

Technology has the potential to increase productivity in the legal industry, thereby lowering costs to consumers and letting more Americans consume legal services. But this will only happen if the "bricks and mortar" legal industry does not attempt to transfer its existing regulatory scheme, to Internet law.

## Power of Attorneys: Will the Organized Bar Thwart the Emergence of Online Law?\*

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The Internet is reshaping not just business, but also professions, including accounting, medicine, optometry, real estate, securities trading, teaching, and law. The Internet and powerful "expert system" software allow consumers to reduce their dependence on professionals of all sorts by empowering them with information and tools, particularly those that carry out more routine, less complex tasks – providing considerable savings to consumers.

But while consumers benefit, some professionals may not. In fact, the emergence of these new information-technology and net-enabled professional services may present a challenge to professions. Some professionals may leave the profession, while still others will have to reinvent themselves, performing more complex, value-added functions. Because the Internet threatens these professions, public policy makers are facing pressures from "bricks and mortar" professionals to erect barriers to the emergence of these new services. However, if the Internet economy is to continue to flourish and consumers benefit, policy makers will need to resist these pressures and ensure that there is a level playing field upon which consumers can make their own choices. This policy brief examines one profession, law, in terms of how the Internet is changing it, how the legal industry has been and is likely to continue to resist changes, and what public policy makers should do to ensure that online and computer-based law flourishes.

### The Emergence of Online Law

Archaeologists found a lease written in Babylon about 2000 B.C. between a landlord named Mashqu and a tenant named Akhibte. The translated document, which reads much like a simple lease today, suggests that the practice of law has changed little in the last 4,000 years. Today, however, the Internet allows consumers to obtain legal information and advice and to carry

out in cyberspace functions that traditionally were performed by attorneys in wood-paneled offices. Dozens of Internet-based legal services have been launched in the United States, including FindLaw.com; MyLawyer.com; Nolo.com; Thelaw.com; and USLaw.com. Moreover, software-based products, such as Intuit's Quicken WillMaker, have grown, giving consumers the ability to easily draft simple legal documents. As these Internet and software law offerings grow and evolve, they could significantly restructure the legal industry, reducing the demand for services performed by traditional lawyers. Thus, the key question is whether the organized legal profession will use its own regulatory powers to resist these developments and put roadblocks in the way of these consumer-friendly legal innovations, or whether it will instead embrace, or at least not oppose, the technologies and facilitate the emergence of online law.

The legal profession essentially regulates itself. Acting typically under the supervision of the state supreme court, the organized bar examines the qualifications of prospective lawyers, licenses them to practice, regulates how lawyers advertise, requires and administers continuing legal education for lawyers, disbars incompetents and miscreants, and prevents the "unauthorized practice" by non-lawyers and the unlicensed. This state-by-state scheme of regulation has the potential to inhibit development of online legal services in at least two ways. First, the arcane, and in some cases archaic, regulations the bar applies to the lawyer/client relationship can and has been invoked by the legal community for anti-competitive reasons. Second, the mere existence of such balkanized regulation can retard the growth of online services that transmit legal

information across state, and indeed national, boundaries.

### **What is Online Law?**

In one sense, online law offers nothing new. Before the Internet, consumers wanting to make do without a lawyer bought blank legal forms and self-help books. They copied a relative's last will and testament or tried to get free legal advice from a lawyer they met at a party. If they wanted a legal specialist, they asked friends, called referral services, or looked in the Yellow Pages.

Many of the initial online legal offerings took the same approach and provided basic legal information. Nolo.com is a prime example. It is an outgrowth of Nolo Press, a company which has been in the self-help legal book business for years. Nolo.com both gives away and sells consumer law information over the Internet. Other providers do the same. They target consumers nationwide by making explanatory and self-help materials available for free at their Web sites. These Web sites collectively cover an array of legal topics: bankruptcy, civil rights, consumer protection, criminal law, family law, harassment, immigration, insurance, pensions, patents, patients' rights, real estate, taxes, trademarks and copyrights, and wills. These same Web sites also have lawyer directories, paid advertisements from lawyers, and classified advertisements.

While providing referrals and basic legal information is not much different from what has gone on before, a few Web sites have developed some significant innovations. USLaw.com, for example, offers a legal forum where Internet users can get answers to their questions. MyLawyer.com sells a variety of legal

documents from its Web site. A simple last will and testament is priced at \$19.95. But, rather than getting a blank form, the user is led through a series of questions. When the questions have been answered, a remote computer prepares the will and makes it available for the user to print out. BuildaWill.com, WillsforAmerica.com, LegalZoom.com, and Wills.com offer similar services.

### **The Benefits of Online Law**

Online law benefits consumers and should be encouraged. Many people do not get help with legal problems because the law seems too complicated and lawyers too expensive. Besides, lawyers charge by the hour, whereas consumers prefer purchasing products for which the price is known in advance. Not surprisingly, in a focus group of 18 adults with school aged children that was convened several years ago by an online law service, only one person provided for his children with a last will and testament.

Online law will simplify the legal profession and lead to lower costs for consumers of legal services. There are several ways this happens.

First, the basic information available from the law Web sites helps consumers sort through their legal affairs, resolve minor problems, and decide if they need professional assistance.

Second, these Web sites help the consumer find a qualified lawyer. Pity the off-line consumer who only has the Yellow Pages for guidance. Bar association rules, which strictly regulate how lawyers can advertise, are not very user-friendly. Online legal directories and referral services, on the other hand, can be efficient ways to guide consumers to lawyers who are qualified to solve their problems.

Third, legal Web sites prepare standard legal documents for consumers for a fee. Such services will be the most beneficial to consumers. Having their contracts, wills, and other legal documents written through Internet-based software promises to be both more convenient and less expensive for clients, compared to trooping downtown to their lawyer's office.

### **Legal Industry Resistance**

The organized bar has an unfortunate history of opposing innovations that lead to substitutes for lawyers. Indeed, there are obvious reasons for the bar to worry about the emergence of online law. If one lawyer can write 10 wills per day via the Internet and only 3 per day if clients visit his office, and if the quality of the wills is the same, the lawyer engaged in the conventional practice is in trouble. And, who will pay a lawyer by the hour to write a simple power of attorney if the document can be purchased on the Internet for a fixed, lower price? Lawyers whose main income is derived from providing clients with routine documents could face real competition from the growth of online law.

The central area of conflict between the off-line legal profession and online law companies falls under the rubric of the "unauthorized practice of law." The organized bar strictly enforces requirements that those who practice law must not only be licensed, but licensed in the jurisdiction in which they practice. But what constitutes the practice of law on the Internet? As consumers demand more and more specific information and legal services from the online legal providers, practicing lawyers have and will surely continue to claim that the online services have crossed the line between providing information and dispensing advice.

In a court test of this question, the Texas Bar's Unauthorized Practice of Law Committee brought suit in U.S. District Court in Texas several years ago claiming that Parsons Technology, Inc., doing business as Quicken Family Lawyer, engaged in the unauthorized practice of law by distributing software that created legal documents. The court sided with the bar, characterizing the software as a "cyberlawyer" and enjoined its sale in Texas, depriving Texas consumers of an easy and cheap means of writing their own wills. An appeal of the ruling was mooted, however, after the Texas legislature changed the definition of unauthorized practice to read: "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney."

The concern is that online law companies will be challenged in other states over the same issue. The American Bar Association House of Delegates addressed the issue in 2003 and signaled opposition to online legal services by passing a resolution that urged each state to adopt its own definition of the practice of law.<sup>1</sup> Among other things, the resolution provided that "the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity," thus implying that online services for preparation of a legal document, such as a will, might constitute the unauthorized practice of law. The ABA resolution has met with only modest success. According to the ABA's count, before the resolution was passed, 20 states defined the term "practice of law" by court rule or statute whereas today four more states have done this or are in the process of doing it. Over half the states still don't define the term at all or leave it to the courts to resolve on a case-by-case basis.

Certainly, the organized bar's track record in such matters has not favored competition from non-lawyer providers. Indeed, the prohibitions against the unauthorized practice of law may be traced back to the ABA itself. Historically, the practice of law meant appearing in court. It did not mean rendering advice outside of court. Non-lawyers commonly prepared legal documents and rendered advice until 1930 when the ABA formed a committee on unauthorized practice. Soon after that, states began to prohibit the unauthorized practice of law.

In "Attorney-Client Relationships in Cyberspace: the Peril and the Promise" in the October 1999 issue of the *Duke Law Journal*, Professor Catherine J. Lanctot of Villanova Law School looked at how the organized bar has, for over 80 years, attempted to thwart innovative legal information services. For example, the organized bar in various states has declared it to be the practice of law to answer legal questions in newspaper columns, to answer legal questions on call-in radio shows, to address individual legal problems at seminars, and to solicit legal questions via the telephone.

According to Lanctot, the handful of bar opinions on online law follows the traditional pattern. Since 1994, state bars in Oregon, Tennessee, Arizona, Pennsylvania and New York have ruled that providing answers online to specific legal questions might be deemed the practice of law. For example, in 1998 the Philadelphia Bar said that a lawyer who provides online advice might be deemed to create a lawyer/client relationship and suggested lawyers who did not want this should include a disclaimer. Lanctot concludes:

"[T]he case law demonstrates that online exchanges resulting in the giving of specific legal advice likely will be viewed as

creating attorney-client relationships.... [T]he bar consistently has both viewed the furnishing of particularized legal advice as creating an attorney-client relationship and frowned on such advice-giving in nontraditional contexts. The bar's cool response to forms of legal assistance spurred by new technology sounds a cautionary note for lawyers on the Internet.”<sup>2</sup>

Of course, even if online advice and online legal services are deemed the practice of law, they would not be unauthorized practice if the provider is an attorney licensed in the state to which the advice applies. Properly licensed lawyers may provide advice on the Internet if they choose.

Yet, state-by-state regulation of the law business obviously can hinder online services that dispense legal advice remotely across state borders. In fact, an Internet legal counselor cannot keep her advice within geographic boundaries. Her words are disseminated in cyberspace for the whole world to read. Is it the unauthorized practice of law for a lawyer in Maryland to tell someone in Virginia that in Maryland it is illegal to tape a telephone conversation without the consent of both parties? Does the mere fact that she has advised a Virginia resident constitute unauthorized practice in Virginia even though the lawyer is talking about Maryland law? And, is there a distinction between a lawyer doing this and software (on or off the Internet) that generates a last will and testament that is valid in most states? In short, any online legal service that is considered “the practice of law,” whether provided by a lawyer or by software, necessarily runs into trouble under the current scheme of regulation, which commonly holds that such services can only be provided by a lawyer licensed in the user’s state.

To a legal profession bent on making trouble for computer-based or online services, the current licensing scheme for lawyers is fertile ground. Many of its rules seem more applicable to a Babylonian lawyer than to the Internet. For example, a lawyer is prohibited from advising both sides in a dispute. This seems eminently sensible when an attorney/client relationship exists and when the attorney is being paid by the hour. But what if both the landlord and the tenant ask a lawyer in an online legal forum about a covenant for quiet enjoyment? Has the online lawyer committed an ethical violation by answering—even though he gives the same answer to both?

### **Principles for Regulating Online Law**

The Internet could revolutionize law just as it has commerce. The risk of real consumer harm from online law appears small and manageable, particularly if a handful of leading Web companies emerges and have an ethical reputation to defend. The risk of overprotecting lawyers seems greater. Legal entrepreneurs should be given the opportunity to innovate without the threat that arcane and stultifying regulations will be senselessly imposed on them for anti-competitive reasons.

There are a myriad of questions about ethics and propriety that may arise over online law. In each instance, the questions must be asked: Do consumers need protection, or does the protection only protect lawyers? Are state bar associations interested in protecting consumers from incompetent and unethical national purveyors of online law, or are they simply trying to prevent online competition? The online marketplace for tax preparation, for example, has proven effective in protecting consumers, and we can expect that the online marketplace for law will also protect consumers, particularly if, as described

below, measures of disclosure are adopted. There appears to be no need for intervention by state bar associations. The open and public relationships between consumers and vendors on the Internet are the antithesis of the private attorney/client relationships that state legal regulations were designed to protect.

The ease and benefits from providing legal information and the automated preparation of legal documents via the Internet also raise questions about whether these activities should fall under the off-line rubric of the practice of law. The Texas legislature has found that they should not. While the organized bar may properly regulate a traditional lawyer/client relationship that just happens to use the Internet, innovative online offerings that do not attempt to create such relationships and that so inform the consumer are different.

Three principles should guide governmental policy with respect to online law:

- **The development of online legal services should be encouraged.** They promise to provide consumers and businesses with affordable, quality legal assistance. The organized bar should expeditiously remove any impediments to the growth of online legal services in current and proposed rules. Among other things, the bar could press for change in the definition of the practice of law to apply the term only where the user of a legal service reasonably expects a lawyer/client relationship.

- **The legal profession should not be allowed to impose existing state-by-state licensing requirements on online purveyors of legal services.** The purpose of regulating the profession is to protect consumers, not the employment prospects of lawyers. It is reasonable to ask providers of online legal services to disclose the states in

which their attorneys are licensed to practice, and in fact it's reasonable to require that the online law firm employ attorneys licensed to practice in the state in which the company is headquartered. However, it is not appropriate to expect them to be licensed in every state in which their customers might happen to reside. To do this would erect overly stringent barriers to the practice of online law.

- **Offering advice or preparing legal documents online should not be deemed the practice of law if the consumer does not expect to establish an attorney/client relationship with the online service.** Clearly, the provision of legal information may not be regulated because it is the exercise of free speech rights and not the practice of law. But providing online legal services, such as preparing legal documents, should also be exempt for consumers who feel they do not need or want to establish an attorney/client relationship with the provider, as the Texas legislature concluded. On the other hand, it may still be the practice of law if a consumer simply establishes a one-on-one relationship online with a lawyer for a fee to address a specific legal problem

There are several things that should be done to ensure that innovation is allowed to flourish and that consumers can use the Web to prepare legal documents and get legal information. First, the online law industry should establish a self-regulatory code of practice, stipulating how Web sites should inform consumers about the limits of online law and stating clearly and conspicuously that the services are not a substitute for the advice of an attorney. This approach is now used by many companies to inform consumers of the extent to which Web sites protect their privacy. Second, the ABA should reverse directions and promulgate a model rule for state bars to adopt, delineating exemptions for online legal offerings that do this. Third, state

legislatures should pass appropriate legislation exempting online law providers from regulation by the state bars.

### **Conclusion**

The Internet and related information technologies have significantly enhanced productivity and economic growth—particularly in the service sector, which until the last decade has been slow to adopt new technologies. Yet, productivity in the legal industry has been almost stagnant in the last two decades, with costs increasing

significantly. Technology, and the Internet specifically, has the potential to increase productivity in the legal industry, thereby lowering costs to consumers and letting more Americans consume legal services. But this will only happen if the "bricks and mortar" legal industry does not attempt to transfer its existing regulatory scheme, developed in an era before advanced communications, to Internet law. Policymakers need to ensure that the industry does not use its powers to resist these beneficial changes.

### **ENDNOTES**

<sup>1</sup> American Bar Association, Task Force On The Model Definition Of The Practice Of Law, Standing Committee On Client Protection, Washington State Bar Association, "Report To The House Of Delegates," [www.abanet.org/cpr/model-def/recomm.pdf](http://www.abanet.org/cpr/model-def/recomm.pdf)

<sup>2</sup> 49 Duke L.J. 147, 149 (1999) <http://www.law.duke.edu/journals/dlj/articles/dlj49p147.htm>

\* An earlier version of the paper was originally published by the Progressive Policy Institute.

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