

The Threat from Regulation of Online Law*

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Many lawyers practice law the same way tailors once made shirts. They take the client's measure then stitch together a custom-made will, lease, bill of sale, or contract. Each client's document is made to order. People who want to pinch pennies can buy legal forms from an office supply store and fill in the blanks, but few are comfortable with this alternative. Of late, however, law has gone online, and change is in the wind.

When Robert Atkinson and I looked at the implications of online law two years ago, we noted that a "dozen Internet-based legal services have been launched in the U.S. in the last 12 months." We identified six of them: FindLaw.Com; MyCounsel.Com; MyLawyer.Com; Nolo.Com; Thelaw.Com; and USLaw.Com. All have survived a very tough business environment. The market should continue to control whether and how these services grow. The concern of this paper is that the legal profession will feel threatened by online law and seek to regulate it as the practice of law.

Online Law and Its Benefits

Before there was an Internet, consumers could avoid paying lawyers by using blank legal forms and reading self-help books. Should they decide to call a lawyer, they asked friends for a recommendation, called referral services, or looked in the Yellow Pages.

Many of the initial online legal offerings responded to consumers in the same way. Their first aim was to provide legal information. Nolo.com began this way. It was an outgrowth of Nolo Press, a company that had been in the self-help legal book business for years. Nolo.com gave away some consumer law information for free over the Internet and charged for some information. Other providers did the same. They targeted consumers nationwide by making explanatory and self-help materials available for free at their Web sites. These same Web sites also helped the consumer find a lawyer with legal directories, paid advertisements from lawyers, and classified advertisements.

In providing basic legal information and making referrals, these Web sites were not so different from off-line offerings. But they also came up with more innovative services. USLaw,

* This paper builds on one that Robert Atkinson and I wrote, "Stopping the Regulatory Threats to the Emergence of Online Law," published by the Progressive Policy Institute, June 15, 2000. Atkinson, who is vice-president and director of the Technology and New Economy Project at PPI, has kindly allowed me to borrow from that joint effort for this presentation. My first look at these questions was in "Is Everyone Ready for E-Law," *Legal Times*, November 2, 1998.

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for example, has a legal chat room where Internet users can interact with lawyers. MyCounsel started by making legal information publicly available but then evolved into using the Internet to provide legal information and services on a membership basis. DeskTopLawyer in England and Wales pioneered the business of selling interactive legal documents from its Web site. A simple last will and testament could be purchased with a credit card for about \$30. But, rather than getting a blank form, the user downloaded software that led him through a series of questions. When the questions were answered, a remote computer prepared the will and emailed it to the user for print out. The user also could elect to have the will reviewed by a lawyer at a specified, per minute rate. A participating lawyer would telephone the user, revise the will if necessary, and send it over the Internet for printing. MyLawyer.com, a U.S. provider, has the same interactive software to help users here prepare standard legal documents.

Online law can provide important benefits to the public. People often resist getting help with legal problems because the law seems complicated and lawyers are expensive. Moreover, lawyers charge by the hour, whereas consumers prefer to know the price in advance of purchase. As a result, people do not retain lawyers even though they should. In a focus group of 18 adults with school children that was convened several years ago by an online law service, only one person said he had provided for his children with a last will and testament.

Current online law offerings are doing three things for consumers. First, they give out basic legal information. Users can go to these sites to get help sorting through their legal affairs, resolving minor problems, and deciding if they need professional assistance. Second, the services can help the consumer find a qualified lawyer. The off-line consumer often has only the Yellow Pages for guidance. The organized bar's rules of professional conduct provide for bare-bones advertising by lawyers, thus creating the appearance that a prospective lawyer is qualified on all matters. Online legal directories and referral services promise to be more efficient ways to guide consumers to the right lawyer. Third, some Web sites offer interactive legal documents. The consumer can prepare his own tailor-made will, trust, promissory note, bill of sale, power of attorney, lease, or like document for a modest, fixed fee.

Regulation of the practice of law

The legal profession is often considered to be a self-regulating one. The process is only slightly more complicated. Most states have so-called "unified" bar associations. These organizations have regulatory powers, but they operate under the supervision of the state supreme court. The bar examines the qualifications of prospective lawyers and determines if they should be admitted to practice. It regulates how lawyers advertise, runs continuing legal education for lawyers, investigates complaints against lawyers and prosecutes to disbarment, and protects against the unauthorized practice by non-lawyers and the unlicensed. The state supreme court has the last word though. In states without unified bars, these regulatory functions are parceled out to other agencies of state government and to the judiciary.

This state-by-state regulation of the legal profession has the potential to inhibit growth of online legal services in two ways. First, regulations meant to protect the lawyer/client relationship

can be invoked by the legal community for anti-competitive reasons to block innovative online services. Second, the mere existence of state-by-state regulation can retard growth of online services that transmit legal information across state, and indeed national, boundaries. This means that the evolution of online law might be altered by non-market forces.

The degree to which the legal community will oppose online law is uncertain. On the one hand, some lawyers see online legal information as a boon to their clients and the profession. If people do not have wills because they do not understand why they need one or because they do not know how to find a lawyer, then these new services can help both lawyers and clients.

On the other hand, lawyers have reason to worry. If one lawyer can write 10 wills per day via the Internet and only 3 per day if clients visit his office and if the quality of the wills is the same, the lawyer engaged in the conventional practice is in trouble. And, who will pay a lawyer by the hour to write a simple power of attorney if the document can be purchased on the Internet for a fixed price? Lawyers whose business consists of providing clients with routine documents may face competition from online law.

The most likely area of conflict relates to prohibitions against unauthorized practice of law. Those who practice law not only must be licensed but they must be licensed in the state in which they practice. This means that a layman in New York cannot practice law in New York and that a lawyer licensed in New York cannot practice in New Jersey.

Prohibitions against the unauthorized practice of law are a comparatively new development. Historically, the practice of law has meant appearing in court. It did not mean rendering advice outside of court. Non-lawyers commonly prepared legal documents and rendered advice. But in 1930, the American Bar Association formed a committee on unauthorized practice. Soon after that, states began to prohibit the unauthorized practice of law. Today, virtually every state does this.

What kind of Internet services might constitute the practice of law and hence run afoul of prohibitions against unauthorized practice?

The principal court test of this question arose in Texas in 1999. The Texas Bar's Unauthorized Practice of Law Committee sued Parsons Technology, Inc., doing business as Quicken Family Lawyer, in U.S. district court claiming that Parsons was engaged in the unauthorized practice of law by distributing software that created legal documents such as wills. The court sided with the bar, characterizing the software as a "cyberlawyer." It enjoined the sale of the software in Texas, depriving Texas consumers of an easy and cheap means of writing their own wills. An appeal was mooted, however, when the Texas legislature changed the definition of unauthorized practice to read: "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney."

The action in Texas was not an atypical, protective move by the organized bar. In an article entitled “Attorney-Client Relationships in Cyberspace: the Peril and the Promise” in the October 1999 issue of the Duke Law Journal, Professor Catherine J. Lanctot looked at other bar rulings that have thwarted innovative legal information services. For example, she cites instances where such innocuous endeavors as answering legal questions in newspaper columns, answering legal questions on call-in radio shows, and addressing individual legal problems at seminars were found to be the practice of law and hence subject to regulation.

Of course, even if online advice and online legal services were deemed the practice of law, they are not the unauthorized practice if the provider is an attorney licensed in the state to which the advice applies. Properly licensed lawyers may give away advice for free on the street corner or on the Internet if they choose.

Nonetheless, state-by-state regulation will hinder an online service that dispenses legal advice across state borders since an Internet legal counselor cannot keep advice within geographic boundaries. Her words are disseminated in cyberspace for the whole world to read. Is it the unauthorized practice of law for a lawyer in Maryland to tell someone in Virginia that in Maryland it is illegal to tape a telephone conversation without the consent of both parties? Does the mere fact that she has advised a Virginia resident constitute unauthorized practice in Virginia even though the lawyer is talking about Maryland law? And, is there a distinction between a lawyer doing this and software, on or off the Internet, that generates a last will and testament that is valid in most states?

To a legal profession bent on making trouble for computer-based or online services, the current licensing scheme for lawyers is fertile ground. Take the prohibition in the rules of professional conduct against a lawyer’s advising both sides in a dispute. This seems sensible if an attorney/client relationship exists. But what if a landlord and a tenant separately ask the same lawyer for advice about covenants for quiet enjoyment in an online legal forum. Has the lawyer committed an ethical violation by answering -- even though he gives the same answer to both?

Online services that do not create confidential relationships should not be regulated

Should regulations applicable to the off-line legal profession apply to online legal services? The online marketplace is effective in protecting consumers generally. It should protect consumers of online law as well. The open and public relationships between consumers and vendors that characterize Internet transactions are the antithesis of the private, confidential attorney/client relationship that is at the heart of the traditional practice of law. It is this relationship that the regulation of lawyers was designed to protect. An individual client often cannot know if her lawyer did a good job or a bad job in writing her will or if the lawyer bills fairly or if he keeps confidences. And so, the client benefits from regulation of lawyers. But, the custom-made, traditional practice of law is very different from online companies that are mass-producing legal products.

The benefits of providing legal information and of the automated preparation of legal documents via the Internet argue strongly against allowing these activities to fall under the off-line rubric of the practice of law. The Texas legislature, for example, concluded that computer software should not be considered the practice of law. Its reasoning applies equally to use of the Internet for the same purpose.

If consumers transact business with an online legal service knowing that they do not have a confidential attorney/client relationship with the online provider, why regulate the transaction under rules applicable to lawyers? The traditional lawyer/client relationship that just happens to use the Internet can remain subject to regulation, while innovative online offerings that do not create such relationships and that so inform the consumer could avoid regulation.

Conclusion

Law is still being practiced the old-fashioned way as a piece-work industry. The legal profession has embraced the Internet and related technologies as tailors once did sewing machines. It uses the new technology to make its product more efficiently, but it is still delivering custom-made products. Online law, in contrast, may be able to deliver legal services in a very way. It may herald the advent of mass-production and mass marketing in the law. The rules of professional conduct that apply to the traditional attorney/client relationship would seriously and unnecessarily hinder online law and should not be applied to it.