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Feature Article

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Against the Wind: Practical and Ethical Implications of Artificial Intelligence in the Practice of Law

The Rules of Professional Conduct are slow to adjust to changes in the practice of law and as the pace of technological innovation increases, it can be expected that the rules will lag behind. This will leave attorneys to navigate these issues armed with rules that are ill-equipped to address the challenges that are coming. Many of those challenges are not even known.

While it is unlikely in the foreseeable future that we will see a true "robot lawyer" try a case, artificial intelligence is already being used to do legal research. Cecil De Jesus, *AI Lawyer "Ross" Has Been Hired by its First Official law Firm*, FUTURISM (May 11, 2016), http://futurism.com/artificially-intelligent-lawyer-ross-hired-first-official-law-firm/. The ethical implications of such developments are legion. Lawyers have the obligation to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." ILL. RULE OF PROF'L CONDUCT 1.1, cmt. 8. Lawyers also have the duty to supervise non-lawyer staff. ILL. RULE OF PROF'L CONDUCT 5.3. These potentially competing obligations, and more, will challenge lawyers in their own practice and the practice of law as a whole.

Background

Since at least the 1970s, the legal profession has been uncomfortable with technological advances that, on the surface, seem to circumvent the demand for lawyers. According to Professor Ronald Staudt at Chicago-Kent College of Law, at that time, the ABA had a debate on whether Lexis should provide public-access terminals showcasing federal statutes, case law and tax documents. Interview with Ronald W. Staudt, Professor, Chicago-Kent College of Law, in Chi., Ill. (Aug. 11, 2016). Today, it is almost impossible to imagine a world where the public does not have instant access to "the law." Nearly every opinion of the courts of review, published and unpublished, is available free to the public on websites maintained by those courts. In addition, websites like Cornell's Legal Information Institute fill the internet with statutes, ordinances, regulations, rules, court opinions, and other information. It would be absurd to argue that these websites are engaging in the practice of law.

But consider sites that go several steps further and use artificial intelligence to provide assistance to the public. Take, for example, www.DoNotPay.co.uk, a site created by 19-year-old Stanford student, Joshua Browder, that touts itself as the "World's First Robot Lawyer." This website has two purposes: to help drivers contest parking tickets in New York City and the United Kingdom; and, to help flyers obtain compensation for delayed flights. The website works by allowing the user to sign up (for free) and to then proceed to answer questions such as, "Which of these best describes why you shouldn't receive a parking ticket?" The website offers twelve options from which to choose, including, among others: my car was stolen; I entered the incorrect date on a permit; missing details on the ticket; and problem with the signage.

The user chooses one of these options and the website generates a form in which to enter information concerning the circumstances of the ticket.

Mr. Browder explained that he spoke with attorneys before creating this website because the issue of legality was one of his main concerns. Telephone Interview with Joshua Browder, Creator, www.DoNotPay.co.uk (Aug. 8, 2016). He contends that he is not engaging in the practice of law, and compares his website to self-help sites such as LegalZoom, which provide pre-packaged forms to the public. Professor Staudt tends to agree. However, some believe that Mr. Browder's website (and sites like LegalZoom) constitutes the unlicensed practice of law.

How does Illinois Define the "Practice of Law"?

Proponents of self-help legal websites that provide forms for the public's use argue that "[o]nline legal help systems just provide information. Words. They do not do anything physically." Marc Lauritsen, *Are We Free to Code the Law?*, 56 COMMUNICATIONS OF THE ACM 60, 62 (2013). Nor do they provide legal advice. When a user enters their information into Mr. Browder's website, they are simply entering information into a form. Professor Staudt analogizes the website's code to a "decision tree." The code is the same for every user; but the outcome is different depending on the selections the user makes. Unlike legal advice, it is not personalized. It is simply the entry of data into a blank template, which generates an answer (similar to a search engine).

The Illinois Supreme Court has defined the practice of law as "[t]he giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill." *People ex rel. Illinois State Bar Ass'n v. Schafer*, 404 Ill. 45, 51 (1949). This definition may be over-inclusive and outdated. With the advent of legal self-help and the public's ease of access to online statutes, regulations and case law, the definition may no longer represent what the law should be. Notwithstanding this evolution, it could be that Mr. Browder's Robot Lawyer is engaging in the practice of law. In fact, the Illinois State Bar Association advises that "the practice of law is not limited to appearing in court, but also the giving of advice or rendering of any service requiring the use of any legal skill or knowledge. This includes, for example, the preparation of documents." *ISBA and the Unauthorized Practice of Law—What the Public Needs to Know*, *available at* www.isba.org/sites/default/files/committees/upl/uplfaq.pdf. While the website prepares generalized legal forms in the literal sense, it does not prepare forms for each individual based on their needs. There seems to be little difference between providing legal information available to the public, such as the propriety of a parking ticket, and advising someone on how to dispose of their property, which requires deeper legal analysis. Analyses such as the latter are not available in neat rules, but rather are formed by applying many rules to the facts of a particular case and invoking legal knowledge beyond what is gathered by reading a statute.

The Cook County Circuit Court distinguishes legal advice from legal information as follows: "'legal information' is a description of the law and the legal process whereas 'legal advice' involves analyzing the application of the law to a litigant's situation or making a suggestion of what action a litigant should take on a legal issue." Cir. Ct. Cook Co. Ill. R. 13.4, comm. cmt. (eff. Jan 6, 2016). While this rule applies specifically to domestic relations proceeding, the distinction between advice and information likely transcends all areas of the law. It is unclear whether the Robot Lawyer is providing legal advice under this definition. The application gathers information from an individual, inserts it into a decision tree and provides the best available pre-packed form for that individual's situation. While the written code analyzes the situation, it does not "suggest" anything.

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Is an Attorney-Client Relationship Created?

Other ethical issues exist with websites that provide self-help legal services and computer generated forms. Does the website form an attorney-client relationship? And further, do these websites hold themselves out to be lawyers? An attorney-client relationship is a "consensual relationship that forms when the attorney and the client both consent to its formation." *Wildey v. Paulsen*, 385 Ill. App. 3d 305 (1st Dist. 2008). This requires the client to authorize the attorney to work on his or her behalf, and the attorney to accept that authority. Assuming that online self-help legal services like those discussed in this article constitute legal advice, Illinois would probably hold that an attorney client relationship has been formed. By logging on to one of these websites, the user consents to the site's terms and conditions. In turn, the creator of the website accepts the user's authorization by providing its services.

However, under the comments to Illinois Rule of Professional Conduct 1.18, "[a] person who communicates information to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of a client-lawyer relationship is not a 'prospective client.'" ILL. RULE OF PROF'L CONDUCT 1.18, cmt. 2.

Some legal self-help websites disclaim that such a relationship exists. LegalZoom, for example, states that it is "not a law firm or a substitute for an attorney or law firm" and that it "cannot provide any kind of advice . . . or recommendation about possible legal rights." *See* www.legalzoom.com. Therefore, one commentator writes, "users of LegalZoom do not likely form a reasonable expectation that an attorney-client relationship exists with the company, because the disclaimer that such a relationship will not exist must be agreed upon by the user before the requested document can be purchased." Lindzey Schindler, *Skirting the Ethical Line: The Quandary of Online Legal Forms*, 16 CHAP. L. REV. 185 (Spring 2012).

On the other hand, users of www.DoNotPay.co.uk arguably do agree to an attorney-client relationship. That site's disclaimer does not contain language similar to LegalZoom's. It disclaims warranties and liabilities but it fails to clarify that it is not a substitute for an attorney. See www.DoNotPay.co.uk. In the absence of this disclaimer, the Robot Lawyer may very well be establishing an attorney-client relationship every time a user logs in to appeal a parking ticket.

Other Jurisdictions and the Newfangled "Practice of Law"

While Illinois has not had the occasion to determine whether legal self-help websites constitute the practice of law, other jurisdictions have. The Court of Appeals for the Ninth Circuit, for example, considered a scenario in which a non-attorney ran a website that prepared bankruptcy petitions and offered informational guides advising on various aspects of bankruptcy law. *In re Reynoso*, 477 F. 3d 1117 (9th Cir. 2007). When the site generated a bankruptcy petition, it asked the user to agree to the terms and conditions which stated, in relevant part, that the contents of the petition are based on the user's own research and that "no one gave [him] legal advice or told [him] to include or omit any information from [his] documents." *Reynoso,* 477 F.3d at 1121. However, the court found that the website was the unauthorized practice of law because it held itself out to be offering legal services and compared itself to a "top-notch bankruptcy lawyer." *Id*. at 1125. The court further noted that the software went "far beyond providing clerical services. It determined where (particularly, in which schedule) to place information provided by the debtor, selected exemptions for the debtor and supplied relevant legal citations. Providing such personalized guidance has been held to constitute the practice of law." *Id*. at 1126.

Unlike the software in *Reynoso*, the Robot Lawyer does not provide "personalized" guidance as it simply inputs a user's information: name, address and why the user believes that they were wrongly issued a ticket. Inputting this information into a pre-programmed appeal form could be seen as more akin to a clerical, rather than legal, service.

LegalZoom has been a defendant in numerous lawsuits alleging the unauthorized practice of law. Some states have found it to be engaged in the practice of law while others, like South Carolina, have found otherwise. In *Medlock v. LegalZoom.com, Inc.*, the court characterized LegalZoom's business as the seller of "interactive self-help form documents" and described the consumer's role as "creat[ing] legal documents using an automated process." *Medlock v. LegalZoom.com, Inc.*, No. 2012-208067, 2013 S.C. Lexis 362, at *4 (2013). South Carolina recognizes a "scrivener" exception to the practice of law: "A scrivener is 'someone who does nothing more than record verbatim' what the . . . [customer] says." *Medlock,* 2013 S.C. Lexis, at *17. The court distinguished this from the preparation of forms that actually involves the giving of advice, consultation, explanation, or recommendations on matters of law. *Id*. at *15. To the extent the website's role is to take a user's information and insert it into a form and not to advise, consult, or recommend on matters of law, South Carolina would likely consider the Robot Lawyer to be more of a Robot Scrivener.

Where does this Leave the Law?

Whether or not online legal services constitute the practice of law, perhaps the better question is, should they? According to the Federal Trade Commission and the United States Department of Justice, the answer seems to be a resounding *no*.

In June 2016, the General Assembly of North Carolina enacted a law that effectively cools the business of legal self-help websites. While this law excludes interactive self-help websites like www.DoNotPay.co.uk from the definition of "practice of law," its conditions are stringent. They require, among other things, that the website provider has an attorney review each blank template provided to consumers and the inclusion of a disclosure that it is not a substitute for the advice or services of an attorney. N.C. GEN. STAT. § 84-2.2(a)(2) (2016). The provider may not disclaim warranties or liability, and the provider must offer a consumer satisfaction process. N.C. GEN. STAT. §§ 84-2.2(a)(5) and (a)(7) (2016).

In response to the North Carolina legislation, the FTC and DOJ drafted a joint letter in support of websites like Mr. Browder's and recommended that North Carolina consider the benefits to consumers. They requested the state loosen the requirements for disclosures. The agencies wrote:

> Interactive software for generating legal forms may be more cost-effective for some consumers, may exert downward price pressure on licensed lawyer services, and may promote the more efficient and convenient provision of legal services. Such products may also help increase access to legal services by providing consumers additional options for addressing their legal situations.

Joint Letter from Marina Lao, Director, Office of Policy Planning, Federal Trade Commission and Robert Potter, Chief of the Legal Policy Section of the Antitrust Division, U.S. Department of Justice to Bill Cook, North Carolina Senator (June 10, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-federal-trade-commission-staff-antitrust-division-addressing-north-carolina-house-bill-436/160610commentncbill.pdf .

Further, the agencies contend that some laws defining the "practice of law" are unnecessarily broad (perhaps such as Illinois'), and belief that these laws will "inhibit the development of innovative ways to deliver legal services to

consumers." Joint Letter, *supra*, at 3. Accordingly, the FTC and DOJ recommend narrowing the definition to one incorporating just two elements: (1) where specialized legal skills are necessary to effectuate the transaction; and (2) a client relationship of trust or reliance exists. *Id.*

The Illinois Supreme Court could potentially take the position of the FTC/DOJ. A few years ago, it promulgated a new Supreme Court Rule providing for uniform, *automated*, state court forms. Ill. S. Ct. R. 10-101. According to Professor Staudt, the Supreme Court's actions are just like Mr. Browder's—it is providing pre-packaged forms to consumers. Interview with Ronald W. Staudt, *supra*. If a litigant uses one of these forms, such as a petition to approve a minor's settlement, is the Illinois Supreme Court engaging in the practice of law? Is the Supreme Court providing legal advice? Common sense dictates that it is simply providing easily accessible legal information. So, too, is Mr. Browder. If coding the law is not the same as practicing the law, is it unconstitutional to prohibit it?

If states determine that self-help legal websites such as www.DoNotPay.co.uk constitute the practice of law, those states, according to some commentators, may be violating the First Amendment's right to free speech. According to Professor Staudt, writing code is like writing a book. *Id*. Writing a book is protected by the First Amendment's guarantee of free speech. There is a fine line between practicing the law and speaking about the law. An individual does not need a law license to read aloud a statute. Nor would she need a law license to write a blog post, available to the masses.

Conclusion

The profession has debated the use of legal information in the public domain for over 40 years. As the Internet becomes more powerful than ever before, the profession will likely continue to debate the distinction between legal advice and legal information well into the future. In the next ten years, we are likely to see more opinions come down regarding the ethics of such websites and whether their prohibition violates the First Amendment. Internet based legal services are providing services to consumers that they desire and at prices they are willing to pay. If the Rules of Professional Conduct and the laws related to the practice of law are to be anything more than protecting lawyers' jobs, the profession must adapt to these new technologies and determine if there are ways to incorporate these technologies into the practice. Lawyers also will have to contend with whether, and to what extent, they can assist in the development of such online legal services.

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