

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

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I. INTRODUCTION

This Article discusses a classic intersection of law, science, and technology. Just like common law courts adjusted the “mailbox rule” to cover fax machines, courts will have to adjust their existing approach to liability for harmful legal services, given the existence of new providers of legal services online.¹ The result is a clash of cultures between one of America’s most conservative² institutions—its common law courts—and some of its most aggressively forward looking ones—internet entrepreneurs.

If you do not believe that America’s courts are conservative by nature, consider Chief Justice Roberts’s comments on technology in his *2014 Year End Report on the Federal Judiciary*.³ Chief Justice Roberts begins the report by mocking the hot technology of yesteryear: pneumatic tubes. He then notes that, by 1971, what was once shiny and new was grossly outdated. He uses this story to launch a defense of common law court technophobia, noting that “courts will often choose to

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

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

3. See JOHN ROBERTS, U.S. SUPREME COURT, 2014 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2014), <http://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf>; Nancy Scola, *Courts ‘Choose’ to Lag Behind on Tech, Says Chief Justice Roberts*, WASH. POST (Jan. 2, 2015), <http://www.washingtonpost.com/blogs/the-switch/wp/2015/01/02/courts-choose-to-lag-behind-on-tech-says-chief-justice-roberts>. All other factual statements in this paragraph come from these sources.

be late to the harvest of American ingenuity.”⁴ But, to use modern parlance, Chief Justice Roberts thinks this is not a bug, but a feature! He states: “Courts are simply different in important respects when it comes to adopting technology, including information technology.”⁵ Given that Chief Justice Roberts is the titular head of the federal judiciary, his attitude towards technology and his celebration of its slow adoption tells you all you need to know about American courts and technology.

By comparison, American internet entrepreneurs are rushing ahead to transform the market for legal services. Between computerization, outsourcing, globalization, and the arrival of the “do it yourself” (“DIY”) movement in law, we are in the greatest period of change since the deregulation of the legal profession during Jacksonian democracy in the mid-nineteenth century.⁶ The revolution in law is part of a larger upheaval in knowledge industries. For years, knowledge occupations resisted mechanization and standardization and reaped the financial benefits of charging by the hour or by the job for individualized services.⁷ But time waits for no one, and the rise of the Internet and the explosion in computing power have meant that services, which were once offered for sale only on a costly and individualized basis, are now offered online via computer programs and at vastly reduced prices.⁸

Wondering about the speed of change in the market for legal services? Just fifteen short years ago, Americans who wanted to incorporate a business or file an uncontested divorce would either have to hire a lawyer or buy a forms book and try to hack it out on their own. To see how many Americans handle those problems on their own today, log onto LegalZoom or Rocket Lawyer and read their advertised list of services and prices.⁹ And, of course, right now these websites are only offering the very lowest hanging fruit: relatively rote legal forms like

4. ROBERTS, *supra* note 3, at 1-3.

5. *Id.* at 3.

6. For an overview of the radical changes during Jacksonian democracy and the period of change in the legal profession, see generally BENJAMIN H. BARTON, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* (2015).

7. See Julie C. Fischer, Note, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 123, 134 (2000); Greg Miller, *A Turf War of Professionals vs. Software*, L.A. TIMES (Oct. 21, 1998), <http://articles.latimes.com/1998/oct/21/news/mn-34752>.

8. See *infra* Part II.

9. See, e.g., *How It Works*, ROCKETLAWYER, <https://www.rocketlawyer.com/how-it-works.rl> (last visited Feb. 15, 2016); *LLC (Limited Liability Company)*, LEGALZOOM, <http://www.legalzoom.com/limited-liability-company/limited-liability-company-overview.html> (last visited Feb. 15, 2016); *Our Products and Services*, LEGALZOOM, <https://www.legalzoom.com> (last visited Feb. 15, 2016); *Plans and Pricing*, ROCKETLAWYER, <https://www.rocketlawyer.com/plans-pricing.rl> (last visited Feb. 15, 2016).

those necessary for incorporation or uncontested divorces. As time goes by, and such companies take advantage of economies of scale and the now familiar internet data feedback loop on their services, the forms they offer will be improved, and they will also offer other new services.¹⁰ LegalZoom, for example, started its business with only printable forms, then moved to interactive forms, and is now aggressively trying to sell legal advice plans.¹¹

As such online providers become more common, instances of injured parties and lawsuits for damages will inevitably arise. Like death and taxes, tort lawsuits are an indelible feature of American life. And yet, for now, it is unclear what law will apply in lawsuits against online providers. The American law of traditional legal malpractice is several hundred years old and relatively well-developed.¹² In contrast, courts will write standards of liability for online providers of legal services like LegalZoom or Rocket Lawyer on a relatively blank slate. LegalZoom is the oldest and most established of these websites and has existed since only 2001.¹³ As of yet, there are no reported cases of lawsuits against LegalZoom or Rocket Lawyer for defective legal forms, so we are in the earliest possible stage. The growth of this area of the law will be fascinating as a matter of doctrinal expansion, but even more so as a meeting between the tortoise and the hare in the courtroom. This Article takes a first stab at laying out some of the issues that courts will face if and when these lawsuits arise.¹⁴

Part II offers a brief and non-exhaustive description of the types of legal services available online.¹⁵ This overview attempts to categorize

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

11. See Isaac Figueras, *The LegalZoom Identity Crisis: Legal Form Provider or Lawyer in Sheep's Clothing*, 63 CASE W. L. REV. 1419, 1422-26 (2013).

12. For a brief historical overview, see George S. Mahaffey, Jr., *Cause-in-Fact and the Plaintiff's Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 SUFFOLK U. L. REV. 393, 398-407 (2004).

13. See Daniel Fisher, *Entrepreneurs Versus Lawyers*, FORBES (Oct. 5, 2011), <http://www.forbes.com/forbes/2011/1024/entrepreneurs-lawyers-suh-legalzoom-automate-daniel-fisher.html>.

14. For examples of some earlier efforts, see Brent L. Barringer, Note, *When Cyberlawyering Fails: What Remedies Are or Should Be Available to Those Harmed From Relying on “Self-Help” Legal Software*, 2005 U. ILL. J.L. TECH. & POL'Y 171, 172-76 (2005), and Fischer, *supra* note 7, at 123-38.

15. See *infra* Part II.

the current offerings, from the most basic, non-interactive legal forms, to interactive forms, online legal advice, virtual law firms, and even the science fiction future—which may be very near—where computer programs will have the capacity to write briefs and answer complicated legal questions.¹⁶ The point of this overview is not full coverage of this roiling and rapidly changing market. Instead, Part II tries to separate online legal services into broad categories so that we can begin to speculate on how courts might treat lawsuits in each segment.¹⁷

Part III discusses my search for evidence of harm arising from online legal services.¹⁸ It starts with the arguments from lawyers and bar associations that non-lawyer online legal services are faulty and even dangerous.¹⁹ Part III also discusses a *Consumer Reports* article that recommends against using online services for any complicated legal issues.²⁰

Despite these warnings, there is limited evidence of actual faulty documents or injured consumers. As of April 1, 2015, Westlaw searches uncovered no lawsuits by injured parties against LegalZoom or Rocket Lawyer, the two biggest online forms providers. However, there are reasons why there might not be any lawsuits. One is that these sites have very extensive arbitration clauses and the injuries from faulty wills or incorporation papers might appear at a significant time lag.²¹ But, the nearest analogue to online forms is old-fashioned forms books from Nolo Press or Stevens-Ness Publishing.²² These forms books have existed for forty years or so and are not subject to mandatory arbitration, so if these forms harmed consumers, we would expect to see lawsuits. There are also no lawsuits where individuals alleged harmful work by these companies. This could mean that legal forms are not dangerous or that legal forms cause such small harms that bringing a lawsuit is not worth it, but it does not support any broad claims that DIY law is harmful.

The dearth of lawsuits also undercuts the common bar association justifications for the prosecution of the unauthorized practice of law (“UPL”).²³ Notably, while there are no suits alleging specific harms to

16. See *infra* Part II.

17. See *infra* Part II.

18. See *infra* Part III.

19. See *infra* notes 83-87 and accompanying text.

20. See *infra* text accompanying notes 88-90.

21. For an example of an arbitration agreement, see *Terms of Use*, LEGALZOOM, <https://www.legalzoom.com/legal/general-terms/terms-of-use> (last visited Feb. 15, 2016).

22. For an example of a forms book, see DENIS CLIFFORD, *SIMPLE WILL BOOK: HOW TO PREPARE A LEGALLY VALID WILL* (Stephen Elias ed., 1986).

23. See Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview*

specific customers, there have been multiple suits for UPL.²⁴ This suggests that Deborah Rhode has been right all along: UPL is more for protection of the lawyers' monopoly than the protection of the public.²⁵

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

II. A BRIEF OVERVIEW OF ONLINE LEGAL SERVICES

First, note that this overview is not comprehensive. Nor will it be timely as you read this, because the online provision of legal services is in explosive flux. As late as 2011, Professor Gillian Hadfield was asking "where are the 'garage guys' in law?"³⁰ The last few years have answered this question quite emphatically. In 2012, legal technology startups took in an estimated \$66 million in venture capital.³¹ In 2013,

of the Legal and Ethical Parameters, 67 *FORDHAM L. REV.* 2581, 2586-94 (1999) (discussing various UPL statutes and their application in practice).

24. *See, e.g.*, *Lowry v. LegalZoom.com, Inc.*, No. 4:11CV02259, 2012 WL 2953109, at *1 (N.D. Ohio July 19, 2012); *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1057 (W.D. Mo. 2011).

25. *See infra* note 112 and accompanying text.

26. *See infra* Part IV.

27. *See infra* Part IV.

28. *See infra* Part IV.B.

29. *See infra* Part IV.B.

30. *See* Gillian K. Hadfield, *Equipping the Garage Guys in Law*, 70 *MD. L. REV.* 484, 487 (2011).

31. Joshua Kubicki, *2013 Was a Big Year for Legal Startups; 2014 Could Be Bigger*, *TECH COCKTAIL* (Feb. 14, 2014, 12:07 PM), <http://tech.co/2013-big-year-legal-startups-2014-bigger-2014-02>.

that amount was \$458 million.³² Growth apparently slowed in 2014,³³ but the general point stands—as computers grow more powerful and ubiquitous, legal work will continue to drift online in different and evolving formats.

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

A. Non-Interactive Legal Forms

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

32. *Id.*

33. Basha Rubin, *Is The Legal Tech Boom Over? It Hasn't Even Begun*, FORBES (Aug. 12, 2014, 12:00 PM), <http://www.forbes.com/sites/basharubin/2014/08/12/is-legal-tech-boom-over-it-hasnt-even-begun>.

34. *See infra* Part II.A–F.

35. *See infra* Part II.A.

36. *See infra* Part II.B. “Scrivener” is defined as “[a] writer, [especially], a professional drafter of contracts or other documents.” *Scrivener*, BLACK’S LAW DICTIONARY (9th ed. 2009).

37. *See infra* Part II.C.

38. *See infra* Part II.D.

39. *See infra* Part II.E.

40. *See infra* Part II.F.

41. *See infra* Part II.F.

42. *See Home Page*, USLEGAL, <http://www.uslegalforms.com> (last visited Feb. 15, 2016); *Legal Forms*, LEGALZOOM, <https://www.legalzoom.com/legalforms> (last visited Feb. 15, 2016).

even to a dog walking contract.⁴³ LegalZoom offers unlimited access to the forms for \$7.99 a month.⁴⁴ There are many competitors. For example, Blumberg Forms Online offers its forms at \$9.00 per order for up to nine forms, although the price goes down if you buy in bulk.⁴⁵

This may seem very inexpensive, but it is actually quite expensive comparatively. Many of the forms that LegalZoom and others sell are already available free or basically free on the Internet, often provided by state supreme courts or local legal aid societies. For example, nycourts.gov, the website of the New York Courts System, offers a long list of free DIY legal forms, including forms for divorces, child custody, and name changes.⁴⁶ Rocket Lawyer has noted this and offers its customers the first legal document for “free.”⁴⁷ LegalZoom was not amused by such an offering and has, in response, sued Rocket Lawyer claiming false advertising,⁴⁸ which is surely a sign of the effectiveness of Rocket Lawyer’s approach.

These forms are very close cousins to the DIY legal forms that publishers like Nolo Press have provided since the 1970s.⁴⁹ The computerized forms are more flexible than the printed forms because they are easier to customize and may include some type of customer service for questions, but overall, they are very similar to a product that has existed for decades.

B. Interactive Legal Forms, With or Without Attorney Review

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

43. See *Legal Forms*, *supra* note 42; *Service Related Agreements*, LEGALZOOM, <https://www.legalzoom.com/legalforms/service-related-agreements> (last visited Feb. 15, 2016).

44. See *General Agreement*, LEGALZOOM, <https://www.legalzoom.com/legalforms/general-agreement> (last visited Feb. 15, 2016).

45. *Home Page*, BLUMBERG FORMS ONLINE, <https://www.blumberglegalforms.com> (last visited Feb. 15, 2016).

46. See *DIY Forms*, NYCOURTS.GOV, <http://nycourts.gov/courthelp/DIY/index.shtml> (last visited Feb. 15, 2016).

47. For an overview of the two different types of “free” services (either one document or one week of the legal service plan) offered by Rocket Lawyer, see *Frequently Asked Questions*, ROCKETLAWYER, <https://www.rocketlawyer.com/faq.rl> (last visited Feb. 15, 2016).

48. See Ingrid Lunden, *Is Rocket Lawyer Free to Use ‘Free’? Court Denies Rival LegalZoom Its Motion for Summary Judgment, Orders Trial for False Ad Claims*, TECH CRUNCH (Oct. 18, 2013), <http://techcrunch.com/2013/10/18/rocket-lawyer-legalzoom>.

49. *About Us*, NOLO, <http://www.nolo.com/about.html> (last visited Feb. 15, 2016). In fact, Nolo Press has a website that sells its books, as well as software and downloadable forms. See *Home Page*, NOLO, <http://www.nolo.com> (last visited Feb. 15, 2016).

example, drafting a living will. LegalZoom's basic living will is \$39.00.⁵⁰ The site offers a page that explains what a living will is.⁵¹ When you click on "Get Started" you answer a series of relevant questions: name, address, county of residence, and others.⁵² Then, the site asks a series of questions about life support. Would you want it if you are unconscious and have a terminal condition with no hope of recovery? What care would you like if life support is withdrawn? Do you have any additional comments or instructions? Next, you decide whether to appoint a healthcare agent and what powers you wish to grant the agent. It closes by asking for your burial wishes. After spending \$39.00, LegalZoom creates a document from your answers and then prints it out and mails it to you. The process is simple, inexpensive, and quick. Not every interactive document is as inexpensive. The basic last will and testament is \$69.00,⁵³ and the basic living trust is \$249.00.⁵⁴

The list of LegalZoom interactive documents covers almost every type of non-court document you can imagine, including entity formation documents, trademark search forms, contracts, leases, patents, and promissory notes, just to name a few. All told, LegalZoom's "Products & Services" page lists more than seventy interactive documents.⁵⁵ Rocket Lawyer offers a similar number.⁵⁶ LegalZoom and other websites also offer interactive forms, plus lawyer review of those forms, which is advertised for as low as \$39.00.⁵⁷

C. Legal Services Plans

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

50. *Living Will (Advance Directive)*, LEGALZOOM, <http://www.legalzoom.com/living-wills/living-wills-overview.html> (last visited Feb. 15, 2016).

51. *Introduction to Living Wills*, LEGALZOOM, <https://www.legalzoom.com/knowledge/living-will/topic/lw-advance-healthcare-directive> (last visited Feb. 15, 2016).

52. The remainder of the facts in this paragraph come from the author's personal experience of using LegalZoom on April 1, 2015.

53. *Last Will and Testament*, LEGALZOOM, <http://www.legalzoom.com/living-trusts/living-trusts-overview.html> (last visited Feb. 15, 2016).

54. *Living Trust*, LEGALZOOM, <http://www.legalzoom.com/living-trusts/living-trusts-overview.html> (last visited Feb. 15, 2016).

55. *See Our Products and Services*, *supra* note 9.

56. *Create Legal Documents & Forms*, ROCKETLAWYER, <https://www.rocketlawyer.com/legal-documents-forms.rl> (last visited Feb. 15, 2016).

57. *Legal Document Review*, LEGALZOOM, <http://www.legalzoom.com/legal-document-review/legal-document-review-overview.html> (last visited Feb. 15, 2016).

58. *Attorneys You Can Trust for Your Business*, LEGALZOOM, <https://www.legalzoom.com/>

brief legal consultations with a licensed lawyer in your state.⁵⁹ If more work is needed, especially in the context of litigation, the user will have to contract separately with the lawyer, although LegalZoom promises a discount on the lawyer's typical hourly rate.⁶⁰

Rocket Lawyer offers "free" forms to try to hook users on a similar model. The first week of membership to Rocket Lawyer is free and thereafter a monthly charge of \$39.95 kicks in.⁶¹ Rocket Lawyer's membership includes unlimited access to their interactive forms.⁶² Like LegalZoom, work beyond legal advice or reviewing forms requires an extra payment of pre-negotiated, discounted fees.⁶³

D. Online Legal Advice

The heart of the legal services plans described above is the provision of legal advice by licensed lawyers. Other than document review, the main perk to these plans appears to be the ability to schedule an appointment to talk to an actual, live lawyer and get legal advice. Other websites offer online, written answers to legal questions, often for free or at a very low cost. For example, eHow.com offers legal advice as part of its "eHow Now" expert advice platform.⁶⁴ Users can pay by the question or pay \$9.99 per month for a monthly subscription.⁶⁵ Both the questions and the answers are posted online.⁶⁶

Avvo is a website that offers an attorney rating system, a paid service for attorney advice, and some free legal advice.⁶⁷ For the free advice, users post questions anonymously and attorneys answer them publicly.⁶⁸ Past questions and answers are also stored on the site and are

attorneys-lawyers/legal-plans/business (last visited Feb. 15, 2016); *Find an Attorney You Can Trust for Your Family*, LEGALZOOM, <https://www.legalzoom.com/attorneys-lawyers/legal-plans/personal> (last visited Feb. 15, 2016).

59. *Attorneys You Can Trust for Your Business*, *supra* note 58.

60. See *Legal Plan Contract*, LEGALZOOM, <https://www.legalzoom.com/legal/product-service-terms/legal-plan-contract> (last visited Feb. 15, 2016); *Plan Details*, LEGALZOOM, <https://www.legalzoom.com/attorneys-lawyers/legal-plans/personal> (last visited Feb. 15, 2016).

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

62. See *Plans and Pricing*, *supra* note 9.

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

64. Michael Carney, *eHow Moved Beyond Canned Content with the Launch of eHow Now and Real-Time Expert Consultations*, PANDO DAILY (Aug. 6, 2013), <http://pando.com/2013/08/06/ehow-moves-beyond-canned-content-with-the-launch-of-ehow-now-and-real-time-expert-consultations>.

65. *Id.*

66. *Id.*

67. *Home Page*, AVVO, <http://www.avvo.com> (last visited Feb. 15, 2016).

68. *Get Free Legal Advice from Top-Rated Lawyers*, AVVO, <http://www.avvo.com/free-legal-advice> (last visited Feb. 15, 2016).

searchable, so users may find that their question has already been answered.⁶⁹ Avvo encourages lawyer interaction by providing a “contributor level” that rises as a lawyer answers more questions.⁷⁰

Avvo also has listings of lawyers, with a controversial—at least among lower-ranked lawyers—multi-factor rating system.⁷¹ A few lawyers have unsuccessfully sued Avvo over low rankings.⁷² Avvo earns profits through advertising on the site and selling “Avvo Pro,” a subscription service for lawyers to track their profiles.⁷³ Avvo thus leverages its ratings and traffic to draw lawyers into giving free advice with the hope of gaining paid work. Avvo draws traffic and potential clients to the site with free advice and lawyer ratings.

E. Virtual Law Firms

The term “virtual law firm” means different things to different people, but essentially it describes lawyers operating their practices primarily through an online portal, rather than in person or through telephonic contact.⁷⁴ Such law firms allow lawyers to automate some or all of their document drafting, client contact, and other support services.⁷⁵ Theoretically, this framework allows lawyers to save money while servicing more clients more efficiently, although actual results have varied.⁷⁶ For our purposes though, virtual law firms are identical to brick and mortar firms. The difference is in how the services are delivered, but these are still law firms or solo practices, staffed by lawyers who are subject to the same standards of legal malpractice and professional rules as any other lawyers.

69. *Id.*

70. *Contributor Levels*, AVVO, http://www.avvo.com/support/contribution_levels (last visited Feb. 15, 2016).

71. *In a Nutshell*, AVVO, http://www.avvo.com/support/avvo_rating (last visited Feb. 15, 2016).

72. *See, e.g., Davis v. Avvo, Inc.*, No. C11-1571, 2012 WL 1067640, at *1-2, *8 (W.D. Wash. Mar. 28, 2012); Peter Lattman, *Seattle Lawyers Sue New Lawyer-Rating Web Site*, WALL STREET J.: L. BLOG (June 15, 2007, 9:15 AM).

73. *Avvo Pro*, AVVO, <http://www.avvo.com/for-lawyers/avvo-pro> (last visited Feb. 15, 2016).

74. *See* Chad E. Burton, *Launching a Virtual Law Firm*, GPSOLO, Jan.-Feb. 2014, at 25, 25-26.

75. *Id.* at 25-27.

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

F. Artificial Intelligence

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

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

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

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

77. John O. McGinnis, *Machines v. Lawyers*, CITY J. (Spring 2014), http://www.city-journal.org/2014/24_2_machines-vs-lawyers.html.

78. *Quill*, NARRATIVESCIENCE, <http://www.narrativescience.com/quill> (last visited Feb. 15, 2016).

79. Steven Levy, *Can an Algorithm Write a Better News Story than a Human Reporter?*, WIRED MAG. (Apr. 24, 2012, 4:46 PM), <http://www.wired.com/2012/04/can-an-algorithm-write-a-better-news-story-than-a-human-reporter>.

80. *Id.*

81. *See id.*

82. Bill Henderson, *Artificial Intelligence and the Law*, LEGAL WHITEBOARD (Sept. 4, 2014), <http://lawprofessors.typepad.com/legalwhiteboard/2014/09/artificial-intelligence-and-the-law.html>.

III. CLAIMED DANGERS AND ACTUAL DANGERS

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

A. Claimed Dangers

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

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

83. Rania Combs, *LegalZoom vs. Lawyer: What You Don't Know Can Hurt You*, TEX. WILLS & TR. L. ONLINE (May 24, 2010), <https://www.texaswillsandtrustslaw.com/2010/05/24/legalzoom-vs-lawyer-what-you-dont-know-can-hurt-you>.

84. Rob Graham, *Empty Cache: When Legal Forms Frustrate Testamentary Intent*, NEV. LAW., Jan. 2015, at 26, 27-28.

85. Kelley Keller, *The Dangerous Commoditization of Legal Services*, INNOVATION TO PROFITS (Oct. 28, 2014), <http://innovationtoprofits.com/dangerous-commoditization-legal-services>.

86. Jonathan Sparks, *Why You Should Never Use LegalZoom or Use DIY Online Documents*, HERBERTSPARKS.COM (Feb. 6, 2014), <https://www.herbertsparks.com/why-you-should-never-use-legalzoom-or-use-diy-online-documents>.

87. See, e.g., Cynthia Wyrick, *Waging War Against the Unauthorized Practice of Law*, TENN. BAR ASS'N (Apr. 1, 2014, 12:00 AM), <http://www.tba.org/journal/waging-war-against-the-unauthorized-practice-of-law>.

88. *Legal DIY Websites Are No Match for a Pro*, CONSUMER REP., Sept. 2012, at 13, 13. All other facts in this paragraph come from this source.

89. *Id.*

These results are unsurprising, but not because the professors involved are protectionist or anti-consumer. I know the reputations of the professors that *Consumer Reports* used, and nothing could be farther from the truth. The results are expected because law professors make their living contemplating complexities and finding problems with legal documents.⁹⁰ For a true test of the safety of online documents, *Consumer Reports* should have done a blind test comparing documents drafted by local lawyers against their online competitors. Having read my share of the work of local lawyers, I strongly predict that law professors would find some or many of the same problems with lawyer-drafted documents.

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

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

An April 1, 2015, Westlaw “allcourts-federal” search for the term “LegalZoom” returned a total of thirty-three documents.⁹¹ Most of these documents are inapposite, and none of the cases involve an injured consumer suing LegalZoom. Two cases are class actions against LegalZoom for UPL: *Janson v. LegalZoom.com* in Missouri⁹² and *Lowry v. LegalZoom.com* in Ohio.⁹³ In neither case did the plaintiffs allege any specific harm to a named plaintiff, or to anyone else, other than LegalZoom’s alleged UPL.⁹⁴ There were no allegations that a particular legal form is faulty, for example, or that a LegalZoom incorporation document failed under state law.

The Ohio case was dismissed because only the Ohio Supreme Court has jurisdiction over UPL.⁹⁵ The Missouri case proceeded past summary

90. See generally Benjamin H. Barton, *The Emperor of Ocean Park: The Quintessence of Legal Academia*, 92 CALIF. L. REV. 585 (2004) (reviewing STEPHEN L. CARTER, *THE EMPEROR OF OCEAN PARK* (2002)).

91. The author personally performed these searches. The author’s research assistant performed the same searches a month earlier with the same basic results.

92. 802 F. Supp. 2d 1053, 1057-58 (W.D. Mo. 2011).

93. No. 4:11CV02259, 2012 WL 2953109, at *1 (N.D. Ohio July 19, 2012).

94. See Class Action Complaint for Violation of Ohio Revised Code 4705 and R.C. 1345, ¶¶ 13–26, *Lowry v. LegalZoom.com*, No. 4:11CV02259, 2012 WL 2953109 (N.D. Ohio July 19, 2012); Amended Class Action Petition, ¶¶ 16–21, *Janson v. LegalZoom.com*, 802 F. Supp. 2d 1053 (W.D. Mo. 2011) (No. 2:10–CV–04018).

95. *Lowry*, 2012 WL 2953109, at *2-4.

judgment with the court strongly suggesting that LegalZoom was engaged in UPL,⁹⁶ and LegalZoom then settled.⁹⁷ The other cases involve a contract dispute between LegalZoom and some bankruptcy lawyers,⁹⁸ LegalZoom serving as a registered agent for a corporation,⁹⁹ LegalZoom assisting in filing a copyright and trademark application,¹⁰⁰ and LegalZoom's peripheral involvement in federal criminal cases.¹⁰¹

The same search in the "allcourts-State" database on Westlaw brings up twenty-two documents. None of them involve a suit between an aggrieved LegalZoom client and LegalZoom. All of the cases where LegalZoom is a named party are UPL cases, and in none of those cases is any specific harm from faulty legal work alleged.¹⁰² A search for "Rocket Lawyer" in the same databases raises only two cases, which are not against Rocket Lawyer for any alleged harm.¹⁰³

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

96. *Janson*, 802 F. Supp. 2d at 1062-65.

97. Martin Bricketto, *LegalZoom Settles with Class over Legal Service Fees*, LAW 360 (Aug. 22, 2011, 6:28 PM), <http://www.law360.com/articles/266603/legalzoom-settles-with-class-over-legal-service-fees>.

98. *LegalZoom.com, Inc. v. Macey Bankr. Law, P.C.*, No. 2:13-cv-8620, 2014 WL 961832, at *1 (C.D. Cal. Mar. 12, 2014).

99. *Clinical Reference Lab., Inc. v. Salugen Biosciences, Inc.*, No. 5:12CV105, 2013 WL 1816352, at *1 (D. Kan. Apr. 29, 2013); *Rezapour v. Earthlog Equity Group, Inc.*, No. 5:12CV1052013, 2013 WL 5493010, at *2 (W.D.N.C. Oct. 1, 2013). Both of these cases are about lifting default judgments. *Clinical Reference Lab.*, 2013 WL 1816352, at *4; *Rezapour*, 2013 WL 5493010, at *4. In both of these cases, it looks like LegalZoom fulfilled its obligations as the registered agent and in both cases, the default was lifted. *Clinical Reference Lab.*, 2013 WL 1816352, at *4; *Rezapour*, 2013 WL 5493010, at *5.

100. *Third Party Verification, Inc. v. SignatureLink, Inc.*, No. 6:06-cv-415, 2007 WL 1288361, at *7 (M.D. Fla. May 2, 2007); *Vitality Anti-Aging Ctr. & Med Spa, LLC v. La Bella Donna Advanced Laser Med-Spas of N. Am., LLC*, No. 5:08cv108, 2009 WL 348217, at *1-2 (W.D.N.C. Feb. 11, 2009). In *Third Party Verification, Inc.*, the LegalZoom customer, SignatureLink, was excoriated by the judge for various malfeasances in the discovery process. 2007 WL 1288361, at *2. As an aside, the judge notes that LegalZoom filed "or perhaps misfiled" a copyright application on behalf of SignatureLink. *Id.* at *7.

101. *United States v. Knowledge*, 418 F. App'x 405, 406-07 (6th Cir. 2011); *United States v. Emor*, 850 F. Supp. 2d 176, 190-91 (D.D.C. 2012).

102. See *LegalZoom.com, Inc. v. McIlwain*, 429 S.W.3d 261, 261-63 (Ark. 2013); *Webster v. LegalZoom.com, Inc.*, B240129, 2014 WL 4908639, at *1-2 (Cal. Dist. Ct. App. Oct. 1, 2014); *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 1511, 2014 WL 1213242, at *1-6 (N.C. Sup. Ct. Mar. 24, 2014); *Solotko v. LegalZoom.com, Inc.*, No. 03-10-00755-CV2013, 2013 WL 3724770, at *1 (Tex. Ct. App. July 11, 2013). In recent months, LegalZoom has sued the North Carolina Bar for alleged antitrust violations. See Jacob Gershman, *LegalZoom Accuses State Bar of Illegally Squelching Competition*, WALL STREET J.: L. BLOG (June 4, 2015, 11:45 AM) <http://blogs.wsj.com/law/2015/06/04/legalzoom-accuses-state-bar-of-illegally-squelching-competition>.

103. See *In re Johnson*, No. 12-14808, 2012 WL 5193964, at *7 (Bankr. D. Md. Oct. 19, 2012); *Sandvik v. Bozung*, A131667, 2013 WL 1431705, at *1 (Cal. Dist. Ct. App. Apr. 9, 2013).

lawsuit trail does not support such a claim. There are reasons why no such claims may exist. Both LegalZoom and Rocket Lawyer have extensive “terms and conditions” that disclaim any warranties and also require arbitration of any disputes.¹⁰⁴ In recent years, the U.S. Supreme Court has extended the reach of these arbitration clauses. For example, in *AT&T Mobility v. Concepcion*, the Court held that an arbitration clause governed over state contract law related to unconscionability and struck down a state class action against AT&T Mobility in favor of individual arbitration cases.¹⁰⁵ This suggests that even common law matters like legal malpractice or negligence for faulty online legal advice that would typically be handled by state or federal courts may end up in arbitration instead. Nevertheless, in the Missouri UPL class action described above, the federal court refused to follow LegalZoom’s terms of service and allowed the case to proceed in court, so the arbitration clause was not foolproof in that case.¹⁰⁶ The Supreme Court of Arkansas, by contrast, recently held the opposite and dismissed a UPL class action case in favor of arbitration.¹⁰⁷

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

Nevertheless, the lack of lawsuits is evidence that the Cassandra-like claims of harm are not yet coming to fruition.¹⁰⁸ As a comparison, note that legal malpractice claims have been rising in number and aggregate damages since the recession,¹⁰⁹ so it is not as if legal services by lawyers are not harming customers or generating lawsuits. The lack

104. *Terms of Service*, ROCKETLAWYER, <https://www.rocketlawyer.com/terms-and-conditions.rl> (last updated July 1, 2015); *Terms of Use*, LEGALZOOM, <https://www.legalzoom.com/legal/general-terms/terms-of-use> (last visited Feb. 15, 2016).

105. 131 S. Ct. 1740, 1744-53 (2011).

106. See *Janson v. LegalZoom.com, Inc.*, 727 F. Supp. 2d 782, 785-87 (W.D. Mo. 2010).

107. See *LegalZoom.com*, 429 S.W.3d at 261-62; Deborah Cassens Weiss, *UPL Suit Against LegalZoom Must Go to Arbitration, Arkansas Supreme Court Says*, ABA J. (Oct. 24, 2014), http://www.abajournal.com/news/article/upl_suit_against_legalzoom_must_go_to_arbitration_arkansas_supreme_court_sa.

108. See generally Carol A. Needham, *Listening to Cassandra: The Difficulty of Recognizing Risks and Taking Action*, 78 FORDHAM L. REV. 2329 (2010) (describing the Greek mythology of Cassandra and applying the myth to the practice of law).

109. See AMES & GOUGH, *LAWYER’S PROFESSIONAL LIABILITY CLAIMS TRENDS: 2014*, at 1-3 (2014), http://c.yecd.com/sites/www.pldf.org/resource/collection/F45224B2-A5C9-4A90-A349-F6ED859A5468/Gephart_2014_LPL_Market_3.pdf.

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

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

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

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

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

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

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

112. See *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 123-29 (1976) (discussing the necessity for lawyers to assist filling in forms for divorce proceedings). See generally Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587 (2014).

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

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

A. Online Services by Licensed Lawyers

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

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

113. See generally BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN COURTS* (2011).

114. See sources cited *supra* notes 3-4.

115. 845 N.W.2d 808, 815-17 (Minn. 2014).

116. This is generally true under the existing law governing paralegals employed by lawyers. See Christene Beck Lissitzyn, *What's in a Name? Should Paralegals Be Liable for Legal Malpractice*, 15 PROF. LAW., no. 4, 2005, at 2, 2.

117. Avvo's terms and conditions of use are a good example. See *Terms and Conditions of Use*, AVVO, <http://www.avvo.com/support/terms> (last updated Jan. 6, 2015).

118. See David S. Caudill, *The Roles of Attorneys as Courtroom Experts: Revisiting the*

even initial consultations that do not result in a further relationship (like the kind that Rocket Lawyer and LegalZoom arrange every day) could create some legal malpractice liability.¹¹⁹ The point here is not to guess how each individual case will be handled. The point is to note that when licensed lawyers are involved, there is already a ready-made source of legal rights and duties—legal malpractice—and that is where courts will turn first.

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

B. Non-Lawyer Liability

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

Conventional Limitations and Their Exceptions, 2 ST. MARY'S J. ON LEGAL MAL. & ETHICS 136, 163-64 (2012).

119. John Casey Pipes, Commentary, *The Implied Professional Relationship: An Extension of the Attorney's Duties and Obligations*, 20 J. LEGAL PROF. 319, 320-26 (1996).

120. Cf. Dwayne J. Hermes et al., *Leveling the Legal Malpractice Playing Field: Reverse Bifurcation of Trials*, 36 ST. MARY'S L.J. 879, 880-84 (2005) (arguing that legal malpractice actions are so common and so unfair to lawyers that they require special procedural protections to "level the playing field").

121. Nicole A. Boothe-Perry, *No Laughing Matter: The Intersection of Legal Malpractice and Professionalism*, 21 AM. U. J. GENDER SOC. POL'Y & L. 1, 23-25 (2012).

122. Hermes, *supra* note 120, at 886-92.

123. See BARTON, *supra* note 113, at 163-69; Mahaffey, *supra* note 12, at 410-20. But see Daniel L. Adams, *When Case-Within-a-Case Method Helps Plaintiffs Prove Legal Malpractice*, N.Y. LEGAL ETHICS REP. (May 1, 2015), <http://www.newyorklegaethics.com/when-case-within-a-case-method-helps-plaintiffs-prove-legal-malpractice> (arguing that the case-within-a-case doctrine, while often times believed to help the defense, provides advantages to the plaintiff).

and would be unlikely to sue an individual when they could sue a wealthy corporation that made the forms available. Similarly, if and when artificial intelligence becomes more prevalent, those services will have some underlying involvement of a lawyer, as well as of coders. But, unlike the lawsuits described in Part IV.A above,¹²⁴ the lawsuits arising in this instance will be against a website or a computer company rather than a particular licensed lawyer.

When injured parties sue these websites, they will face a list of terms and conditions stating that they have not received legal services or legal advice and that, if they have a serious problem, they should seek a lawyer.¹²⁵ Because of these disclaimers, and because plaintiffs will not attach their suit to any particular lawyer, legal malpractice will not be an easy fit for such suits. Legal malpractice claims have traditionally required a lawyer-client relationship as an element of the tort,¹²⁶ and while third-party suits are more common in recent times, courts have acted differently when it comes to applying legal malpractice principles against non-lawyers.¹²⁷

Regardless of what courts call the suits, however, every court will face the question of what duty an online purveyor of legal services owes its injured customers. Regardless of whether the cases are presented using theories of negligence or legal malpractice, and regardless of the lack of a named lawyer-defendant, I predict that eventually online providers will face the same duty that lawyers face: the duty to act with the ordinary skill and ability of a licensed lawyer.¹²⁸ This is partially because that standard will even the playing field between lawyers and websites, and partially because any other standard, such as “to behave as an ordinarily prudent legal website,” would be more unwieldy and harder to apply.

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

124. See *supra* Part IV.A.

125. See *Terms of Use*, *supra* note 104.

126. See Robert M. Jarvis, *The Erring Proctor: Admiralty Lawyers and Malpractice Claims*, 31 J. MAR. L. & COM. 407, 409-11 (2000).

127. See Thomas D. Morgan, *Professional Malpractice in a World of Amateurs*, 40 ST. MARY'S L.J. 891, 899-907 (2009).

128. This is already how at least the Alabama legal malpractice statute handles the issue. Both lawyers and non-lawyers are considered “Legal Services Providers” and are subject to the same legal standards. See ALA. CODE § 6-5-572 (2014).

An easier possibility is to apply simple negligence theories—the baseline for pecuniary liability for harms in the United States—with the heightened duty to behave as a reasonable lawyer would.¹²⁹ Negligence also offers the possibility of a different standard of care, such as the “reasonable purveyor of online legal services.” As noted above, the higher standard seems more likely to me, but time will tell which will be applied.¹³⁰

There are two other possible prevailing legal regimes: products liability or breach of contract. Some plaintiffs may pursue products liability claims because of the siren song of strict liability and the hope that demonstrating their injury and the defect in the legal documents would be sufficient to establish liability.¹³¹ Proving that a product is “defective,” however, is easier said than done and usually requires a showing of fault regardless of products liability law’s roots in strict liability.¹³²

Moreover, generally speaking, strict products liability is not available against service providers, but only against sellers of products.¹³³ This distinction has proven particularly elusive in the medical and hospital contexts.¹³⁴ Similarly, it will be difficult to decide whether online legal forms are a service or a product. On the one hand, these websites have a set template (interactive or not) that provides legal documents. Because of the rote and mechanized nature of what is sold, it hardly seems like a service.

On the other hand, if one looks at what is actually being provided, it is clearly a replacement for what would traditionally be considered legal services. LegalZoom sells the same thing a solo practitioner does—LLC documents, divorce papers, and so forth.¹³⁵ Generating legal documents has always been considered a service, and a plaintiff who attempted to sue a licensed lawyer under products liability principles for a

129. See Boothe-Perry, *supra* note 121, at 21-23.

130. See *supra* text accompanying notes 113-14.

131. Under the strict liability standard for products liability claims, courts apply strict liability if a product is “defective by virtue of a design defect, manufacturing defect, or an inadequate warning.” See *Cooper v. Old Williamsburg Candle Corp.*, 653 F. Supp. 2d 1220, 1224 (M.D. Fla. 2009).

132. William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639, 651-52 (1991); William Powers, Jr., *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 781-97 (1983).

133. See Richard L. Cupp, Jr., *Sharing Accountability for Breast Implants: Strict Products Liability and Medical Professionals Engaged in Hybrid Sales/Service Cosmetic Products Transactions*, 21 FLA. ST. U. L. REV. 873, 875-82 (1994).

134. *Id.* at 878-81.

135. See *supra* Part II.

defective pleading would not progress past a motion to dismiss in any American court.

Finally, an online provider of legal services might try to avoid tort law altogether and force injured parties to prosecute a breach of contract action, with the very restrictive terms and conditions of use from the website standing in as the governing contract.¹³⁶ Given that courts are often hostile to replacing tort claims with more restrictive contract claims in situations where the “contract” at issue is a terms and conditions page (which, typically, no user reads or understands),¹³⁷ and that judges are likely to be unfriendly to these companies altogether, this possibility seems more remote.¹³⁸

C. Lawyer Referral Cases

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

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

136. See *Terms of Use*, *supra* note 104.

137. Juliet M. Moringiolo & William L. Reynolds, *Survey of the Law of Cyberspace: Internet Contracting Cases 2004-2005*, 61 BUS. LAW. 433, 434-38 (2005) (stating that notice of terms and conditions, and not fairness, seems to control enforceability).

138. Depending on the nature of the harm, injured plaintiffs might also consider a consumer fraud or unfair trade practices type claim.

139. For an overview, see generally Emily S. Lassiter, *Liability for Referral of Attorneys*, 24 J. LEGAL PROF. 465 (2000).

140. *Id.* at 470-71.

“reasonable lawyer” standard or its equivalent—is a likely import because courts will be loath to treat lawyer competitors more generously than lawyers themselves. Thus, even if a case is classified as a “legal malpractice” case or a “negligence” case, the end result in terms of the standard of care and the applicable procedure is likely the same. Products liability or breach of contract are less likely to govern, but remain possibilities until courts reject them.

V. CONCLUSION

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

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

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

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

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

141. See George Leef, *Why the Legal Profession Says LegalZoom Is Illegal*, FORBES (Oct. 14, 2014, 3:00 PM), <http://www.forbes.com/sites/georgeleef/2014/10/14/why-the-legal-profession-says-legalzoom-is-illegal>.

142. See Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and*

create a fifty-state online solution to the access-to-justice problem.¹⁴³ While lawyer discipline remains largely covered by a cone of silence,¹⁴⁴ Avvo posts all publicly available disciplinary information and client reviews together on a single “Tripadvisor for lawyers” site.¹⁴⁵

The clash of these two worlds will be fascinating to watch, especially as more lawyers begin to feel the bite of online competition and start complaining to their friends in the judiciary. There is an apocryphal Chinese curse that states “may you live in interesting times.”¹⁴⁶ American lawyers and judges are certainly living through such times.

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

143. See BARTON, *supra* note 6, at 193-210.

144. See Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 58 (1998).

145. See *In a Nutshell*, *supra* note 71.

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