that state.⁴⁵ With the Arkansas Supreme Court compelling arbitration of the class claims against LegalZoom, litigation over whether LegalZoom is engaged in the unauthorized practice of law in that state continues.⁴⁶

³⁹ *Id.* at 1065, 1069.

⁴⁰ Debra Cassens Weiss, *LegalZoom Can Continue to Offer Documents in Missouri Under Proposed Settlement*, ABA JOURNAL (Aug. 23, 2011), www.abajournal.com/news/article/legalzoom_can_continue_to_offer_documents_in_missouri_under_proposed_settle/ (settling a mere 21 days after the Missouri court’s denial for summary judgment).

⁴¹ See generally *Washington Attorney General*, *supra* note 26. See also Def.’s Assurance of Discontinuance ¶2.1(a), Sept. 15, 2010, available at www.atg.wa.gov/uploadedFiles/Home/News/Press_Releases/2010/LegalZoomAOD.pdf.

⁴² N.C. State Bar, No. 11 CVS 15111, 2012 WL 3678650 at *2 (N.C. Super. Aug. 27, 2012).

⁴² *Id.* at *3.

⁴³ *Id.*

⁴⁴ *Id.* at *6.

⁴⁵ See generally www.legalzoom.com/attorneys-lawyers/legal-plans/business.html (the author attempted to register for a prepaid Business Legal Plan in North Carolina and was met with an error message stating “We’re sorry! Business Advantage Pro is not currently available in the state you selected”).

⁴⁶ *McIllwain*, 429 S.W.3d at 266 (“while we confess that it is tempting to say that our authority to regulate the practice of law, granted to us by the Arkansas Constitution, empowers us to reserve the questions regarding the unauthorized practice of law for the courts of this state over which we have a superintending authority, we are chastened by the awareness of our duty to defer to the Supreme Court of the United States on matters of federal statutory interpretation” and therefore the FAA controls and compels arbitration to decide whether or not LegalZoom is engaged in the unauthorized practice of law). *But see id.* (“Whether the contract mentioned in the underlying case contains only one, or even a dozen arbitration clauses, is irrelevant to the issue presented because the contract is wholly irrelevant

There remains, however, some hope for LegalZoom. The lawsuit in 2011 brought by E. Allen Dodd, a lawyer in Alabama, resulted in a dismissal.⁴⁷ The Alabama court ruled that LegalZoom could continue its services in Alabama, and the Alabama Bar refused to intervene to make the case that LegalZoom was practicing law unlawfully.⁴⁸ The Alabama Bar's refusal to act, and the court's refusal to hold that LegalZoom is engaged in the unauthorized practice of law, would seem to suggest that Alabama laws do not prohibit LegalZoom's continued operation in that state.⁴⁹ Additionally, although no ruling on the merits has come from the class action brought against LegalZoom in Texas, Texas courts are likely to hold that LegalZoom is *not* engaged in the unauthorized practice of law.⁵⁰ In addition to state support of this online legal alternative, many legal academics support LegalZoom and similar services, and other regulatory branches support relaxed rules to allow services like LegalZoom to exist.⁵¹

C. The Possibility & the Problems

The possibilities available for consumers if LegalZoom is accepted in all 50 states are clear: affordable, efficient, and user-friendly legal services.⁵² However, LegalZoom's forms and services are not perfect. In fact,

to the question of whether LegalZoom has engaged in the unauthorized practice of law...nothing in the FAA preempts the courts from carrying out their duties to regulate the practice of law") (Hannah, C.J., dissenting).

⁴⁷ Chas Rampenthal, *Alabama Lawsuit Against LegalZoom Dismissed*, GLOBENEWSWIRE (Feb. 1, 2011, 10:00 AM), <http://globenewswire.com/news-release/2011/02/01/438943/212411/en/Alabama-Lawsuit-Against-LegalZoomDismissed.html> (citing www.legalzoom.com).

⁴⁸ See generally Pl.'s Pet. Writ of Mandamus, No. 1091717, 2010 WL 4234944 at *1.

⁴⁹ See generally Rampenthal, *supra* note 47; see also *supra* note 48.

⁵⁰ In 1999, a Texas district court heard a challenge to Parsons Technology, Inc.'s Quicken Family Lawyer Software that claimed the software was engaged in the unauthorized practice of law. See Schindler, *supra* note 9, at 186. Although the district court ruled that the software was engaged in the unauthorized practice of law, the Texas legislature subsequently passed legislation overturning the court's decision. *Id.* The unauthorized practice of law statute in Texas now excludes websites, books, and software programs which "clearly and conspicuously" state that the resources are not a "substitute for the advice of a lawyer." *Id.* (citing Tex. Gov't Code Ann. § 81.101 (2011)). LegalZoom will likely fall under this exclusion, depending on how the court defines "conspicuously," if the court is asked to do so. When accessing the Business Legal Plan (described in Part III.A *supra*), a customer that chooses Texas is provided language stating "[w]e are not a law firm or a substitute for an attorney or law firm" at the bottom of the page in fine print—seemingly bringing LegalZoom within the exclusion set-out by the Texas legislature.

⁵¹ 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 has... criticized state use of broad practice of law definitions for... failure to accommodate access to emerging technologies").

⁵² See Isaac Figueras, *The LegalZoom Identity Crisis: Legal Form Provider or Lawyer in Sheep's Clothing?*, 63 CASE W. RES. 1419, 1429 (2013) (stating "[i]f LegalZoom's business model survives, then this could be a significant step towards the commoditization of

LegalZoom disclaims a guarantee that any form or service is “correct, complete[,] or up-to-date.”⁵³ Thus, there is tension between possible advances in the commoditization of law and the quality of services that commodity provides. Below is an exploration of two of the most common issues with LegalZoom, and whether or not the academic alarm over these issues is warranted.

1. *Practice of Law*

As mentioned above in Part III.B, most litigation brought against LegalZoom revolves around claims that LegalZoom is engaging in the unauthorized practice of law. Further, LegalZoom itself recognizes the threat unauthorized practice laws imposes to the success of its business, positioning this concern first in a list of “Risks Relating to Our Business” in its 2012 SEC IPO filing.⁵⁴ The definition of what *is* the practice of law varies from state to state.⁵⁵ In addition to non-uniformity among states, attempts to define “the practice of law” have historically been fruitless.⁵⁶ Generally, the practice of law is marked by an exercise of professional judgment by a trained lawyer.⁵⁷ This professional judgment is exercised when an attorney uses her ability to analyze a specific legal issue by applying “the general body and philosophy of law.”⁵⁸ The general purpose of unauthorized practice statutes is to protect consumers.⁵⁹ Regulating who may practice law protects consumers because a license ensures that the practitioner has the education

law... [t]his provides many advantages to consumers who were previously unable to access affordable, customized legal services”). *See, e.g.,* Mathew Rotenberg, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 720 (2012) (asserting that “[c]onsumers are benefiting [from LegalZoom] as well, using these products as affordable alternatives to hiring an attorney”).

⁵³ *Terms of Use*, LEGALZOOM, www.legalzoom.com/legal/general-terms/terms-of-use (stating “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. [. . .] [T]he legal information contained on the Site and Applications . . . is not guaranteed to be correct, complete or up-to-date”).

⁵⁴ *See* LegalZoom.com, Inc., Registration Statement (Form S-1) 11 (May 10, 2012).

⁵⁵ *See* Model Rules of Prof’l Conduct R. 5.5 cmt. 1 (2013).

⁵⁶ *See* Catherine Lanctot, *Conference on Legal Ethics: “What Needs Fixing?”: Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 811 (2012) (stating “lawyers have famously struggled for decades to define what it is that they do for a living... it is the amorphous nature of the practice of law that makes inquiries into unauthorized practice principles so challenging”).

⁵⁷ *Id.*

⁵⁸ *Id.* (citing Model Code of Prof’l Responsibility EC 3-5 (1982)).

⁵⁹ *See* Rotenberg, *supra* note 52 at 714. *See also* Schindler, *supra* note 10, at 439.

and ability to grapple with complex legal issues and provides a means of meeting consumer expectations of effective legal service.⁶⁰

Many believe LegalZoom is engaged in the unauthorized practice of law.⁶¹ Instead of simply providing blank forms with instructions, LegalZoom makes determinations about which form best suits the needs of the consumer based on the consumer's answers to a questionnaire.⁶² LegalZoom also drafts legal documents which include information deemed necessary by its algorithms.⁶³ For example, when a business owner is debating which type of legal entity to form, LegalZoom provides an online questionnaire which, after answering a few basic questions about the future business, allows the consumer to "choos[e] the right business structure."⁶⁴ This advice giving function, and parallel form-choosing function, brings LegalZoom into traditional "practice of law" territory.⁶⁵

The concerns deriving from a nonlawyer practicing law are varied. First, lay consumers may not be capable of determining which form best suits their needs, or if the form selected by LegalZoom best fits their needs.⁶⁶ This means that lay consumers may be saddled with a product that is inadequate for, or actually harms, the consumer's interest—an issue that is normally addressed through regulations ensuring those practicing law are adequately trained to provide sufficient solutions to legal issues.⁶⁷

⁶⁰ See Underwood, *supra* note 51, at 440. Underwood also discusses that license requirements allow for confidentiality when an attorney-client relationship is formed, but this fact will be discussed in the next section.

⁶¹ See *supra*, Part II.B.

⁶² See *Janson*, 802 F.Supp.2d at 1055–57. See also *How It Works*, LEGALZOOM, <https://www.legalzoom.com/about-us/how-it-works> (last visited Sept. 3, 2014).

⁶³ See *How It Works*, *supra* note 62.

⁶⁴ See *Starting Your Business, Get Help*, LEGALZOOM, www.legalzoom.com/business/guide_intro.html.

⁶⁵ See Lanctot, *supra* note 56, at 849 ("the courts have consistently taken the position that selecting which form to use, giving advice about which information ought to be included in a form, or soliciting information from a lay person and then making determinations about how to use the information in the form is the equivalent of practicing law"). See also Figueras, *supra* note 52, at 1426 (stating "the customization of forms for customers and review of their documents for inconsistencies could push LegalZoom into the role of a document preparer and therefore into the practice of law") and at 1438 (asserting "[e]ven if the clauses that end up in these forms are written beforehand by attorneys, the fact that LegalZoom's program selects which clauses go in the form supports the argument that this constitutes providing legal advice [a form of practicing law]"); *Janson*, 802 F.Supp.2d at 1065 ("[a] computer sitting at a desk in California cannot prepare a legal document without a human programming it to fill in the document using legal principles that are derived from... law that are selected for the customer based on the information provided by the customer... there is little or no difference between this and a lawyer... asking a client a series of questions and then preparing a legal document based on the answers provided and applicable... law").

⁶⁶ See Lanctot, *supra* note 56, at 821.

⁶⁷ See *id.* at 848, 854 ("[t]he forms may be outdated or not suitable for use for a particular set of facts... [t]here is no follow-up to ensure that the appropriate documents were used, or whether additional assistance was necessary").

Second, because of LegalZoom’s proclamations about guaranteed satisfaction and “personalized, affordable legal *protection*” consumers may be lulled into a false sense of security after purchasing documents or services.⁶⁸ Even if consumers have read LegalZoom’s disclaimer and understand that the forms and services on the site may not be accurate, consumers are still likely to believe that LegalZoom’s documents and services are “prepared with a minimal level of competence and care.”⁶⁹ It is hard to reconcile consumer expectations of a “minimal level of competence and care” provided by LegalZoom’s own guarantee of quality and “affordable legal protection” with LegalZoom’s repudiation of completeness or correctness relating to its forms and services.⁷⁰ In light of the tension between what LegalZoom guarantees and what it actually provides—along with the understanding that consumers generally do not read disclaimers—the legal community’s concern is that consumers are relying on unreliable legal services to their detriment.⁷¹ If nonlawyers are prohibited from providing such services, then consumers are generally justified in relying on such services because they are only provided by licensed practitioners.

Finally, consumers have no recourse in the worst case scenario—the LegalZoom document is wholly inadequate for the consumer’s needs and therefore provides no legal protection.⁷² Although LegalZoom allows for “binding arbitration” should disputes prove unresolvable through informal channels, LegalZoom’s disclaimer largely eviscerates the company’s liabilities.⁷³ With minimal or no consequences resulting from sub-par legal instruments and services, LegalZoom has no incentives to ensure accuracy or quality. If consumers receive products or services from licensed practitioners, however, regulations prevent attorneys from disclaiming such liability and therefore attorneys have substantial incentives to ensure accuracy and quality.⁷⁴

⁶⁸ See *id.* at 854 (“consumers themselves may be misled into thinking that they have resolved their legal difficulties without realizing that the documents they have paid for are woefully incomplete”). See also *Home Page*, LEGALZOOM, www.legalzoom.com (emphasis added).

⁶⁹ See Katy Ellen Dedy, *Cyberadvice: The Ethical Implications of Giving Professional Advice Over the Internet*, 14 GEO. J. LEGAL ETHICS 891, 902 (2001).

⁷⁰ See *supra* note 63.

⁷¹ See Catherine Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 193 (Oct. 1999) (“the nature of disclaimers in cyberspace may create difficulties in enforcing them, as they may easily be ignored or avoided with the inadvertent click of a mouse”).

⁷² See Lanctot, *supra* note. 56, at 821 (“document preparers [are] largely immune from liability for their services”).

⁷³ See *Home Page Disclaimer*, LEGAL ZOOM, www.legalzoom.com/disclaimer.html (“LegalZoom is not responsible for any loss, injury, claim, liability, or damage related to your use of this site...whether from errors or omissions in the content of our site... your use of the site is at your own risk”).

⁷⁴ Model Rules Prof’l Conduct R.1.8(h)(1) (“[a] lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice”).

While the hypothetical harms follow logically from an analysis of unauthorized practice laws, the empirical data does not support the conclusion that consumers are harmed when unauthorized persons or entities practice law.⁷⁵ Of 144 unauthorized practice cases reported between 1908 and 1969, only 12 claimed “specific injury.”⁷⁶ Only 2% of unauthorized practice claims are initiated by consumers—the rest are a result of Bar Committee initiatives.⁷⁷ Further, it is likely true that many rote and routine legal services do not require a Juris Doctor to be completed effectively.⁷⁸ Allowing para-professionals, such as paralegals, to perform these tasks lowers costs while still providing quality services.⁷⁹ Also, although a disclaimer of all liability could, in theory, lower quality, consumers will not use nonlawyers for legal services if the services provided are routinely insufficient.⁸⁰ With empirical data to show that consumers are ultimately not the voice of discontent, unlicensed para-professionals having the ability to provide quality routine legal services, and market forces ensuring document and service quality, it is likely LegalZoom is able to avoid the parade of horrors caused by nonlawyers practicing law predicted by academia.

2. Attorney-Client Privilege

Even licensed attorneys are protected from claims when no attorney-client privilege is formed.⁸¹ Therefore, a prerequisite to holding LegalZoom liable, in addition to or instead of the liability they may face for practicing law without a license, is the existence of an attorney-client relationship. Like unauthorized practice statutes, whether or not an attorney-client relationship has been formed varies by jurisdiction. However, generally courts draw

⁷⁵ See Rotenberg, *supra* note 52, at 724 (“[h]arm resulting from the unauthorized practice of law is historically overstated”).

⁷⁶ *Id.* at 724–25 (citing Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors - Or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 203 (1980)).

⁷⁷ *Id.* (citing Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 43 (1981)).

⁷⁸ See Roger C. Cramton, *Symposium on Mandatory Pro Bono: Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113, 1139 (1991) (“[s]even years of higher education is not required for most repetitive transactions” such as “wills, uncontested divorces, simple bankruptcies, [and] residential home transactions”).

⁷⁹ *Id.* at 1137.

⁸⁰ See Rotenberg, *supra* note 52, at 726 (“market forces create strong incentives for [LegalZoom] to create reliable, cost-efficient[,] and non-harmful products”) and at 727 (“existing market forces already incentivize consumer protection, while a variety of legal actions provide significant tools for redress”). See also Underwood, *supra* note 51, at 464 (“a demonstrably reliable service does not raise the same concerns” as are normally raised by nonlawyers practicing law).

⁸¹ See Dedy, *supra* note 68, at 896 (discussing that a prerequisite to a legal malpractice claim is the existence of an attorney-client relationship giving rise to a duty of care).

distinctions by gauging the generality of the advice.⁸² Specifically tailored advice directed at a present and real legal question ordinarily will give rise to an attorney-client relationship.⁸³ An attorney-client relationship can arise through both explicit and implicit means.⁸⁴ Much like LegalZoom's disclaimer asserting that LegalZoom is not engaged in the practice of law, LegalZoom also specifically disclaims the existence of an attorney-client relationship.⁸⁵ LegalZoom warns that "you are and will be representing yourself in any legal matter you undertake through LegalZoom's legal document service."⁸⁶ However, licensed practitioners have also tried to disclaim attorney-client relationships, often to no avail.⁸⁷ There is no reason to assume that courts would disallow attorneys to disclaim such a relationship but then paradoxically allow LegalZoom to continue the practice.⁸⁸

The duty of care imposed on lawyers as a result of forming an attorney-client relationship protects clients in two important ways, among others: (1) the relationship ensures loyalty by the attorney to the client, and (2) the duty gives rise to the important attorney-client privilege.⁸⁹ As to the first concern, there is an argument that LegalZoom does not have loyalty to the client, but rather, to profit.⁹⁰ Because the well-being of the client is not

⁸² See Kristine M. Moriarty, *Law Practice and the Internet: The Ethical Implications that Arise From Multijurisdictional Online Legal Service*, 39 IDAHO L. REV. 431, 433 (2001) ("[t]he courts have generally drawn the line regarding whether or not a duty exists by considering the generality of the advice").

⁸³ *Id.* at 434. See also Deady, *supra* note 70, at 898 ("[g]iving legal advice has been viewed as a hallmark of the attorney-client relationship and the bar has been distinctly hostile to lawyers answering questions about specific legal issues").

⁸⁴ See generally Deady, *supra* note 70, at 897 ("with legal cyberadvice we are dealing with an implied attorney-client relationship rather than an explicit contract or agreement to provide services").

⁸⁵ *Terms of Use*, LEGALZOOM, www.legalzoom.com/legal/general-terms/terms-of-use ("LegalZoom does not and will not create an attorney-client relationship between you and LegalZoom") (Sept. 3, 2014).

⁸⁶ *Id.*

⁸⁷ See Moriarty, *supra* note 81, at 434–35 ("[m]any lawyers attempt to . . . disclaim[] the existence of [an attorney-client relationship] . . . [t]hese disclaimers, however, are usually unpersuasive to the courts").

⁸⁸ See Schindler, *supra* note 10, at 207–08 ("in other areas of life, providing a disclaimer is not always enough to disclaim liability—New York and Ohio both have statutes that void liability disclaimers for parking garages whose employees act negligently in handling patrons' cars . . . [w]hile valuable, cars are likely less valuable than the sum of the estate a person leaves in their will, the handling of which deserves care above a level of potential negligence").

⁸⁹ See *id.* at 204 n. 124 (the existence of an attorney-client relationship "insure[s] the loyalty of the lawyer to the client unimpaired by intervening and possibly conflicting interests.") (quoting Elliot E. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 UCLA L. REV. 438, 439 (1965)). See also Underwood, *supra* note 51, at 440–41 ("[in] the absence of [the] attorney-client privilege courts may compel nonlawyers to testify about communications involving their clients").

⁹⁰ See Schindler, *supra* note 10, at 189 ("the motivating factor behind publishing these tools is profit rather than concern for the public").

the main focus of LegalZoom, there is a possibility that LegalZoom's legal services will be colored by its own interests and resultantly ill-fitted to the consumer.⁹¹ For example, LegalZoom, in order to realize more revenue, may try to "up-sell"⁹² a consumer buying a Last Will by offering a Living Trust. Notwithstanding the fact that a Living Trust may not be appropriate for that particular consumer, LegalZoom may encourage its purchase. This sort of salesmanship is ordinarily not allowed in the law, as the main concern in such a transaction is the profit of the legal services provider and not the well-being of the client.⁹³

As to the second concern, LegalZoom specifically disclaims the existence of an attorney-client privilege.⁹⁴ Further, because LegalZoom is not an attorney, or an attorney's subordinate, LegalZoom is not covered by the Rules of Professional Conduct and therefore customers of LegalZoom could not form an attorney-client relationship. Without the attorney-client privilege, LegalZoom may be subpoenaed for information relating to one of its two million customers.⁹⁵ Imagine a father who leaves all of his money to his new wife and disinherits his children. During a moment of unhappiness with his marriage, the father creates an account on LegalZoom in order to file for an uncontested divorce. After filling out the questionnaire, LegalZoom sends the divorce documents to the father. The father's marriage gets better, he decides not to file for an uncontested divorce, and burns the documents. Unfortunately, a few months later, the father falls ill and passes away. The father's children may claim that the will leaving all the money to the new wife does not represent the wishes of their now deceased father and, in order to prove it, could subpoena LegalZoom to prove their father tried to file for divorce.⁹⁶ If that same father had gone to an attorney to prepare divorce documents, the court, and the children, would be unable to subpoena the attorney for the same documents because of the attorney-client privilege.

⁹¹ See Cramton, *supra* note 78, at 1125 ("the assistance of lawyers is either essential or highly advantageous in dealing with court or administrative proceedings . . . [and] although . . . nonlawyers could handle many routine tasks . . . a . . . person is at a severe disadvantage if an experienced and able lawyer is representing the opposing interest").

⁹² While selling an item, the salesperson attempts to sell a complimentary, but perhaps unnecessary, item in order to boost sales.

⁹³ Model Rules Prof'l Conduct § 1.7, cmt 1 ("[I]oyalty and independent judgment are essential . . . in the lawyer's relationship with the client. . . [c]oncurrent conflicts of interest can arise . . . from the lawyer's own interests" and are prohibited). See also Lanctot, *supra* note 56, at 848 (examining bankruptcy cases and concluding that the negative outcomes in the cases studied arose from either "misrepresentation or negligence by unscrupulous entrepreneurs trying to make a quick buck" or "honest lay practitioners, who genuinely believed they were providing valuable service, [and] made basic errors because of their lack of adequate training or experience with the complexities of the bankruptcy codes").

⁹⁴ LEGALZOOM, www.legalzoom.com (last visited Sept. 5, 2014) ("[c]ommunications between you and LegalZoom are protected by our Privacy Policy but not by the attorney-client privilege").

⁹⁵ See Rotenberg, *supra* note 52, at 736.

⁹⁶ See Underwood, *supra* note 51 at 441 ("courts may compel nonlawyers to testify about communications involving their clients").

Although the hypotheticals offered above are possible negative scenarios following from a consumer using LegalZoom, the benefits may outweigh the costs.⁹⁷ In the 12 years LegalZoom has been in operation, there has been little public outcry concerning the inadequacy of LegalZoom products, other than from practicing attorneys.⁹⁸ This lack of public displeasure would seem to indicate a general satisfaction with the legal services LegalZoom provides to its consumers.⁹⁹ If LegalZoom is able to provide a minimal level of legal protection to those consumers who cannot otherwise afford an attorney, or who simply would not otherwise choose to see an attorney, such services may help prevent some litigation that would have otherwise occurred had those consumers not turned to LegalZoom.¹⁰⁰ Additionally, it is likely true that some help for otherwise pro se litigants is better than no help.¹⁰¹ Pro se litigants can be a burden on the court systems and, with no information whatsoever at their disposal, often do a poor job of representing themselves.¹⁰² Even if not every document or service created and sold by

LegalZoom is perfect for a particular consumer, for those consumers who find success using LegalZoom there is no subsequent litigation or, if there is, the consumers are better prepared to represent themselves, relieving some of the burden on the court system.

⁹⁷ See Cramton, *supra* note 78, at 1128 (“[v]iewed in light of the alternatives—no representation or self-representation—the competency problem is overstated”). See also Richard W. Painter, *Symposium on Ethical Issues and Trends in Family Law Pro Se Litigation in Times of Financial Hardship—A Legal Crisis and Its Solutions*, 45 FAM. L.Q. 45, 60 (2011) (“[I]legal services are a necessity for many people and should be available for persons of modest means, even if some qualitative sacrifices have to be made and some ethics rules have to be adjusted”).

⁹⁸ See LegalZoom.com, Inc., Registration Statement (Form S-1) 1 (May 10, 2012) (explaining that in the first ten years of operation, LegalZoom surveyed “two million consumers,” and that in 2011 “nine out of ten of our surveyed customers said they would recommend LegalZoom to their friends and family” an apparent indication of satisfaction). See also David A. Hiersekorn, *So, What’s So Bad About LegalZoom.com, Anyway?*, www.kctrustlaw.com/files/Download/Legalzoom.pdf (last visited Aug. 5, 2014) (an account of the experience of one estate planning lawyer using LegalZoom to create a will and a documenting of the failures of the will to address his specific needs).

⁹⁹ See LegalZoom.com, Inc., Registration Statement, *supra* note 97, at 1. *But see* Lanctot, *supra* note 56, at 854 (“we have no way of knowing how courts will react in the future, when the first dot-com wills are probated or divorce papers are challenged, and turn out to have been inadequate under the law”).

¹⁰⁰ See Rotenberg, *supra* note 52 at 733 (stating LegalZoom may “create a new preventative market for consumer driven legal services”).

¹⁰¹ See Painter, *supra* note 97, at 53 (“courts recognize that computerized legal forms can help pro se litigants and save judges some of the time they spend dealing with litigants who are unprepared”).

¹⁰² See *id.* at 45 (“litigants are generally doing a poor job of representing themselves and are burdening the courts”).

III. THE HIGH PRICE OF LAW

The issue with the organized bar taking actions to enjoin LegalZoom's continued existence is that the legal community's failure to provide affordable legal services to all those who need legal services has a long and well-documented history. The bar took notice of this disparity as early as 1908, and the disparity continues and has grown into this decade. These next sections explore the past failings of the bar to ensure access to the justice system, the bar's recent history and continued failure to provide access, and potential causes of the vacuum that has been created through providing the very wealthy and the very poor legal services, with no services going to those in between.

A. *The Past*

One of the "Core Principles" of the legal profession is that lawyers have "an obligation to the public in addition" to an obligation to the client.¹⁰³ These obligations to the public have justified special privileges given to the legal profession—such as self-regulation—and manifested in the form of ideological visions of attorneys committed to the "spirit of public service."¹⁰⁴ "The professional ideal is that each lawyer should strive to make the legal system live up to its grand promise of equality before and under the law."¹⁰⁵

While this has been the aspiration, the legal profession, in practice, has fallen short of the ideal. The first code attempting to regulate the ethics of attorneys made its debut in 1908.¹⁰⁶ The codification of the profession's duty of "honesty, integrity, and impartial[ity]" was a response to the public's perceptions that the legal profession did not serve the public, but rather only the "wealthy and powerful."¹⁰⁷ However, the members of the American Bar Association, when drafting the 1908 Canon, believed *new* attorneys who charged contingency fees and advertised themselves in order to attract more business were the source of the image problem.¹⁰⁸ And so, the ABA took the first step of many to limit access for less wealthy individuals by regulating both contingency fees and advertising.¹⁰⁹

¹⁰³ Christopher J. Whelan, *Some Realism About Professionalism: Core Values, Legality, and Corporate Law Practice*, in *Enron and Other Corporate Fiascos: The Corporate Scandal Reader*, 813 (Nancy B. Rapoport, et al. ed. 2, 2009).

¹⁰⁴ See Cramton, *supra* note 78, at 1121–22.

¹⁰⁵ *Id.* at 1122.

¹⁰⁶ See Douglas L. Colbert, *Katrina and the Rule of Law in the Time of Crisis: Natural Disasters and the Rule of Law in the Time of Crisis: Professional Responsibility in Crisis*, 51 *How. L.J.* 677, 690 (2008).

¹⁰⁷ *Id.* at 690–91.

¹⁰⁸ *Id.* at 695.

¹⁰⁹ *Id.*

The next attempt to ensure ethical behavior was not until 1969, at the height of the civil rights movement.¹¹⁰ Members of the legal community were aware that colleagues had been part of sophisticated schemes which helped segregationists skirt the profound new mandates coming out of the U.S. Supreme Court.¹¹¹ The movement to supplement and amend the 1908 Canons grew from the ABA's view that members of the bar were tasked with a responsibility to "safeguard individual rights."¹¹² Still, however, the new Model Code codified a lawyer's responsibility to "serve the unrepresented" only as an aspirational goal in the Ethical Considerations rather than a rule with disciplinary consequences.¹¹³

Subsequently, the bar saw many changes. In 1975, the Federal government established the Legal Services Corporation (LSC)—an organization that provided publicly funded legal assistance to indigent clients.¹¹⁴ Many law school graduates entering the workforce in the 1960s and 1970s were committed to public service and were seeking employment with organizations that provided legal aid to the poor.¹¹⁵ By 1980, the Legal Services Corporation was at its apex, employing 6,000 attorneys.¹¹⁶ Parallel to this expansion of legal aid services in the U.S. was the expansion and establishment of "elite" law firms.¹¹⁷ The 1980s also saw the largest surge in the elite law firm arena—the growth rate prior to 1975 holding at 5% and jumping to 8% after 1975.¹¹⁸

¹¹⁰ *Id.* at 697 ("Changing the legal profession's view toward regulating members' ethical conduct rarely occurs in a historical vacuum... virtually every change in... practice... reflects... prevailing political and social forces operating in the period of reform").

¹¹¹ *Id.* at 700.

¹¹² See Colbert, *supra* note 106, at 698.

¹¹³ *Id.* at 702.

¹¹⁴ See Cramton, *supra* note 78, at 1118.

¹¹⁵ Colbert, *supra* note 106, at 704–05.

¹¹⁶ See Cramton, *supra* note 78, at 1118.

¹¹⁷ See Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 10–11 (2011). "Elite law firms" (also often referred to as "Big Law") are most notable for their size, structure, and clientele. *Id.* at 8–10. Although employing more attorneys than traditionally would be part of firms in the 1960s, elite law firms were notable for the small number of partners at the top with many "lesser" attorneys working under them. *Id.* at 9. The structure was bureaucratic, with the marching orders coming from the senior partners and the majority of the substantive work completed by the junior associates. *Id.* at 23–25. Elite law firms dealt primarily, if not exclusively, with "captains of industry," the large corporations and the wealthy entrepreneurs. *Id.* at 8.

¹¹⁸ See Burk & McGowan, *supra* note 117 at 11–12. While only thirty-eight firms in the U.S. had more than fifty lawyers in the 1950s, there was an astonishing 508 firms with more than fifty lawyers in the 1980s, and there were more than 250 law firms employing 100 or more attorneys. *Id.* This expansion in the number of attorneys employed by elite law firms tracked the expansion of elite law firms into multiple jurisdictions, rather than the "single city" model of the 1960s. *Id.* at 12.

B. The Present

In 1983, the Kutak Commission of the ABA redrafted the Model Rules of Professional Conduct into the version with which the lawyers currently in practice are familiar.¹¹⁹ Due to an increasing understanding that pro bono service is an ethical duty of the legal profession, the Commission attempted to codify a mandatory pro bono requirement into the Code.¹²⁰ This measure was met with strong support and equally strong resistance.¹²¹ The result was the Commission's ultimate adoption of Rule 6.1, "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay . . . a lawyer should *aspire* to render at least 50 hours of pro bono . . . services per year."¹²² Again, the ideal of lawyers dedicated to public service remained an aspiration, without being required.¹²³

Meanwhile, elite law firms became bigger and made more money.¹²⁴ The 250 largest law firms in the U.S. in 2008 employed, on average, 535 attorneys.¹²⁵ The average salary for a first year law associate in an elite law firm in 2007 was \$160,000 and the average salary for equity partners in the 100 most profitable firms was \$1.3 million.¹²⁶ This increase in salary amount correlated with a rise in the cost of the billable hour. In 2007, elite law firms were charging clients \$200-\$300 an hour for first year associate work.¹²⁷ During this same year, while money spent on non-LSC funding grew to \$753 million, only about \$375 million was spent on the LSC.¹²⁸ In 2009, "the United States continued to rank last among peer nations in government support for legal aid."¹²⁹

C. The Vacuum

With elite law firms serving the very rich, and legal aid organizations serving the very poor, a vacuum is created for middle- and low-income individuals who need (or want) access to the justice system but do not qualify for assistance and cannot afford attorneys.¹³⁰ For example, in

¹¹⁹ Colbert, *supra* note 106, at 707.

¹²⁰ *Id.* at 710.

¹²¹ *Id.* at 711.

¹²² Model Rules of Prof'l Conduct R. 6.1 (2013) (emphasis added); *see also* Colbert, *supra* note 106, at 707.

¹²³ Colbert, *supra* note 106, at 712.

¹²⁴ Burk & McGowan, *supra* note 117, at 12.

¹²⁵ *Id.*

¹²⁶ *Id.* at 13–14, 21.

¹²⁷ *Id.* at 22. Some equity partners were making as much as \$1,000 per hour during this same year. *Id.*

¹²⁸ *See* Jeanne Charn, *Legal Services for All: Is the Profession Ready?*, 42 LOY. L.A. L. REV. 1021, 1030 (2009).

¹²⁹ *Id.* at 1022.

¹³⁰ *Id.* at 1045 ("[w]e have had a nearly exclusive focus on the very poor at the expense of middle-income people who also cannot afford traditional market-rate lawyer

1994 the ABA reported that 61% of people with moderate incomes that needed legal assistance never actually accessed the justice system.¹³¹ While most lawyers do participate in pro bono, participation is often self-serving and generally does not help to ameliorate the barriers to access.¹³² Additionally, although the recession decreased salaries of incoming associates and partners in elite law firms, the price of the services in those firms still increased, placing those services further from reach for low- and middle-income individuals.¹³³ So now the question is this: When members of the bar generally agree that the legal community has an ethical duty to serve those who are unrepresented, when lawyers in both practice and academia are intently aware of low- and middle-income persons lack of access to the justice system, and with the recession threatening the previous elite law firm model, why has the legal profession failed to fill this vacuum? Three theories are pervasive.

1. Monopoly

First, lawyers have a monopoly over legal services.¹³⁴ Each state, and the Model Rules of Professional Conduct, forbid unlicensed persons from providing legal services.¹³⁵ In this environment, individuals must either risk representing themselves or seek the services of an attorney.¹³⁶ With no competition, there can be little coercive pressure to reduce costs.¹³⁷ “The autonomy of law is . . . that of an institution that can establish its own values . . . without pressure to take into account an important value for participants

services”); see also Cramton, *supra* note 78, at 1116, 1119 (“[t]hose who want lawyers and are able to pay for them have little difficulty finding reasonably competent professional services”) and (“[t]he working poor, and large portions of the middle class, encounter problems in selecting and paying for lawyers”).

¹³¹ See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 960 (2000).

¹³² See Cramton, *supra* note 78, at 1124. (“much of [the time spent on pro bono] is directed toward activities that build relations with other lawyers, such as bar association work, or work that is designed to attract clients, such as free or reduced-rate work for local charities” explaining this is so because Model Rule 6.1 gives many options to fulfill pro bono duties, not limited to helping those that cannot afford representation). See Hadfield, *supra* note 131, at 960 (Another study done by the ABA in 1990 found that 52% of divorces were obtained without attorneys and 88% of family cases litigated had at least one party with no representation or one party who failed to appear.)

¹³³ See Burk & McGowan, *supra* note 117, at 33 (“[m]any large firms... reduced entering associates’ salaries by 10–20% with similar reductions up the line in the more senior classes”). See also *id.* at 36 (“many large firms announced increases in their... standard... rates in early 2009 and again in early 2010” although the increases were “more modest” than in previous years).

¹³⁴ See, e.g., Cramton, *supra* note 78, at 1126; Hadfield, *supra* note 125, at 954; Schindler, *supra* note 10, at 187. See also *supra* Part III.C.1.

¹³⁵ See *supra* Part III.C.1. See also Model Rules of Prof’l Conduct R. 5.5 (2013).

¹³⁶ See Hadfield, *supra* note 131, at 993.

¹³⁷ *Id.*

in the system: the cost of participating.”¹³⁸ In addition to a monopoly over the actual service, lawyers also generally hold a monopoly over the information needed to effectively resolve a legal issue.¹³⁹ This monopoly over information results in consumers having little coercive pressure to reduce costs because consumers do not have the tools to readily value legal services.¹⁴⁰ Some members of the profession believe the monopoly is precisely the reason that lawyers have an affirmative duty to provide legal services for free, or at reduced rates.¹⁴¹

2. Greed

A second theory for why legal services are unaffordable is because lawyers are greedy.¹⁴² What the public perceives as greedy is often translated in legal academia as the tension between the law as a profession and the law as a business.¹⁴³ As a professional, a lawyer serves the public as well as the client.¹⁴⁴ As a businessperson, a lawyer serves the bottom line.¹⁴⁵ When money is the motivating factor behind representation, lawyers become

¹³⁸ *Id.*

¹³⁹ *Id.* at 985–92 (discussing “natural barriers of entry” into the legal market—legal education, practical experience, and a cognitive ability to engage in complex reasoning).

¹⁴⁰ Victor E. Schwartz, et al., *Consumer Protection in the Legal Marketplace: A Legal Consumer’s Bill of Rights Is Needed*, 15 LOY. CONSUMER L. REV. 1, 2 (2002) (“[t]he result is that consumers may not have all the information they need to make an educated decision when choosing either an attorney or a payment plan for legal fees . . . most consumers do not know the value of a claim, how much work and skill will be needed for the attorney to pursue it, or its chance of success . . . [c]onsequently a consumer may be overcharged for legal services”).

¹⁴¹ See Cramton, *supra* note 78, at 1126 (“[L]awyers have a special responsibility to provide legal assistance to the poor because of the profession’s . . . its monopoly of legal services.”).

¹⁴² See Hadfield, *supra* note 131, at 954 (when discussing reasons why the price of law is so high, Hadfield asserts that popular culture believes it is because “lawyers are an avaricious lot who will bleed you dry”); See also Jessica J. Sage, *Authority of the Law? The Contribution of Secularized Legal Education to the Moral Crisis of the Profession*, 31 FLA. ST. U.L. REV. 707, 707–08 (2004) (“[O]ver the last century the study of law has undergone a significant transformation and earned itself a reputation amongst the public as one of being unethical and greedy.”).

¹⁴³ See David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203, 205 (2004) (“[I]n a system in which law practice is a business, if it does not cost the business itself any money it doesn’t matter . . . making a motion that a judge calls ‘stupid’ isn’t a problem, because if the client can pay the freight, you have created more billable hours to pad the bottom line . . . as a business person, if it does not cost you it is simply not real.”) (emphasis added).

¹⁴⁴ See Whelan, *supra* note 103, at 813 (“lawyers have been called upon to be professional—entailing some public service ideal—despite also making a living”).

¹⁴⁵ See Barnhizer, *supra* note 143, at 232 (“We have increasingly seen the assertion that law practice should be viewed as a business activity run for profit rather than a principled profession in which lawyers are obligated to behave in a higher and more ethical manner.”).

beholden to their clients or may engage in bill padding, resulting in the appearance of, or actual, greed.¹⁴⁶

3. Market

Market forces are more likely than monopoly or greed, however, to be driving prices up.¹⁴⁷ The legal market “is characterized by a bidding competition between commercial actors and individuals for access to scarce legal resources.”¹⁴⁸ In addition, the practice of law is difficult and complex.¹⁴⁹ The complexity and difficulty of law results in high costs because it takes a lot of effort and time for a lawyer to resolve even the most benign legal matter effectively and with enough due diligence to satisfy the requirements of Model Rule 1.3.¹⁵⁰ When wealthy corporate and individual clients are competing for the same resources as low- or middle-income individuals, more resources will inevitably be allocated to the wealthy client as it is the wealthy client that will be able to adequately compensate the attorney for the amount of work devoted to the legal issue.¹⁵¹ This allocation of resources distorts the price of legal services, allowing the corporate and wealthy clients to determine the pricing mechanism for all legal services.¹⁵²

IV. THE SOLUTION

Lawyers have had opportunities to fix the disparities in the provision of legal services and have failed to take meaningful action.¹⁵³ One of the first chances was in 1908, when the bar was aware of the public perception that lawyers were beholden to the wealthiest in society.¹⁵⁴ Instead of making it easier for attorneys to represent clients for free, on a contingency basis, and therefore increasing access, the bar stifled attorneys’ ability to contract with clients for this fee arrangement.¹⁵⁵ Then in 1969, when ideals of public service and access to justice for all were pervasive within the profession, the ABA took the conservative approach.¹⁵⁶ Instead of capitalizing on the public service spirit of the 1960s and 1970s by including a duty of mandatory pro bono hours, the ideal of legal services for the unrepresented remained an

¹⁴⁶ See Whelan, *supra* note 103, at 853; see also Barnhizer, *supra* note 143, at 231.

¹⁴⁷ See Hadfield, *supra* note 131, at 998.

¹⁴⁸ *Id.* at 956.

¹⁴⁹ *Id.* at 965–67. Complex not only because of the intricacies involved but also because of the schooling required to practice.

¹⁵⁰ *Id.* at 969. See also Model Rules of Prof’l Conduct R. 1.1 (diligence).

¹⁵¹ Hadfield, *supra* note 131, at 973.

¹⁵² *Id.* at 998 (“[i]t is the wealth of the business client group that ultimately determines the pricing in the markets for lawyers... the legal system prices itself out of reach of all individuals except those with a claim on corporate wealth”).

¹⁵³ See *supra* notes 108–129 and accompanying text.

¹⁵⁴ See *supra* note 107 and accompanying text.

¹⁵⁵ See *supra* note 109 and accompanying text.

¹⁵⁶ See *supra* note 122 and accompanying text.

aspiration.¹⁵⁷ By the time the Kutak Commission undertook to revise the Model Code, it was too late for mandatory pro bono hours.¹⁵⁸ The idea of mandatory pro bono service divided the legal community and the ABA faltered at such strong opposition.¹⁵⁹ Furthermore, despite what the ABA *could* have done to force lawyers to fulfill the public service ideal, attorneys did not take it upon themselves to fulfill the promise of providing legal services to all who needed it.¹⁶⁰

Whether the price of law remains high because a monopoly insulates attorneys from outside pressure to lower costs, the sheer greed of bar members, or because noncompetitive market forces skew the cost of legal services high when corporations and low- and middle-income individuals compete for the same resources, the vacuum remains.¹⁶¹ LegalZoom provides needed access to the legal system that attorneys have been otherwise unable (or unwilling) to fulfill.¹⁶² The services provided by LegalZoom are often characterized as “routine” or “common” legal services.¹⁶³ While LegalZoom does not guarantee accuracy or completeness, and warns consumers that the company does not provide legal representation, consumers are willing to forgo the protections provided by traditional legal services in exchange for minimal legal protections.¹⁶⁴ Even if consumers are fully aware that LegalZoom does not guarantee protection of legal rights, consumers know that something is better than nothing.¹⁶⁵ Furthermore, for those consumers whose legal issues are completely resolved by purchasing a document or service from LegalZoom, the company relieves some of the strain already placed on resources of licensed attorneys.¹⁶⁶ In addition to relieving the strain on legal resources, adequate services provided by LegalZoom act as preventative measures.¹⁶⁷ Consumers that might have otherwise needed to journey through probate or family court may have resolved their legal issues through LegalZoom and never need the court system.¹⁶⁸ Thus, to the extent that LegalZoom’s services adequately meet consumer need, the justice system is not burdened by pro se litigants.¹⁶⁹

Consumers, academics, and some regulators have already recognized these benefits.¹⁷⁰ Most of the criticism pointed at LegalZoom stems from

¹⁵⁷ See *supra* note 122, and accompanying text.

¹⁵⁸ See *supra* notes 124–126 and accompanying text.

¹⁵⁹ See *supra* notes 121–123 and accompanying text.

¹⁶⁰ See *supra* note 132 and accompanying text.

¹⁶¹ See *supra* notes 134–151 and accompanying text.

¹⁶² See *supra* notes 99–100 and accompanying text.

¹⁶³ See *supra* note 12 and accompanying text.

¹⁶⁴ See *supra* notes 52–53, 53, 85, 99–102 and accompanying text.

¹⁶⁵ See *supra* note 99–102 and accompanying text.

¹⁶⁶ See *supra* note 150 and accompanying text.

¹⁶⁷ See *supra* notes 100–102 and accompanying text.

¹⁶⁸ See *supra* note 100 and accompanying text.

¹⁶⁹ See *supra* note 102 and accompanying text.

¹⁷⁰ See *supra* notes 21–25, 47–51 and accompanying text.

licensed attorneys—not the public.¹⁷¹ Alarm about LegalZoom by legal professionals has garnered little sympathy from the public that has been otherwise forgotten by these same professionals.¹⁷² This support for LegalZoom by consumers, paired with the academic harms (as opposed to empirical harms) LegalZoom may cause, is strong evidence that LegalZoom will survive the critics.¹⁷³ Moreover, LegalZoom should survive. For too long the legal community has underserved the population that LegalZoom aims to serve.¹⁷⁴ Therefore, it is the legal community's ethical obligation to ensure access to the justice system that the bar has been unable to provide is provided through services like LegalZoom. While LegalZoom will and should survive attacks by the organized bar, the nature of the service does pose legitimate threats to consumer interests.¹⁷⁵ However, these threats do not need to mean the end of LegalZoom. Rather, states should act to regulate LegalZoom through licensure requirements, disclosures which are thorough and conspicuous, and clearly defined unauthorized practice statutes.

A. Licensure

Though there have not been consumer complaints regarding the quality of LegalZoom's documents or services, states should adopt measures which hold LegalZoom to a higher duty than their current standard of *caveat emptor*.¹⁷⁶ Although market forces should ensure that LegalZoom provides quality services, lest consumers stop using the site, by creating licenses for nonlawyers and nonlawyer entities states could provide incentives with more bite than mere customer disapproval.¹⁷⁷ Theoretically attorneys could be

¹⁷¹ See *supra* notes 27–30, 77 and accompanying text.

¹⁷² See *supra* notes 98–99.

¹⁷³ See *supra* notes 21, 36, 47–51, 76–78, and accompanying text; see also Lanctot, *supra* note 56, at 853 (“[W]e must consider the ramifications of [enforcing unauthorized practice of law statutes against LegalZoom]. The public reaction would likely be negative. Enforcing unauthorized practice of law statutes against online document preparation services would be neither painless nor popular. The lay public, which already detests lawyers, generally perceives unauthorized practice of law enforcement as yet another way for the legal profession to line its collective pockets at the expense of consumers. In addition, it is at least possible that these websites are managing to provide some consumers with a necessary service—basic legal documents at an affordable price. At a time when the bar seems to have abdicated its responsibility to provide routine, noncomplex legal services to the poor and middle class, it could well be counterproductive to try to shut down one vehicle for serving those unmet needs.”).

¹⁷⁴ See *supra* notes 3, 109–129 and accompanying text.

¹⁷⁵ See *supra* notes 53, 66–74, 91, 94–96 and accompanying text.

¹⁷⁶ See *supra* notes 53, 86 and accompanying text.

¹⁷⁷ See Hadfield, *supra* note 131, at 1004 (“the boundaries of the profession... are... a matter of institutional and deliberate choice... in theory... it is quite possible to conceive of a different set of boundaries... over time, [there could be] the development of professional identities, degrees, training, and practices [in the legal system] that become as distinct from each other as... those of the M.B.A. and the M.S.W.”). See also Painter, *supra*

regulated by the marketplace as well—after all, attorneys are also in the business of providing quality services to consumers. However, through licensing, state bar associations and state supreme courts are able to ensure attorneys comply with a higher level of care and diligence than salespeople of other services.¹⁷⁸ Although consumers turning to LegalZoom are necessarily choosing low-cost over high-quality, it does not follow that states should wholly protect consumers in one arena—when consumers use licensed attorneys—and wholly ignore consumer protection in the other arena—when consumers use LegalZoom.¹⁷⁹ Nor does it make sense to deprive consumers of quality affordable alternatives to licensed attorneys. Through licensing, and therefore regulating, the services provided by LegalZoom, states can provide greater access to the justice system while still ensuring “correct, complete, [and] up-to-date” forms and services that aim to actually and accurately fulfill consumer needs.¹⁸⁰

B. Disclosure

Texas courts have already recognized the need for “clear and conspicuous” disclosures.¹⁸¹ The most palatable threat LegalZoom has to consumer interests is misleading the public into believing that LegalZoom is an equivalent replacement for the services of an attorney.¹⁸² When consumers buy “personalized, affordable legal protection” with a “100% satisfaction guarantee,” they may not understand that LegalZoom cannot guarantee the documents will be enforceable if tested in litigation.¹⁸³ The warnings in the fine print at the bottom of the home page that LegalZoom does not represent the customer’s interests, hidden in the text of the overwhelmingly long Terms of Use, and relegated to the inconspicuous Disclaimer, does not provide the consumer an accurate understanding of what they are trading by choosing LegalZoom instead of an attorney.¹⁸⁴ Well-informed consumers should be allowed to accept responsibility for a failed legal document and waive their right to place that responsibility on the legal services provider in exchange for paying lower costs—but the key language is *well informed*.¹⁸⁵

note 97, at 60 (“[o]rganizations that provide low-cost legal services... should be subject to state licensure and regulation of their services”).

¹⁷⁸ See *supra* notes 60, 74, 138 and accompanying text.

¹⁷⁹ See Charn, *supra* note 128, at 1048 (guaranteeing access to the justice system through nonlawyers “will require an examination of cost and quality trade-offs among different modes of service delivery”).

¹⁸⁰ See *supra* notes 66–74 and accompanying text.

¹⁸¹ See *supra* note 50.

¹⁸² See *supra* notes 68–71 and accompanying text.

¹⁸³ See *supra* notes 66–72 and accompanying text.

¹⁸⁴ See *supra* notes 53, 86 and accompanying text.

¹⁸⁵ See Underwood, *supra* note 51, at 467 (“[c]ourts should require that nonlawyers disclose this risk to clients at the outset of the relationship... [n]onlawyers could satisfy this requirement by way of a written disclaimer, provided the disclaimer is unambiguous and is shown to all clients prior to use of the product or service... [i]f consumers

Licensing of nonlawyer legal services, as mentioned above, would be able to regulate entities like LegalZoom in order to approve and monitor adequate disclosure.

C. Clear Definitions

As time has proven, the legal community cannot provide the necessary services to all those who need it.¹⁸⁶ As holders of the keys to access, it is incumbent upon the ABA and states to allow for services like LegalZoom to flourish and do what licensed attorneys have been unable to do.¹⁸⁷ In order for LegalZoom to succeed, however, states must adopt definitions of “practice of law” that are clear and concise. Without an adequate definition of what it is the legal community wants to prevent nonlawyers from doing, LegalZoom will continuously be under threat of class actions by bar associations looking to villainize LegalZoom’s apparently harmless unauthorized practice of law.¹⁸⁸ The legal community has failed to provide services for low- and middle-income individuals, and created a vacuum by providing services for the very wealthy and the very poor. It would be unethical for the legal community to continue to deprive these individuals of services by allowing LegalZoom to fail because of the uncertainty in current definitions of “the practice of law.”

V. CONCLUSION

LegalZoom does what the bar, thus far, has been unable to do. The online form provider brings legal aid to those who cannot otherwise afford it. It provides a means for low-income entrepreneurs to start a business, for those with a smaller nest-egg to ensure it is taken care of if the worst happens, and for moderate-income families to navigate the legalities of love and love lost. While LegalZoom is not without its critics, a whopping 2 million business and personal users, \$12 million net income in 2012, plus little to no outcry from its users proves that LegalZoom is a valid alternative to high-priced lawyers. And while the high price of law cannot be blamed exclusively on attorneys themselves, nor on the monopoly attorneys hold in the legal services market, nor the greed so often associated in the media with the profession of law, nor other market factors such as the enormous cost of law school, there remains a vacuum in the legal services market: a vacuum that leaves those with low- to middle-incomes without legal services. LegalZoom fills that vacuum. Attempts to fill the vacuum, while noble, have failed to completely address the legal services gap. And while consumer

solicit a nonlawyer’s services after reading the disclaimer, then they are presumed to have impliedly consented to the lack of privilege”).

¹⁸⁶ See *supra* notes 106–133 and accompanying text.

¹⁸⁷ See *supra* notes 134–141 and accompanying text.

¹⁸⁸ See *supra* notes 32, 38–46, 54–57 and accompanying text.

protection is a laudable goal, the milk is spilt and we must now find a way to clean it up—LegalZoom is the answer.

It is no longer appropriate for attorneys to bring suits against LegalZoom for phantom harms caused by LegalZoom’s unauthorized practice of law. Consumers are demanding access to legal services, and LegalZoom is making such access available. The legal community has spoken repeatedly throughout history about a duty that each attorney has to provide services to those that cannot otherwise afford them. Although this ideal has not been met by the legal community, LegalZoom provides an alternative that is working. To block access to legal services because of something as amorphous as “practice of law” statutes is to effectively deny access to legal services to those whom the legal community has neglected: a miscarriage of justice and a failure of the profession’s ethical obligations. Therefore, the organized bar is ethically obligated to ensure LegalZoom’s continuation through changes to current regulations.