

ChatGPT, Esq.: Recasting Unauthorized Practice of Law in the Era of Generative AI

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**ChatGPT, Esq.: Recasting Unauthorized Practice of Law in
the Era of Generative AI**

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In March of 2023, OpenAI released GPT-4, an autoregressive language model that uses deep learning to produce text. GPT-4 has unprecedented ability to practice law: drafting briefs and memos, plotting litigation strategy, and providing general legal advice. However, scholars and practitioners have yet to unpack the implications of large language models, such as GPT-4, for long-standing bar association rules on the unauthorized practice of law (“UPL”). The intersection of large language models with UPL raises manifold issues, including those pertaining to important and developing jurisprudence on free speech, antitrust, occupational licensing, and the inherent-powers doctrine. How the intersection is navigated, moreover, is of vital importance in the durative struggle for access to justice, and low-income individuals will be disproportionately impacted.

In this Article, we offer a recommendation that is both attuned to technological advances and avoids the extremes that have characterized the past decades of the UPL debate. Rather than abandon UPL rules, and rather than leave them undisturbed, we propose that they be recast as primarily regulation of entity-type claims. Through this recasting, bar associations can retain their role as the ultimate determiners of “lawyer” and “attorney” classifications while allowing nonlawyers, including the AI-powered entities that have emerged in recent years, to provide legal services—save for a

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narrow and clearly defined subset. Although this recommendation is novel, it is easy to implement, comes with few downsides, and would further the twin UPL aims of competency and ethicality better than traditional UPL enforcement. Legal technology companies would be freed from operating in a legal gray area; states would no longer have to create elaborate UPL-avoiding mechanisms, such as Utah's "legal sandbox"; consumers—both individuals and companies—would benefit from better and cheaper legal services; and the dismantling of access-to-justice barriers would finally be possible. Moreover, the clouds of free speech and antitrust challenges that are massing above current UPL rules would dissipate, and bar associations would be able to focus on fulfilling their already established UPL-related aims.

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Introduction

A college student was walking her dog on private property in Florida when she was cited for trespassing. Unsure of what to do, she sought the help of someone who, although not a lawyer, had genuine legal knowledge: they had scored in the 90th percentile on the Uniform Bar Exam. The advice given was tailored and specific; the trespasser was told which Florida statutes to review and which aspects of the charges would be most susceptible to challenge, as well as what arguments she should make, depending on the facts of her case. On the same day, a veteran was wrongfully evicted from his home. Distraught, and without funds to hire a lawyer, he contacted someone (a nonlawyer) and was led, free of charge, through the relevant statutes and the different avenues for recourse. Finally, a first-year attorney licensed to practice in Florida fell behind on a legal memo she was writing. She contacted this same nonlawyer, who promptly provided her with a well-written and factually correct overview of the Florida Securities and Investor Protection Act, including a detailed analysis of Sections 517.211-517.218, which she needed for an upcoming meeting with a client.

It should not be a great surprise to learn that the benevolent nonlawyer who provided these legal services was also a nonhuman: it was GPT-4, an autoregressive language model that uses artificial intelligence (“AI”) technologies, including deep learning, to produce text.¹ As is evident in the above examples, there is a wide spectrum along which large language models (“LLMs”) are providing legal services.² They can

¹ For complete transcripts of these exchanges see <https://osf.io/49nsm> [<https://perma.cc/FPB3-8EEA>]. (These are “real” cases in a limited sense: the authors consulted ChatGPT about these issues and received detailed responses, as described above.) For a description of GPT-4, see *GPT-4*, OPENAI (Mar. 14, 2023), <https://openai.com/research/gpt-4> [<https://perma.cc/LP9J-JXKP>].

² Alec Radford et al., *Language Models are Unsupervised Multitask Learners*, OPENAI BLOG (Feb. 14, 2019), <https://openai.com/blog/better-language-models> [<https://perma.cc/T37E-5AHW>] (describing large

function like Zoom does in the provision of mental health services, acting as a medium through which greater and cheaper delivery of professional advice is achieved. They can function like “Dr. Google,” such that clients will use them to conduct their own research prior to, during, and after meeting with licensed attorneys. They can function as a means for licensed attorneys to outsource: just as Americans overwhelmingly outsourced tax preparation to individuals in non-U.S. countries, lawyers now can cheaply and effortlessly outsource legal work to AI. And, lastly, LLMs can function in isolation, serving as full replacements for lawyers: think of Expedia and other software-as-a-service (“SaaS”) companies that have diminished the need for traditional travel-agent professionals. Moreover, think again of “Dr. Google,” as law is a profession quite distinct from medicine: a patient may Google her symptoms and treatment options, but she cannot write a prescription for herself or go to a hospital and perform medical procedures on herself. A legal client, in contrast, could, in theory, ask GPT-4 for a legal diagnosis and advice, and she then could go to court and represent herself in a *pro se* capacity.

Until recently, law was somewhat immune from the large technological disruptions felt in other domains, and this immunity was at least partly because law is not a mathematics-driven, computational field.³ Rather, law “has language at its

language models (LLMs) as a type of artificial intelligence model designed to understand and generate human-like text based on vast amounts of textual data). We consider LLMs to be a subset of artificial intelligence, and we define artificial intelligence in line with how Sundar Pichai, the CEO of Google, does: “At its heart, AI is computer programming that learns and adapts.” Sundar Pichai, *AI at Google: Our Principles*, GOOGLE (June 7, 2018), <https://www.blog.google/technology/ai/ai-principles> [<https://perma.cc/25KF-ZFHL>].

³ Later, we discuss a second reason for law’s immunity from technological disruption: the legal industry has long had mechanisms in place to protect its monopoly on the provision of legal services. See Susan Stephen, *Blowing the Whistle on Justice as Sport: 100 Years of Playing a Non-Zero Sum Game*, 30 *HAMLIN L. REV.* 588, 588-89 (2007) (“The concepts of the legal profession as a cartel and of the ABA and state and local bar associations as competition-restricting entities in the realm of legal education and the practicing bar are far from original.”).

heart.”⁴ And language is a human endeavor, not an endeavor that is overly susceptible to technological encroachment—until the development of LLMs, that is. In May of 2020, OpenAI described its creation of GPT-3, an autoregressive language model that uses deep learning to produce text.⁵ In other words, GPT-3 is an AI that can write—and write well. In 2021, “A Human Being Wrote This Law Review Article” was published in the *U.C. Davis Law Review*.⁶ In the article, Professor Amy B. Cyphert made the claim that AI like GPT-3 were “poised for wide adoption in the field of law.”⁷ ChatGPT, a chatbot that is built on top of GPT-3, was widely in use by the end of 2022, including by students who were enlisting the AI to write their research papers.⁸ A student interviewed by *The New York Times* professed that ChatGPT had eliminated the need for professional guidance: “it completely destroys the use of tutors.”⁹

But does ChatGPT completely destroy the use of lawyers? The successor to GPT-3, GPT-4, now scores higher than 90

⁴ David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. 1001, 1020 (2021) (quoting Robert Dale, *Law and Word Order: NLP in Legal Tech*, MEDIUM (Dec. 15, 2018), <https://towardsdatascience.com/law-and-word-order-nlp-in-legal-tech-bd14257ebd06> [<https://perma.cc/4QWF-RGLW>]; see also Alfred Denning, *The Discipline of Law*, 128 CAMBRIDGE L. J. 493 (1979).

⁵ Tom B. Brown et al., *Language Models Are Few-Shot Learners* 5 (2020), <https://arxiv.org/pdf/2005.14165.pdf> [<https://perma.cc/JYP5-R4ZH>] (describing GPT-3).

⁶ Amy B. Cyphert, *A Human Being Wrote This Law Review Article: GPT-3 and the Practice of Law*, 55 U.C. DAVIS L. REV. 401 (2021).

⁷ *Id.*

⁸ Kalley Huang, *Alarmed by A.I. Chatbots, Universities Start Revamping How They Teach*, N.Y. TIMES (Jan. 16, 2023), <https://www.nytimes.com/2023/01/16/technology/chatgpt-artificial-intelligence-universities> [<https://perma.cc/6Q6D-XHGL>].

⁹ The Learning Network, *What Students Are Saying About ChatGPT*, N.Y. TIMES (Feb. 2, 2023), <https://www.nytimes.com/2023/02/02/learning/students-chatgpt> [<https://perma.cc/DSG6-3X69>].

percent of human test takers on the Uniform Bar Exam.¹⁰ In February of 2023, a “robot lawyer” that leverages OpenAI’s technology was set to represent a client in court.¹¹ The dawn of AI law, long foretold, had arrived. Or not quite. The plan was to have the AI go to court in a limited sense: via smart glasses and earbuds, the AI would tell the defendant (who was challenging a speeding ticket) what to say.¹² But the CEO of the AI’s parent company, DoNotPay, said that multiple state bar associations had threatened to report him for the unauthorized practice of law (“UPL”), with one even intimating a referral to a district attorney’s office for prosecution—since in some states, UPL is a crime punishable by up to six months in jail.¹³ As *NPR* put it, “A robot was scheduled to argue in court, then came the jail threats.”¹⁴

For at least a decade, AI has been touted as a potential boon for legal claimants and legal justice.¹⁵ The Legal Services

¹⁰ Kevin Roose, *GPT-4 Is Exciting and Scary*, N.Y. TIMES (Mar. 15, 2023), <https://www.nytimes.com/2023/03/15/technology/gpt-4-artificial-intelligence-openai.html> [<https://perma.cc/TW6Z-R2F3>]. But see also how, with all things AI, there is dispute over performance and concerns over the conclusions people might draw from performance reports: “The fact that GPT-4’s reported ‘90th percentile’ capabilities were so widely publicized might pose some concerns that lawyers and non-lawyers may use GPT-4 for complex legal tasks for which it is incapable of adequately performing.” Karen Sloane, *Stellar or So-So? ChatGPT Bar Exam Performance Sparks Differing Opinions*, REUTERS (May 31, 2023), <https://www.reuters.com/legal/transactional/stellar-or-so-so-chatgpt-bar-exam-performance-sparks-differing-opinions-2023-05-31> [<https://perma.cc/Y52S-YSEM>].

¹¹ Bobby Allyn, *A Robot Was Scheduled to Argue In Court, Then Came the Jail Threats*, NPR (Jan. 25, 2023), <https://www.npr.org/2023/01/25/1151435033/a-robot-was-scheduled-to-argue-in-court-then-came-the-jail-threats> [<https://perma.cc/BRX4-U3EU>].

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See LEGAL SERVS. CORP., REPORT OF THE SUMMIT ON THE USE OF TECHNOLOGY TO EXPAND ACCESS TO JUSTICE 10 (2013), https://www.lsc.gov/sites/default/files/LSC_Tech%20Summit%20Report_2013.pdf [<https://perma.cc/W38F-FYBP>] (“The Legal Services Corporation

Center, for example, showed that legal technology could make a genuine difference in resolving the long stalemate in the fight for access to justice.¹⁶ More recent years have seen countless scholars argue similarly,¹⁷ with the only major roadblock being the rate of technological advancement: when would something as capable and effective as ChatGPT come along? And yet, now that ChatGPT is here, we see legal authorities checking its use, even for something as anodyne as helping a person argue a traffic-ticket case.

This was not just an isolated anti-AI event. At the national level, the American Bar Association (“ABA”) House of Delegates recently passed a nonbinding resolution discouraging states from innovating in such areas.¹⁸ As just one example from the state level, California recently put together a “Closing the Justice Gap Working Group,” which was tasked with producing a report on how the state might expand its legal

(LSC) has found through its experience with its Technology Initiative Grant program that technology can be a powerful tool in narrowing the justice gap the difference between the unmet need for civil legal services and the resources available to meet that need.”).

¹⁶ *Id.*

¹⁷ Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553, 588 (2015) (“The ‘Great Recession’ of 2008 increased the need for legal services for low- and moderate-income individuals.”); Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?*, 35 MICH. J. INT’L L. 485, 492 (2014) (arguing that online dispute resolution systems “can increase individuals’ access to justice”); Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law*, 70 HASTINGS L.J. 173, 180 (2018) (“AI will be an even more impactful force [in fixing the access to justice problem] than previous tools, and has the potential to magnify and transform benefits of existing technologies.”).

¹⁸ Sam Skolnik, *ABA Sides Against Opening Law Firms Up to New Competition*, BLOOMBERG L. (Aug. 9, 2022), <https://news.bloomberglaw.com/business-and-practice/aba-sides-against-opening-law-firms-up-to-new-competition> [https://perma.cc/FUW6-Y2WB].

profession to better provide access to justice.¹⁹ But the Working Group was quickly shut down by state legislators who passed legislation limiting the California State Bar’s ability to work on UPL reform.²⁰

In this Article, we begin in Part I by explaining this paradox. With AI poised to help so many with legal needs, why is it being blocked not on negligence grounds, but on statutory UPL grounds? Explaining this paradox requires unpacking the rather nuanced context of UPL: that its current form is a relatively recent one,²¹ that it benefits from the “inherent powers doctrine,” which is a judge-made doctrine holding that courts alone have the power to regulate the practice of law;²² and that it may be in conflict with the evolving jurisprudence of occupational freedom,²³ antitrust,²⁴ and anti-competitive practices,²⁵ especially as the Supreme Court has begun to move

¹⁹ Lucy Ricca & Graham Ambrose, *The High Highs and Low Lows of Legal Regulatory Reform*, LEGAL EVOLUTION (Oct. 16, 2022), <https://www.legalevolution.org/2022/10/the-high-highs-and-low-lows-of-legal-regulatory-reform-334> [<https://perma.cc/VP37-BLV6>].

²⁰ Joyce E. Cutler, *California Restrains State Bar From Expanding Nonlawyer Practice*, BLOOMBERG L. (Sept. 19, 2022), <https://news.bloomberglaw.com/business-and-practice/california-restrains-state-bar-from-expanding-nonlawyer-practice> [<https://perma.cc/ZU6E-Y272>].

²¹ Laurel A. Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 QUINNIPIAC L. REV. 97, 98 (2018).

²² Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation: The Role of the Inherent-Powers Doctrine*, 12 U. ARK. L. J. 1, 17 (1989).

²³ See, e.g., David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J.F. 287, 302-03 (2016) (“The time, however, may be ripe for courts to evince greater skepticism of occupational restrictions. . . . [T]he unofficial demise of the fundamental/non-fundamental rights dichotomy in the Supreme Court’s due process jurisprudence, combined with a rising generation of judges, liberal and conservative, who may not share their predecessors’ reflexive hostility to meaningful judicial oversight of occupational restrictions, provide a glimmer of hope that the right to pursue a lawful occupation free from unreasonable government regulation will soon be rescued from constitutional purgatory.”).

²⁴ *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

²⁵ *N.C. State Bd. of Dental Exam’rs v. FTC*, 574 U.S. 494 (2015).

away from the rational-basis test when considering the right to occupational freedom.²⁶

After explaining UPL's history and its recent impingement upon legal technology, we provide in Part II an overview of the types of human-AI collaboration and their relevance for legal practice and UPL claims. In Part III, we then outline the case against UPL rules, building upon recent First Amendment and antitrust scholarship relating to occupational rights but focusing most acutely on how LLMs are radically altering the nature of legal practice. This Part concludes with a discussion of how UPL harms legal consumers and exacerbates many of the access-to-justice issues the United States currently faces.

In Part IV, we turn to our main argument. Rather than abandon UPL rules, we propose that they be recast as primarily regulation of entity-type claims. This recasting will allow bar associations to retain their role as the ultimate determiners of "lawyer" and "attorney" classifications, while permitting nonlawyers, including the AI-powered entities that have emerged in recent years, to provide certain legal services (which have never been adequately defined anyway, save for a narrow and clearly defined subset). This Part is especially important in how it advances the academic literature. To date, prominent scholarship has focused on the inevitability of technological development: how change is coming, whether or not lawyers like it.²⁷ Or it has focused on how we should understand such technology.²⁸ Those scholars who have focused on technology and UPL have done the hard work of breaking new ground, arguing for exceptions for technology,

²⁶ Clark Neily, *Beating Rubber-Stamps into Gavel: A Fresh Look at Occupational Freedom*, 126 YALE L.J.F. 304, 308-09 (2016).

²⁷ John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3064-66 (2014).

²⁸ Daniel W. Linna Jr., *What We Know and Need to Know about Legal Startups*, 67 S.C. L. REV. 389, 412 (2016).

but such work has been light on specifics.²⁹ Others have focused on definitions, addressing whether AI actually infringes UPL rules.³⁰ In sum, there has been a distinct lack of scholarship that both embraces legal technology and outlines a specific, practicable way forward. This Article and our proposal does just that.

Under our recommendation, consumers would be free to avail themselves of nonlawyer providers of legal services, acknowledging the risks inherent in relying upon an individual or entity who has not received bar certification. “Risks,” of course, may be an overstatement, since (i) there is no guarantee that lawyers will perform adequately; (ii) both lawyers and nonlawyers who provide negligent legal services will be exposed to liability via the tort system; and (iii) nonlawyers, especially legal technology solutions, will often surpass the performance of lawyers with respect to specific commoditized legal services.³¹ Although this recommendation is novel, it is easy to implement, comes with few downsides, and manages to further the twin UPL aims of competency and ethicality better than traditional UPL enforcement. In brief, legal technology companies would be freed from operating in a legal grey area; states would no longer have to create elaborate UPL-avoiding mechanisms, such as Utah’s “sandbox”;³² consumers—both individuals and companies—would benefit from better and cheaper legal services; and solutions to long-standing access-to-

²⁹ Benjamin H. Barton & Deborah L. Rhode, *Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators*, 70 HASTINGS L.J. 955, 959 (2019).

³⁰ Thomas E. Spahn, *Is Your Artificial Intelligence Guilty of the Unauthorized Practice of Law*, 24 RICH. J.L. & TECH. 1, 47 (2018).

³¹ See *infra* Part II and Section III.B. See also McGinnis & Pearce, *supra* note 27, at 3064-66.

³² Robert Gehrke, *A New App Is Helping Some 450 Utahns Get A Second Chance. Robert Gehrke Explains How*, SALT LAKE TRIB. (Nov. 23, 2022), <https://www.sltrib.com/opinion/2022/11/23/new-app-is-helping-some-450> [https://perma.cc/SLB2-G8CV]. See also *An Office of the Utah Supreme Court*, UTAH OFF. LEGAL SERVS. INNOVATION, <https://utahinnovationoffice.org> [https://perma.cc/D86K-JLJY] [hereinafter Utah Innovation Off.].

justice problems would finally be within reach. Moreover, the free speech and antitrust challenges that are massing above current UPL rules will be mooted, and bar associations will be free to focus on fulfilling their already established UPL-related aims.

I. ChatGPT Meets UPL

In 1968, Norman Dacey was convicted of a misdemeanor and faced jail time for writing and publishing a book.³³ The book was not untoward or obscene or seditious. But the book did possess a scandalous title: *How to Avoid Probate*.³⁴ Such draconian policing of nonlawyers is an oddity that is generally limited to the United States. As Gillian Hadfield writes, “Control is at its greatest in the United States, where effectively no one who has not completed a three-year graduate degree that meets requirements established by the [ABA] and passed an exam designed and graded by lawyers in state bar associations can provide any kind of legal service.”³⁵ To understand how U.S. lawyers have managed to secure nearly unchecked powers of self-regulation and tight control over the supply of legal services, we have to understand the history and development of UPL in the United States. In this Part, after covering these matters, we turn to the significant problems with UPL, particularly its increasing tensions with Supreme Court rulings on antitrust and anticompetitive practices. We conclude by unpacking recent instances of UPL litigation, focusing on those that impinge legal technology.

³³ See Catherine J. Lanctot, *Does LegalZoom Have First Amendment Rights? Some Thoughts about Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 225, 265-74 (2011).

³⁴ *Id.* (noting that Dacey ultimately won his fight: a New York appellate court upheld Dacey’s claim that he had a constitutional right to publish such a book without being a lawyer, though he did not have the right to practice law without being a lawyer).

³⁵ GILLIAN K. HADFIELD, RULES FOR A FLAT WORLD 228 (2017).

A. *What is UPL?*

UPL, in its current form, is relatively recent. People often practiced without a law degree prior to the 20th century.³⁶ In 1931, with lawyers increasingly wary of nonlawyers encroaching upon their historically recognized space,³⁷ the ABA created its first committee on the unauthorized practice of law.³⁸ Over the ensuing decades, numerous states created their own statutory rules regarding UPL, with each successive round of rules seemingly more expansive than the last.³⁹

Carte blanche for such expansion emanated from “the *inherent-powers doctrine*—a judge-made, lawyer-supported doctrine holding that courts, and *only* courts, may regulate the practice of law.”⁴⁰ There are both affirmative and negative assertions within the doctrine.⁴¹ The affirmative assertion is

³⁶ Franklin Delano Roosevelt, for example, practiced at a prestigious New York City law firm without ever obtaining a law degree. In fact, Roosevelt had dropped out of Columbia Law School. ROBERT DALLEK, FRANKLIN D. ROOSEVELT: A POLITICAL LIFE 38-39 (2017); *see also* JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX 28 (1956).

³⁷ Susan B. Schwab, Note, *Bringing Down the Bar: Accountants Challenge Meaning of Unauthorized Practice*, 21 CARDOZO L. REV. 1425, 1435-36 (2000); Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 248 (2000). *See also* Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2583-84 (1999) (outlining how UPL regulations expanded into curtailing non-litigation related legal activities performed by nonlawyers).

³⁸ Charles H. Kuck & Olesia Gorinshteyn, *Immigration Law: Unauthorized Practice of Immigration Law in the Context of Supreme Court’s Decision in Sperry v. Florida*, 35 WM. MITCHELL L. REV. 340, 342 (2008).

³⁹ John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 90-91 (2000); Kuck and Gorinshteyn, *supra* note 38, at 343; Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 238-39 (2002); Schwab, *supra* note 37, at 1428-29.

⁴⁰ Wolfram, *supra* note 22, at 3.

⁴¹ *Id.* at 4.

that courts inherently have the power to regulate the legal profession, even without express statutory grants.⁴² This is relatively uncontroversial. More controversial is the negative assertion: *only* courts have the power to regulate the legal profession. Professor Wolfram made the arrogant nature of the negative assertion clear: “For example, to say that as a citizen I have the power to vote normally does not also entail a claim that no *other* citizen has the same right. But that is essentially what courts have claimed.”⁴³ Drawing shakily on the separation-of-powers doctrine, the negative assertion within the inherent-powers doctrine asserts that, should the legislative or executive branches issue laws or regulations concerning lawyers (or the practice of law), state courts may strike down such issuances as unconstitutional.⁴⁴

Although the inherent-powers doctrine is not firmly rooted in the Constitution, and although it has been contravened on occasions both historical and more recent,⁴⁵ it is important as a point of distinction between the legal profession and other professions. After all, medicine, nursing, accounting, cosmetology, the ministry, and so on, are all at least partially self-regulating, but their forms of self-regulation are not emboldened by notions of inherent powers. It is the legal profession alone that posits itself—courts and lawyers—as the only and final arbiter of its business, able to frustrate even reasonable legislative or administrative attempts at reform.⁴⁶

It was not until 1975, with *Goldfarb v. Virginia State Bar*,⁴⁷ that the U.S. Supreme Court began to check this power and the attendant expansion of UPL litigation. In *Goldfarb*, a group of lawyers in northern Virginia had agreed to set minimum fees for their services.⁴⁸ Fee schedules in Virginia are regulated by

⁴² *Id.*

⁴³ *Id.* at 6-7.

⁴⁴ *Id.* at 7.

⁴⁵ *Id.* at 4-5.

⁴⁶ *Id.* at 18-19. *See also* Hadfield, *supra* note 35, at 229.

⁴⁷ 421 U.S. 773 (1975).

⁴⁸ *Id.* at 776.

the Virginia State Bar, and the Bar approved the fee schedule.⁴⁹ Moreover, the Bar began chastising lawyers who were charging lower fees.⁵⁰ One such chastised lawyer was Lewis Goldfarb, who filed suit challenging the fee schedule on federal antitrust grounds.⁵¹

The Supreme Court ruled in favor of Goldfarb, holding that the fee schedule was a vertical restraint on competition and violated the Sherman Antitrust Act.⁵² The ruling drew into relief the fact that licensing boards do not necessarily benefit from the same protections as states: the latter are largely immune from antitrust suits when, for policy reasons, they enforce regulations that eliminate competition.⁵³ In *Goldfarb*, the Court intimated that licensing boards like the Virginia State Bar, which is run by members of the very profession it oversees, should not be likewise immune.⁵⁴ There are limits, it would appear, to the inherent-powers doctrine.

From this foundation, we turn to the specifics of UPL. As a general rule in all U.S. states, unless a person is a licensed attorney who has been admitted to the state bar after having met requirements of education, examination, and moral character, she may not represent another person in a legal matter.⁵⁵ The restriction is embodied in Model Rule of Professional Conduct 5.5, although Rule 5.3 also touches upon UPL.⁵⁶ From the Model Rules, three basic forms of UPL restrictions can be gleaned.⁵⁷ First, there are rules prohibiting

⁴⁹ *Id.* at 776-77.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Nolan-Haley, *supra* note 39, at 262.

⁵⁴ 421 U.S. at 791.

⁵⁵ Drew A. Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. ILL. U. L.J. 223, 224-25 (2012).

⁵⁶ MODEL RULES OF PRO. CONDUCT r. 5.3, 5.5 (AM. BAR ASS'N 2019).

⁵⁷ Denckla, *supra* note 37, at 2587; Dzienkowski and Peroni, *supra* note 39, at 90. *See also* Nolan-Haley, *supra* note 39, at 259 (citation omitted).

non-attorneys from practicing law.⁵⁸ “Practicing law” is not welldefined,⁵⁹ although we argue that it certainly would include representation in legal proceedings, and it extends to preparing legal instruments or documents that affect the legal rights of others, as well as giving legal advice. Second, there are rules prohibiting attorneys duly licensed in one jurisdiction from practicing in other jurisdictions in which they are not licensed.⁶⁰ Third, there are rules limiting the extent to which attorneys may assist nonattorneys who are committing UPL.⁶¹

If one runs afoul of UPL rules, punishment may include injunctions, findings of contempt, *quo warranto* writs, and criminal penalties.⁶² Criminal penalties are more common than one would assume;⁶³ in many states, the first form of UPL violation—nonlawyers practicing law—is a criminal offense.⁶⁴

⁵⁸ MODEL RULES OF PRO. CONDUCT r. 5.5(a) (AM. BAR ASS’N 2019) (“A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction . . .”).

⁵⁹ People ex rel. Ill. State Bar Ass’n v. Schafer, 404 Ill. 45, 50 (1949).

⁶⁰ MODEL RULES OF PRO. CONDUCT r. 5.5(b)-(e) (AM. BAR ASS’N 2019).

⁶¹ *Id.* at r. 5.3.

⁶² RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. a (AM. L. INST. 2000); Denckla, *supra* note 37, at 2592-93. *See also* Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2242 (1999); Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL’Y REV. 193, 218 (1996); Nolan-Haley, *supra* note 39, at 260.

⁶³ *See, e.g.*, ALA. CODE § 34-3-1 (2023) (stating that the penalty for UPL is a fine of up to \$500 or imprisonment of up to six months, or both); S.C. CODE ANN. § 40-5-310 (2023) (stating that practicing law without admittance to the South Carolina Bar may lead to a fine of up to \$5,000 or imprisonment of up to five years, or both).

⁶⁴ *See* Attorneys’ Liability Assurance Society, Inc., *Statutes and Rules Limiting Multijurisdictional Law Practice from 51 United States Jurisdictions*, AM. BAR ASS’N (2000), https://www.americanbar.org/groups/professional_responsibility/committees/commissions/commission-on-multijurisdictional-practice/mjp_uplrules [<https://perma.cc/CX3H-X2FG>] (surveying court rules and statutes on UPL).

Typically, this would be a misdemeanor offense, but in certain circumstances it can rise to a felony.⁶⁵

B. UPL's Existential Problems

The former introduction to the Rules of the Supreme Court of Virginia states, “[N]o one has the right to represent another; it is a privilege to be granted and regulated by law for the protection of the public.”⁶⁶ In Section I.A of this Article, we explained *what* UPL is, not *why* it is. The Supreme Court of Virginia made the *why* explicit: “for the protection of the public.”⁶⁷ Or, as the Model Rules have it: “Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.”⁶⁸ The theory is that nonlawyers will make errors that lawyers would not make, thereby harming the legal consumer.⁶⁹ The theory is also that, because nonlawyers are not bound by the various ethical rules stipulated by bar associations, they are not the upstanding, conflict-free, loyal professionals they should be.⁷⁰

While such aims are commendable, they are hard to square with glaring exceptions—longstanding loopholes—to UPL rules. The Restatement makes these exceptions clear: “a nonlawyer undoubtedly may engage in some limited forms of law practice . . . ”⁷¹ Or, as a Montana court put it:

⁶⁵ TEX. PENAL CODE ANN. § 38.123 (West 2023); N.J. STAT. ANN. § 2C:21-22 (West 2023).

⁶⁶ *In re Jay*, 446 B.R. 227, 243 (E.D. Va. Bankr. 2010) (quoting Va. Sup. Ct. R., Pt. 6, § I, Introduction (2010)).

⁶⁷ *Id.*

⁶⁸ MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS’N 2019).

⁶⁹ Dzienkowski & Peroni, *supra* note 39, at 92.

⁷⁰ *Id.* Moreover, there is a related argument that flows from this: because nonlawyers are outside of the bar associations’ remit, they cannot be regulated in the way that bar associations would like to regulate them. Tort law provides ex post solutions, but that still is not precisely what bar associations want.

⁷¹ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. a (AM. L. INST. 2000).

[W]e conclude that the array of persons and institutions that provide legal or legally-related services to members of the public are, literally, too numerous to list. To name but a very few, by way of example, these include bankers, realtors, vehicle sales and finance persons, mortgage companies, stock brokers, financial planners, insurance agents, health care providers, and accountants.⁷²

Paralegals and legal assistants often provide legal services, and they often do so without requisite supervision.⁷³ Yet bar associations have long turned a blind eye since to do otherwise would hazard the full functioning of many law firms.⁷⁴ Likewise, law librarians may fervently disclaim that they practice law, yet their daily work straddles the line.⁷⁵ Law students, law clerks, and new associates who have not yet passed the bar often engage in legal practice, especially giving advice that ostensibly is legal advice, but they seldom face UPL prosecution. And consider corporate officers who, despite being nonlawyers, are permitted to represent their corporations on convoluted *pro se* grounds.⁷⁶ But the most important and glaring exception is the legal representation provided to individuals in federal and state administrative proceedings.⁷⁷

⁷² *In re Dissolving Comm'n on Unauthorized Prac. of L.*, 242 P.3d 1282, 1283 (Mont. 2010) (dissolving the Bar's Commission on UPL).

⁷³ Warren H. Resh, *Paralegals - Are They the Solution of a Problem or Just Part of the Problem Itself*, 40 UNAUTHORIZED PRAC. NEWS 88, 88-89 (1976). See MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 3 (AM. BAR ASS'N 2018) ("Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services.").

⁷⁴ See Resh, *supra* note 73, at 88.

⁷⁵ See Paul D. Healey, *Pro Se Users, Reference Liability, and the Unauthorized Practice of Law: Twenty-Five Selected Readings*, 94 LAW LIBR. J. 133 (2002).

⁷⁶ See, e.g., Suzannah R. McCord, *Corporate Self-Representation: Is It Truly the Unauthorized Practice of Law*, 67 ARK. L. REV. 371 (2014).

⁷⁷ Denckla, *supra* note 37, at 2591-92.

The Administrative Procedure Act allows for nonlawyer representation before federal administrative agencies, as happens in social security disability proceedings.⁷⁸ Such representation often is in clear violation of UPL rules. After the Florida Bar Association charged Alexander Sperry, a patent agent, with unauthorized practice of law, the U.S. Supreme Court took up the matter in *Sperry v. Florida*.⁷⁹ While the Court held that the regulation of the practice of law was primarily the responsibility of the states and not the federal government, it ultimately ruled in favor of Sperry.⁸⁰ The Court approvingly cited a report stating that, in the patent office context, “[T]here is no significant difference between lawyers and nonlawyers, either with respect to their ability to handle the work or with respect to their ethical conduct.”⁸¹ The *Sperry* decision affirmed what was already clear: in some circumstances, nonlawyers may provide legal services without violating prohibitions of the unauthorized practice of law.

A central tension can be gleaned from this discussion: there is an inappropriate vagueness that besets UPL enforcement. That which qualifies as the practice of law has never been clearly delineated. As one court explained, it is often “difficult, if not impossible, to lay down a formula or definition of what constitutes the practice of law.”⁸²

In the early 2000s, the ABA convened a task force for the sole purpose of defining the “practice of law.”⁸³ What did the task force conclude? That it could not, in the end, produce a

⁷⁸ Swank, *supra* note 55, at 235.

⁷⁹ 373 U.S. 379, 381 (1963).

⁸⁰ *Id.* at 404.

⁸¹ *Id.* at 402 (citing COMM’N ON ORG. OF THE EXEC. BRANCH OF THE GOV’T, REPORT OF THE TASK FORCE ON LEGAL SERVICES AND PROCEDURE 158 (1955)).

⁸² People ex rel. Ill. State Bar Ass’n v. Schafer, 404 Ill. 45, 50 (1949).

⁸³ See AM. BAR ASS’N CTR. FOR PRO. RESP., TASK FORCE ON MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT & RECOMMENDATION TO THE HOUSE OF DELEGATES (adopted Mar. 28, 2003) (resolving that each jurisdiction should develop its own definition of the practice of law).

viable definition.⁸⁴ Instead, it urged the various jurisdictions to adopt their own standards and to apply “common sense.”⁸⁵ Even more astounding is the current ABA Model Rules definition, or what might be called a nondefinition: “[t]he definition of the practice of law is established by law and varies from one jurisdiction to another.”⁸⁶ And so we are left with “broad and vague definitions of what does, and does not, constitute the practice of law.”⁸⁷ We are left with the feeling that “much unauthorized practice doctrine is inconsistent, incoherent, and, from a policy perspective, indefensible,”⁸⁸ a claim that was true forty years ago and has persisted to the present, in no small part owing to the entrenchment of the bar associations’ members. This situation is troubling for most parties, but it is perhaps, all too convenient for bar associations and lawyers who seek, as one court put it, “to localize, monopolize, regulate, or restrict the interstate and international provision of legal services.”⁸⁹

Is there anything to this? Could UPL be substantially motivated by a desire to restrain the trade for the economic benefit of lawyers? That is, in spite of its claimed aims, is UPL actually driven by a protectionist aim? Moreover, in answering these questions, have courts sent notice to bar associations that that their power has become more tenuous, that it is no longer guaranteed that, when occupational freedom is at stake, courts will apply the deferential rational-basis test articulated in

⁸⁴ *Id.*

⁸⁵ See AM. BAR ASS’N CTR. FOR PRO. RESP., TASK FORCE ON MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT & RECOMMENDATION TO THE HOUSE OF DELEGATES 5 (adopted Aug. 11, 2003), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/taskforce_rpt_803.pdf [<https://perma.cc/7QUH-Y3ZT>].

⁸⁶ MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS’N 2019).

⁸⁷ Swank, *supra* note 55, at 232.

⁸⁸ Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 5 (1981).

⁸⁹ See *In re Dissolving Comm’n on Unauthorized Prac. of L.*, 242 P.3d 1282, 1283 (Mont. 2010) (dissolving the Bar’s Commission on the unauthorized practice of law).

*Williamson v. Lee Optical of Oklahoma, Inc.*⁹⁰ A Supreme Court case addressed many of these issues—albeit in another profession. *North Carolina State Board of Dental Examiners v. FTC* involved a dispute between the North Carolina State Board of Dental Examiners and the Federal Trade Commission (“FTC”).⁹¹ The Board had been sending cease-and-desist letters to nondentists who were providing teeth-whitening services in North Carolina.⁹² The Board’s argument was that teeth-whitening services fell within the practice of dentistry, and thus nondentists were not allowed to perform these services.⁹³ It is worth noting, as the Court did, that eight of the Board’s ten members during the period at issue earned substantial fees from providing teeth-whitening services.⁹⁴ The FTC filed an administrative complaint charging the Board with violating federal antitrust laws.⁹⁵ The FTC alleged that the Board’s actions to exclude nondentists from the market for teeth-whitening services constituted an anticompetitive and unfair method of competition.⁹⁶

The Court held that the Board was not immune from antitrust laws, as state actors would be, because it was controlled by active market participants who were competing in the market that they were regulating.⁹⁷ In other words, because the Board members had a financial interest in limiting competition in the market for teeth-whitening services, they would be subject to antitrust scrutiny.⁹⁸

⁹⁰ 348 U.S. 483, 487-88 (1955).

⁹¹ 574 U.S. 494 (2015).

⁹² *Id.* at 501.

⁹³ *Id.*

⁹⁴ *Id.* at 500.

⁹⁵ *Id.* at 501.

⁹⁶ *Id.*

⁹⁷ *Id.* at 503-04.

⁹⁸ We pause here to mention one potential limitation in extending teeth-whitening scenarios (dental practice) to provision of legal services scenarios: teeth whitening requires less expertise than a root canal. Likewise, there are a range of legal services, and perhaps only those that require less expertise should be subject to the reach of *North Carolina State Board of Dental Examiners*.

The ruling has already proven influential. “Active market participants” who regulate their own markets now are on notice that they face liability for antitrust violations. In *Teladoc, Inc. v. Texas Medical Board*,⁹⁹ the U.S. District Court for the Western District of Texas cited *North Carolina State Board of Dental Examiners* in holding that a state medical board’s rule prohibiting telemedicine was subject to antitrust scrutiny. Likewise, a legal technology company under UPL pressures—LegalZoom—attempted to leverage *North Carolina State Board of Dental Examiners* in making its case.¹⁰⁰

But the question remains: even if UPL rules are overly broad and so vague as to be boundaryless, and even if they are crafted with exceptions and loopholes, are they problematically driven by an economic protectionist aim? There are instances of this being the case. For example, the attorney in charge of a patent and trademark law firm in California admitted that growth is flat for his company and that he is failing to compete with legal technology companies. Over the past few years, he has initiated UPL suits against many such companies, including LegalZoom.¹⁰¹ Legal scholars have identified this protectionist instinct and its misuse of UPL litigation: “lawyers often fight rearguard actions in attempts to prohibit laymen from using books, software.”¹⁰² Or, as Professors McGinnis and Pearce put it: “[t]he surest way for lawyers to retain the market power of old is to use bar regulation to delay and obstruct the use of machine intelligence.”¹⁰³ In fact, claims of market power and

⁹⁹ *Teladoc, Inc. v. Tex. Med. Bd.*, 112 F. Supp. 3d 529, 535-36 (W.D. Tex. 2015).

¹⁰⁰ Brief for Legalzoom.com, Inc. as Amici Curiae Supporting Respondent, *Dental Examiners*, 574 U.S. 494 (2015) (No. 13-534). See *infra* for a full discussion of LegalZoom’s UPL litigation.

¹⁰¹ Jason Tashea, *Rash of UPL Lawsuits Filed by LegalForce Show its Failure to Compete, Defendants Say*, AM. BAR ASS’N J. (Jan. 9, 2018), https://www.abajournal.com/news/article/rash_of_upl_lawsuits_filed_by_legalforce_show_failure_too_compete_defendant [https://perma.cc/5TV5-AGDK].

¹⁰² Spahn, *supra* note 30, at 47.

¹⁰³ McGinnis & Pearce, *supra* note 27, at 3042.

monopolistic aims for UPL restrictions have been leveled since such rules were first instituted.¹⁰⁴

Since AI currently can automate various tasks, including document generation, there should be significant time savings that are passed on to clients in the form of lower fees. Of course, this exposes a tension, a misalignment of incentives, that is inherent to the legal business model. Mark Chandler, former Chief Legal officer at Cisco Systems, Inc., has described how clients seek to manage expenses, while law firms, driven by hourly billing, are somewhat indifferent to productivity gains and expense reductions.¹⁰⁵ Lawyers' adherence to their highly customized, highly leveraged, labor-intensive, and expensive methods, as well their adherence to UPL rules, certainly seems to be a protectionist maneuver.

But the question of economic protectionism is nearly impossible to answer, requiring one to intuit the motivations of countless parties across many years. Moreover, it is not even a question that is limited to UPL and the legal context. Professor Haupt has put the more general question thus: "Is licensing merely an access control mechanism that serves a profession's economic interests by excluding newcomers?"¹⁰⁶ That is, it is a question that can be put to any profession, assessment of which demands weighing of both the barriers to entry created and the public interest in ensuring competency. Of course, "'Competency' . . . may be but a euphemism for economic control of the trade group."¹⁰⁷ In recent years, a consensus has formed in support of this proposition. Those criticizing professional licensing hail from a wide expanse of the political

¹⁰⁴ Rigertas, *supra* note 21, at 100, 112.

¹⁰⁵ Mark Chandler, Gen. Counsel, Cisco Sys., Inc., *Address at the Northwestern School of Law's 34th Annual Securities Regulation Institute: State of Technology in the Law*, Jan. 25, 2007 (transcript available at <https://www.legalevolution.org/2017/11/mark-chandler-speech-january-2007-035> [<https://perma.cc/RA9K-6TRC>]).

¹⁰⁶ Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. 501, 516 (2019).

¹⁰⁷ Henry Paul Monaghan, *The Constitution and Occupational Licensing in Massachusetts*, 41 B.U. L. REV. 157, 165 (1961).

spectrum.¹⁰⁸ The Obama Administration,¹⁰⁹ the 2016 Clinton presidential campaign,¹¹⁰ the Hamilton Project at the Brookings Institution,¹¹¹ and libertarian groups¹¹² have all taken positions against licensing.

Regardless of the motivations, we begin to unpack the effects of UPL rules and whether they serve their stated public interest purposes in the discussion below, especially given the rise of capable language models like GPT-4. Before we get there, though, we must turn to a few examples of UPL litigation in action, including the spate of lawsuits that LegalZoom has navigated over the past decade.

C. UPL in Action (Causing Inaction)

The classic example of a UPL violation—indeed, what bar associations hold up as justification for UPL—is when a bad actor tricks a naïve legal consumer. For example, individuals who identify as “notarios” often mislead immigrants into

¹⁰⁸ Haupt, *supra* note 106, at 515-16.

¹⁰⁹ Press Release, White House, Fact Sheet: New Steps to Reduce Unnecessary Occupation Licenses that are Limiting Worker Mobility and Reducing Wages (June 17, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/17/fact-sheet-new-steps-reduce-unnecessary-occupation-licenses-are-limiting> [<https://perma.cc/D9GH-5YZD>]; *see also* DEP’T OF THE TREASURY OFF. OF ECON. POLICY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 45-46 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf [<https://perma.cc/ZJQ9-8YAN>] (encouraging states to reduce the burdens imposed by professional regulations).

¹¹⁰ Jeanne Sahadi, *Hillary Clinton’s New Plan to Help Small Business Owners*, CNN BUS. (Aug. 23, 2016), <https://money.cnn.com/2016/08/23/news/economy/hillary-clinton-small-business/index.html> [<https://perma.cc/6JPH-Y2JK>].

¹¹¹ Ryan Nunn, *The Future of Occupational Licensing Reform*, BROOKINGS INST. (Jan. 30, 2017), <https://www.brookings.edu/articles/the-future-of-occupational-licensing-reform> [<https://perma.cc/5V88-R46C>].

¹¹² *See Occupational Licensing*, INST. FOR JUSTICE, <http://ij.org/issues/economic-liberty/occupational-licensing> [<https://perma.cc/2XVS-6WA7>] (“[O]ccupational licenses, which are essentially permission slips from the government, routinely stand in the way of honest enterprise.”).

believing that, in addition to notary-type services, they are qualified to provide legal services.¹¹³ This exploits a lexical ambiguity. In many Spanish-speaking countries, the term “notario” refers to someone who is licensed to provide some legal services.¹¹⁴ In the United States, notarios have filed fraudulent asylum applications on behalf of clients, knowing that it will be years before the fraud is discovered.¹¹⁵

Other classic examples include disbarred attorneys who continue to represent clients, or attorneys representing clients in states in which they are not bar licensed.¹¹⁶ This latter UPL violation might seem like an easy case—if UPL stands for anything, it is that attorneys should not practice in states in which they are not licensed. But the past few years have proven the impracticality of UPL rules even when it comes to easy cases. With the spread of COVID-19, many lawyers across the country took to remote work, which resulted in countless instances of attorneys practicing in jurisdictions in which they did not hold a license to practice law.¹¹⁷ Although the Model Rules include a loophole for such conduct,¹¹⁸ the loophole has only increased the balkanization of legal ethics, since not all states have adopted it.¹¹⁹

¹¹³ Helen Gunnarsson, *Immigration Lawyers Should Embrace Technology to Thwart UPL*, 33 LAW.’S MANUAL PRO. CONDUCT 664 (2017).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Lauren M. Hardesty, *What Constitutes the Unauthorized Practice of Law*, 61 RES GESTAE 35 (2018).

¹¹⁷ Lyle Moran, *Ethics Attorneys Hopeful COVID-19 Will Prompt Changes in Remote Working Rules*, AM. BAR ASS’N J. (2021), <https://www.americanbar.org/groups/journal/articles/2021/ethics-attorneys-hopeful-covid-19-will-prompt-changes-in-remote-> [https://perma.cc/HB2Q-32HJ].

¹¹⁸ “A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.” MODEL RULES OF PRO. CONDUCT r. 8.5(b)(2) (AM. BAR ASS’N 2019).

¹¹⁹ D.C. Bar Ass’n, Ethics Op. 370, at 5 (2016). *See also* Richard J. Rosensweig, *Unauthorized Practice of Law: Rule 5.5 in the Age of COVID-*

Most germane to this Article are UPL lawsuits against technology-driven legal solutions. The roots of such litigation can be found in matters like the case, discussed *supra* in Part I, wherein a nonlawyer wrote a book providing advice about probate.¹²⁰ Similarly, there have been countless suits brought against “Do-It-Yourself legal kits.”¹²¹ In the 1970s, there was even an effort—with bar associations enlisting the aid of newspaper editors—to scare people away from self-help legal services.¹²² Consider the quaint hysteria in the following:

Sidestepping lawyers’ fees, Americans by the thousands are representing themselves in legal disputes—usually with less skill and thrill than a TV courtroom lawyer and often with disastrous results. . . .

This “unauthorized practice of law,” says Warren H. Resh of the Wisconsin Bar Association, may be well-intentioned, but the public must be protected from incompetent legal advice.¹²³

One of the first cases that addressed self-help instantiated in technology was *Unauthorized Practice of Law Committee v. Parsons Technology*,¹²⁴ a 1999 Texas case involving Quicken Family Lawyer and Quicken WillMaker, software programs developed by Parsons Technology. The program provided users with templates for more than 100 different legal forms, including leases and employment contracts, and it provided

19 and Beyond, AM. BAR ASS'N (Aug. 12, 2020), <https://www.americanbar.org/groups/litigation/resources/newsletters/ethics-professionalism/unauthorized-practice-law-rule-55-age-covid-19-beyond> [<https://perma.cc/Y3UA-YNTT>].

¹²⁰ See Lanctot, *supra* note 33, at 225, 265-74 (noting that Dacey ultimately won his fight: a New York appellate court eventually upheld Dacey’s claim that he had the constitutional right to publish such a book, though he did not have the right to practice law, of course).

¹²¹ *Newspapers Help in Alerting the public to the Hazards in the Purchase of Do-It-Yourself Kits*, 40 UNAUTHORIZED PRAC. NEWS 28 (1976).

¹²² *Id.*

¹²³ *Id.* at 29-30.

¹²⁴ No. Civ. A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999).

instructions as to how the forms should be filled out.¹²⁵ Moreover, if users answered a series of questions, the software would produce documents tailored for them.¹²⁶ A Texas district court enjoined sale of the software program, holding that its services constituted the practice of law and were thus unauthorized.¹²⁷

The Quicken case was just a precursor to the wave of litigation that would crash upon LegalZoom, Inc. Established in 2001, LegalZoom is an online legal-technology platform that was founded with the aim of “mak[ing] legal help available to all.”¹²⁸ What this grandiose aim consists of is rather mundane. LegalZoom’s business model is centered on providing individuals and business entities with simple legal forms that can be pre-filled.¹²⁹ This may include forms for business formation, copyright protection, power-of-attorney appointment, and so on.¹³⁰ For providing these services, LegalZoom was either sued or faced bar proceedings in multiple states, actions that hobbled the company and threatened its continued existence.¹³¹

¹²⁵ *See id.* at *1.

¹²⁶ *See id.* at *1-2.

¹²⁷ *Id.* at *6-7, *10.

¹²⁸ Sarah Templin, *Blocked-Chain: The Application of the Unauthorized Practice of Law to Smart Contracts*, 32 *GEO. J. LEGAL ETHICS* 957, 966 (2019) (citing *Legal Zoom*, LEGALZOOM, <https://www.legalzoom.com> [<https://perma.cc/C4D3-QKJD>] (2018)).

¹²⁹ *We’re the One-Stop-Shop for All Your Business Formation, Tax, and Trademark Needs*, LEGALZOOM, <https://www.legalzoom.com/business> [<https://perma.cc/75K5-BX77>].

¹³⁰ *Id.*

¹³¹ Emily McClure, *Legal Zoom and Online Legal Service Providers: Is the Development and Sale of Interactive Questionnaires That Generate Legal Documents the Unauthorized Practice of Law?*, 105 *KY. L.J.* 563, 573-78 (2017) (discussing a number of cases in which UPL claims have been brought against online legal providers). *See also* Daniel Fisher, *LegalZoom Sees Supreme Court Ruling as Tool to Challenge N.C. Bar*, *FORBES* (June 6, 2015), <https://www.forbes.com/sites/danielfisher/2015/06/06/legalzoom-sees-supreme-court-ruling-as-tool-to-challenge-n-c-bar/?sh=14d09de75f5f> [<https://perma.cc/V2RM-LG7U>]; Conn. Unauthorized Prac. L. Comm.,

In *Janson v. LegalZoom.com, Inc.*,¹³² a class action brought in the Western District Court of Missouri, the court held that there was no significant difference between a lawyer preparing a document for a client and LegalZoom's services, and thus LegalZoom would have to cease such operations. This was in spite of LegalZoom's extensive disclaimer, provided to all customers.¹³³

The North Carolina State Bar, in particular, waged a lengthy battle with the company. In *LegalZoom.com, Inc. v. North Carolina State Bar*, the North Carolina Superior Court held that the Bar had the requisite authority to regulate the company.¹³⁴ LegalZoom, in turn, filed a federal antitrust suit against the Bar. LegalZoom essentially won the suit, with the two sides reaching a settlement that allows LegalZoom to provide legal services in North Carolina.¹³⁵ But "won" is an overstatement: as per the settlement, the parties agreed that "practice of law" does not include offering "consumers access

Informal Op. 2008-01 (2008); Pa. Bar Ass'n Unauthorized Prac. L. Comm., Formal Op. 20 10-01 (2010) (finding that LegalZoom had violated Pennsylvania's UPL rules).

¹³² 802 F. Supp. 2d 1053, 1065 (W.D. Mo. 2011).

¹³³ "LegalZoom is not a law firm, and the employees of LegalZoom are not acting as your attorney. LegalZoom's document service is not a substitute for the advice of an attorney. LegalZoom cannot provide legal advice and can only provide self-help services at your specific direction. LegalZoom is not permitted to engage in the practice of law. LegalZoom is prohibited from providing any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, remedies, defenses, options, selection of forms or strategies. This site is not intended to create an attorney-client relationship, and by using LegalZoom, no attorney-client relationship will be created with LegalZoom. Instead, you are representing yourself in any legal matter you undertake through LegalZoom's legal document service." *Legalzoom Disclaimer*, LEGALZOOM, <https://www.legalzoom.com/disclaimer.html> [<https://perma.cc/98KS-CW77>].

¹³⁴ *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 1511, 2014 WL 1213242, at *9 (N.C. Super. Ct. Mar. 24, 2014).

¹³⁵ See Joan C. Rogers, *Settlement Allows LegalZoom to Offer Legal Services in N.C.*, BNA (Nov. 18, 2015), <https://news.bloomberglaw.com/class-action/settlement-allows-legalzoom-to-offer-legal-services-in-nc> [<https://perma.cc/CED9-R7VG>].

to interactive software that generates a legal document based on the consumer's answers to questions presented by the software . . . ”¹³⁶ In other words, LegalZoom was put into a small box, a proximal legal space. Unsurprisingly, this changed little; LegalZoom continued to face UPL suits.¹³⁷

II. Human-AI Legal Collaboration

In this Part, we consider two taxonomies that are essential for understanding the intersection of artificial legal intelligence and UPL rules. First, there is the taxonomy of the forms of human-AI conjoined effort—in other words, the spectrum of automation. Second, there is the taxonomy of legal technology—in other words, the types of legal automation.¹³⁸ The first taxonomy is essential to the present Article, as the different bands on the automation spectrum will trigger UPL concerns of differing magnitude. The second taxonomy is useful for providing examples as to where specific legal technologies fall within the automation spectrum.

Before we explore these taxonomies, we want to reiterate the general framework of UPL rules, acknowledging that they vary by jurisdiction. As the Model Rules of Professional Conduct have it, supervision is governed by Rule 5.3, which states that a supervisory lawyer must make reasonable efforts to ensure that nonlawyer assistants comply with professional legal obligations.¹³⁹ In addition, there are rules prohibiting

¹³⁶ *LegalZoom.com, Inc., v. N.C. State Bar*, No. 11-cvs-15111, 2015 WL 6441853, at *1 (N.C. Super. Ct. Oct. 22, 2015).

¹³⁷ *See, e.g., LegalForce RAPC Worldwide v. LegalZoom.com, Inc.*, No. 17-cv-07194-MMC, 2018 WL 1730333 (N.D. Cal. Apr. 10, 2018).

¹³⁸ *See, e.g., McGinnis & Pearce, supra* note 27, at 3046.

¹³⁹ MODEL RULES OF PRO. CONDUCT r. 5.3(b) (AM. BAR ASS'N 2019) (“With respect to a nonlawyer employed or retained by or associated with a lawyer . . . a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer . . .”). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 11 (AM. L. INST. 2000).

nonlawyers from practicing law,¹⁴⁰ which include prohibiting lawyers duly licensed in one jurisdiction from practicing in other jurisdictions in which they are not licensed.¹⁴¹

Murray and colleagues,¹⁴² in considering the waxing presence of AI in organizations like law firms, developed the following intuitive taxonomy of the ways in which human-AI conjoined effort may occur. AI may be “assisting,” “arresting,” “augmenting,” or “automating.”¹⁴³ These are ordered in terms of AI agentic freedom, going from least to most agentic. Beginning with least agentic, we have “assisting,” which is nonagentic collaboration. An example of this is when an attorney uses an excel spreadsheet. The spreadsheet merely stores information in a usable format. Moreover, if functions are embedded within the spreadsheet, then it also performs automated work on behalf of the attorney. Imagine that an attorney has created a formula, based on medical expenses and lost wages, for determining the range of settlement outcomes that she will present to her client. The machine performs the mathematics, and it even provides a settlement range, but the attorney retains control over what is presented to the client. As of this writing, there are few circumstances, absent an attorney’s failure to vet the automated output, in which a UPL suit against assisting technologies would be appropriate. Such technologies do not provide advice.

That said, consider Electronic Discovery (“E-Discovery”), which may be classified as assisting technology (although it might also fall into the next category, “arresting” technology). E-Discovery is the automation of document review. Instead of having an attorney (typically, a junior associate at a big firm) comb through millions of documents, firms have taken to

¹⁴⁰ MODEL RULES OF PRO. CONDUCT r. 5.5(a) (AM. BAR ASS’N 2019) (“A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction . . .”).

¹⁴¹ *Id.* at (b)-(e).

¹⁴² Alex Murray, J. E. N. Rhymer & David G. Sirmon, *Humans and Technology: Forms of Conjoined Agency in Organizations*, 46 ACAD. MGMT. REV. 552 (2021).

¹⁴³ *Id.* at 553.

offloading such tasks onto machines.¹⁴⁴ Software is used to search for words or phrases, or even entire document types, and flag instances for subsequent use in litigation. In other words, the attorneys encode the search parameters, and the AI executes the search.¹⁴⁵ Modern legal practice is beset with digitized documents, and E-Discovery tools have become indispensable. This is in spite of the fact that most, if not all, lawyers do not possess the proper analytical tools “to assess whether a particular technology is adequate for the task and whether it is working properly when employed,” raising questions about the scope of lawyer supervision.¹⁴⁶

The second type of human-AI collaboration is even trickier to unpack. “Arresting” agentic collaboration is when an AI exercises intentionality over action selection. The AI does not have the ability to develop protocols, but it does have the ability to select actions.¹⁴⁷ The most common example of this is a blockchain-based smart contract. When encoded conditions are satisfied, the contract automatically executes encoded actions. For example, Walmart works with IBM to employ smart contracts that use AI to authenticate materials and products—or verify task completion—at various handoff points, facilitating automatic release of funds.¹⁴⁸ To fully

¹⁴⁴ See, e.g., Thomas Spigolon, *Law Firms’ E-Discovery Centers See Growing Business From Other Firms, Clients*, LAW.COM (Aug. 7, 2023, 5:26 PM), <https://www.law.com/dailyreportonline/2023/08/07/law-firms-e-discovery-centers-see-growing-business-from-other-firms-clients> [<https://perma.cc/QD4U-94QH>].

¹⁴⁵ For example, “Is this UPL?” Answering that question would require a Model Rule 5.3-type reasonableness analysis: did the responsible attorney make reasonable efforts to ensure that the AI’s conduct was compatible with the professional obligations of the attorney? MODEL RULES OF PROFESSIONAL CONDUCT r. 5.3(a)-(b) (2019).

¹⁴⁶ Dana A. Remus, *The Uncertain Promise of Predictive Coding*, 99 IOWA L. REV. 1691, 1710 (2014).

¹⁴⁷ Murray et al., *supra* note 142, at 556.

¹⁴⁸ Michael J. Casey & Pindar Wong, *Global Supply Chains Are About To Get Better, Thanks To Blockchain*, HARV. BUS. REV. (Mar. 2017), <https://hbr.org/2017/03/global-supply-chains-are-about-to-get-better-thanks-to-blockchain> [<https://perma.cc/X5M3-PKEP>]; Alex Tapscott &

understand the agentic nature of such AI, consider The Dao, which was an investor-led decentralized investment fund. In 2016, the fund was hacked, and close to \$60 million was stolen.¹⁴⁹ Various people observed the hack as it was happening, but they were unable to stop it because The Dao ran autonomously on smart contracts.¹⁵⁰ To stop the attack, all designated actors would have had to reach consensus about appropriate revisions to the underlying structure; otherwise, the smart contract would proceed as designed, which it did.¹⁵¹

When deployed in the legal domain, are “arresting” technologies practicing law? Most likely. LegalZoom, after all, should be classified as an arresting technology. Its “interactive legal documents” function much like smart contracts, receiving input from customers and generating documents in accordance with encoded rules.¹⁵² And we have discussed the UPL liability that LegalZoom faced—in spite of the fact that LegalZoom was not actually executing or filing anything. As a similar example, consider *Franklin v. Chavis*,¹⁵³ a case in which an insurance agent tried to help his elderly neighbor make a will.¹⁵⁴ The agent used software to generate a fill-in-the-blank form, which he then completed and provided to his neighbor.¹⁵⁵ The neighbor eventually passed away, at which point her family

Don Tapscott, *How Blockchain Is Changing Finance*, HARV. BUS. REV. (Mar. 2017), <https://hbr.org/2017/03/how-blockchain-is-changing-finance> [<https://perma.cc/79CW-6Q5T>].

¹⁴⁹ Quinn DuPont, *Experiments in Algorithmic Governance: A History And Ethnography Of “The DAO,” A Failed Decentralized Autonomous Organization*, in BITCOIN AND BEYOND: CRYPTOCURRENCIES, BLOCKCHAINS, AND GLOBAL GOVERNANCE 157-77 (Malcolm Campbell-Verduyn ed., 2017).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Caroline Shipman, *Unauthorized Practice of Law Claims Against LegalZoom - Who Do These Lawsuits Protect, and Is the Rule Outdated*, 32 GEO. J. LEGAL ETHICS 939 (2019).

¹⁵³ 640 S.E.2d 873, 875-76 (S.C. 2007).

¹⁵⁴ Mathew Rotenberg, Note, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709 (2012).

¹⁵⁵ 640 S.E.2d at 875-76.

sued the insurance agent for UPL.¹⁵⁶ The South Carolina Supreme Court agreed with the family: “Even the preparation of standard forms that require no creative drafting may constitute the practice of law if one acts as more than a mere scrivener.”¹⁵⁷

Still, such technology is far less objectionable on UPL grounds than are arresting technologies like Rasa Legal, a B-corporation that combines AI-enabled software with nonlawyer professionals to do two things: (1) help individuals determine whether they are eligible to expunge their criminal records and (2) perform the expungement process.¹⁵⁸ This is a UPL violation. The only reason Rasa Legal is permitted to operate is because the state of Utah instituted a “legal services sandbox” in 2020—in essence, a free-pass from UPL claims for companies experimenting with using technology to overcome barriers to justice.¹⁵⁹

Before progressing to the third type of human-AI conjoined effort, it is worth pausing to consider the different types of artificial legal intelligence. McGinnis and Pearce identified five types of artificial legal intelligence tools that would develop: (1) discovery, (2) legal search, (3) document generation, (4) brief and memoranda generation, and (5) prediction of case outcomes.¹⁶⁰ Professor Linna, in his own taxonomy, does a few things differently. For one, he merges the document automation pieces into a unified group: brief and memoranda generation would be subsets of document automation, also known as assembly.¹⁶¹ Prediction of case outcomes, likewise, would fall within a broader group: outcome analytics.¹⁶² This would include predictions, and it also would include more general analytics, such as actionable business

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 876.

¹⁵⁸ *Expungement Made Easy*, RASA LEGAL, <https://www.rasa-legal.com> [<https://perma.cc/H7TC-K4RL>].

¹⁵⁹ See sources cited *supra* note 32.

¹⁶⁰ McGinnis & Pearce, *supra* note 27, at 3046.

¹⁶¹ Linna, *supra* note 28, at 412.

¹⁶² *Id.*

intelligence or strategy recommendations.¹⁶³ Finally, Professor Linna includes tools that impinge the paradigmatic examples of lawyering: technologies that litigators are using in the courtroom to gain advantages.¹⁶⁴ In summary, Professor Linna’s classification encompasses a streamlined approach, consolidating document-related tasks into document automation, broadening case outcome prediction into outcome analytics, and incorporating technologies that enhance litigators’ performance in the courtroom. The specifics, however, matter less than the overall survey of the field.

Of these groups, discovery and document generation have already been covered above in the discussions of assisting and arresting human-AI conjoined effort. Legal search might also be put into the assisting bin. Brief and memoranda generation (as a subset of document generation) and outcome analytics are pure legal tasks—by any definition of the practice of law, they would be included. But this is also true for certain types of discovery, search, and document generation. Systems like ROSS intelligence, for example, steered search in such a way that they were undoubtedly doing the work of a lawyer.¹⁶⁵ It should now be evident—but it will become more evident still—that AI is rapidly subsuming tasks that constitute the practice of law, and disentangling humans from AI contributions is nearly impossible. That is, most every law firm, most every individual attorney’s practice, is or will be reliant upon AI that are violating UPL rules and cannot be reasonably overseen.

The third type in the taxonomy is “augmenting” agentic collaboration, where an AI exercises intentionality over protocol development. More than “arresting,” “augmenting” AI takes on some of the deliberative process. Think of a machine-learning algorithm that parses large amounts of data, detects patterns, and makes predictive recommendations.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 413.

¹⁶⁵ *Our Company, ROSS INTELLIGENCE*, <https://www.rossintelligence.com/about-us> [https://perma.cc/W3N8-3NDU].

However, these recommendations would be made to humans; the AI would not subsume action selection. Much legal technology, including the advanced search functions in Lexis, Westlaw, and other systems, arguably are technologies of the augmenting type. Other examples here would include judicial-risk-score calculators or structured machine-learning processes, such as case outcome predictors,¹⁶⁶ that parse datasets, detect patterns, and provide predictive recommendations for a human collaborator to pursue.

The fourth type in the taxonomy is “automating” agentic collaboration, where the AI exercises intentionality over protocol development *and* action selection. This final category reaches most fully into AI independence (i.e., away from conjoined effort), as seen in the example of IBM’s Deep Blue for chess. Deep Blue uses a combination of brute-force searching and domain-specific heuristics, to independently seek data, learn, formulate rules for action, and ultimately execute.¹⁶⁷ As another example, consider how the publisher of *Sports Illustrated* and other media is now using AI to both pitch potential topics and write full articles.¹⁶⁸ Some articles in *Men’s Journal*, for instance, are entirely AI-generated, created by an AI process that is trained on the publisher’s archived articles and leverages OpenAI’s LLMs.¹⁶⁹

In the legal domain, automating technology is seen in prediction tools that are able to act, if given such authority. These might be active at the case-resolution stage or at the case-intake stage, analyzing potential client case information and making determinations as to whether a case should be

¹⁶⁶ See Masha Medvedeva, Martijn Wieling & Michel Vols, *Rethinking the Field of Automatic Prediction of Court Decisions*, 3 A.I. L. 195 (2023).

¹⁶⁷ See generally FENG-HSIUNG HSU, BEHIND DEEP BLUE: BUILDING THE COMPUTER THAT DEFEATED THE WORLD CHESS CHAMPION (2002).

¹⁶⁸ Alexandra Bruell, *Sports Illustrated Publisher Taps AI to Generate Articles, Story Ideas*, WALL ST. J. (Feb. 3, 2023), <https://www.wsj.com/articles/sports-illustrated-publisher-taps-ai-to-generate-articles-story-ideas-11675428443> [<https://perma.cc/Q7N6-S2XB>].

¹⁶⁹ *Id.*

accepted or rejected.¹⁷⁰ But an even more salient form of automating technology is that embodied by LLMs that can generate text and, conceivably, briefs and other legal documents. In other words, this technology can, on its own, generate legal output, including the provision of legal advice. ChatGPT, in particular, has been shown to be relatively adept at nuanced writing tasks like penning scholarly articles,¹⁷¹ and at creative writing tasks like penning love notes.¹⁷² In a recent study, academic reviewers were only able to catch 63% of fake abstracts created by ChatGPT.¹⁷³ As one commentator said, “That’s a lot of AI-generated text that could find its way into the literature soon.”¹⁷⁴ At the *Science* family of journals, editors have specifically singled out ChatGPT, stating that text generated by the AI may not be used since, “[i]t is, after all, plagiarized from ChatGPT.”¹⁷⁵

A recent article explored the extent to which different professions will be impacted by LLMs, such as GPT-4.¹⁷⁶ The authors looked at “exposure percentages,” where exposure was defined as reducing the time it takes to complete a task by at least 50%. They projected that as much as 70% of lawyers’ tasks are exposed to GPT-powered software.¹⁷⁷

Anyone with access to ChatGPT can see how reasonable this projection is. In early March 2023, we asked ChatGPT to

¹⁷⁰ Medvedeva et al., *supra* note 166; *Robots Change the Face of Legal Practice*, DISCIPLINARY BD. SUP. CT. PA. (May 2017), <http://198.8.33.167/Storage/media/pdfs/20180417/133713-attorneynewsletter-2017.05.pdf> [<https://perma.cc/MU3Y-9LTE>].

¹⁷¹ Holden H. Thorp & Valda Vinson, *ChatGPT is Fun, But Not an Author*, 379 SCI. 313 (2023).

¹⁷² Callie Holtermann, *Leave ‘I Love You’ to the Pros*, N.Y. TIMES (Feb. 10, 2023), <https://www.nytimes.com/2023/02/10/style/flower-delivery-card-messages> [<https://perma.cc/U23G-6H7E>].

¹⁷³ Thorp, *supra* note 171.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Tyna Eloundou et al., *GPTs are GPTs: An Early Look at the Labor Market Impact Potential of Large Language Models* 1, 15 (2023), <https://arxiv.org/abs/2303.10130> [<https://perma.cc/LJY5-9KF2>].

¹⁷⁷ *Id.* at 16.

write a brief on the law of trespassing in Miami-Dade County, Florida.¹⁷⁸ Wary of UPL rules, the AI deferred: “I’m sorry, but . . . creating a legal brief without proper training and knowledge could result in significant legal repercussions. It’s important to seek assistance from a licensed attorney who can provide the necessary legal guidance and prepare a legal brief that is appropriate for your case.” So we asked the AI to do an equivalent task: explain the “concept and rules” of trespassing in Miami-Dade County, Florida. ChatGPT then wrote an excellent brief for us. Two weeks later, in mid-March 2023, we had access to an updated version of ChatGPT, one that is built atop GPT-4. We asked the AI to write a brief to help us beat a trespassing charge in Miami-Dade County. This time, after a short disclaimer (“It is essential to consult with a qualified attorney to ensure that the advice is tailored to your specific case. This memo is for informational purposes only and should not be considered as legal advice.”), it rather brilliantly told us what to do, even referring to itself as our “ChatGPT Legal Advisor.”¹⁷⁹ Specifically, we were impressed by three aspects of ChatGPT as lawyer. First, it displayed a solid grasp of statutory interpretation, parsing the nuances of the relevant legislation to provide clear, contextual guidance. Second, the legal analysis was thorough and methodical, with all relevant facets of the issue considered and addressed. Third, the advice showed factual accuracy, drawing upon up-to-date legal rules in presenting an informed perspective on the matter.

With each iteration, the potential of generative AI like ChatGPT to benefit the legal profession increases; such tools are becoming not just ancillary aids but frequent and almost essential legal collaborators. This increased utility brings us to our next Part, wherein we explore compelling arguments for rethinking the traditional framework of UPL in light of these technological advancements.

¹⁷⁸ For complete transcripts of these exchanges, see <https://osf.io/49nsm> [<https://perma.cc/FPB3-8EEA>].

¹⁷⁹ *Id.*

III. The Case for Dismantling UPL Rules

The case for dismantling UPL rules has never been stronger than it is today. First, there are the constitutional arguments. As Professor Bernstein and others have argued, there exists a due process right to occupational freedom that many licensing bodies may be unlawfully restricting.¹⁸⁰ In fact, opinions like that of the Texas Supreme Court in *Patel v. Texas Department of Licensing & Regulation*¹⁸¹ suggest that courts are becoming more protective of the right to pursue an occupation, a right that traditionally has been considered a subset of liberty of contract.¹⁸² At issue in *Patel* was a law requiring individuals who make their living by threading eyebrows to obtain a cosmetology license.¹⁸³ Instead of applying the rational-basis test, which indubitably would have led to a ruling in favor of the law, the court used a more stringent test. Under the Texas Constitution, the state cannot meet the test if “the statute’s actual, real-world effect as applied to the challenging party . . . is so burdensome as to be oppressive in light of[] the governmental interest.”¹⁸⁴ Drawing on such rulings, Professor Bernstein has shown that there is an ever-expanding opening for litigants to argue for a more robust (greater than rational basis) test for laws and regulations restricting occupational liberty.¹⁸⁵

Similarly, Clark Neily has argued that the First Amendment may provide robust protection against occupational restrictions that implicate free-speech issues.¹⁸⁶ Since the dawn of the so-called Information Age, vocations have become increasingly expressive.¹⁸⁷ Neily uses the example of an interior designer to make this point: drafting design ideas, recommending furniture, suggesting finishes—all of this is

¹⁸⁰ Bernstein, *supra* note 23, at 289 n.9.

¹⁸¹ 469 S.W.3d 69 (Tex. 2015).

¹⁸² Bernstein, *supra* note 23, at 289 n.9.

¹⁸³ 469 S.W.3d at 87.

¹⁸⁴ *Id.*

¹⁸⁵ Bernstein, *supra* note 23, at 289.

¹⁸⁶ Neily, *supra* note 26, at 306.

¹⁸⁷ *Id.* at 310.

speech, “and frequently artistic speech.”¹⁸⁸ This is even more true for legal services, where the work product is nothing but speech. Importantly, courts do not apply the rational-basis test when free speech is implicated. Rather, as discussed in the previous paragraph, they apply some form of heightened scrutiny.¹⁸⁹

The Circuits have taken varied stances on this issue. For example, in some states, licensing requirements have been instituted for tour guides, who primarily convey information about points of interest (quite literally, their job is to speak). There is a split in authority over the issue, with the D.C. Circuit striking down the licensing laws on First Amendment grounds and the Fifth Circuit upholding such laws while rejecting the First Amendment argument.¹⁹⁰ In cases involving psychotherapy, the Third Circuit has expressly recognized a speech interest,¹⁹¹ while the Ninth Circuit has done precisely the opposite.¹⁹²

Among other reasons, Neily suggests that heightened scrutiny regarding occupational licenses may be beneficial because policymakers will be required to exercise at least a modicum of care when they restrict the right to work.¹⁹³ This would be impactful in the legal domain, where decades of research has shown that UPL rules have caused harm¹⁹⁴ and where the inherent-powers doctrine restricts individuals’ ability to seek recourse through the political process. Applying First Amendment analysis to UPL rules risks conflating political, artistic, commercial, and other types of speech in the

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Compare *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014) (rejecting the free-speech argument and upholding New Orleans’ licensing requirement for tour guides), with *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (rejecting the *Kagan* court’s holding and striking down D.C.’s licensing of tour guides on First Amendment grounds).

¹⁹¹ *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014).

¹⁹² *Pickup v. Brown*, 740 F.3d 1208, 1221-22 (9th Cir. 2014).

¹⁹³ Neily, *supra* note 26, at 311.

¹⁹⁴ See *infra* Section III.B.

analysis, so it is worth hesitating here for a moment. The core restriction that's questionable is that which forbids provision of legal advice: as in the case of psychotherapy, the communication itself (the therapist's psychosocial advice; the lawyer's legal advice) is the product. So we might think of expression of legal opinions: if someone cannot provide their perspective on a legal matter due to fear of being accused of unauthorized practice, this might chill public discourse on matters of public concern. But this is the more extreme form of UPL and it implicates the more expansive protections afforded to noncommercial speech. It perhaps is best to think of a nonlawyer offering legal information as a service or a product (like self-help legal books or a demand letter or a brief), where UPL often infringes upon the speech right.

While these constitutional arguments suggest that courts will continue the process of curtailing UPL overreach, there also are reasons why bar associations might want proactively to dismantle UPL rules. First and foremost is the fact that, especially with the emergence of LLMs, UPL rules are routinely broken and are impossible to enforce with consistency, thus providing bar associations with significant discriminatory powers. Second, the externalities of UPL rules run counter to the intended aims. UPL rules harm legal consumers and prevent solutions to durative access-to-justice problems. In the remainder of this Part, we unpack these two points.

A. *Enforcement Issues*

A century ago, lawyers functioned much like medieval priests: they held information to which the public lacked access. For the most part, individuals with legal questions had to bring those questions to lawyers, as no one else knew the answers. Today, with the democratization of information, legal knowledge is not possessed by a select few; in stark contrast, it is widely available on the Internet.¹⁹⁵ Other information-centric professions have already felt the impact from the

¹⁹⁵ Linna, *supra* note 28, at 399.

democratization of information. For example, over the eight-year period that ran from 2006 to 2014, revenues in traditional journalism fell by about a third, and employment decreased by about 17,000 people; the market value of newspapers plummeted.¹⁹⁶ Spurred by information democratization, legal-technology companies have sprouted and proliferated, in spite of the fact that UPL laws force them to operate in legal gray areas.¹⁹⁷ In 2009, only 15 legal startups were listed on the startup-related website, AngelList.¹⁹⁸ By April 2014, there were more than 400 legal startups listed.¹⁹⁹ By January 2015, the number had grown to more than 720 startups.²⁰⁰ As of November 2015, there were 976 entities listed under the “legal startups” category²⁰¹ and 210 entities listed under the “legal tech startups” category.²⁰²

Likewise, demand for nonlawyer provision of legal services is high and has been high for many years. In a 1974 ABA survey, 82% of respondents (all drawn from the general legal-services-using public) agreed with the following statement: “many things that lawyers handle—for example, tax matters or estate planning—can be done as well and less expensively by nonlawyers like tax accountants, trust officers of banks and insurance agents.”²⁰³ Nearly five decades later, attitudes remained the same. A study of over 2,000 adults aged 18-54 found that 76% of respondents “were willing to use online legal

¹⁹⁶ See McGinnis & Pearce, *supra* note 27.

¹⁹⁷ Linna, *supra* note 28, at 389.

¹⁹⁸ Nicole Bradick, Potomac Law Grp., *All Rise: The Era of Legal Startups Is Now in Session*, VENTURE BEAT (Apr. 13, 2014), <https://venturebeat.com/entrepreneur/all-rise-the-era-of-legal-startups-is-now-in-session> [<https://perma.cc/3SH9-A4NA>].

¹⁹⁹ *Id.*

²⁰⁰ Susan C. Liebel, *Are You Working with the New Consumer-Facing Legal Startups?*, SOLO PRAC. UNIV. (Jan. 26, 2015), <https://solopracticeuniversity.com/2015/01/26/are-you-working-with-the-new-consumer-facing-legal-startups> [<https://perma.cc/9LHK-MZ2S>].

²⁰¹ Linna, *supra* note 28, at 389.

²⁰² *Id.*

²⁰³ BARBARA CURRAN & FRANCIS SPAULDING, *THE LEGAL NEEDS OF THE PUBLIC* 231 (1977).

services for legal issues if it would save them money.”²⁰⁴ These lay attitudes are also echoed by specialists, such as in-house counsel and corporate legal departments, which are demanding lower prices, greater transparency, and higher-quality legal services—even if that means straying from traditional legal services business models.²⁰⁵

So information has been democratized, the moat around legal work has dried up, and technology tools that provide legal services are widely available and in high-demand, but rules still exist to prevent the use of such tools. A parallel situation is evident in education. With the emergence of ChatGPT, schools and universities have been deciding on the equivalent of UPL rules: whether to ban the technology in educational settings.²⁰⁶ Some educators have argued against bans, even asserting that students should be obligated to use the technology, as it can serve as a useful collaborator that pushes students to perform better.²⁰⁷ Professor Mollick said of his students, “I expect them to write more and expect them to write better. This is a force multiplier for writing. I expect them to use it.”²⁰⁸ While some are taking the opposite tack, banning ChatGPT. An education expert believes such moves are fools’ errands: “[t]he first reason not to ban ChatGPT in schools is that, to be blunt, it’s not going to work.”²⁰⁹ Administrators in colleges and universities across the country have echoed this sentiment.²¹⁰

²⁰⁴ Shipman, *supra* note 152, at 940.

²⁰⁵ Linna, *supra* note 28, at 393.

²⁰⁶ Kevin Roose, *Don’t Ban ChatGPT in Schools. Teach With It*, N.Y. TIMES (Jan. 12, 2023), <https://www.nytimes.com/2023/01/12/technology/chatgpt-schools-teachers.html> [<https://perma.cc/V3L2-LSUH>].

²⁰⁷ Douglas Belkin, *Professors Turn to ChatGPT to Teach Students a Lesson*, WALL ST. J. (Jan. 25, 2023), <https://www.wsj.com/articles/professors-turn-to-chatgpt-to-teach-students-a-lesson-11674657460> [<https://perma.cc/DW98-RMXK>].

²⁰⁸ *Id.*

²⁰⁹ Roose, *supra* note 206.

²¹⁰ Katherin Schulten, *Lesson Plan: Teaching and Learning in the Era of ChatGPT*, N.Y. TIMES (Jan. 24, 2023), <https://www.nytimes.com/2023/01/24/learning/lesson-plans/lesson-plan-teaching-and-learning-in-the-era-of-chatgpt.html> [<https://perma.cc/668H-FJJR>].

The technology is helpful and in-demand, so students will use it regardless of the rules. Case in point: during the second week of January 2023, a sampling of papers from all grade levels from around the world revealed that 10% of students had used ChatGPT.²¹¹ A recent survey of 1,000 students aged 18 or older found that roughly 50% had used ChatGPT to complete an at-home test or quiz or to write an essay.²¹² In early 2023, a professor of philosophy at a U.S. college was grading papers when he came across one that was “the best paper in the class.”²¹³ A quick discussion with the student led to a confession—ChatGPT had written the paper.²¹⁴

The use of this technology in legal practice is similarly inevitable. Even before the emergence of artificial legal intelligence, Professor Swank observed that “[d]espite the rules prohibiting the unauthorized practice of law, it is rampant in the United States.”²¹⁵ Today, with the existence of LLMs, it is safe to assume that UPL infractions are rampant, both by lawyers who are using these tools without providing adequate oversight and by nonlawyers who are doing work traditionally performed by lawyers. Rampant infractions are not in and of themselves a concern; they simply indicate that the UPL restrictions are overbroad, unenforceable, or both. What is a concern, however, is that rampant infractions create room for inequitable enforcement by bar associations. If a vast swath of legal and law-adjacent individuals can be hit with UPL suits, then nearly everyone is operating at the whim of bar association leadership.

Earlier in this Section, we described the rapid proliferation of legal-technology startups. Notice that these startups were proliferating at the same time LegalZoom was tied up in litigation with bar associations in multiple states. Some of these startups undoubtedly offered services similar to LegalZoom’s.

²¹¹ Belkin, *supra* note 207.

²¹² *Id.*

²¹³ Huang, *supra* note 8.

²¹⁴ *Id.*

²¹⁵ Swank, *supra* note 55, at 225.

Many of them undoubtedly were engaging in what most bar associations would deem the unauthorized practice of law. But because there were so many startups, and because most of them were relatively small, only a few visible ones, like LegalZoom, were targeted for suit. Case in point: white shoe law firms, such as New York's Cravath, have had dedicated data-analytics groups for years.²¹⁶ These groups undoubtedly have engaged in UPL. Yet, as with E-Discovery tools that lack proper oversight, they operate with impunity.

If bar associations want to stipulate UPL rules, at the very least they need to clearly define what is and is not a violation, and they need be consistent in identifying and litigating violations. The past decades have evinced a complete unwillingness to do either, and consumers are paying the price, as we discuss in the succeeding Section.

B. A Frustrated (or Perhaps False) Aim

If the stated aim of UPL rules is to benefit legal consumers, it is alarming that the bulk of the evidence suggests that UPL rules accomplish the exact opposite.²¹⁷ This concern has formed the backdrop of the antitrust claims that have dogged bar associations and their UPL rules. A joint letter from the Department of Justice and the Federal Trade Commission concluded, "There is no evidence before the [ABA] of which we are aware that consumers are hurt by this competition [between lawyers and nonlawyers] and there is substantial evidence that they benefit from it."²¹⁸ Indeed, it has been

²¹⁶ See *Scott B. Reents*, CRAVATH, <https://www.cravath.com/sreents> [<https://perma.cc/4HZK-CVUG>] (noting that the head of the Data Analytics and E Discovery team "advises clients on defensible approaches to the preservation, collection, search and analysis of digital evidence").

²¹⁷ David Nahmias, *The Changemaker Lawyer: Innovating the Legal Profession for Social Change*, 106 CALIF. L. REV. 1335, 1370 n.140 (2018).

²¹⁸ U.S. DEP'T OF JUST. & FED. TRADE COMM'N, COMMENT LETTER ON AMERICAN BAR ASSOCIATION'S PROPOSED MODEL DEFINITION OF THE PRACTICE OF LAW 3 (Dec. 20, 2002), <https://www.justice.gov/sites/default/files/atr/legacy/2008/03/26/200604.pdf> [<https://perma.cc/93ZJ-M2T7>] [hereinafter Justice/FTC Letter].

convincingly argued that, if UPL rules are eliminated, legal costs will go down.²¹⁹ Even 20 years ago, scholars recognized that UPL rules had created a gap in justice. Individuals most in need of legal services, especially those with low incomes, were unable to access them because of the monopoly prices.²²⁰

In 2015, ABA President William Hubbard estimated that 80% of the U.S. population lacked adequate access to legal services.²²¹ In 2013, the Legal Services Corporation (“LSC”) estimated that low-income Americans had 1.7 million legal issues, and, for more than half of these issues, the cost of legal services would prohibit them from receiving requisite legal guidance.²²² “Lacking effective representation, poor persons often see the law not as a protector, but as an enemy which evicts them from their flat, victimizes them as consumers, cancels their welfare payments, binds them to usury, and seizes their children.”²²³ This access-to-justice problem also affects businesses. Each year, more than 7 million small businesses fail to seek out a lawyer when dealing with a significant legal event, primarily because of cost concerns.²²⁴ In sum, the most salient negative externality of UPL statutes is that they unfairly and overwhelmingly impact underprivileged individuals.²²⁵

When UPL restrictions are lifted, the benefits to consumers are immediately apparent. For example, Professor Linna of

²¹⁹ Julian Moradian, *A New Era of Legal Services: The Elimination of Unauthorized Practice of Law Rules to Accompany the Growth of Legal Software*, 12 WM. & MARY BUS. L. REV. 247, 267-69 (2020).

²²⁰ See Cynthia L. Fountaine, *When Is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment*, 71 U. CIN. L. REV. 147, 147 (2002).

²²¹ Meg Graham, *How the ABA Is Using Technology to Make Legal Services More Accessible*, CHI. TRIB. (Mar. 16, 2015), <http://www.chicagotribune.com/bluesky/originals/chi-william-hubbard-aba-bsi-20150313-story.html> [<https://perma.cc/D54L-PQZ5>].

²²² LEGAL SERVS. CORP., *supra* note 15.

²²³ William H. Brown, Comment, *Legal Software and the Unauthorized Practice of Law: Protection or Protectionism*, 36 CAL. W. L. REV. 157, 170 (1999).

²²⁴ Linna, *supra* note 28, at 393.

²²⁵ Denckla, *supra* note 37, at 2581.

Northwestern Law is experimenting with a chatbot called “Rentervention,” which uses LLMs including ChatGPT, to come up with better responses and draft more detailed letters for tenants facing legal problems.²²⁶ Similarly, Utah and a few other states, like Arizona, have permitted limited experimentation with technological and nonlawyer provision of legal services. The results have been a boon to legal consumers.²²⁷

The general process by which automation improves legal services and benefits consumers is well-established.²²⁸ Human-driven legal work is bespoke in the sense that it is handcrafted and individualized. Such work might be high-quality; it also undoubtedly is sometimes low-quality. As a step towards automation, lawyers—but more truly, firms—might begin to standardize legal work. Checklists and templates, built from past experience, create less of a need for bespoke, time-intensive work. Next, that which is standardized becomes systematized: expert systems are built, document drafting is automated, and so on. Technology has replaced the human component. At some point, this standardized and systematized technology is packaged so that it can be bought and used by others. It becomes a commodity, a high-quality standardized service that is made available at a reasonable price. At this point, there is no reason for clients to pay more than a standard rate. Rather than a bespoke, lawyer-driven legal service, what

²²⁶ *Law Center for Better Housing Honors Professors Laurie Mikva and Daniel Linna*, NW. (Sept. 21, 2023), <https://news.law.northwestern.edu/law-center-for-better-housing-honors-professors-laurie-mikva-and-daniel-linna> [<https://perma.cc/GZL6-TVLH>]; *CS+Law Innovation Lab Teams Demo Client-Focused Technology Solutions*, NW. (April 27, 2023) (“ . . . utilized ChatGPT to train Rentervention to better recognize a user’s intent and thus provide the most relevant, detailed legal advice.”), <https://www.mccormick.northwestern.edu/computer-science/news-events/news/articles/2023/cs-plus-law-innovation-lab-teams-demo-client-focused-technology-solutions.html> [<https://perma.cc/8SVK-YGED>].

²²⁷ Gehrke, *supra* note 32. See David Engstrom et al., *Legal Innovation After Reform: Evidence from Regulatory Change*, STAN. L. SCH., DEBORAH L. RHODES CTR. ON. LEGAL PRO. (Sept. 2022).

²²⁸ RICHARD SUSSKIND, *TOMORROW’S LAWYERS* 23-28 (1st ed. 2013).

the client is purchasing after all is nothing more than a commoditized service.²²⁹

While this process is well-established, what perhaps goes unnoticed is that this final commoditized service may be—or even is likely to be—of the highest quality. For the types of legal services that can be commoditized, noise and bias in performance may be significantly reduced. Thinking about ChatGPT in particular, we know that as even better LLMs are developed,²³⁰ and as ones geared especially for legal work are created, it is only a matter of time until the best, cheapest, and most efficient attorney for some matters will be an AI. In these instances, UPL restrictions will be a grave injustice for consumers, especially those who are low income.

In the previous paragraph, we mentioned that noise and bias may be significantly reduced, and it is worth pausing on this claim. Bias in AI is a well-studied area,²³¹ and it certainly is possible that artificial legal intelligence will show bias in, say, case evaluations or text generation.²³² For example, in a law-adjacent space (policing), there has been some use of facial recognition tools, and researchers have found racial biases in these types of tools.²³³ But we must remember that bias is a

²²⁹ *Id.*

²³⁰ Huang, *supra* note 8 (“That’s especially true as generative A.I. is in its early days. OpenAI is expected to soon release another tool, GPT-4, which is better at generating text than previous versions. Google has built LaMDA, a rival chatbot, and Microsoft is discussing a \$10 billion investment in OpenAI. Silicon Valley start-ups, including Stability AI and Character.AI, are also working on generative A.I. tools.”).

²³¹ Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L. J. 2218 (2019).

²³² Tiffany Hsu & Stuart A. Thompson, *Disinformation Researchers Raise Alarms About A.I. Chatbots*, N.Y. TIMES (Feb. 8, 2023), <https://www.nytimes.com/2023/02/08/technology/ai-chatbots-disinformation.html> [<https://perma.cc/P549-82TN>].

²³³ Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, PROC. MACH. LEARN. RSCH. 79 (2018).

human problem,²³⁴ and one that has proven intractable.²³⁵ To continue with the facial recognition example, the AI architecture for these tools is modeled on human cognition: one of the more common computational learning systems—artificial neural networks (“neural nets”)—is designed to function somewhat like neurons in human brains. Not surprisingly, research on neural nets used in facial-recognition classifiers shows skin-type biases, echoing the well-documented “own-race bias” in humans. Just as one’s memory for faces of one’s own race is typically superior to one’s memory for faces of other races,²³⁶ AI facial recognition systems err in the direction of their exposure, i.e., training.²³⁷

So biases in AI are reflections of human biases present in training data or in development protocols. AI bias is human bias, which means that AI itself, if properly developed and deployed, could lessen biases in overall outcomes.²³⁸ A startling demonstration of this can be found in bail decisions. Professor Kleinberg and colleagues showed that their algorithm could improve upon judicial decision-making, such that it could reduce all categories of crime, including violent crimes, while simultaneously reducing racial disparities.²³⁹ A full discussion of AI bias is, however beyond the scope of this Article. For now, we close the topic by saying that AI, including artificial legal intelligence, appears to be a promising route by which greater fairness (greater than what humans provide) in legal

²³⁴ Frank W. Munger & Carroll Seron, *Race, Law, and Inequality: Fifty Years After the Civil Rights Era*, 13 ANN. REV. L. & SOC. SCI. 331, 333 (2017).

²³⁵ Elizabeth Levy Paluck & Donald P. Green, *Prejudice Reduction: What Works? A Review and Assessment of Research and Practice*, 60 ANN. REV. PSYCH. 339 (2009).

²³⁶ Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCH., PUB. POL’Y & L. 3, 7 (2001).

²³⁷ Buolamwini & Gebru, *supra* note 233, at 77.

²³⁸ Joseph J. Avery & Joel Cooper, *Racial Bias in Post-Arrest and Pretrial Decision Making: The Problem and a Solution*, 29 CORNELL J. L. & PUB. POL’Y 257, 280-289 (2020).

²³⁹ Jon Kleinberg et al., *Human Decisions and Machine Predictions*, 133 Q. J. ECON. 237, 241, 275 (2018).

outcomes could be achieved, including by self-restraint of sorts: AI itself, if properly deployed, could lessen biases in overall outcomes by strategically placing constraints on the underlying algorithms.

IV. Where UPL Rules Once Were, Let There Be . . . UPL Rules?

Nearly ten years ago, Professors McGinnis and Pearce wrote in the *Fordham Law Review* that “the machines are coming, and bar regulation will not keep them out of the profession or do much to delay their arrival.”²⁴⁰ Said bar regulation will, however, empower bar association leadership with mechanisms for selective enforcement and unjust litigation. It also will prevent the resolution of longstanding access-to-justice problems, with disproportionate harm befalling low-income and indigent individuals. And it will continue to frustrate consumers—both individuals and businesses—who desire cheaper and better legal services. In light of these facts, maintaining the UPL status quo would not be responsible, and it is not tenable. UPL rules are causing—and will cause—too much harm. However, abandonment of UPL rules seems too extreme, with the prospect of unintended consequences too daunting. UPL rules are old fences; as lawyers and law professors who have long supported UPL rules, we acknowledge feeling a reluctance, perhaps psychological as much as intellectual, to tear them down entirely.

In the landmark Supreme Court case, *Sperry v. Florida*,²⁴¹ discussed *supra* in Section I.B, the Court addressed two issues in deciding whether to permit nonattorneys to practice law before a federal agency. The two issues that the Court addressed were (1) competency and (2) ethical misconduct.²⁴² If there was assurance that nonlawyers were, and would be, as competent and as ethical as lawyers, then the Court would

²⁴⁰ McGinnis & Pearce, *supra* note 27, at 3043.

²⁴¹ *Sperry v. Florida*, 373 U.S. 379, 404 (1963).

²⁴² *Id.*

permit them to practice when authorized by federal law. If we duplicate the Court's analysis and apply it to the whole U.S. legal system, we have a relatively straightforward question: if UPL rules are dismantled, how can we be sure that the individuals providing legal services meet baseline competency and ethics requirements? In this Part, we make a recommendation that, although novel, is workable from a policy perspective, comes with scant downsides, and furthers the twinned UPL aims better than traditional UPL enforcement.

Before we proffer our recommendation, it is worth mentioning the current alternatives to the dominant UPL regime. As discussed above, some states, most notably Utah,²⁴³ have instituted a "legal services sandbox." This is essentially a free pass from UPL claims for companies experimenting with using technology to overcome barriers to justice.²⁴⁴ But Utah's approach is experiment, not reform. It allowed a limited number of companies to enter the legal space, but these companies were carefully vetted and approved by Utah's Office of Legal Services Innovation. Moreover, since February 2023, the Utah Supreme Court has ordered the Office to temporarily stop accepting new applications due to excessive demand.²⁴⁵ So our recommendation stands at the beachhead of this important work.

Our recommendation is as follows. First, rather than controlling provision of legal services, bar associations should primarily control lawyer designations (that is, which individuals can call themselves lawyers). This would leave the

²⁴³ Or, more precisely, only Utah, as other states have experimented with changes to Model Rule 5.4, but these have mainly dealt with nonlawyer ownership of law firms, rather than UPL. Daniel J. Siegel, *Playing in the Regulatory Sandbox: A Survey of Developments*, AM. BAR ASS'N (Oct. 26, 2021),

https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2021/october-2021/playing-regulatory-sandbox-survey-developments [https://perma.cc/6TTD-BXV3].

²⁴⁴ See sources cited *supra* note 32.

²⁴⁵ Utah Innovation Off., *supra* note 32.

current institutional framework largely untouched. Law schools, bar examinations, and UPL rules would continue to serve their essential purpose of identifying individuals who have met baseline educational, competency, and ethicality requirements for the practice of law—that is, lawyers or attorneys. At the same time, nonlawyers would be free to provide legal services, which have never been sufficiently delineated anyhow.²⁴⁶ However, nonlawyers would not be allowed to explicitly or implicitly hold themselves out as “lawyers” or “attorneys.” In turn, consumers would be able to avail themselves of nonlawyer providers of legal services. Although we acknowledge the risks inherent to relying upon an individual or entity who has not received bar endorsement, these “risks” may be less than initially believed, since (i) there is no guarantee that lawyers will perform adequately; (ii) both lawyers and nonlawyers who provide negligent legal services will be exposed to liability via the tort system; and (iii) nonlawyers, especially legal technology solutions, will often surpass the performance (in efficacy, efficiency, and cost) of lawyers with respect to specific commoditized legal services.²⁴⁷ In addition, the benefits of this reconceptualization of UPL rules are various and significant, especially for low-income individuals. We discuss these in the next Section.

The qualifier stated in the first prong above—bar associations should *primarily* control lawyer designations—leads us to our second prong: UPL rules should continue to forbid nonlawyers from providing *some* legal services. Here, we are referring to a clearly defined subset of legal services—representation in legal proceedings. This prong solves the vagueness and overbreadth problem that has long enabled bar associations to selectively prosecute UPL claims. Moreover, this prong limits the possibility of disruptive unintended consequences, as courts will continue to function much as they

²⁴⁶ *People ex rel. Ill. State Bar Ass’n v. Schafer*, 404 Ill. 45, 50 (1949).

²⁴⁷ *See supra* Part II and Section III.B. *See also* McGinnis & Pearce, *supra* note 27, at 3064-66.

have to date. Only lawyers will be able to provide legal representation.

We draw the line at representations in legal proceedings for a number of reasons. One, the line between these two classes of legal services has significant historical precedent. In the United Kingdom, as in the United States, “the bar” has come to refer to a symbolic barrier that separates the public from the court.²⁴⁸ Only those who are admitted to a court may traverse the bar. Historically, in the United Kingdom, such persons were called “barristers.”²⁴⁹ They specialized in representing clients in court. In the 17th, 18th, and 19th centuries, barristers were distinct from “solicitors” in this important respect.²⁵⁰ Solicitors provided legal services, including provision of legal advice. But should a matter require representation in court, a solicitor would need to enlist a barrister on behalf of the client.²⁵¹ At present in the United States, a similar distinction exists around *pro se* representation. If legal proceedings are implicated, such that an individual seeks to appear before a court (or is called to appear before a court), the individual has but two options: she can hire a licensed lawyer, or she can represent herself.²⁵² This latter option—representing herself—is called *pro se* representation.²⁵³ In our recasting of UPL rules, this practice remains undisturbed. A nonlawyer may not represent an individual in a legal proceeding. For such legal work, either a lawyer must be hired, or the individual must proceed *pro se*. Importantly, the first prong of our recommendation makes *pro se* representation more feasible. A *pro se* litigant could leverage the full gamut of nonlawyer legal

²⁴⁸ *Bar*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/bar> [<https://perma.cc/TTN9-27MS>].

²⁴⁹ DAVID LEMMINGS, GENTLEMEN AND BARRISTERS: THE INNS OF COURT AND THE ENGLISH BAR 1680-1730, at 110-143 (1990).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 41 (2010).

²⁵³ *Pro se*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/pro_se [<https://perma.cc/E7AV-UX9H>].

advice, technological or otherwise, in prepping for court. Even more importantly, this is an appropriate place to draw the line because the definition of representation in legal proceedings is clear, well-defined, and hard to dispute—a stark contrast from the murky uncertainty of “legal practice.”²⁵⁴

Two, representation in legal proceedings includes significant interpersonal dynamics.²⁵⁵ Representatives must build rapport with jurors, cross-examine witnesses, and craft compelling narratives that are sensitive to judges’ waxing and waning emotional engagement. These interactions require a level of human connection, trust, and persuasion that AI is unlikely to effectively replicate in the immediate future. Moreover, there is a physical aspect to legal proceedings, and the influence of a nonhuman actor (either positively or negatively) on such an environment has not yet been fully worked out.

Third, in a courtroom proceeding, it is more likely that a person’s liberty and even life are at stake. Such decisions have heightened moral salience, and AI moral decision-making raises complex and nuanced human responses.²⁵⁶

In Part II, *supra*, we outlined taxonomies that illustrate different levels of automation. Our proposal limits AI from representing parties in legal proceedings. Applying this proposal to the taxonomies can help make the proposal more concrete. For the taxonomy of the forms of human-AI conjoined effort (that is, the spectrum of automation), there would be no restrictions on AI taking the lead in assisting, arresting, or augmenting tasks. The only limitation would be for automating tasks and, even here, the limitation would not be absolute. For instance, for non-court-based legal

²⁵⁴ By legal proceedings, we refer to those instances in which an individual physically appears before a court.

²⁵⁵ Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225, 1228-29 (2004).

²⁵⁶ Yochanan E. Bigman & Kurt Gray, *People Are Averse to Machines Making Moral Decisions*, 181 COGNITION 21, 31-32 (2018).

representations, AI would be permitted to provide legal services. If we consider the second taxonomy (that is, the types of legal automation), it makes this clearer still. Discovery, legal search, document generation, brief and memoranda generation, and prediction of case outcomes—all fall within the new remit of AI. What does not fall within AI's remit, however, is the presentation of such work product at in-court proceedings. For the reasons mentioned above, this importantly remains in human hands.

All that said, we view the present Article as a launching point for greater discussion regarding what this reconceptualization will produce. We also acknowledge that there are numerous questions that we have only partially answered. We nonetheless hope that the answers we offer can aid the thinking of lawyers, policymakers, and scholars as they plan for this inevitable development.²⁵⁷

A. *The Recommendation Unpacked*

This recommendation resolves the decades-long debate regarding UPL, a debate that rightly has intensified with the rise of AI. We believe adoption of the recommendation is both necessary and inevitable. We begin our overview of the recommendation by showing how the Model Rules ought to be redrafted in light of it.

First, Rule 5.3,²⁵⁸ which governs the obligations of a lawyer who has retained or employed a nonlawyer, should be left largely unchanged. When relying upon nonlawyer work product to provide services to a client, a lawyer should have an obligation to ensure that the work product is on par with that which she herself would provide. That general principle should remain.²⁵⁹ The primary change needed concerns diction. Rule

²⁵⁷ Engstrom & Gelbach, *supra* note 4, at 1099.

²⁵⁸ MODEL RULES OF PRO. CONDUCT r. 5.3 (2019).

²⁵⁹ Rule 5.3 should protect lawyers whose clients have engaged or used nonlawyer legal services that are not under the lawyers' supervision or control. For example, an individual civil plaintiff may think that certain

5.3 repeatedly refers to the nonlawyer as a “person,” which should be changed to “person or entity” to include AI and legal technology companies that might be serving as the nonlawyer.²⁶⁰

Rule 5.3 should be able to protect lawyers whose clients have engaged or used nonlawyer legal services that are not under the lawyers’ supervision or control. For example, an individual civil plaintiff may think that certain legal tasks can be more efficiently and economically handled by an AI. Clients should have the ability to make these decisions and rely upon these technologies, but lawyers who took no part in selecting, employing, monitoring, and vetting such output should not be held liable should the AI’s services fall below the standard of care.

Second, and most importantly, we turn to Rule 5.5, which was drafted with the understanding that anyone providing legal services is acting as a lawyer. Thus, there are statements like this: “A lawyer who is not admitted to practice in this jurisdiction shall not . . . hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.”²⁶¹ The understanding should be that a lawyer in a specific jurisdiction is someone who has completed all of the licensing requirements for being a lawyer in that jurisdiction. Only such persons may hold themselves out to be lawyers. However, any person or entity that wants to provide legal services—so long as they are not representing clients in legal

legal tasks can be more efficiently and economically handled by an AI. Clients should have the ability to make these decisions and rely upon these technologies, but lawyers that took no part in selecting, monitoring, and vetting such output should not be held liable should if AI’s services fall below the standard of care.

²⁶⁰ As additional guidance for modifying Rule 5.3, we recommend full consideration of Katherine Medianik’s 2018 article, in which she adds new terms and comments to Model Rule 5.3, as well as Rules 1.1 and 2.1. See Katherine Medianik, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 *CARDOZO L. REV.* 1497, 1531 (2018).

²⁶¹ MODEL RULES OF PRO. CONDUCT r. 5.5(b)(2) (2019).

proceedings—may do so to the extent they are not holding themselves out as lawyers. Said again, providing legal services does not redesignate providers as lawyers. Thus, such providers are not subject to UPL suits, so long as they do not claim to be lawyers or represent clients in legal proceedings. With this understanding in place, Rule 5.5 can be largely left unaltered, as it now will apply only to those individuals who are claiming to be lawyers.²⁶²

A parallel that may help to illustrate this distinction can be found in healthcare. Most women in the United States who become pregnant enlist a medical doctor to help with the pregnancy and delivery. This doctor is nearly always an obstetrician or gynecologist (“OB/GYN”), physicians who are specially trained and licensed to care for women during pregnancy and childbirth and to diagnose and treat diseases of the female reproductive organs.²⁶³ However, it is fully within the rights of a pregnant woman to forgo the services of an OB/GYN and enlist, say, a doula. A doula is a person who provides guidance and support for a client who is undergoing a significant health-related experience, such as childbirth. In the United States, there is no law requiring that doulas be licensed or certified.²⁶⁴ Yet many pregnant women enlist doulas to perform virtually the same services that OB/GYNs provide. While these women cannot have doulas assist them in delivering their babies in a traditional hospital, they can have the doula assist with at home deliveries or in alternative birthing sites. Similarly, pregnant women can choose to have a doula provide prenatal care and support during a delivery. But these women will have to receive the services of licensed

²⁶² This may also be clarified in a comment to the model rule.

²⁶³ GARY F. CUNNINGHAM, ET AL., *WILLIAMS OBSTETRICS 2-13* (McGraw-Hill Medical 25th ed. 2018).

²⁶⁴ Amy Chen & Kate Rohde, *Doula Medicaid Training and Certification Requirements: Summary of Current State Approaches and Recommendations for Improvement*, NAT'L HEALTH L. PROGRAM (Mar. 16, 2023), <https://healthlaw.org/doula-medicaid-training-and-certification-requirements-summary-of-current-state-approaches-and-recommendations-for-improvement> [<https://perma.cc/5674-EAYM>].

medical providers with privileges should they choose hospital care.²⁶⁵

We propose that nonlawyers, including AI, be allowed to function likewise with respect to providing legal services.²⁶⁶ These nonlawyers can assist consumers by providing legal services the same way that any consumer of such services is authorized to act on his own behalf. They cannot, however, hold themselves out as lawyers or assume the role of a lawyer in legal proceedings before a court.

The benefits of this approach are manifold. First, it will enable bar associations to skirt the free speech and antitrust claims that are steadily mounting. “Lawyer” will take on a special meaning—indicating that one is duly licensed in the jurisdiction in which one claims to be a lawyer—and thus UPL restrictions on free speech will become trivial. If one is not a lawyer, one cannot claim to be a lawyer, as this is an instance of misrepresentation and not protected speech. Moreover, the core free-speech claims—that providing legal advice is speech, and bar associations cannot regulate who can speak in such ways—is rendered moot, since any person and any entity can provide legal advice.

The antitrust claims also would lose strength since bar associations will no longer have a monopoly on the provision of legal services. Even more importantly, the dismantling of the monopoly will serve consumers, who have long demanded

²⁶⁵ *Are Doulas Allowed In Hospitals?* INT’L DOULA INST. (Dec. 5, 2020) <https://internationaldoulainstitute.com/2020/12/are-doulas-allowed-in-hospitals> [<https://perma.cc/7SPF-BY54>].

²⁶⁶ We must also mention the limitations of the doula analogy. Doulas do not have admitting privileges at hospitals, just as AI would not be allowed to represent a client in court in our proposal. But there may be some other particularly complex legal services besides courtroom representation where a human lawyer would still be preferable to an AI (for example, in a negotiation over a contract/deal); the use of an AI tool in those contexts may be to the detriment of the consumer. But we leave this to customer choice, preference, and the tort mechanisms mentioned *infra*.

nonlawyer provision of legal services.²⁶⁷ Legal-technology companies will be able to focus on the areas that are most in demand, rather than relegating themselves to those areas that can survive current UPL scrutiny. They also will be freed from the uncertainty that emanates from current UPL rules, considering how bar associations are able to selectively target entities for UPL violations. This would create a legal-services marketplace that better reflects the conclusion, mentioned *supra*, reached by the Department of Justice and the Federal Trade Commission that “[t]here is no evidence before the [ABA] of which we are aware that consumers are hurt by this competition [between lawyers and nonlawyers] and there is substantial evidence that they benefit from it.”²⁶⁸ Legal-technology companies will surely seek to reap the financial rewards available to anyone who can address the United States’s access-to-justice issues and meet the millions of legal needs that go unmet each year.

Finally, this shift in UPL rules will represent a step towards greater “private ordering,” the practice wherein parties are empowered to make their own law by private agreement,²⁶⁹ and general problem-solving. So long as the UPL-based monopoly on the provision of legal services is in effect, individuals will shy away from using, outside of formal legal representation, the rules, procedures, and tools of the profession for resolving matters. With the expansion of AI-driven legal-service providers, people may come to emphasize results and resolution, not place and credentialing, a shift that would echo the recent emphasis on problem-solving courts.²⁷⁰

B. Consideration One: The Importance of Torts

When a fully licensed and barred attorney provides incompetent legal services, the recourse available to the

²⁶⁷ See *supra* Section III.B.

²⁶⁸ Justice/FTC Letter, *supra* note 218.

²⁶⁹ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979).

²⁷⁰ See, e.g., Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579 (2018).

harmed client is generally limited. Bar associations might investigate and discipline the attorney, but that largely works to sanction the attorney and prevent others (potential future clients) from being harmed.²⁷¹ And bar censure does not necessarily accomplish even that. How many clients review an attorney's bar notices before hiring the attorney? Moreover, a harmed client can only recover damages through a legal malpractice case, which she can, of course, pursue even in the absence of UPL rules. However, attorneys are infamously reluctant to take on such matters since they involve suing colleagues. So the only remaining justification for UPL rules on competency grounds is at the gatekeeping stage: law school and bar exam requirements. In other words, UPL rules mandate baseline education and certification for those seeking to practice law. Nevermind that commentators, including Barack Obama, have made strong arguments that law school is at least partly (i.e., one third) superfluous²⁷² and that bar exams might be both unnecessary and partially responsible for the death of diversity in the legal profession given racial differences in passage rates.²⁷³ The question is whether baseline competency can be achieved without these requirements.

As others have argued, the tort system is fully equipped to achieve this end in the absence of UPL rules.²⁷⁴ While legal malpractice claims exist to compensate individuals for injuries

²⁷¹ In most cases, with the exception of Client Protection Funds, clients do not receive compensation when the bar pursues an attorney for ethics violations (i.e., there are no damages).

²⁷² Robert Steinbuch, *Many Persuasive Arguments in "Failing Law Schools"*, NAT'L L.J., Aug. 13, 2012, at 20-21, 173 (calling upon the ABA to reduce the minimum hours of instruction required for the J.D. by a third); Peter Lattman, *What Students Are Saying About ChatGPT*, N.Y. TIMES (Aug. 23, 2013), <https://archive.nytimes.com/dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three> [https://perma.cc/9X6X-BN58].

²⁷³ See generally Scott Devito, Kelsey Hample & Erin Lain, *Examining the Bar Exam: An Empirical Analysis of Racial Bias in the Uniform Bar Examination*, 55 U. MICH. J.L. REFORM 597 (2022).

²⁷⁴ Rotenberg, *supra* note 154, at 736.

sustained from a licensed lawyer's negligence,²⁷⁵ consumers of alternative legal services can find similar recourse in tort law. Nonlawyer providers of legal services will not escape liability simply because the fiduciary attorney-client relationship required under the legal malpractice tort is absent. Injured consumers will have a private right of action such that the negligence claim will look to the definition of the service provided and determine whether that service fell below the standard of care. It might take some time for the common law to establish the standard of care owed by nonlawyer legal service providers, particularly in instances in which partial services are provided (e.g., a nonlawyer provides legal research and gives legal advice but neither drafts nor files the final legal document), but legal malpractice jurisprudence will provide guidance.²⁷⁶

Moreover, these claims will be less tentatively prosecuted. At present, legal malpractice claims are beset with stigma, as they involve a licensed attorney suing a colleague: another licensed attorney. As per our recommendation, consumers of legal services would have a private right of action against any party that provides legal services, rather than specifically against licensed attorneys.²⁷⁷ Importantly, if anyone, including AI, can provide legal services, then the stigma around claims

²⁷⁵ *Legal Malpractice*, JUSTIA, <https://www.justia.com/injury/legal-malpractice> [<https://perma.cc/7LFX-YM4Z>].

²⁷⁶ For example: Just as lawyers owe a duty of care to their clients, nonlawyer legal service providers might also be held to a duty of care consistent with the specific service they are providing. This could be established by the reasonable expectations of the client, by industry standards, or by some similar other metric. Or consider causation: As in legal malpractice suits, wherein a client must prove that the attorney's negligence caused their harm, a consumer might need to prove that the nonlawyer legal services provider's error directly resulted in their harm. As the legal landscape evolves to accommodate nonlawyer legal service providers, core principles from legal malpractice like these can serve as foundational benchmarks to protect consumers.

²⁷⁷ Rotenberg, *supra* note 154, at 736.

for negligent provision of these services will be diminished and such claims may be more expansively pursued.²⁷⁸

In addition, nonlawyer legal-service providers would be held to the same public-policy restrictions as lawyers with respect to waivers. If a lawyer could not enforce a negligence waiver, a mandatory arbitration clause, or like ilk, then a nonlawyer could not enforce them either.

In total, this tort-based right would create a competency incentive that likely would be more effective than the two (law school graduation and bar examination) competency bars currently in place. For example, if a company like DoNotPay wants to provide legal services,²⁷⁹ then its AI must be competent enough to withstand claims of negligent provision. The attendant analysis would be rather simple: What service did DoNotPay claim it could provide? What service did the client reasonably enlist DoNotPay to perform? Did DoNotPay's provision of that service fall below the standard of care? Companies and individuals would thus be incentivized to make sure that the legal services they provide are efficacious.

Injured consumers also could bring deceptive practices and false advertising suits. The basis for such claims is well-established in state and federal law.²⁸⁰ If new players in the legal-services market make misleading, deceptive, unfair, or inaccurate claims regarding the services they provide, then false advertising and unfair deceptive trade-practices suits would be appropriate.²⁸¹ Litigation here would be at the edges:

²⁷⁸ However, costs may pose a problem. Legal malpractice claims typically require a costly expert witness (i.e., a legal expert) to establish the relevant standard of care. As in other areas of the law in which poor individuals are disadvantaged, work will have to be done to ensure that such suits do not become inaccessible ex post remedies.

²⁷⁹ Allyn, *supra* note 11.

²⁸⁰ See *In re* Petition of Felmeister & Isaacs, 518 A.2d 188, 188-89 (N.J. 1986); *Carter v. Lovett & Linder*, 425 A.2d 1244, 1246 (R.I. 1981).

²⁸¹ *False Advertising*, JUSTIA, <https://www.justia.com/consumer/deceptive-practices-and-fraud/false-advertising> [<https://perma.cc/439B-HMXZ>]. See also Rotenberg, *supra* note 154, at 736.

Is a nonlawyer creating the impression that she is a licensed attorney when she is not? If so, then UPL litigation should be initiated.

Increased reliance on torts would require courts to think deeply about the standard of care required in providing legal services—about what negligence in the sphere of legal practice looks like. Behavior and performance would become central. For instance, imagine that a consumer relies upon an LLM for legal advice, and the AI hallucinates incorrect information.²⁸² If that false advice causes harm to the consumer, should the developer of the AI be held liable? What if the developer didn't hold itself out as providing legal services? What if it couldn't have reasonably anticipated that someone might use its AI for legal services? Relatedly, consider the examples of LLMs providing legal services that were mentioned *supra* in the Introduction. LLMs may be used like “Dr. Google,” such that clients will conduct their own research prior to, during, and after meeting with a licensed attorney; they may be used as a means for lawyers to outsource legal work to AI; and they may operate in isolation, as full replacements for lawyers. Negligence would be quite different across these use cases. As things currently stand, legal malpractice is a relatively weak tool that regulates what will become a diminishing percentage of providers of legal services. A move towards the torts system would ensure greater focus on what matters: the quality of the legal services provided to consumers.

²⁸² Lance Eliot, *What You Need To Know About GPT-4 The Just Released Successor To Generative AI ChatGPT, Plus AI Ethics And AI Law Considerations*, FORBES (Mar. 15, 2023), <https://www.forbes.com/sites/lanceeliot/2023/03/15/what-you-need-to-know-about-gpt-4-the-just-released-successor-to-generative-ai-chatgpt-plus-ai-ethics-and-ai-law-considerations> [https://perma.cc/Y7K7-QPKV] (discussing how AI may hallucinate false but plausible answers to questions).

C. *Additional Considerations: Updating Civil Procedure and Federalizing Legal Ethics*

Regardless of the future of UPL, legal technology is necessitating significant changes in civil procedure.²⁸³ Across three case studies, Professors Engstrom and Gelbach showed that E-Discovery, outcome prediction, and advanced legal analytics tools are making specific civil procedure rules, such as *Twombly/Iqbal*'s pleading standard, adapt. The result is that legal technology will soon remake the adversarial system by altering several of the system's procedural cornerstones.²⁸⁴ This reform, which the authors posit as necessary, both overlaps with the reforms that our recommendation will necessitate and reveals the hurdles that lie ahead. With AI tools and other nonlawyers providing legal services, civil procedure will have to adjust.

In addition, there may be a need for at least some code of legal ethics that applies to providers of legal services—lawyers and nonlawyers alike. This assertion is mostly just a proposal for discussion, since we have already detailed the significant problems with defining legal services. And without adequate definition, determining implicated parties becomes nearly impossible. That said, consider how licensed lawyers are at least ostensibly bound by the attorney-client duty. This includes such facets as confidentiality, although commentators have been chipping away at such duties for some time.²⁸⁵ Regardless, on account of the sensitive nature of legal services, perhaps there should be elevated standards of allegiance from provider to client. So, there is a case for imposing a general professional duty on providers of legal services. And the attorney-client duty is not the only professional duty that might warrant memorialization. For duties like this, we believe a case

²⁸³ Engstrom & Gelbach, *supra* note 4, at 1099.

²⁸⁴ *Id.* at 1001-07.

²⁸⁵ See generally William H. Simon, *Attorney-Client Confidentiality: A Critical Analysis*, 30 GEO. J. LEGAL ETHICS 447 (2017).

can be made for a limited federalization of legal ethics.²⁸⁶ A federal code of ethics for legal providers, as opposed to state-level codes, would create the consistency needed when legal service providers are technology-driven, since their tools will operate across state lines.

These are but two additional considerations. As mentioned above, there will be many more that emerge. For example, one problem is that nonlawyers who provide legal services will be less likely to carry malpractice insurance. This issue is well-discussed in the medical field, as some states like Florida do not require all physicians to carry malpractice insurance.²⁸⁷ Exempt physicians must, however, notify their patients in writing that they do not carry insurance.²⁸⁸ Something similar may be needed for providers of legal services. As another example, consider our prior discussion of notarios, individuals who exploit a lexical ambiguity to falsely imply that they are licensed attorneys.²⁸⁹ With nonlawyers permitted to provide legal services, will there be an increase in similar ploys, even though our recommendation maintains bar-association control over the lawyer/attorney designation? Consider the economic effects as well: with nonlawyers providing legal services, will there be such a precipitous drop in legal fees that talented individuals leave the legal field altogether? And although our recommendation appears poised to resolve many access-to-justice issues and increase legal coverage for lower-income individuals, is it possible that our policy will disproportionately benefit individuals who are either well-educated or well-off? After all, it takes some technical proficiency, education, time, and resources to make use of even intuitively designed, low-cost AI products. This Article does not answer all of these questions, but it hopefully takes a step toward having these important conversations, paving the way for a more informed

²⁸⁶ See generally Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994).

²⁸⁷ FLA. STAT. ANN. § 458.320(5)(f) (West 2023).

²⁸⁸ *Id.*

²⁸⁹ See *supra* Section I.C.

and nuanced understanding of the evolving intersection between generative AI and legal practice.

Conclusion

It is not easy to recast UPL rules. Such recasting comes with the prospect of unintended consequences, and unintended legal consequences are daunting because they may touch upon such essentialities as livelihood, liberty, family—everything that law involves. Moreover, any change to UPL rules is certain to be met with resistance, as judges, practicing attorneys, law professors, and law students all are committed to the notion of law as a profession that should have high barriers to entry. However, maintaining the UPL status quo is no longer tenable with the rise of LLMs and the indisputable evidence that “justice is not equal under the law, and that lawyers’ monopoly does not promote the public good.”²⁹⁰ Our recommendation, which recasts UPL rules while largely preserving the professional structure they create, is not a compromise. Quite the opposite, it is a novel solution. In permitting bar associations to remain the final arbiter of “lawyer” and “attorney” designations, and by allowing AI and other nonlawyers to provide any legal service besides representation in court proceedings, the stated aims of UPL rules will be best achieved. Baseline competency and ethicality will be denoted by lawyer/attorney monikers; competency will improve, as legal technology is already less noisy, less biased, and more adept at providing certain legal services; and the millions of legal needs that go unmet each year will start to be addressed. Moreover, the free-speech and antitrust challenges that are looming above current UPL rules will dissipate, and bar associations will be free to focus on fulfilling their already established UPL-related goals.

While law might be nonpareil in some respects, this sea change will not be so different from that being felt in other domains, such as education. As two commentators recently remarked about ChatGPT: “[E]ducators needn’t fear this

²⁹⁰ McGinnis & Pearce, *supra* note 27, at 3065.

change. Such technologies are transformative, but they threaten only the information-centric type of education that is failing to help students succeed. . . . AI may be a useful invention that hastens much-needed educational reform.”²⁹¹ Indeed, autoregressive LLMs are transformative, but they threaten only the information-monopolizing type of legal practice that is failing consumers. AI may be a useful invention that hastens much-needed legal reform and improves access to legal services.

²⁹¹ Joe Ricketts & Ray Ravaglia, *AI Can Save Education From Itself*, WALL ST. J. (Jan. 23, 2023), <https://www.wsj.com/articles/ai-can-save-education-from-itself-chatgpt-reform-information-skills-tools-reasoning-opportunity-11674513542> [<https://perma.cc/E2YZ-3XLG>].