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Possible Anticompetitive Efforts to
Restrict Competition on the Internet:
Internet Legal Services

"Regulating the Provision of Legal Services in Cyberspace"

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Introduction.

In order to consider whether regulating Internet legal services may have anticompetitive effects, it is essential to understand the various regulatory principles governing the furnishing of legal advice in cyberspace. The broader issue generated by legal activity in cyberspace is the question of whether this technology can be harnessed to make access to legal services easier and more affordable for the millions of low- and middle-income people who currently feel that they cannot afford lawyers

At the outset, we must keep in mind the contrast between the pervasive regulation of the market for legal services and the relatively unfettered world of cyberspace. Lawyers are subject to a variety of different regulatory constraints, including the ethical rules of their own states, a number of bodies of substantive law, and the unauthorized practice of law statutes. Nonlawyers may also be subject to regulatory restrictions, to the extent that their activity can be characterized as "the practice of law" and thus reserved to licensed attorneys. In addition, the possibility that restricting some types of speech about the law may implicate the First Amendment provides an additional constitutional overlay that may affect the degree to which state laws may be brought to bear on Internet legal services.

At bottom, the question of how (or whether) to regulate Internet legal services implicates two principal concerns. On the one hand is the inevitable concern from the legal profession about economic competition. Lawyers historically have used the unauthorized practice of law statutes to protect against perceived incursions by real estate agents, bankers, insurance adjusters, and other groups that seemed to be providing legal services. The legal profession is likely to be equally self-protective if it views certain cyberspace activity as a threat to its economic viability or its status as a learned profession.

On the other hand, there are legitimate questions of consumer protection that arise from the proliferation of Internet legal services. These concerns arise whether the services are

furnished by lawyers or by lay providers. With respect to lawyers providing legal services in cyberspace, consumer protection issues arise about whether the services were competent and provided by a lawyer licensed to practice in the relevant jurisdiction, and whether the consumer has any recourse for shoddy services, particularly in light of the disclaimers commonly attached to such services. As to nonlawyers furnishing legal advice or preparing legal documents, the question is whether these services constitute the unauthorized practice of law, and whether consumers can be protected from suffering injury at the hands of incompetent or unscrupulous providers.

This summary provides a brief overview of the regulatory issues most likely to raise antitcompetitive concerns. It will address the question of lawyers and lay people separately, although there is necessarily some overlap between the two sets of issues.

Advice-Giving by Lawyers.

In general, the trigger for imposing the vast body of law regulating lawyers on Internet legal advice would be finding that an Email exchange between lawyer and lay questioner created an attorney-client relationship. It is well-settled that the act of giving specific legal advice to a lay person, under circumstances in which it would be reasonable for that person to rely on it, may create an attorney-client relationship, with all the professional obligations inherent in that relationship. *See* Catherine Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147 (1999) (available online at http://www.law.duke.edu/journals/dlj/articles/dlj49p147.htm). Although no court to date has ruled on this issue, courts traditionally have seen their role as protecting lay people who reasonably believed they were being represented by a lawyer, and there is ample precedent for finding such relationships to be created by certain communications on the Internet. In cyberspace, a lay person may demonstrate the intent to create an attorney-client relationship through Email, by expressly asking for legal advice or for assistance in carrying out a particular objective. The lawyer's act of responding to that request with specific legal advice could constitute consent to provide legal services, and thereby create an attorney-client relationship.

To create an attorney-client relationship, however, the lawyer's advice must be specific to the facts of the putative client's case. Giving specific legal advice in response to a set of particular facts is the hallmark of the practice of law, while offering general information about the law is not. It could well be reasonable for a putative client to rely on advice that is specifically tailored to his particular request, and the courts are clear that it is the reasonable belief of the client that will govern. The nature of the communication could give the lawyer either actual or constructive knowledge that the questioner intends to rely on the advice or is otherwise depending on the lawyer to protect his or her legal interests. Such a situation would meet the requirements of the Restatement, and could thereby result in liability for an unwary cyberspace lawyer. In contrast, generalized legal information would not constitute the practice of law, and presumably not create a professional relationship (although other ethical rules such as those governing advertising might be implicated).

The regulatory implications of finding an attorney-client relationship in these Internet communications are substantial. Lawyers who provide specific advice to on-line questioners may now owe duties of loyalty, confidentiality, competency, and zealous advocacy to those clients. They may be subject to liability for malpractice if their advice proves to be negligent. They may themselves run afoul of restrictions against unauthorized practice of law if they advise on-line clients in jurisdictions other than those in which the lawyers are licensed to practice. To the extent that these restrictions apply to Internet legal advice, they may act to discourage some attorneys from using the technology to provide brief legal services to lay people.

Some lawyers have sought to avoid the creation of an attorney-client relationship by including broad disclaimers on their websites. Whether these disclaimers will be upheld by courts if disputes arise over the services provided remains an open question. The courts have been especially protective of lay people when lawyers attempt to enforce contracts against them, and this view is likely to apply with particular force in cyberspace transactions. In addition, once the lawyer gives specific legal advice to someone who asked for it, it is unpersuasive to suggest that the person was unreasonable to rely on it. At some point, the conduct of the lawyer would be so inconsistent with the disclaimer of a professional relationship that the disclaimer would be treated as ineffective. Despite attorney dependence on elaborate written disclaimers, courts may well find it reasonable for lay people to treat such disclaimers as nothing more than "legalese," particularly if the conduct of the attorney is inconsistent with the disclaimer.

One regulatory response that has been suggested is the so-called “unbundling” of legal services from the full-service model of the traditional attorney-client relationship. The model is that of a menu of legal tasks from which the client selects, in consultation with the lawyer, and. purchases only the services that he or she needs and can afford. In an unbundled relationship, the lawyer would not incur the full obligations inherent in a traditional attorney-client relationship. The act of giving specific legal advice to clients on-line, while expressly disclaiming any additional responsibilities, is at least theoretically a cyberspace version of discrete task representation.

Unbundling remains controversial within the legal profession, however, and it is not a cost-free solution. There are real risks to the lay public from establishing a type of professional relationship that may not provide them with the legal protection they need, particularly if that relationship is structured to insulate the lawyer against all malpractice liability. In addition, there is the obvious danger of creating a two-tiered model of legal services: full-service for the rich and cut-rate for the not-so-rich. Nevertheless, the idea of limited representation may be one for the organized bar to explore further, as legal advice in cyberspace becomes more prevalent.

The potential anticompetitive effects of regulating lawyer advice-giving on-line may depend on how the legal profession responds to the emergence of these services. If Internet legal advice by lawyers is treated as generating a full-fledged attorney-client relationship, it is possible that lawyers would be discouraged from using cyberspace as a way to serve lay people who otherwise might not be able to afford traditional services. On the other hand, treating this advice as if it were simply generalized legal information may leave the field entirely unregulated, with no recourse for consumers who will not have the necessary background to determine whether the advice they have been given was valid. The unbundling concept may have merit, but as yet has not received sufficient study to determine whether its pitfalls would outweigh its advantages.

Advice-Giving by Lay People.

Substantial regulatory concerns are also raised when lay people provide legal advice or generate legal documents for other lay people in cyberspace. The question of whether certain activities on the Internet by nonlawyers constitute the unauthorized practice of law is likely to become the focus of future regulatory efforts. The broader question of whether the entire concept of "unauthorized practice of law" is inherently anticompetitive is beyond the scope of this discussion. Nevertheless, a fundamental policy question remains to be resolved as to whether the legal profession ought to use unauthorized practice statutes to prevent lay people from providing basic wills and other personalized legal documents to consumers.

Among the lay activities that have generated concern in recent years are the offering of legal advice (either free or for a fee) and the sale of personalized legal documents. The lay entrepreneurs who operate these sites hope to garner a portion of the market for legal services that traditionally has been underserved by the organized bar.

The emergence of these websites raises three legal questions. First, does filling out a legal form for someone else constitute "legal advice" and therefore the unauthorized practice of law? Second, assuming such activity would meet that definition, would application of state laws to such activity pass constitutional muster? Third, even assuming that the activities of these legal information providers could be legally and constitutionally regulated, as a matter of social policy, should the organized bar seek to regulate this activity at all? See Catherine J. Lanctot, Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law, 30 Hofstra 812 (2002) (available online at http://www.hofstra.edu/PDF/law_lanctot.pdf)

As to the first question, the courts have consistently taken the position that selecting which form to use, giving advice about which information ought to be included in a form, or soliciting information from a lay person and then making determinations about how to use the information in the form is the equivalent of practicing law. On the other hand, merely serving as a scrivener is not. Indeed, the distinction that courts and bar opinions have drawn with respect to the creation of attorney-client relationships -- the difference between general legal information and specific legal advice -- is the same one used to define whether a lay person is practicing law. There is ample case law to support the proposition that a lay person who is paid to assist another in making decisions about how to prepare a legal document is engaged in the unauthorized practice of law.

Whether applying such precedent to online activity would be constitutional is far less clear. The First Amendment has been raised repeatedly in defense of the rights of lay people to provide legal information to others, with some success. It is quite possible that aggressive enforcement of the unauthorized practice of law statutes against online document preparers could run into serious constitutional problems. Resolution of the issue will hinge largely on the distinction between general legal information or opinions about the law, which presumably is protected by the First Amendment, and specific legal advice tailored to a unique set of facts, which presumably is not. One difficulty that is likely to emerge is that statutes that suppress some free speech ordinarily must be tailored to be no more burdensome than necessary. Here, the historic inability of the bar to define the practice of law may prove to be an insurmountable weakness. Enforcing an

unauthorized practice of law statute against an online legal document provider could be difficult if the scope of what constitutes a violation of that statute cannot adequately be defined.

As to the policy question of whether the organized bar ought to enforce the unauthorized practice statutes against these websites, several concerns must be kept in mind. Failure to enforce these provisions could create an entirely unregulated industry, marketing what are clearly legal services to unsuspecting lay consumers. There are real consumer protection issues that we cannot simply ignore by terming all bar attempts to regulate unauthorized practice of law as nothing but economic protectionism. The information given may be false or misleading. The forms may be outdated or not suitable for use for a particular set of facts. There is no followup to ensure that the appropriate documents were used, or whether additional assistance was necessary. Consumers themselves may be misled into thinking that they have resolved their legal difficulties without realizing that the documents they have paid for are woefully incomplete. Finally, we have no way of knowing how courts will react five or ten years from now, when the first dot.com wills are probated and turn out to have been inadequate.

The anticompetitive effects of such enforcement must be considered as well. These Internet services would not have emerged if the legal profession had been adequately meeting the needs of the market. Advocates of these lay services argue that the legal profession has essentially abdicated its responsibility to meet the basic legal needs of ordinary people at an affordable rate, and thus has left an unserved market ripe for the picking. These advocates further argue, with some historical justification, that the legal profession's insistence on labelling all kinds of routine activities to be the "practice of law" has been nothing but economic protectionism. The mantra for these advocates has been "empowering consumers" to represent themselves.

The risk of deregulating the field of routine legal document preparation is that it could harm the lay public without substantially improving the quality of the legal documents they receive The suggestion that the average middle class consumer would be better off representing himself or herself in simple legal matters is problematic at best, particularly as the law becomes increasingly complex. Self-representation is hardly an unqualified good, and representation by competent lawyers is hardly an unqualified evil. It seems illogical to suggest that the appropriate societal response to the unmet legal needs of millions of Americans is to tell them to represent themselves. The fact of the matter is that legal principles are often opaque, and factual scenarios often complex, and that using boilerplate legal documents as a "one-size-fits-all" response to common legal problems is hardly an effective solution to the unmet legal needs of most consumers.

Conclusion.

The question of how to address the emergence of Internet legal services has yet to capture the attention of the legal profession. The challenge facing regulators in this area, as in so many others, is to use this technology in a way that protects consumers at the same time that it keeps costs low. The legal profession should focus its attention on how cyberspace can be best used to provide competent and affordable legal services, before the rapidly-evolving world of the Internet makes its traditional regulations obsolete.