



2024

Unauthorized  
Practice of Law  
Seminar

# Seminar Materials

December 13, 2024



*Hosted by the Supreme Court of Ohio Board on the Unauthorized Practice of Law.*

*Approved for 2.75 hours of General CLE Credit.*



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# Board on the Unauthorized Practice of Law

2024 Seminar Materials

December 2024

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# I. Agenda



2024

Unauthorized  
Practice of Law  
Seminar

# Current UPL Challenges, *Including Concerns About Artificial Intelligence*

December 13, 2024

Noon – 12:05 p.m.

## **Introductory Remarks**

*David A. Kutik, Esq., Retired Partner, Jones Day, Chair of the Supreme Court of Ohio Board on the Unauthorized Practice of Law*

12:05 – 12:35 p.m.

## **New Challenges to UPL Matters**

*Justice Patrick F. Fischer, Supreme Court of Ohio*

12:35 – 1:20 p.m.

## **UPL Caselaw Update**

*David A. Kutik, Esq.*

1:35 – 3:05

## **Artificial Intelligence Panel**

*Joel Bush, Partner, Capellic*

*Professor Joseph Avery, Assistant Professor, University of Miami  
Herbert Business School*

*Damien Riehl, Esq., VP, Solutions Champion, vLex*

II. *Cleveland Metro. Bar Assn.*  
*v. Carson*, 2023-Ohio-4036

**CLEVELAND METROPOLITAN BAR ASSOCIATION v. CARSON.**

[Cite as *Cleveland Metro. Bar Assn. v. Carson*, 2023-Ohio-4036.]

*Unauthorized practice of law (“UPL”)—Under Gov.Bar R. VII(12)(G), in a default UPL proceeding, there must be sufficient “sworn” or certified documentary evidence submitted with default motion for trier of fact to find that each element of charged offense, in absence of contradictory evidence, has been proved by preponderance of evidence—For purposes of Gov.Bar R. VII(12)(G), “sworn” means that the evidence is based on personal knowledge of the facts being relayed, sets forth such facts as would be admissible into evidence, and shows that affiant is competent to testify to matters stated—Respondent engaged in UPL by holding himself out as an attorney on return of service for four subpoenas—Relator failed to present sworn or certified documentary prima facie evidence regarding relator’s other alleged conduct—Permanent injunction issued and civil penalty imposed in connection with one of two charged counts.*

(No. 2023-0426—Submitted May 2, 2023—Decided November 9, 2023.)

ON FINAL REPORT by the Board on the Unauthorized Practice of Law  
of the Supreme Court, No. 2021-002.

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**Per Curiam.**

{¶ 1} In a two-count December 2021 complaint, relator, Cleveland Metropolitan Bar Association, charged respondent, Brett Carson, with engaging in the unauthorized practice of law in Ohio by holding himself out as an attorney and by preparing various legal documents on behalf of two other people.

{¶ 2} In January 2022, the Board on the Unauthorized Practice of Law attempted to serve relator’s complaint on Carson at a South Euclid address by



SUPREME COURT OF OHIO

certified mail and by ordinary mail, the latter evidenced by a certificate of mailing, but both attempts were returned marked “NOT DELIVERABLE AS ADDRESSED” and “UNABLE TO FORWARD.” (Capitalization sic.)

{¶ 3} In June 2022, the board issued an order to show cause directing relator to submit an alternative address for service on Carson. Relator furnished to the board two other addresses for Carson—one in Cleveland and the other in North Carolina. On July 13, 2022, the board attempted to serve Carson at each of those addresses by certified mail and by ordinary mail with certificates of mailing. Both certified mailings were returned marked “UNABLE TO FORWARD”; the North Carolina envelope was also marked “INSUFFICIENT ADDRESS,” and the Cleveland envelope was also marked “UNCLAIMED.” (Capitalization sic.) The ordinary mail sent to North Carolina was returned marked “Does Not Live Here.” However, the complaint sent to the Cleveland address by ordinary mail was not returned; therefore, service of the complaint on Carson is deemed complete. *See* Gov.Bar R. VII(2)(C).

{¶ 4} On January 6, 2023, relator filed a motion for default pursuant to Gov.Bar R. VII(12)(B) that contained a statement of its efforts to engage with Carson, purported sworn or certified documentary prima facie evidence in support of the allegations of the complaint, citations to authorities relator was relying on, a statement of mitigating factors or exculpatory evidence known to relator, a statement of the relief sought, and a certificate of service stating that the motion had been sent by ordinary mail to Carson at the Cleveland and South Euclid addresses. *See* Gov.Bar R. VII(12)(B). Carson has not answered the complaint or responded to the motion for default.

{¶ 5} A three-member panel of the board found that Carson was in default and that relator had proved by a preponderance of the evidence that Carson engaged in the unauthorized practice of law as described in both of the charged counts. The panel recommended that Carson be enjoined from engaging in additional acts of

the unauthorized practice of law and be ordered to pay a civil penalty of \$5,000 for each of the two violations. The board adopted the panel's findings and recommended sanction but recommended that we limit our finding of the unauthorized practice of law to Carson's holding himself out as an attorney in the two matters.

{¶ 6} For the reasons that follow, we find that relator has submitted sworn or certified prima facie evidence demonstrating that Carson engaged in the unauthorized practice of law by holding himself out as an attorney as charged in Count One of relator's complaint and we agree with the board's assessment that an injunction and a civil penalty for that violation are warranted. However, we reject the board's findings of fact, conclusions of law, and recommendation with respect to Count Two and dismiss it based on the insufficiency of the evidence.

**EVIDENTIARY REQUIREMENTS IN DEFAULT  
UNAUTHORIZED-PRACTICE-OF-LAW PROCEEDINGS**

{¶ 7} Gov.Bar R. VII(12)(B)(2) requires a relator to submit "[s]worn or certified documentary prima facie evidence" to support the allegations of the complaint in a motion for default judgment in an unauthorized-practice-of-law ("UPL") proceeding. Obviously, the respondent in a default UPL proceeding has not entered an appearance and thus cannot object to the relator's evidence. Therefore, if the requirements of the rule are to have any meaning, it is incumbent on this court to enforce them.

{¶ 8} Gov.Bar R. VII does not define the phrase "sworn or certified documentary prima facie evidence." Prima facie evidence is "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." *Black's Law Dictionary* 701 (11th Ed.2019). This court has held, in the context of a criminal case, that "[p]rima facie evidence is such evidence as is sufficient \* \* \* to establish the fact of guilt, and, if believed by the trier of the facts, it is sufficient for that purpose, unless rebutted or the contrary proved." *State v. Cummings*, 25 Ohio

St.2d 219, 267 N.E.2d 812 (1971), paragraph two of the syllabus. Thus, in a default UPL proceeding, there must be sufficient sworn or certified documentary evidence submitted with the default motion for a trier of fact to find that each element of the charged offense, in the absence of contradictory evidence, has been proved by a preponderance of the evidence. *See* Gov.Bar R. VII(12)(G).

{¶ 9} “Documentary evidence” is “[e]vidence supplied by a writing or other document, which must be authenticated before the evidence is admissible.” *Black’s* at 699. For the evidence to be admissible, there must be authentication or identification “sufficient to support a finding that the matter in question is what its proponent claims,” Evid.R. 901(A)—hence the need for the evidence to be *sworn* or *certified* in default proceedings, in which there will be no oral testimony. Certified copies of public records are self-authenticating and do not require extrinsic evidence of authenticity. Evid.R. 902(4). But other documents must be sworn to be admissible in a default proceeding. A “sworn statement” is “[a] statement given *under oath*; an affidavit.” (Emphasis added.) *Black’s* at 1699.

{¶ 10} “An affidavit must appear, on its face, to have been taken before the proper officer and in compliance with all legal requisites. A paper purporting to be an affidavit, but not to have been sworn to before an officer, is not an affidavit.” *In re Disqualification of Pokorny*, 74 Ohio St.3d 1238, 657 N.E.2d 1345 (1992); *see also* R.C. 2319.02 (“An affidavit is a written declaration under oath \* \* \*”). Accordingly, this court has rejected documents bearing a notary public’s stamp but not her signature and lacking a notarial jurat or any other indication that the declarants had sworn to their statements or had made their statements under oath. *See State ex rel. White v. Franklin Cty. Bd. of Elections*, 160 Ohio St.3d 1, 2020-Ohio-524, 153 N.E.3d 1, ¶ 13; *see also* R.C. 147.542 (setting forth the requirements for a valid notarial certificate).

{¶ 11} In *Cincinnati Bar Assn. v. Newman*, 124 Ohio St.3d 505, 2010-Ohio-928, 924 N.E.2d 359, ¶ 7, we analogized the requirements of Civ.R. 56(E) for

“[s]worn or certified copies” of documents submitted in support of motions for summary judgment to the requirement for “sworn or certified documents” submitted in support of a default motion in an attorney-discipline case under former Gov.Bar R. V(6)(F)(1).<sup>1</sup> Civ.R. 56(E) provides that “[s]worn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit.” And we have held, “ ‘The requirement of Civ.R. 56(E) that sworn or certified copies of all papers referred to in the affidavit be attached is satisfied by attaching the papers to the affidavit, coupled with a statement therein that such copies are true copies and reproductions.’ ” *Newman* at ¶ 7, quoting *State ex. rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981). Applying that standard to the evidence submitted in *Newman*, we found that the record lacked sufficient sworn or certified documentary prima facie evidence to support the relator’s allegations of attorney misconduct. *Newman* at ¶ 9.

{¶ 12} In addition to requiring sworn or certified copies of all papers referred to, Civ.R. 56(E) requires affidavits—i.e., “sworn statements,” *Black’s* at 1699—submitted with motions for summary judgment to (1) be made on personal knowledge, (2) set forth such facts as would be admissible into evidence, and (3) show that the affiant is competent to testify to the matters stated in the affidavit. We now hold that these requirements, directed toward ensuring the admissibility of the facts contained in an affidavit or sworn statement, apply equally to the requirement for “sworn” evidence submitted in support of default motions in UPL proceedings.

{¶ 13} Having established the form of the sworn evidence necessary to support a default motion in a UPL proceeding, we turn to the evidence submitted with relator’s motion in this case.

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1. The requirement for sworn or certified documentary prima facie evidence in support of a default motion in an attorney-discipline proceeding is now set forth in Gov.Bar R. V(14)(F)(1)(b). The requirements under that rule and its predecessor discussed in *Newman* are identical to the requirement of Gov.Bar R. VII(12)(B)(2) in a default UPL proceeding.

**RELATOR’S DEFAULT EVIDENCE**

{¶ 14} Relator has submitted a certificate from this court’s Office of Attorney Services showing that Carson, an Ohio resident, has never been admitted to the practice of law in Ohio and that he has not applied for or been granted pro hac vice status in this state. In addition, relator has submitted additional documents related to each of the two counts charged in its complaint.

**Count One: The Jackson Matter**

{¶ 15} The first count of relator’s complaint relates to Carson’s conduct with respect to his cousin, Randa Jackson. In April 2021, Jackson filed a grievance against Carson with relator. In the grievance, Jackson stated that Carson had told her that he was an attorney, given her advice regarding a dispute she was having with a contractor, and filed legal documents on her behalf.

{¶ 16} Jackson’s grievance consists of a printout of a completed online complaint form that bears her electronic signature below the statement, “By signing this form, I attest that my statements herein and the documents attached are true and accurate to the best of my knowledge.” As noted above, “[a] paper purporting to be an affidavit, but not to have been sworn to before an officer, is not an affidavit.” *Pokorny*, 74 Ohio St.3d at 1238, 657 N.E.2d 1345. Jackson’s signature is not notarized and offers no indication that it was sworn or affirmed before an officer. Therefore, Jackson’s grievance is not an affidavit and does not constitute sworn evidence.

{¶ 17} Furthermore, even if Jackson’s grievance had been properly sworn or certified, the only indication in that document that Carson *drafted* or *prepared* legal documents on her behalf as the panel found consists of Jackson’s response to the question “What services did this person provide?” Next to that question, Jackson checked a box, among others, indicating that Carson had “[s]elected, drafted, or completed legal forms, documents, or agreements” on her behalf. Jackson’s narrative explaining the details of her grievance states only that Carson “*filed* [a] claim and

amendment against contractor” and “*sent* subpoenas to banks and researched the backgrounds of the defendants in [her] case.” (Emphasis added.) But neither of those actions necessarily encompasses the drafting of those documents. Moreover, with the exception of the subpoenas discussed below, relator has not submitted copies—let alone sworn copies—of any of the documents that Carson allegedly prepared.

{¶ 18} In addition to Jackson’s grievance, relator submitted an affidavit from bar counsel Christopher Joseph Klasa stating that it is based on his personal knowledge and establishes his competency to testify. *See* Evid.R. 601 (providing that every person is competent to be a witness unless disqualified for certain enumerated reasons, including that the person is incapable of expressing himself or herself so as to be understood or is incapable of understanding the duty of a witness to tell the truth—none of which apply here).

{¶ 19} According to Klasa’s affidavit, during relator’s investigation of Jackson’s grievance, Carson spoke with a member of relator’s Committee on the Unauthorized Practice of Law. After receiving a copy of relator’s draft complaint in December 2021, Carson sent relator’s counsel an email describing the work he had performed in Jackson’s matter. Klasa’s affidavit identifies that email and states that “[a] true and accurate copy \* \* \* is attached as Exhibit F.” With regard to the legal aspects of Jackson’s matter, Carson stated in the email that they had talked about and worked together on her case and that they had “drafted it,” without stating exactly what “it” was. Carson represented that “[t]his is not the kind of behavior [he would] ever indulge in again” and that he did not recall issuing document subpoenas as an attorney on Jackson’s behalf. Carson closed that email with the typed signature “Brett W. Carson Jr.”

{¶ 20} Also identified in Klasa’s affidavit and attached thereto are true and accurate copies of four subpoenas bearing the caption for Jackson’s case and two file stamps of the Cuyahoga County Clerk of Courts dated January 15 and 19, 2021. The second page of each of those subpoenas includes an affidavit of service bearing

what appears to be Carson’s signature above the circled designation “Attorney,” indicating that he was serving the subpoenas as an attorney on behalf of Jackson. The sworn evidence consisting of Klasa’s affidavit authenticating Carson’s own email and the subpoenas, which contain Carson’s own affidavits of service, constitute prima facie evidence that Carson held himself out as an attorney as charged in Count One of relator’s complaint.

**Count Two: The Ganesh Matter**

{¶ 21} In August 2021, attorney LeeDaun C. Williams filed a grievance against Carson on behalf of her client Rajeswari Chandrasekar Ganesh. Williams attached copies of multiple communications that were purportedly exchanged between Carson and Ganesh. In that grievance, Williams attested that Carson had prepared legal documents for Ganesh and had provided legal advice to her in connection with a Cuyahoga County domestic-relations case and that he had collected a “retainer” of \$2,500 from her for that representation. Although the grievance was signed under an attestation that the statements it contained and the documents attached were true and accurate to the best of Williams’s knowledge, it was not notarized. Therefore, it is not an affidavit and does not constitute sworn evidence as required by Gov.Bar R. VII(B)(2).

{¶ 22} In addition to that infirmity, it is evident that Williams did not possess personal knowledge of the facts she relayed to relator in her grievance. In response to a question on the complaint form asking how she had become aware that Carson was providing legal services, Williams stated: “[Ganesh] informed me that Brett Carson prepared legal filings for her between her former attorney and myself. I asked for documentation and she provided it to me. Documentation from Brett Carson outlines the services he provided to [Ganesh].”

{¶ 23} This court has previously found that statements of an affiant in a default UPL proceeding that were not based on personal knowledge consisted of nothing more than inadmissible hearsay. *Ohio State Bar Assn. v. Pro-Net Fin., Inc.*,

168 Ohio St.3d 115, 2022-Ohio-726, 196 N.E.3d 792, ¶ 23. We held that those statements did not constitute proper sworn or certified evidence and could not support a finding that the respondent engaged in the unauthorized practice of law. *Id.*; see also *Dayton Bar Assn. v. Sebree*, 104 Ohio St.3d 448, 2004-Ohio-6560, 820 N.E.2d 318, ¶ 9 (holding that a motion for default in an attorney-discipline proceeding supported only by summary, conclusory, and hearsay-filled affidavits is not supported by the prima facie evidence of misconduct required by rule). Because relator offers Ganesh’s out-of-court statements to Williams to prove the truth of the matter asserted—i.e., that Carson held himself out as an attorney and prepared legal documents and filed them on her behalf—those statements constitute inadmissible hearsay. And under *Pro-Net* and *Sebree*, they would not be admissible to prove that Carson engaged in the unauthorized practice of law even if Williams’s grievance had been notarized.

{¶ 24} The documents that Williams offered to support the allegations in her grievance—i.e., the emails that Ganesh purportedly exchanged with Carson—are likewise infirm. It is true that Williams has attested that those documents are true and accurate to the best of her knowledge, but she did not do so under oath. Nor is there evidence indicating that she possessed personal knowledge of that fact. The body of Williams’s grievance states only that she “asked for documentation and [Ganesh] provided it to [her]” and that the “[d]ocumentation from Brett Carson outlines the services he provided to [Ganesh].” Those documents include seven separate emails from Ganesh to Williams. Attached to those emails are other emails that were exchanged between Ganesh and Carson.

{¶ 25} The statements attributed to Carson in those emails—particularly the statements in a December 13, 2020 email regarding the documents he had prepared and the services he had provided to Ganesh—could be entirely excluded from the definition of hearsay as admissions by a party-opponent. See Evid.R. 801(D)(2) (providing that a statement is not hearsay if it is offered against a party and is the



party’s own statement). But relator has offered only hearsay statements from Williams containing hearsay statements from Ganesh to establish the origin of those documents. Because the emails proffered by relator have not been properly sworn under Gov.Bar R. VII(12)(B) and are not based on personal knowledge, they are not admissible to establish that Carson engaged in the unauthorized practice of law. Under *Newman*, 124 Ohio St.3d 505, 2010-Ohio-928, 924 N.E.2d 359, and as explained in our holding above, Gov.Bar R. VII(12)(B) required relator to submit an affidavit from a person with personal knowledge of the origin of the emails (e.g., Ganesh) (1) setting forth such facts as would be admissible into evidence, (2) showing that the affiant is competent to testify to the matters set forth in the affidavit, (3) identifying those documents as emails exchanged between Carson and Ganesh, and (4) stating that they are true and accurate copies of the originals.

{¶ 26} Because relator has not presented any sworn or certified documentary prima facie evidence regarding Carson’s conduct relative to the Ganesh matter, we dismiss Count Two of relator’s complaint.

**CARSON ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW**

{¶ 27} This court has original jurisdiction over the admission to the practice of law in Ohio, the discipline of persons so admitted, and “all other matters relating to the practice of law,” Article IV, Section 2(B)(1)(g), Ohio Constitution, which includes the regulation of the unauthorized practice of law, *Royal Indemn. Co. v. J.C. Penney Co., Inc.*, 27 Ohio St.3d 31, 34, 501 N.E.2d 617 (1986); *Greenspan v. Third Fed. S. & L. Assn.*, 122 Ohio St.3d 455, 2009-Ohio-3508, 912 N.E.2d 567, ¶ 16. The purpose of that regulation is to “protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation.” *Cleveland Bar Assn. v. CompManagement, Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181, ¶ 40.

{¶ 28} We have defined the unauthorized practice of law as including both the “rendering of legal services for another,” Gov.Bar R. VII(31)(J)(1)(a) through

(c), and the “[h]olding out to the public or otherwise representing oneself as authorized to practice law in Ohio” by any person who is not authorized to practice law under our rules, Gov.Bar R. VII(31)(J)(1)(d). Indeed, nonlawyers are prohibited from holding themselves out “in any manner as an attorney at law” and from representing that they are authorized to practice law “orally or in writing, directly or indirectly.” R.C. 4705.07(A)(1) and (2).

{¶ 29} Relator’s sworn evidence with respect to Count One demonstrates that Carson held himself out as an attorney in affidavits confirming the service of four subpoenas in Jackson’s legal matter. We therefore adopt the board’s recommendation and find that Carson engaged in the unauthorized practice of law with respect to that count.

**AN INJUNCTION AND CIVIL PENALTY ARE WARRANTED**

{¶ 30} Because we have found that Carson engaged in the unauthorized practice of law in the Jackson matter, we adopt the board’s recommendation that we issue an injunction prohibiting him from further engaging in the unauthorized practice of law in Ohio.

{¶ 31} The board also recommends that we impose a civil penalty of \$5,000 for this violation pursuant to Gov.Bar R. VII(14)(B). That provision instructs us to consider (1) the degree of a respondent’s cooperation during the investigation, (2) the number of times the respondent engaged in the unauthorized practice of law, (3) the flagrancy of the respondent’s violations, (4) any harm that the violations caused to third parties, and (5) any other relevant factors, which may include the aggravating and mitigating circumstances identified in UPL Reg. 400(F). *See also Disciplinary Counsel v. Ward*, 155 Ohio St.3d 488, 2018-Ohio-5083, 122 N.E.3d 168, ¶ 13.

{¶ 32} Carson’s participation in relator’s investigation of this matter consisted of a single telephone conversation with relator’s investigator and an email he sent in response to relator’s notice of intent to file a complaint against him.

Moreover, Carson failed to participate in the formal proceedings in any way. Consequently, the board found that his cooperation was minimal, at best. As discussed above, relator’s evidence shows that Carson engaged in a single instance of the unauthorized practice of law by holding himself out as an attorney with respect to the Jackson matter. Although the board found that his conduct in the Jackson matter was not an isolated incident because it occurred over a period of at least several months, our findings of the unauthorized practice of law are limited to his conduct in holding himself out as an attorney on the return of service for four separate subpoenas on a single day. Based on the record before us, it appears that the only harm Jackson suffered was delay in the resolution of her legal matter.

{¶ 33} Having weighed these factors, we agree with the board’s assessment that a civil penalty of \$5,000—one-half the maximum amount authorized per offense by Gov.Bar R. VII(14)(B)—is warranted for Carson’s single instance of the unauthorized practice of law in this case.

**CONCLUSION**

{¶ 34} Accordingly, we enjoin Brett Carson from engaging in further acts constituting the unauthorized practice of law in Ohio. We also order Carson to pay a civil penalty of \$5,000. Costs are taxed to Carson.

Judgment accordingly.

KENNEDY, C.J., and FISCHER, DEWINE, DONNELLY, STEWART, BRUNNER, and DETERS, JJ.

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Tucker Ellis, L.L.P., and Chad M. Eggspuehler; and Christopher J. Klasa and Kelli J. Perk, Bar Counsel, for relator.

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### III. Recasting Unauthorized Practice of Law in the Era of Generative AI

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

**Joseph J. Avery,\* Patricia Sánchez Abril,\*\* Alissa del Riego\*\*\***

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

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

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

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## Introduction

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

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

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

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



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

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

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

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

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

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

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

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

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

<sup>7</sup> *Id.*

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

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

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

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

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

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

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See LEGAL SERVS. CORP., REPORT OF THE SUMMIT ON THE USE OF TECHNOLOGY TO EXPAND ACCESS TO JUSTICE 10 (2013), [https://www.lsc.gov/sites/default/files/LSC\\_Tech%20Summit%20Report\\_2013.pdf](https://www.lsc.gov/sites/default/files/LSC_Tech%20Summit%20Report_2013.pdf) [<https://perma.cc/W38F-FYBP>] (“The Legal Services Corporation

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

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

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

<sup>16</sup> *Id.*

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

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

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

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

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

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

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

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

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

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

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

away from the rational-basis test when considering the right to occupational freedom.<sup>26</sup>

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

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

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

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

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

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

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

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

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

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

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

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

## I. ChatGPT Meets UPL

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

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

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

<sup>35</sup> GILLIAN K. HADFIELD, RULES FOR A FLAT WORLD 228 (2017).



A. *What is UPL?*

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

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

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

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

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

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

<sup>40</sup> Wolfram, *supra* note 22, at 3.

<sup>41</sup> *Id.* at 4.

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

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

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

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 6-7.

<sup>44</sup> *Id.* at 7.

<sup>45</sup> *Id.* at 4-5.

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

<sup>47</sup> 421 U.S. 773 (1975).

<sup>48</sup> *Id.* at 776.

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

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

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

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<sup>49</sup> *Id.* at 776-77.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Nolan-Haley, *supra* note 39, at 262.

<sup>54</sup> 421 U.S. at 791.

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

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

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

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

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

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

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

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

<sup>61</sup> *Id.* at r. 5.3.

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

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

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

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

### *B. UPL's Existential Problems*

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

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

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

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

<sup>67</sup> *Id.*

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

<sup>69</sup> Dzienkowski & Peroni, *supra* note 39, at 92.

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

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

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

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

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

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

<sup>74</sup> See Resh, *supra* note 73, at 88.

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

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

<sup>77</sup> Denckla, *supra* note 37, at 2591-92.

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

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

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

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<sup>78</sup> Swank, *supra* note 55, at 235.

<sup>79</sup> 373 U.S. 379, 381 (1963).

<sup>80</sup> *Id.* at 404.

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

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

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

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

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

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<sup>84</sup> *Id.*

<sup>85</sup> See AM. BAR ASS’N CTR. FOR PRO. RESP., TASK FORCE ON MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT & RECOMMENDATION TO THE HOUSE OF DELEGATES 5 (adopted Aug. 11, 2003), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/model-def\\_migrated/taskforce\\_rpt\\_803.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/taskforce_rpt_803.pdf) [<https://perma.cc/7QUH-Y3ZT>].

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

<sup>87</sup> Swank, *supra* note 55, at 232.

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

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



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

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

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<sup>90</sup> 348 U.S. 483, 487-88 (1955).

<sup>91</sup> 574 U.S. 494 (2015).

<sup>92</sup> *Id.* at 501.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 500.

<sup>95</sup> *Id.* at 501.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 503-04.

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

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

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

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

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

<sup>101</sup> Jason Tashea, *Rash of UPL Lawsuits Filed by LegalForce Show its Failure to Compete, Defendants Say*, AM. BAR ASS’N J. (Jan. 9, 2018), [https://www.abajournal.com/news/article/rash\\_of\\_upl\\_lawsuits\\_filed\\_by\\_legalforce\\_show\\_failure\\_too\\_compete\\_defendant](https://www.abajournal.com/news/article/rash_of_upl_lawsuits_filed_by_legalforce_show_failure_too_compete_defendant) [https://perma.cc/5TV5-AGDK].

<sup>102</sup> Spahn, *supra* note 30, at 47.

<sup>103</sup> McGinnis & Pearce, *supra* note 27, at 3042.

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

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

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

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<sup>104</sup> Rigertas, *supra* note 21, at 100, 112.

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

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

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

spectrum.<sup>108</sup> The Obama Administration,<sup>109</sup> the 2016 Clinton presidential campaign,<sup>110</sup> the Hamilton Project at the Brookings Institution,<sup>111</sup> and libertarian groups<sup>112</sup> have all taken positions against licensing.

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

### C. UPL in Action (Causing Inaction)

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

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<sup>108</sup> Haupt, *supra* note 106, at 515-16.

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

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

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

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

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

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

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

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

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

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

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

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

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

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

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

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

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

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

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

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 29-30.

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

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

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

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<sup>125</sup> *See id.* at \*1.

<sup>126</sup> *See id.* at \*1-2.

<sup>127</sup> *Id.* at \*6-7, \*10.

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

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

<sup>130</sup> *Id.*

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

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

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

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

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

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

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

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



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

## II. Human-AI Legal Collaboration

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

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

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

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

<sup>138</sup> *See, e.g., McGinnis & Pearce, supra* note 27, at 3046.

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

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

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

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

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

<sup>141</sup> *Id.* at (b)-(e).

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

<sup>143</sup> *Id.* at 553.

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

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

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

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

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

<sup>147</sup> Murray et al., *supra* note 142, at 556.

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

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

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

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

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

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

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

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

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

<sup>155</sup> 640 S.E.2d at 875-76.

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

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

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

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 876.

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

<sup>159</sup> See sources cited *supra* note 32.

<sup>160</sup> McGinnis & Pearce, *supra* note 27, at 3046.

<sup>161</sup> Linna, *supra* note 28, at 412.

<sup>162</sup> *Id.*

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

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

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

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 413.

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

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

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

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

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

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

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

<sup>169</sup> *Id.*

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

A recent article explored the extent to which different professions will be impacted by LLMs, such as GPT-4.<sup>176</sup> The authors looked at “exposure percentages,” where exposure was defined as reducing the time it takes to complete a task by at least 50%. They projected that as much as 70% of lawyers’ tasks are exposed to GPT-powered software.<sup>177</sup>

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

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

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

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

<sup>173</sup> Thorp, *supra* note 171.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

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

<sup>177</sup> *Id.* at 16.



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

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

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

<sup>179</sup> *Id.*

### III. The Case for Dismantling UPL Rules

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

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

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<sup>180</sup> Bernstein, *supra* note 23, at 289 n.9.

<sup>181</sup> 469 S.W.3d 69 (Tex. 2015).

<sup>182</sup> Bernstein, *supra* note 23, at 289 n.9.

<sup>183</sup> 469 S.W.3d at 87.

<sup>184</sup> *Id.*

<sup>185</sup> Bernstein, *supra* note 23, at 289.

<sup>186</sup> Neily, *supra* note 26, at 306.

<sup>187</sup> *Id.* at 310.

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

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

Among other reasons, Neily suggests that heightened scrutiny regarding occupational licenses may be beneficial because policymakers will be required to exercise at least a modicum of care when they restrict the right to work.<sup>193</sup> This would be impactful in the legal domain, where decades of research has shown that UPL rules have caused harm<sup>194</sup> and where the inherent-powers doctrine restricts individuals’ ability to seek recourse through the political process. Applying First Amendment analysis to UPL rules risks conflating political, artistic, commercial, and other types of speech in the

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

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

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

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

<sup>193</sup> Neily, *supra* note 26, at 311.

<sup>194</sup> See *infra* Section III.B.

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

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

#### A. *Enforcement Issues*

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

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<sup>195</sup> Linna, *supra* note 28, at 399.

democratization of information. For example, over the eight-year period that ran from 2006 to 2014, revenues in traditional journalism fell by about a third, and employment decreased by about 17,000 people; the market value of newspapers plummeted.<sup>196</sup> Spurred by information democratization, legal-technology companies have sprouted and proliferated, in spite of the fact that UPL laws force them to operate in legal gray areas.<sup>197</sup> In 2009, only 15 legal startups were listed on the startup-related website, AngelList.<sup>198</sup> By April 2014, there were more than 400 legal startups listed.<sup>199</sup> By January 2015, the number had grown to more than 720 startups.<sup>200</sup> As of November 2015, there were 976 entities listed under the “legal startups” category<sup>201</sup> and 210 entities listed under the “legal tech startups” category.<sup>202</sup>

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

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<sup>196</sup> See McGinnis & Pearce, *supra* note 27.

<sup>197</sup> Linna, *supra* note 28, at 389.

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

<sup>199</sup> *Id.*

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

<sup>201</sup> Linna, *supra* note 28, at 389.

<sup>202</sup> *Id.*

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

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

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

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<sup>204</sup> Shipman, *supra* note 152, at 940.

<sup>205</sup> Linna, *supra* note 28, at 393.

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

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

<sup>208</sup> *Id.*

<sup>209</sup> Roose, *supra* note 206.

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

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

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

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

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<sup>211</sup> Belkin, *supra* note 207.

<sup>212</sup> *Id.*

<sup>213</sup> Huang, *supra* note 8.

<sup>214</sup> *Id.*

<sup>215</sup> Swank, *supra* note 55, at 225.

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

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

#### *B. A Frustrated (or Perhaps False) Aim*

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

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

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

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



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

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

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

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

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

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

<sup>222</sup> LEGAL SERVS. CORP., *supra* note 15.

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

<sup>224</sup> Linna, *supra* note 28, at 393.

<sup>225</sup> Denckla, *supra* note 37, at 2581.

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

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

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

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

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

the client is purchasing after all is nothing more than a commoditized service.<sup>229</sup>

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

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

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<sup>229</sup> *Id.*

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

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

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

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

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

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

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

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

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

<sup>237</sup> Buolamwini & Gebru, *supra* note 233, at 77.

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

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

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

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

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

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

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<sup>240</sup> McGinnis & Pearce, *supra* note 27, at 3043.

<sup>241</sup> *Sperry v. Florida*, 373 U.S. 379, 404 (1963).

<sup>242</sup> *Id.*

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

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

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

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

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

<sup>244</sup> See sources cited *supra* note 32.

<sup>245</sup> Utah Innovation Off., *supra* note 32.

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

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

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

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

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

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

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

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

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

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

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



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

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

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

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

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

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

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

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

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

#### *A. The Recommendation Unpacked*

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

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

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<sup>257</sup> Engstrom & Gelbach, *supra* note 4, at 1099.

<sup>258</sup> MODEL RULES OF PRO. CONDUCT r. 5.3 (2019).

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

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

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

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

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

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

<sup>261</sup> MODEL RULES OF PRO. CONDUCT r. 5.5(b)(2) (2019).

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

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

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<sup>262</sup> This may also be clarified in a comment to the model rule.

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

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

medical providers with privileges should they choose hospital care.<sup>265</sup>

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

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

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

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

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

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

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

### *B. Consideration One: The Importance of Torts*

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

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<sup>267</sup> See *supra* Section III.B.

<sup>268</sup> Justice/FTC Letter, *supra* note 218.

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

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

harmed client is generally limited. Bar associations might investigate and discipline the attorney, but that largely works to sanction the attorney and prevent others (potential future clients) from being harmed.<sup>271</sup> And bar censure does not necessarily accomplish even that. How many clients review an attorney's bar notices before hiring the attorney? Moreover, a harmed client can only recover damages through a legal malpractice case, which she can, of course, pursue even in the absence of UPL rules. However, attorneys are infamously reluctant to take on such matters since they involve suing colleagues. So the only remaining justification for UPL rules on competency grounds is at the gatekeeping stage: law school and bar exam requirements. In other words, UPL rules mandate baseline education and certification for those seeking to practice law. Nevermind that commentators, including Barack Obama, have made strong arguments that law school is at least partly (i.e., one third) superfluous<sup>272</sup> and that bar exams might be both unnecessary and partially responsible for the death of diversity in the legal profession given racial differences in passage rates.<sup>273</sup> The question is whether baseline competency can be achieved without these requirements.

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

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

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

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

<sup>274</sup> Rotenberg, *supra* note 154, at 736.

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

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

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

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

<sup>277</sup> Rotenberg, *supra* note 154, at 736.



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

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

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

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

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

<sup>279</sup> Allyn, *supra* note 11.

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

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

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

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

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

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

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

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

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<sup>283</sup> Engstrom & Gelbach, *supra* note 4, at 1099.

<sup>284</sup> *Id.* at 1001-07.

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

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

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

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

<sup>287</sup> FLA. STAT. ANN. § 458.320(5)(f) (West 2023).

<sup>288</sup> *Id.*

<sup>289</sup> See *supra* Section I.C.

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

### **Conclusion**

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

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

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<sup>290</sup> McGinnis & Pearce, *supra* note 27, at 3065.

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

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

## IV. Working Group on AI Report



Minnesota  
State Bar  
Association

# WORKING GROUP ON AI

Implications of Large Language Models (LLMs)  
on the Unauthorized Practice of Law (UPL)  
and Access to Justice

JUNE  
2024



The MSBA Assembly adopted this report and its recommendations as noted on June 20, 2024.

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# SECTION 1.

## Introduction

In November 2022, ChatGPT was released, and in just two months, it had over 100 million monthly active users — making ChatGPT the fastest-growing consumer application in history. Large Language Models (LLMs) like ChatGPT have the potential to transform legal practice, since the law is entirely words. Lawyers’ primary tasks: (1) read words, (2) analyze words, and (3) write words. For the first time in human history, a machine can do all three of those things at superhuman speed and at a postgraduate level. LLMs can potentially transform legal practice; they can also potentially transform society and its adherence to the rule of law.

In early 2023, the Minnesota State Bar Association (MSBA) appointed us, the members of this Working Group, to determine how “artificial intelligence” (AI)<sup>1</sup> might relate to the unauthorized practice of law (UPL). The group’s mandate was wide and largely undefined, a welcome development that gave our Working Group the latitude to explore broader potential effects than if the MSBA had made our mandate more circumscribed. As such, we have expanded this group’s mandate to include analysis of how LLMs might relate to lawyers’ ethical obligations under the Minnesota Rules of Professional Conduct, as well as how LLMs might be used to improve access to justice.

During this Working Group’s discussions over the past year, we have analyzed the relationship between AI and UPL, as well as exploring how those concepts might relate to (and potentially improve) the access-to-justice crisis. We have long known that our current legal system does not properly serve most legal needs, which remain unmet. Knowing that AI continues to evolve, our objective has been to examine how these advancements might align with helping fulfill our profession’s ethical and legal obligations to help ensure justice for all.

We also explored what “Artificial Intelligence” and “Large Language Models” mean, and at a basic level how they work. We believe further clarity about AI-backed tools will be critical to sensible oversight of their use in connection with the law. As a simple framing concept, such tools do not “think.” Rather, in their most basic concept, they convert text to a string of numbers (vector embeddings) and rely on statistics and math to “predict” the next set of numbers which are then displayed as text. AI tools have been used for many years in various contexts, including legal research. The expansion into these so-called LLMs supported by massive computing power and offered broadly to consumers to generate new text based on a user’s query is driving this change.

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<sup>1</sup> Throughout this document, the Working Group uses the terms “AI” and “LLMs” and “Generative AI” interchangeably.

Central to our inquiry — determining the role of “artificial intelligence” in the context of UPL — are the definitions and distinctions between “practice of law,” “legal information,” and “legal advice.” These terms have evaded bright-line definitions throughout their history, and we don’t believe that this Working Group will succeed in providing more-meaningful definitions, where so many others (e.g., courts) have consistently failed to do so. But this Working Group’s document may help elucidate how existing definitions are probably insufficient today, where the line between “legal information” and “legal advice” is largely indistinguishable.

In doing our work, our focus has extended beyond the technical aspects of AI: We have also addressed the ethical, regulatory, and practical implications of AI in legal services. Throughout, we anchor our discussion with Minnesota’s rules, judicial opinions, and professional conduct standards in Minnesota — as well as similar decisions and developments around the country.

Our group greatly benefited from our June 2023 meeting with Susan Humiston, Director of the Office of Lawyers Professional Responsibility, and ethics attorney Eric Cooperstein. In that meeting, we discussed the potential for sandboxes in regulating legal technologies, cases where non-lawyers provided legal assistance to help serve the access-to-justice gap (e.g., Upsolve’s First Amendment claim), and the role of LLM-based disclaimers. We’re grateful for the contributions of attorneys Humiston and Cooperstein, whose conversation underscored the need for a nuanced approach to legal technologies, balancing consumer protection and professional standards with potential benefits to access-to-justice initiatives.

Despite our profession’s ethical obligations to help ensure equal justice for all, we must acknowledge our failure to provide adequate access to justice. In 2022, the Legal Services Corporation reported that low-income Americans do not receive sufficient legal help for 92% of their substantial civil legal problems. LLMs offer powerful tools to address this justice gap. By assisting self-represented litigants with forms, navigation, and plain-language translation, LLMs have the potential to democratize access to justice, enabling more equitable participation in our legal system.

To better harness the potential of LLMs in serving access-to-justice initiatives, we propose the creation of an Access to Justice Legal Sandbox. This regulatory sandbox would provide a controlled environment for organizations to use LLMs in innovative ways, without the fear of UPL prosecution. By permitting experimentation and evaluation, this sandbox could foster legal innovation while ensuring that the deployment of these technologies is both safe and beneficial. This approach aligns with our profession’s commitment to justice and fairness, ensuring that the benefits of LLMs are accessible to all Minnesotans, regardless of their ability to afford legal representation. Given the dire need for support, we believe this Sandbox approach should move quickly.

We also acknowledge that MSBA members must learn how to integrate LLMs and technology into their practices. We acknowledge that lawyers might have many questions about their livelihoods. And we encourage the MSBA to provide educational sessions to its members regarding LLMs and their implications today. And also discussing how legal practice might be affected in the near future.

Throughout this document, we outline an approach that seeks to provide a nuanced analysis that aligns with both the letter of the UPL law, as well as its spirit. We assess the broader implications of AI in the legal sector, considering both risks associated with over-regulation, as well as AI's potential benefits in enhancing access to justice. Balancing these factors can help ensure that our profession demonstrates its commitment to upholding the central tenet of our Constitution: equitable justice for all.

Our goal is to provide some guidance on navigating the complexities of LLMs usage for legal tasks, helping ensure that both lawyers and the public can harness this powerful tool to analyze, interpret, and align with the law. While some in our profession approach Large Language Models with apprehension, our year-long analysis has filled us with optimism. We see LLMs not as a threat, but as a beacon of hope, offering unprecedented opportunities to enhance our profession's service and extend a helping hand to those most in need of legal assistance. In doing so, we can simultaneously uphold our profession's commitment to justice, fairness, and public protection.

## SECTION 2.

### Overview of UPL in Minnesota

As a threshold matter, determining whether anyone (or any tool) violates the UPL statute first requires an analysis of that statute's text, as well as interpretive caselaw.

#### 2.1. Minnesota's UPL Statute

Below are the relevant portions of Minnesota's Unauthorized Practice of Law statute:

Subdivision 1. **Prohibitions.** It shall be unlawful for any **person** or **association of persons**, except members of the bar of Minnesota admitted and licensed to practice as attorneys at law, to **appear as attorney or counselor at law in any action or proceeding in any court** in this state to maintain, conduct, or defend the same, except personally as a party thereto in other than a representative capacity, or, by word, sign, letter, or advertisement, to hold out as competent or qualified to **give legal advice or counsel**, or to **prepare legal documents**, or as being engaged in advising

or counseling in law or acting as attorney or counselor at law, or in **furnishing to others the services of a lawyer** or lawyers, or, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to another legal services, or, for or without a fee or any consideration, to prepare, directly or through another, for another person, firm, or corporation, any will or testamentary disposition or instrument of trust serving purposes similar to those of a will, or, for a fee or any consideration, to **prepare for another person**, firm, or corporation, **any other legal document**, except as provided in subdivision 3.

Subd. 2. **Corporations**. No corporation, organized for pecuniary profit, except an attorney's professional firm organized under chapter 319B, by or through its officers or employees or any one else, shall maintain, conduct, or defend, except in its own behalf when a party litigant, any action or proceeding in any court in this state, or shall, by or through its officers or employees or any one else, give or assume to **give legal advice or counsel** or perform for or furnish to another person or corporation **legal services**; or shall, by word, sign, letter, or advertisement, solicit the public or any person to permit it to prepare, or cause to be prepared, any will or testamentary disposition or instrument of trust serving purposes similar to those of a will, or **hold itself out** as desiring or willing to **prepare any such document**, or to give legal advice or legal services relating thereto or to **give general legal advice or counsel**, or to act as attorney at law or as supplying, or being in a position to supply, the services of a lawyer or lawyers; or shall to any extent engage in, or hold itself out as being engaged in, the business of supplying services of a lawyer or lawyers; or shall cause to be prepared any person's will or testamentary disposition or instrument of trust serving purposes similar to those of a will, or any other legal document, for another person, firm, or corporation, and receive, directly or indirectly, all or a part of the charges for such preparation or any benefits therefrom; or shall **itself prepare, directly or through another, any such document for another person, firm, or corporation**, except as provided in subdivision 3.

MINN. STAT. § 481.02, subds. 1–2 (2024) (emphasis added).

In summary, Minnesota's UPL statute appears to implicate people and corporate entities that perform one or more of these tasks:

1. appear in court as an attorney on behalf of another
2. give "legal advice or counsel" or "legal services"
3. prepare legal documents
4. hold themselves out (or advertise themselves) as an attorney.

This prohibition is followed by Subdivisions 3, 3a, and 7, which contains the following exceptions:

- **Personal Document Drafting:** Any person may draw, without charge, any document in which they, their employer, or their firm or corporation is a party, except for wills or trust instruments. Subd. 3(1).
- **Emergency Will Drafting:** In an emergency where death is imminent, a person may draw a will for another if there's insufficient time for an attorney. Subd. 3(2).
- **Insurance Company Defense:** Insurance companies can defend their insureds through selected lawyers in accordance with policy terms. Subd. 3(3).
- **Labor Organization Advice:** Bona fide labor organizations can give legal advice to their members in employment-related matters. Subd. 3(5).
- **Non-Testamentary Document Drafting:** Any person or corporation may draw non-testamentary legal documents like leases, notes, and deeds, for or without a fee. Subd. 3(8).
- **Legal Q&A Publication:** Established farm journals or newspapers may publish legal Q&As answered by a licensed attorney, provided no charges or legal services are offered. Subd. 3(11).
- **Rental Property Actions:** Authorized agents of residential rental property owners may commence and maintain actions in court for possession of the property, with certain restrictions. Subd. 3(12)
- **Specialized Legal Assistant Services:** Services by a specialized legal assistant with a specialty license issued before July 1,1995, are allowed. Subd. 3(14).
- **Sole Shareholder Representation:** The sole shareholder of a corporation may appear on behalf of the corporation in court. Subd. 3(15).
- **Association Representation:** Officers, managers, partners, employees, or agents of a condominium, cooperative, or townhouse association may represent the entity in conciliation court or related district court actions. Subd. 3(16).
- **Real Estate Closing Assistance:** Real estate brokers, salespersons, or closing agents may draw or assist in drawing papers related to property transactions and charge for these services, with future restrictions by the supreme court. Subd. 3a.
- **Clerical Service Provision:** Corporations may provide clerical services or information to attorneys for their professional work, with the attorney maintaining full responsibility for the services received. Subd. 7.

MINN. STAT. § 481.02, subs. 3, 3a, 7 (2024)

**Legislative purpose.** The reasons why, in 1931, Minnesota's legislature enacted the UPL statute (and the purpose of similar statutes nationwide) are unclear. The statutory language on its face appears to seek to protect the public from



unscrupulous people who might deceive the would-be client, causing that person harm. One court noted that “The protection of the public, as the purpose of confining law practice to a licensed bar, ancient as it is in its origin, is of vital importance today.” *Gardner v. Conway*, 234 Minn. 468, 478, 48 N.W.2d 788, 795 (Minn. 1951).

A 2024 *Yale Law Journal* article from Stanford Law professors — investigating thousands of pages of archival material — traced the origins of UPL statutes to the Great Depression and guild protectionism.<sup>2</sup> This Working Group takes no position on the Minnesota UPL statute’s intended purpose. Minnesota courts’ applications of Minnesota’s UPL statute have provided varied analyses, as described below.

## 2.2. Minnesota Caselaw on the Unauthorized Practice of Law

The Minnesota Supreme Court has developed and applied five factors to determine when the unauthorized practice of law has occurred. *Gardner v. Conway*, 48 N.W.2d 788 (Minn. 1951) (involving a public accountant who provided clients with advice about tax laws while preparing their income tax returns).

- (1) **Holding Out to the Public:** "In further confirmation of the conclusion that defendant was practicing law, the evidence establishes that he advertised and held himself out as a ‘Tax Consultant,’ which by reasonable implication advised the public that he was competent to give legal advice on the law of taxation." *Id.* at 798.
- (2) **Giving Legal Advice & Counsel:** "For a consideration, and as part of his regular income tax work, defendant advised and determined for the taxpayer whether the latter had attained the status of a lawful marriage with a woman with whom he had been living but to whom he had never been ceremonially married." *Id.*

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<sup>2</sup> Nora Freeman Engstrom and James Stone, *Auto Clubs and the Lost Origins of the Access-to-Justice Crisis*, *Yale Law Journal* (Feb. 16, 2024), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4728564](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4728564). See also Laurel Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, *Quinnipac Law Review* (2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3128969](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3128969) (studying the origins of UPL in the late 1800s and early 1900s); Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors-Or Even Good Sense?*, *American Bar Foundation Research Journal* (1980), available at <https://www.jstor.org/stable/827980> (tracing the origins of UPL back to the founding of the profession in 1700s colonial America); Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, *Fordham Law Review* (2014), available at <https://ir.lawnet.fordham.edu/flr/vol82/iss6/2/> (discussing the need for UPL to focus on public interests, and dating the beginning of UPL enforcement back to the early twentieth century).

- (3) **Performing Legal Services:** "Whether a difficult or doubtful question of law is resolved by the giving of advice to, or the doing of an act for, another must in each case depend upon the nature of the problem involved." *Id.* at 797.
- (4) **Dealing with Complex Legal Matters:** "When an accountant or other layman who is employed to prepare an income tax return is faced with difficult or doubtful questions of the interpretation or application of statutes, administrative regulations and rulings, court decisions, or general law, it is his duty to leave the determination of such questions to a lawyer." *Id.*
- (5) **The Public would be Protected by its Regulation:** "The protection of the public, as the purpose of confining law practice to a licensed bar, ancient as it is in its origin, is of vital importance today." *Id.* at 795.

## 2.3. Legal Practice and Applicable MN Rules of Professional Conduct (e.g., Competence, Confidentiality)

While the MSBA's mandate did not specifically mention legal practice, the organization's wide purview allowed us to explore how LLMs might relate to lawyers' practice, including applicable rules and practical considerations.

The rules of professional conduct address lawyers' ethical responsibility, which may be implicated using LLMs — as well as how lawyers' use of technology can help them avoid unreasonable fees. The relevant portions of Minnesota's Rules of Professional Conduct are as follows:

### Rule 1.1: **Competence.**

A lawyer shall provide *competent representation* to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

### Rule 1.18: **Duties to Prospective Client.**

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has consulted with a prospective client shall not use or reveal information obtained in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

Rule 1.5: **Fees.**

(a) A lawyer shall not make an agreement for, charge, or collect an *unreasonable fee* or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the *time and labor required*, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

...

(3) the *fee customarily charged* in the *locality* for similar legal services;

(4) the *amount involved* and the results obtained;

(5) the *time limitations* imposed by the client or by the circumstances;

...

Rule 1.6: **Confidentiality of Information.**

(a) Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.

(b) A lawyer may reveal information relating to the representation of a client if: (1) the client gives informed consent . . . (3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 5.3: ***Responsibilities Regarding Nonlawyer Assistants.***

With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner and a lawyer, who individually or together with other lawyers possess comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for the conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.4: ***Professional Independence of a Lawyer***

. . . (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

Minn. R. Prof'l Conduct 1.1, 1.18 1.6, 5.3 (2022).

### **2.3.1 MIT Task Force and Other States' Guidance**

This Working Group has taken inspiration from several other groups that have considered how LLMs fit into existing ethical rules. In particular, we have been impressed with the work of MIT and Stanford, whose Task Force on Responsible Use of Generative AI for Law ("MIT Task Force") provided helpful suggestions on how to align LLM-based processes with lawyers' existing ethical obligations:

<https://law.mit.edu/pub/generative-ai-responsible-use-for-law>

The MIT Task Force's guidance has helped shape the documents provided by the State Bar of California, Argentina, and several others. As such, the MSBA Working Group sees no need to re-create the wheel. Rather, we reference the [link above](#), including these principles:

1. **Duty of Confidentiality** to the client in all usage of AI applications;
2. **Duty of Fiduciary Care** to the client in all usage of AI applications;
3. **Duty of Client Notice and Consent\*** to the client in all usage of AI applications;

4. **Duty of Competence** in the usage and understanding of AI applications;
5. **Duty of Fiduciary Loyalty** to the client in all usage of AI applications;
6. **Duty of Regulatory Compliance** and respect for the rights of third parties, applicable to the usage of AI applications in your jurisdiction(s);
7. **Duty of Accountability and Supervision** to maintain human oversight over all usage and outputs of AI applications;

\*Consent may not always be required — refer to existing best practices for guidance. We [MIT Task Force] also seek feedback on whether or when consent may be advisable or required.

### 2.3.2 Rules based on both Client Risk and Client Benefits

In this Working Group’s estimation, the Minnesota Rules of Professional Conduct rules already offer good guidance regarding LLMs. We consider those rules’ applicability to LLMs in two ethical categories:

1. **Rules on Client Risk:** Most of these rules seek to ensure that lawyers do not do things that might cause their clients undue risk, including requiring competence and preserving confidentiality.
  - a. **Competence.** Lawyers must, of course, ensure that LLM-based output is accurate.
  - b. **Confidentiality.** Lawyers must, of course, ensure that their tools, including LLM-backed tools, ensure client confidentiality.
  - c. **Supervisory authority.** Lawyers must, of course, ensure that they properly supervise and delegate responsibilities. That includes delegation to both humans and to machines.
2. **Rules on Client Benefits:** In addition to those Risk-Based rules, additional Benefit-Based rules — giving clients benefits — including requiring lawyer “competence” and prohibiting an “unreasonable fee” has relevance to our LLM purview:
  - a. **Competence** includes “benefits associated with relevant technology”
    - i. Under Comment 8 to Rule 1.1, lawyers “should keep **abreast of changes** in the law and its practice, including the **benefits** and risks associated with **relevant technology**.” Available at [https://www.revisor.mn.gov/court\\_rules/pr/subtype/cond/id/1.1/](https://www.revisor.mn.gov/court_rules/pr/subtype/cond/id/1.1/)
    - ii. The rule requiring competence also includes *benefits* of advancing technology:
      1. In the past, **book-based legal research** was the norm. But book-based legal research — and their efficiencies — are outdated, favoring **electronic legal databases’** speed.

2. In the past, **paper-based letters** and faxes were the norm. But those inefficiencies are outdated, favoring **email's** speed. See ABA Formal Opinion No. 99-413 (Mar. 10, 1999) (“A lawyer may transmit information relating to the representation of a client by unencrypted e-mail.”)
3. In the past, **paper discovery documents** were the norm. But those inefficiencies are outdated, favoring **electronic documents (ESI)** and their concomitant speed (e.g., searching). See *U.S. v. O’Keefe*, 537 F.Supp.2d 14 (D. D.C. 2008) (“I expect the government to preserve the electronically stored information in its native format”); *Lawson v. Love’s Travel Stops & Country Stores*, Civ. No. 1:17-CV-1266 (M.D. Pa. Dec 23, 2019) (“Advancements in technology now enable us to collect, retain, analyze and review electronically stored information (ESI) on a scale which was unimaginable a generation ago.”).

b. **Unreasonable fees**

- i. Each of the items above (e.g., book-based research, paper-based letters, paper discovery documents) can today be interpreted as “unreasonable.” And clients’ bills have benefited from “reasonable fees.”
- ii. How long before a court or other authority will rule that spending 10 hours on a task — that an LLM-backed tool can perform in 2 minutes — constitutes an “unreasonable fee” under Rule 1.5?

“Old lawyering” always gives way to “new lawyering.” Lawyers in the 1930s were less technologically sophisticated than those in the 1950s, who were less sophisticated than those in the 1980s, who were less sophisticated than those in the 2000s, who were less sophisticated than those in 2024. Lawyers have a duty to keep abreast of technological changes — including LLM-based changes — to both (1) avoid undue risk and (2) ensure client benefits. And we should not let risks overshadow client benefits: They are both important, ethically.

We would encourage our proposed successor AI Standing Committee to consider whether Minnesota should adopt — or perhaps adapt — the fine work of other organizations who have assessed LLM use into the context of lawyers’ existing ethical duties.

## SECTION 3.

# Regulating “legal advice” and “practice of law,” not “legal information”

One of this Working Group’s tasks is to determine how LLMs might relate to “legal advice” and the “practice of law.” But as noted above, Minnesota’s UPL statute does not define the “practice of law,” nor does the statute define “legal advice.”

Furthermore, the statute does not define permissible “legal information” (e.g., statutes, cases, regulations, treatises, court handbooks, court pro se guides, lawyer websites).

As such, any interpretation of the “practice of law” or “legal advice” might seek to cross-reference courts’ interpretations, including those above. But even those descriptions do not provide any clarity to distinguish “practice of law” or “legal advice” from permissible “legal information” (e.g., legal books, caselaw, treatises).

**First impression: “Legal Advice” vs. “Legal Information”** The question of whether AI and LLMs might constitute “legal information” or “legal advice” appears to be a matter of first impression. After doing a full analysis of Minnesota cases and statutes, we’re not aware of any Minnesota court or any other authority that has considered this question.

**Legal Information** has always included primary law, as well as secondary materials:

- **Primary law:** Statutes, regulations, caselaw, administrative opinions
- **Secondary materials:** In addition, “legal information” similarly includes treatises, articles, and commentaries on the law.
- **Lawyers’ websites:**
  - Is a law firm website — discussing a lawyer’s areas of expertise — performing UPL?
  - “Injured in a car crash? Here’s what you need to know about Minnesota law!”
  - Probably not. Especially if you include disclaimers: “This is not legal advice.”

Legal information has also always included legal concepts (e.g., elements of a breach of contract claim), as well as propositions (e.g., Black Letter Law) — all as provided by legislators, judges, and regulators.

**Legal information underpins our legal system’s foundation.** It must be accessible to all. We’re all bound by the law — so we should all have access to it. As the Supreme Court noted in 2020, “Every citizen is presumed to know the law, and... ‘all should have free access’ to its contents.” That access to legal information

is provided by various free resources, such as Google Scholar (for cases) and Cornell's Legal Information Institute (for statutes).

**No court or authority clearly distinguishes “legal information” from “legal advice” or “practice of law.”** The Minnesota Supreme Court has noted that attorney-client privilege applies “only to advice which is legal in nature.” *Polaris, Inc. v. Polaris, Inc.*, 967 N.W.2d 397, 408 (Minn. 2021). Of course, this “definition” is circular — essentially “Legal advice is advice that is legal.” That definition provides no clarity regarding our LLM-based task.

**Gardner’s discussion of “legal advice” without addressing “legal information.”** The central piece of Minnesota case law discussing the unauthorized practice of law related to furnishing “legal advice” is *Gardner v. Conway*, 48 N.W.2d 788 (Minn. 1951) (involving a public accountant who provided clients with advice about tax laws while preparing their income tax returns). The relevant portion relate to “resolving legal questions” through “advice” or “action”:

“Generally speaking, whenever, as incidental to another transaction or calling, a layman, as part of his regular course of conduct, *resolves legal questions* for another — at the latter's request and for a consideration — by giving him *advice* or by *taking action* for and in his behalf, he is practicing law if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind.”

*Gardner v. Conway*, 48 N.W.2d 788, 796 (Minn. 1951) (emphasis added). Query whether any court would find that a machine (e.g., LLM) has *Gardner’s* requisite “trained legal mind.” And *Gardner* does not attempt to distinguish “legal information” from “legal advice.”

The American Bar Association defines the “practice of law” as “the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law,” and “[a] person is presumed to be practicing law when . . . [g]iving *advice* or counsel to persons.” ABA TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, *Definition on the Practice of Law* (Sep. 18, 2002), [https://www.americanbar.org/groups/professional\\_responsibility/task\\_force\\_model\\_definition\\_practice\\_law/model\\_definition\\_definition/](https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition/) (emphasis added).

But the ABA, like other authorities, refers to a “person” — not the LLM-based machines that is this Working Group’s charge. And the ABA, like Minnesota courts, declines to distinguish “legal advice” from “legal information.”

**Minnesota Rules of Professional Conduct.** Comments to the MPRC — which governs Minnesota’s licensed attorneys — state that attorney-client communication “includes a disclosure of the *facts* and *circumstances* giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the *material advantages* and *disadvantages* of the proposed course of conduct and a discussion of the client’s or other person’s *options* and *alternatives*.” Comment: Informed



Consent [6], Rule 1.0: Terminology, MINN. RULES OF PRO. CONDUCT, [https://www.revisor.mn.gov/court\\_rules/pr/subtype/cond/id/1.0/](https://www.revisor.mn.gov/court_rules/pr/subtype/cond/id/1.0/) (emphasis added).

But as noted above, converting a person’s “facts and circumstances” into an explanation of law (statutory or caselaw) that can give “material advantages and disadvantages” is no longer the sole provenance of humans; LLMs are now able to provide those explanations easily and quickly.

And because the Minnesota Rules of Professional Conduct apply to licensed attorneys — not LLMs — this definition does not aid this Working Group in performing its required tasks.

**What is the line between “legal information” and “legal advice”?** In contrast to our historical concept of “legal information,” our concept of “legal advice” has historically been viewed as applying that legal information (e.g., legal concepts, statutes, caselaw) to a client’s specific facts. (Or, if you prefer, “applying specific facts to law.”) Throughout human history, the only entities that could apply law to specific facts were humans.

**LLMs can now apply law to facts.** With today’s LLMs, machines are now increasingly capable of applying the law to specific facts. As such, our Working Group is assessing novel questions about whether LLMs providing “legal information” might also constitute “legal advice.”

Upload a statute and caselaw into an LLM, asking the LLM to consider how a person’s specific facts apply to statutory law and caselaw, and the LLM will provide a response. And that response might be shockingly similar to words that a lawyer might write. Perhaps even better.

**Disclaimers.** Massively popular LLMs (e.g., ChatGPT, Gemini, CoPilot) run by some of the world’s largest companies (e.g., Microsoft, Google, OpenAI) are also likely to provide the same types of disclaimers as lawyers provide on firm websites: “This is not legal advice.” Of course, these disclaimers help keep lawyers from creating attorney-client relationships. Do they also keep consumers from believing that any attorney-client relationship exists — when consumers use tools like LLMs?

Or are disclaimers insufficient, where a vulnerable population may not fully appreciate the risk, even with such disclaimers? Unsophisticated people, people unfamiliar with our legal system, immigrants, and other non-English speakers (even with AI translation tools) who may not appreciate the impact of relying on such AI generated responses and so such disclaimers are not effective and pose a real risk to certain populations.

At the same time, what legal sources do those vulnerable populations rely upon today? Google searches? Their friends and family? And are LLM-backed tools better or worse than the status quo? And how will today’s LLMs compare to tomorrow’s LLMs, which are rapidly improving? Are some legal problems (e.g.,

criminal law) more risky than other use cases (e.g., landlord-tenant law)? And does the Bar have a role in educating the population about potential pitfalls? We recommend Bar further balance LLMs' risk and benefits — for particular use cases, and for particular populations.

As we note below, other regulators — the new European AI Act for example — prohibit certain uses, and have higher restrictions for others, and only in the lowest risk areas allow such disclaimers. See AI Act, adopted March 13, 2024. This risk-based framework, described later in this paper, could help identify to what extent disclaimers sufficiently protect the public in such applications.

**Declining to provide definitions.** For the reasons discussed above, this Working Group declines to create definitions that would attempt to distinguish “legal advice” from “legal information.” We think that attempting to clearly differentiate those terms would be an exercise in futility, as they are so dependent on context, and even then, subject to differing views. In addition, interpreting statutes is the province of the Minnesota courts, not this Working Group.

As such we decline to define “legal advice” as distinguished from “legal information,” since we think that drawing any distinction between the two is very, very difficult — if not impossible in the abstract. That has likely always been true, and its likely impossibility is even more apparent now that LLMs can apply law to particular facts. Impossibility may be the reason that no court has attempted to distinguish “legal advice” from “legal information” in the UPL statute’s nearly 95-year history.

**Only humans who are deemed to have “good character” may provide “legal advice” — as a matter of current law.**

In addition to the challenging issue of defining ante hoc legal “information” vs. legal “advice,” Minnesota (and other states) has other critical requirements for the privilege of “practicing law.”

These include competency requirements such as holding a 4-year bachelor’s degree, earning a juris doctorate from an accredited law school, and passing both an Ethics test and the Bar exam. More importantly, the Board of Law Examiners, and its process, was “established to ensure those who are admitted to the bar have the necessary competence **and character** to justify the trust and confidence that clients, the legal system, and the legal profession place in lawyers.

<https://ble.mn.gov/wp-content/uploads/2021/09/BLE-Rules-10-1-21.pdf> (Bold added).

Minnesota law and the Rules of Professional Conduct outline a host of obligations that inure to “people” regarding ethical and legal duties that make no sense when applied to an LLM following a statical formula. This would be the same as applying them to a calculator (albeit it an amazingly powerful one). Evaluating “character” and an expectation of professional ethics is not perfunctory. Rather, it is ingrained within

the very fabric of our justice systems given the potential for attorneys to create harm by abusing their license, and to help protect the reality and perception of fairness in our courts; yet others see this as window dressing. See

<https://clp.law.harvard.edu/knowledge-hub/magazine/issues/character-and-fitness/a-higher-bar/>

We do not offer a solution to this challenge, and instead highlight it as an area the Working Group often debated without resolution. An issue so important, and complex given the potential of AI to radically improve access to justice for so many, warrants a group of more robust, diverse experts and stakeholders than represented by this Working Group.

We recommend that the MSBA establish an AI Standing Committee, which should pay close attention to the American Bar Association’s parallel work on this topic. Some members also suggested the European model of regulating uses may be more suited to improving access to justice for certain lower risk activities, like assisting in applications, and not in other cases, such as criminal cases with a constitutional right to counsel.

## SECTION 4.

### First Amendment Challenges to UPL laws

This Working Group is aware of challenges that might implicate the constitutionality of Minnesota’s UPL laws as applied to specific use cases. In two federal cases, two federal courts have held that “unlawful practice” statutes were unconstitutional violations of the First Amendment’s “Free Speech” clause. We discuss each here.

**Upsolve:** In *Upsolve v. James*, the Southern District of New York granted Upsolve a preliminary injunction, using an “as applied” standard to hold that Upsolve’s argument — that New York’s UPL statute unlawfully constrains Upsolve’s ability to provide low-income persons information, thereby constraining Upsolve’s freedom of speech — is likely to succeed on the merits. The case is currently being appealed to the Second Circuit. *Upsolve, Inc. v. James*, Case No. 1:22-cv-00627-PAC (S.D.N.Y. May 24, 2022), available at

[https://www.docketalarm.com/cases/New\\_York\\_Southern\\_District\\_Court/1--22-cv-00627/Upsolve\\_Inc.\\_et\\_al\\_v.\\_James/68/](https://www.docketalarm.com/cases/New_York_Southern_District_Court/1--22-cv-00627/Upsolve_Inc._et_al_v._James/68/), appealed to Case No. 22-1345 (2d Cir.), available at

[https://www.docketalarm.com/cases/US\\_Court\\_of\\_Appeals\\_Second\\_Circuit/22-1345/Upsolve\\_Inc.\\_v.\\_James/](https://www.docketalarm.com/cases/US_Court_of_Appeals_Second_Circuit/22-1345/Upsolve_Inc._v._James/)

**Nutt:** In a similar case in North Carolina, *Nutt v. Ritter*, a federal court recently held that the North Carolina Board of Examiners for Engineers and Surveyors violated a retired engineer’s free-speech rights. In December, the federal court held that the regulators’ attempt to prohibit the retired engineer from providing an engineering

report constituted an unconstitutional violation of free speech. The court reasoned that the engineering guild's "interests must give way to the nation's profound national commitment to free speech." *Nutt v. Ritter*, Case No. 7:21-cv-00106 (E.D.N.C. Dec. 20, 2023), available at

[https://www.docketalarm.com/cases/North\\_Carolina\\_Eastern\\_District\\_Court/7--21-cv-00106/Nutt\\_v.\\_Ritter\\_et\\_al/63/](https://www.docketalarm.com/cases/North_Carolina_Eastern_District_Court/7--21-cv-00106/Nutt_v._Ritter_et_al/63/)

These two cases raise similar, difficult questions: Can states continue asserting UPL statutes without impinging on free speech rights? Upsolve is before the Second Circuit, and North Carolina federal courts appeal to the Fourth Circuit. Our Working Group's deadline has passed while both cases are being appealed. In the interim, our Working Group wonders that if those federal district court decisions are upheld, would Minnesota's UPL statute face similar First Amendment challenges?

## SECTION 5.

### Causes of Action: Alternatives to UPL

Of course, if the UPL statute doesn't apply to LLM-backed tools — which might be considered "legal information" rather than "legal advice" — one might then wonder how a consumer who uses those tools might recover from the type of public harm that UPL ostensibly seeks to protect? Common-law and statutory claims might protect members of the public.

Below are statutory and common-law claims that might apply in these scenarios:

- (1) **Negligence:** Plaintiffs could argue that the LLM-backed tool's provider had a duty to ensure the tool's reliability and accuracy in providing legal advice, the tool's failure to provide correct legal advice breached that duty, and if the person suffered a legal detriment or financial loss as a direct result of relying on the incorrect advice provided by the tool, then the breach of duty by the provider can be considered the proximate cause of the person's injury.
- (2) **Product Liability:** Plaintiffs could argue that the LLM-backed tool was defective in providing accurate legal advice, making it unreasonably dangerous for its intended use, and that this defect, which existed at the time it was provided, directly caused the plaintiff's legal or financial harm.
- (3) **Misrepresentation:** Plaintiffs could argue that the provider of the LLM-backed tool made a false representation about the tool's reliability in providing legal advice, knew or was indifferent to the truth of this representation, and intended for the plaintiff to rely on this advice in making legal decisions.
- (4) **Unfair or Deceptive Trade Practices:** Plaintiffs could argue that the provider of the LLM-backed tool engaged in deceptive trade practices by

misleading consumers about the quality and reliability of the tool in providing legal advice.

- (5) **Breach of Contract:** Plaintiffs could argue that a contract was formed for the provision of accurate legal advice using the LLM-backed tool, the plaintiff fulfilled any conditions precedent by using the tool as intended, the defendant breached the contract by failing to provide accurate advice, and the plaintiff suffered damages as a result.
- (6) **Consumer Protection:** Plaintiffs could argue that the provider of the LLM-backed tool violated the Consumer Protection Act by using misrepresentation or misleading statements about the tool's accuracy and reliability in providing legal advice, constituting unfair or deceptive business practices.
- (7) **False Advertising:** Plaintiffs could argue that the provider of the LLM-backed tool had the intent to deceive, made a statement or advertisement claiming the tool's reliability in providing legal advice, which was false or misleading, and as a result, the plaintiff suffered damages.
- (8) **Fraud:** Plaintiffs could argue that the provider of the LLM-backed tool made a false representation about the tool's reliability in providing legal advice, which was a material fact, knew or lacked confidence in the truth of this representation, intended for the plaintiff to rely on this advice, and as a result, the plaintiff suffered damage.

A potential benefit of declining to assert UPL violations, instead leveraging these *existing* causes of action:

- **UPL**, as a criminal claim, requires a regulatory authority (e.g., prosecutors) to bring a lawsuit or regulatory proceeding. Prosecutions under UPL are very, very rare.
- **These private causes of action** (civil) can be brought by *any plaintiff* with standing. So this could effectively be a “private cause of action” for UPL — which can be brought by any wronged person.

Given the alternatives to UPL, many statutory and common-law claims, with even broader supporting caselaw and enforcement capabilities, can address challenges in applying the UPL statute to LLM-based tools. We also acknowledge the possibility that our courts and legislature might create new common-law or statutory claims regarding LLM-backed technologies. These existing and potential claims can effectively serve UPL’s ostensible purpose: public protection.

# SECTION 6.

## Overview of the Regulation of Artificial Intelligence

### 6.1. Definitions of “Artificial Intelligence”

Since this Working Group has been asked to address “artificial intelligence,” that term requires a definition. Such a definition is difficult to find, since “artificial intelligence” has been a term used since the 1950s — so that term’s application to any particular technology has been a matter of moving goalposts:

- **1950s:** “Artificial Intelligence” might have included **calculators**
- **1980s:** “Artificial Intelligence” might have included **spreadsheets**
- **2000s:** “Artificial Intelligence” might have included **MapQuest** and **Google Maps**
- **2010s:** “Artificial Intelligence” might have included **IBM Watson**
- **2020s:** “Artificial Intelligence” now apparently includes **Generative AI**, including **LLMs**.
- **2030s:** What technology might constitute “Artificial Intelligence” in the coming decade?

Given the moving goalposts, we look to various authorities, which have attempted to define the term “AI.”

#### 6.1.1. Organisation for Economic Co-operation and Development

The OECD defines “artificial intelligence” as follows:

An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.”

<https://oecd.ai/en/ai-principles>

This definition could include two AI sub-types:

1. **Symbolic AI** (aka “Good Old Fashioned AI,” or “GOFAI”) is an approach to artificial intelligence that relies on predefined symbolic rules and logic to perform tasks such as reasoning, problem-solving, and knowledge representation, treating information as symbols and manipulating them according to formal rules.  
[https://en.wikipedia.org/wiki/Symbolic\\_artificial\\_intelligence](https://en.wikipedia.org/wiki/Symbolic_artificial_intelligence)
2. **Connectionist AI** is an approach to artificial intelligence that models computational processes as interconnected networks of simple units, similar

to neurons in the brain, which can learn and adapt by adjusting connections based on input data for tasks like pattern recognition and decision-making.  
<https://en.wikipedia.org/wiki/Connectionism>

Today's Transformer-based LLMs (e.g., ChatGPT, Gemini, LLaMA) are a form of Connectionist AI, since they are based on Neural Nets, which seek to mimic brains' neurons. Because ChatGPT is a Transformer-based LLM that spurred this Working Group's inception, we choose to apply the definition of "artificial intelligence" to LLMs — and tools that deploy LLMs.

### 6.1.2 U.S. Executive Order and 15 U.S.C. 9401(3)

President Biden's Executive Order, signed on October 30, 2023, provides this definition of "AI":

The term "artificial intelligence" or "AI" has the meaning set forth in 15 U.S.C. 9401(3): a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments.

Section 3(b) of the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (Oct. 30, 2023), *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/>

In turn, here is 15 U.S.C. 9401(3) and its statutory definition:

#### (3) Artificial intelligence

The term "artificial intelligence" means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to-

- (A) perceive real and virtual environments;
- (B) abstract such perceptions into models through analysis in an automated manner; and
- (C) use model inference to formulate options for information or action.

15 U.S.C. 9401(3), *available at* [https://uscode.house.gov/view.xhtml?req=\(title:15%20section:9401%20edition:prelim\)](https://uscode.house.gov/view.xhtml?req=(title:15%20section:9401%20edition:prelim))

Again, this broad definition includes both Symbolic AI and Connectionist AI, so our Working Group chooses to include its application to LLMs.

### 6.1.3. EU AI Act (Adopted March 13, 2024)

The EU AI Act provides this definition of “AI”:

‘AI system’ is a machine-based system designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments;

EU AI Act, Article 3(1), *available at*

<https://data.consilium.europa.eu/doc/document/ST-5662-2024-INIT/en/pdf>

The European Parliament adopted the AI Act by plenary vote on March 13, 2024. The general framework of this regulation regulates AI by its intended use. It creates four risk levels/categories and requires all AI offerings to be assessed prior to being released into the EU market:

- (1) Unacceptable risk AI systems, which are prohibited outright;
- (2) High risk AI systems that pose a significant risk to health, safety or fundamental rights, which must meet requirements for: data quality; documentation and traceability; transparency; human oversight; accuracy, cybersecurity and robustness; demonstrated competence via ‘conformity assessments’; and if deployed by public authorities, registered in a public EU database (with some exceptions).
- (3) Low risk AI systems, which require providers to ensure AI systems that interact with individuals are designed and developed to guarantee individual users are aware they are interacting with an AI system, and encourages providers to develop and commit to industry codes.
- (4) General purpose AI models, which require providers to: perform fundamental rights impact assessments and conformity assessments; implement risk management and quality management systems to continually assess and mitigate systemic risks; inform individuals when they interact with AI, and that AI content be labelled and detectable; and test and monitor for accuracy, robustness and cybersecurity. It notes that GPAI models with systemic risk are subject to greater testing and reporting requirements.

The EU AI act’s general risk-based framework may provide a useful structure for regulating AI in connection with legal services. We recommend a more detailed analysis of how this framework might apply.



#### 6.1.4. MSBA Working Group’s focus on LLM-based “AI”

Of course, while all the definitions above are helpful, for the purposes of this Minnesota State Bar Association Working Group, none of those definitions is binding. Our work is informed by all the definitions above, and we address our particular focus on the type of “AI” that is most at issue at this group’s inception in 2023 — and the type of “AI” that most applies to legal work: Large Language Models (LLMs) and LLM-backed tools.

## SECTION 7. Lawyers’ Obligations to Promote Access to Justice

We as lawyers have an obligation to help ensure that everyone has access to justice. Those obligations are enshrined in our profession’s rules and regulations. But our profession’s “special responsibility” to ensure the “quality of justice” is failing.

### 7.1. Rules obligating lawyers to help ensure access to justice

The Preamble to the American Bar Association’s (ABA) Model Rules of Professional Conduct provide that “[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and *a public citizen having special responsibility for the quality of justice.*” American Bar Association, Model Rules of Professional Conduct Preamble & Scope (2023) (emphasis added), *available at* [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/).

Our responsibility to ensure justice is so important that the ABA Model Rules and Minnesota Rules of Professional Conduct both direct lawyers to “aspire” to render at least 50 hours of pro bono services per year. *Id.* at R. 6.1, *available at* [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_6\\_1\\_voluntary\\_pro\\_bono\\_publico\\_service/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_6_1_voluntary_pro_bono_publico_service/); Minn. R. Prof’l Conduct 6.1 (2023), [https://www.revisor.mn.gov/court\\_rules/pr/subtype/cond/id/6.1/](https://www.revisor.mn.gov/court_rules/pr/subtype/cond/id/6.1/).

Our ethical obligation to promote access to justice must evolve over time to ensure that the dynamic technological advances in the legal profession advance, rather than hinder, the ability for all people, regardless of resources, to meaningfully participate in the legal system to protect and access their rights.

## 7.2. Our failure to provide access to justice

But despite our ethical obligations, we are failing. In 2022, the Legal Services Corporation found “[l]ow-income Americans do not get any or enough legal help for 92% of their substantial civil legal problems.” Legal Services Corporation, *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans* (2022), <https://justicegap.lsc.gov/resource/executive-summary/>.

The need to radically improve Self-Represented Litigants’ access to and participation in the legal system is clear. Generative AI and related technologies may provide powerful tools to help address systemic issues that contribute to this justice gap.

**Chief Justice John Roberts**, in his *2023 Year-End Report on the Federal Judiciary*, provided these words regarding the power of AI to help low-income individuals:

For those who cannot afford a lawyer, AI can help. It drives new, highly accessible tools that provide answers to basic questions, including where to find templates and court forms, how to fill them out, and where to bring them for presentation to the judge — all without leaving home. These tools [AI] have the welcome potential to smooth out any mismatch between available resources and urgent needs in our court system.<sup>3</sup>

Those words seem pretty clear: Chief Justice Roberts appears to favor using LLMs to help the low-income population, bridging the access-to-justice gap. We should, too.

As the legal profession grapples with the changes that Generative AI will inevitably bring, it must ensure that we do not outright prohibit the public’s use of these new technologies, which can create a more equitable and accessible legal system for all stakeholders.

## 7.3. Opportunities to increase Access to Justice

Generative AI has the capacity to change society. Regarding access to justice, our LLM regulations could lead us down two divergent paths:

1. **Democratize the law**, giving everyone unprecedented access to justice
2. **Further exacerbate inequalities**, widening the access-to-justice gap

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<sup>3</sup> Chief Justice John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary* (Dec. 31, 2023), available at <https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf>

If we create regulations that only permit licensed attorneys to access Generative AI for legal purposes, only those who can afford an attorney will benefit. The poor will, again, be left out. The rich will continue to hire lawyers, who will continue using the best LLM-backed tools. The poor — who lack representation, needing those LLM-backed tools the most — will be denied them.

With proper guardrails in place, Generative AI could create massive benefits in assisting self-represented litigants (SRLs) to access reliable resources and understand how to navigate the judicial system, without violating UPL statutes and regulations or otherwise constitute the unauthorized practice of law as interpreted by the Minnesota Supreme Court.

Below are several potential areas where Generative AI might be applied for SRLs. Each section addresses potential UPL concerns, if any.

This section focuses on civil law applications. While there are undoubtedly worthy criminal law applications, the right to counsel in criminal cases alleviates some of the issues faced by SRLs in the civil context.

### 7.3.1. Forms assistance

Forms assistance is a powerful access-to-justice tool that may help SRLs more effectively participate in the legal system. Without forms, many SRLs may not know what procedural steps to take or what facts the Court requires to evaluate a claim (e.g., the dates and method by which a tenant informed their landlord of a serious repair issue, the paperwork and forms needed to support a SRL's filing).

The Minnesota Courts and legal aid currently maintain public document automation programs that use predefined logic to assist SRLs in creating legal forms. The forms ask the SRL a series of questions and with behind-the-scenes logic, use the SRL's answers to fill out legal forms.

For example, existing automated forms help SRLs fill out simple legal documents and letters, like a [Delegation of Parental Authority](#) or a [Security Deposit Demand Letter](#), as well as complete court forms like an [Answer to an Eviction Complaint](#) or a [Request for a Restraining Order](#). Generative AI could be used to amplify the power of document automation in several ways.

**Automate forms.** First, Generative AI could augment the actual automation process. Using AI to create a first draft of an automated form saves the author time and could thereby greatly increase the number of automated forms that the Courts and legal aid offer to the public free of charge. The UPL analysis would remain the same for forms generated with AI as with forms generated using existing non-AI methods.

**Conversational interface.** Second, Generative AI could create a more conversational interface for end users, as contrasted with the existing scripted flow chart-based model.

- In current document automation programs, the program’s author creates a script that is applied to all users.
- Generative AI has the potential to create an interface that is more responsive to SRL inputs:
  - For example, authors currently use static “Learn More” features to offer legal definitions and other clarifications. Generative AI could be leveraged to make it easier for SRLs to ask clarifying questions and receive the same substantive information contained in a “Learn More” feature.
  - In addition, common features such as a multi-select list --- for example, a list of common rental repair issues --- could become more powerful by presenting commonly co-occurring issues and evolving over time based on user inputs.
  - Finally, automated forms could prompt SRLs for an open narrative description of their legal issue and use the information in this narrative to prefill relevant portions of the form (with later validation by the SRL) and ask the SRL follow-up questions for elements that are not sufficiently addressed in the SRL’s initial response.
  - This application raises some UPL risks if the AI responses stray into the territory of providing advice or a recommendation of how an SRL should respond.

**Quality assurance.** Third, Generative AI could assist with reviewing SRLs forms for errors. This is possible to some extent with existing tools — such as programming an automated form to check that a date provided makes sense — but Generative AI could flag such errors with greater ease, and without requiring the automated form author to anticipate every possible type of error.

For example, many immigration forms require applicants to list each address at which the applicant has lived in the past. AI could be harnessed to flag gaps or overlaps in address history, and even flag inconsistencies between an applicant’s narrative (for example, an applicant’s affidavit in support of an asylum claim) and address history. This reduces waste and burden for all parties.

**Narrative creation.** Finally, Generative AI could enhance automated forms by crafting narrative text in the produced legal documents, such as by creating a letter using a specified “tone.”

For example, a tenant could craft a letter notifying their landlord of necessary repairs and requiring that those repairs be made within 14 days in accordance with state law. With generative AI, the SRL could choose the tone of the letter, depending on the nature of the SRLs relationship with the landlord.

This final application creates a larger risk of potentially violating the UPL statute, as it involves applying the SRL’s facts, as provided during the document assembly

process, to create a tailored legal work product. But we think that risk is properly balanced with the benefits to SRLs.

### **7.3.2. Navigational assistance**

Generative AI can be used to create a chatbot that uses retrieval augmented generation (RAG) and cites its sources. This chatbot could assist SRLs with finding legal information, while minimizing the risk of hallucination.

For example, a chatbot could ingest resources available on an organization's legal information website, so when an SRL asks a question, the chatbot can return the website's relevant resources, along with the resource's plain-language summary. This can help the SRL decide which resources they would like to explore further. To address UPL considerations, the chatbot should be instructed to never tell the SRL what course of action they should take.

### **7.3.3. Plain language translation**

Generative AI can help SRLs understand the law by creating plain language "translation" of statutes, contract terms, case law, and other material that contains legalese. Ideally, attorneys can serve as an intermediary to ensure that the 'translation' is accurate. But as Generative AI becomes more popular, accessible, and accurate (precise), SRLs will likely use Generative AI for this purpose without the benefit of having an attorney first review the plain language version to ensure its accuracy.

Generative AI tools that do not apply an SRL's specific facts to the law likely avoid UPL concerns. And again, the tools can be programmed to avoid UPL risk.

### **7.3.4. Procedural assistance**

Court procedures can be difficult for SRLs to research and understand. Generative AI can help SRLs identify which sources contain relevant procedural rules and explain what those rules mean (see Plain Language Translation above).

Like several of the other examples mentioned, UPL risk can be minimized by instructing the chatbot not to tell SRLs what course of action to take.

### **7.3.5. Identifying an appropriate legal resource**

Generative AI could assist SRLs by helping to identify that a given problem is legal in nature and what kind of legal practitioner might be able to help. Particularly when integrated within general search engines, Generative AI has the capacity to direct them to legal resources that might be able to assist.

A recent study found that 74% of low-income households in the United State experienced at least one civil legal problem in the past year. (Legal Services Corporation, *The Justice Gap: The Unmet Civil Legal Needs of Low-Income*

*Americans* (2022), available at [www.justicegap.lsc.gov](http://www.justicegap.lsc.gov)) But when the study inquired as to whether those households sought legal help for these issues, the study determined that study participants sought legal help for just 19% of their civil legal problems. *Id.* The study found that when the legal issue was less obviously legal in nature (e.g., did not involve going to court), low-income Americans were less likely to seek help. *Id.*

As Generative AI becomes more commonly used, it can help direct SRLs to resources for problems they might not identify as being legal. This application poses little UPL risk as it simply directs SRLs to potential legal resources rather than, for example, providing SRLs with legal advice.

## 7.4. Creating an Access to Justice Legal Sandbox

We recommend a pilot project to “test out” Generative AI in an acute area of need, such as housing or immigration. We further recommend a cross-stakeholder AI Standing Committee to further define and refine such a pilot, including representatives from the Attorney General’s Office, the Courts, legal aid experts in the target areas who have close familiarity with the needs, as well as private legal professionals.

**An LLM Sandbox.** Creating a Generative AI Access to Justice Sandbox will foster legal innovation while also providing protections for SRLs or potentially other parties who may offer solutions adhering to UPL laws. A sandbox could create a controlled environment with close regulatory oversight that allows Generative AI to be applied in innovative ways to further access to justice. Under this model, the relative impacts of new Generative AI approaches can be closely monitored and evaluated to determine whether statutory or regulatory changes are in the public interest. To the extent such a project would seek a change or modification to law, it would work with the Judicial Branch and potentially the Legislature for modification or a “safe harbor.”

**Other sandboxes.** Minnesota has previously allowed for similar sandbox “pilot” approaches. The Legal Paraprofessional Pilot Project, launched in 2021, allows non-attorney paraprofessional to represent clients, including in court, in certain case types. (Minnesota Judicial Branch, Legal Paraprofessional Pilot Project, available at [www.mncourts.gov/lppp](http://www.mncourts.gov/lppp))

**Utah’s sandbox.** Utah also provides a model for a more expansive sandbox. The Utah Legal Sandbox seeks to find innovative solutions to the justice gap by allowing entities to apply for permission to pilot service models that would otherwise violate unauthorized practice of law rules. (Utah Supreme Court, Utah Office of Legal Services Innovation, available at <https://utahinnovationoffice.org/>). The Utah Office of Legal Services Innovation could serve as a model for creating a similar sandbox in Minnesota, which would allow organizations seeking to improve access to justice

in Minnesota to apply innovative Generative AI approaches to help SRLs navigate the legal system.

**Minnesota LLM Sandbox.** Like Minnesota’s Legal Paraprofessional Pilot Project, which allowed non-attorney professionals to represent clients in limited case types, a regulatory sandbox could specify certain areas of law. If the sandbox was narrowed in such a way, regulators should balance considerations of which areas of law have the greatest access to justice gaps, which areas most significantly impact basic human needs such as the shelter and security, and where Generative AI has the greatest potential to be significantly impactful in increasing access to justice. If the sandbox is to be limited to particular areas of law, the access to justice community should be engaged to assist with weighing these considerations.

**Housing Sandbox.** Analyzed within such a rubric, an area ripe for a regulatory sandbox is housing law. Safe and secure shelter is a core human need, and many housing cases feature a power imbalance between a sophisticated landlord or financial institution and an individual lay person. The effectiveness of existing SRL tools, such as forms assistance, could be magnified by incorporating generative AI.

**Immigration Sandbox.** Another area of law that Generative AI has great potential to benefit is Immigration Law. Our country’s immigration laws control immigrants’ ability to obtain legal work, live in a country free from persecution, and access basic support. While a regulatory sandbox would likely need to be implemented on a federal level, practitioners and funders can focus resources on leveraging Generative AI in ways that stay within the bounds of existing regulatory controls.

**Conciliation Court Sandbox.** It’s this group’s understanding that the Minnesota Supreme Court’s committee on legal paraprofessional pilot project has already suggested sandboxes for conciliation. This group agrees that this would be a good use case for leveraging Generative AI-backed tools.

**Other potential Sandboxes.** Beyond those sandboxes above, we think that there’s potential for other sandboxes, which would fall into what our group considers a “low risk” category.

Ultimately, as part of its professional obligations to promote access to justice, the legal community must direct its energy and resources toward ensuring that generative AI’s potential to transform participation in the legal system closes the access to justice gap, rather than exacerbating it.

## 7.5. Minnesota’s Legal Aid Organizations

This Working Group’s guidance seeks to cover and potentially help [legal aid organizations funded by the Legal Services Advisory Committee](#), including without

limitation the [direct service and support program grant recipients](#) that received funding in the most recent LSAC funding cycle.

- Anishinabe Legal Services
- Cancer Legal Care
- Central Minnesota Legal Services
- HOME Line
- Housing Justice Center
- ICWA Law Center
- Immigrant Law Center of Minnesota
- Justice North (formerly LASNEM)
- Law School Clinics:
  - University of Minnesota Law School
  - University of St. Thomas School of Law
  - Mitchell Hamline School of Law
- Legal Assistance of Dakota County
- Legal Assistance of Olmsted County
- LegalCORPS
- Legal Services of Northwest Minnesota
- Mid-Minnesota Legal Aid
- Minnesota Disability Law Center
- Minnesota State Law Library
- Rainbow Health
- Southern Minnesota Regional Legal Services
- The Advocates for Human Rights
- Tubman
- Volunteer Lawyers Network (VLN)

## **SECTION 8.**

# **Risk-based Frameworks for AI Regulations**

Our Working Group has considered implementing a risk-based framework for LLM use in legal tasks. At least two other national and international entities have sought to investigate and regulate Generative AI, including LLMs. Those include both:

1. U.S. President's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence
2. The European Union's final draft of the Artificial Intelligence Act (AI Act), approved March 13, 2024

Both take a risk-based approach, seeking to assess the amount of risk in various use cases and applications of Generative AI. This document will summarize each of those risk-based frameworks, in turn.



## 8.1. U.S. President's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence

Signed on October 30, 2023, Executive Order 14110, titled "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence," aimed to establish a comprehensive framework for responsible AI development and deployment in the United States.

The order outlines a risk-based approach to AI development and use. It emphasizes the need for robust evaluations and policies to mitigate risks before deployment, focusing on addressing the most pressing security risks such as biotechnology, cybersecurity, and critical infrastructure. The order also highlights the importance of responsible innovation, competition, and collaboration to unlock AI's potential while managing its risks

The Executive Order's goals:

1. **Lead in responsible AI development:** The order seeks to position the US as a leader in developing and using AI ethically and responsibly.
2. **Mitigate risks and maximize benefits:** The order seeks to address potential risks associated with AI while fostering its benefits for society and the economy.

Below are Key areas of focus:

- **Safety and security:** The order mandated standards for AI safety and security, requiring developers of certain high-risk systems to share testing results and safety information with the government.
- **Privacy and civil rights:** It emphasized the protection of individuals' privacy and civil rights in the development and use of AI.
- **Equity and fairness:** The order aimed to prevent and address biases and discrimination arising from AI systems.
- **Consumer and worker protection:** It sought to safeguard consumers and workers from potential harm caused by AI, including job displacement and unfair treatment.
- **Innovation and competition:** The order encouraged continued innovation and fostered a fair and competitive environment for AI development.
- **Global leadership:** It emphasized international collaboration and the development of shared principles for responsible AI across different countries.

## 8.2. European Union's Artificial Intelligence Act (AI Act)

The European Union's (EU) draft of the Artificial Intelligence Act (AI Act), released in January 2024, similarly provides a risk-based approach, including potential benefits.

Like the executive order above, the AI Act provides similar goals:

- **Foster innovation in trustworthy AI:** By encouraging responsible development practices, the Act seeks to position the EU as a global leader in the field.
- **Safeguard fundamental rights:** The framework prioritizes the protection of fundamental rights and ethical principles, ensuring AI applications align with human values.
- **Mitigate potential risks:** By addressing potential ethical issues and societal concerns, the Act seeks to create a safe and responsible environment for AI adoption.

The AI Act adopts a risk-based approach, classifying AI systems into four categories with varying levels of regulation:

- **Unacceptable Risk (Prohibited):** This category encompasses high-risk applications deemed inherently harmful and banned outright. This includes:
  - **Social scoring systems:** Evaluating individuals for non-essential purposes like access to services.
  - **Emotion recognition for manipulative purposes:** Exploiting user vulnerabilities by analyzing emotional state.
  - **Real-time remote biometric identification for general crime prevention:** Extensive use in public spaces.
- **High Risk:** This category includes applications with significant potential for harm and requires strict regulations. Examples include:
  - **Recruitment tools** using AI for candidate selection.
  - **Biometric identification** in law enforcement for specific purposes with safeguards.
- **Limited Risk:** This category encompasses applications with lower potential for harm, subject to proportionate regulations. These include AI systems that generate or manipulate image, audio, or video content (e.g., deepfakes).

- **Minimal Risk:** This category includes applications deemed low-risk, requiring minimal regulatory intervention. Most AI systems will fall into this category and will be subject to fewer obligations.

### 8.3. Minnesota’s potential risk-based approach

This Working Group believes that Minnesota might consider adopting a similar risk-based approach to assessing the risks and benefits of using LLMs in legal contexts. By recognizing that some legal uses of LLMs are less risky than others, Minnesota can ensure that these technologies’ deployment for legal tasks are both safe and beneficial. This approach aligns with the principles outlined in the Executive Order on AI, emphasizing the need for responsible development and use while addressing potential risks.

Aligned with the risk-based approach outlined above, we believe that the Legal Aid and Access to Justice use cases, as described in Section 5, fall under the Minimal Risk category. These applications of Generative AI — including forms assistance, navigational assistance, plain language translation, procedural assistance, and identifying appropriate legal resources — are designed to empower self-represented litigants (SRLs) and enhance their ability to navigate the legal system effectively. By providing tools that assist SRLs, these applications can help increase access to justice without posing significant risks that would necessitate stringent regulations.

Given Generative AI’s potential to significantly increase access to justice without posing substantial risks, we recommend that the Minnesota State Bar Association draft an opinion letter stating that organizations seeking to assist SRLs in the manner outlined in Section 5 should not be subject to prosecution under the unauthorized practice of law (UPL) statute. Such an opinion letter would provide clarity and assurance to entities working to develop and deploy these low-risk, high-impact tools, fostering innovation in legal aid and ensuring that the benefits of Generative AI are accessible to all Minnesotans, regardless of their ability to afford legal representation.

We also believe that a successor AI Standing Committee should further explore potential use cases, and that successor commission might consider exploring which use cases, if any, belong in each of these categories:

- Unacceptable Risk (Prohibited)
- High Risk
- Limited Risk
- Minimal Risk

## SECTION 9. Conclusion

For the past year, the Minnesota State Bar Association Working Group on AI has met regularly, exploring the multifaceted relationship between Large Language Models (LLMs), the Unauthorized Practice of Law (UPL) statutes, and lawyers' ethical obligations. Our journey began with societal recognition of LLMs' transformative potential in legal practice, which inherently interprets and manipulates language. Our work has sought to balance the technological risks with the risks of over-regulation, as well as the potential benefits that LLMs can offer to enhance access to justice.

As we recommend a risk-based regulatory framework, akin to approaches taken by the U.S. government and the European Union, we think that categorizing LLM use in legal contexts into distinct risk levels can help ensure that these technologies are deployed safely and beneficially. And we particularly think that LLMs can greatly assist self-represented litigants (SRLs) navigate our legal system. If organizations are protected from potential UPL prosecution, they can help SRLs with low-risk Generative AI tools, thereby fostering innovation in legal aid.

We also propose the creation of an Access to Justice Legal Sandbox to pilot Generative AI applications in areas of acute need, including housing or immigration law. This type of controlled environment could allow for close regulatory oversight and the evaluation of new AI approaches to determine their impact on — and potential improvement of — access to justice.

We recognize that our legal profession has always had a duty to support equal justice for all, but we must acknowledge that we have fallen *far short* of our ideals. The stark reality is that low-income Americans receive inadequate legal help for the vast majority of their significant legal issues. Our profession's failing underscores the urgent need for innovative solutions. LLMs present a promising opportunity to bridge our vast access-to-justice gap. By leveraging technology responsibly, our profession can allow organizations to offer vital assistance to those who have been underserved by our legal system, fulfilling our ethical obligations and moving closer to the ideal of justice for all.

As noted throughout this document, this Working Group recommends that the MSBA create an AI Standing Committee, which will continue to explore, oversee, and guide all of the work described above. LLMs continue developing rapidly. The AI Standing Committee should keep abreast of those rapid developments, permitting agile adjustments to our profession's approach to this document's noted challenges and promises.

The world stands on the precipice of a new era in legal work, and we believe that the Minnesota State Bar Association can help us through this next stage — not with fear, but with hope. By carefully navigating the risks and benefits of LLMs, we have the opportunity to not only enhance the efficiency and effectiveness of legal work but also to democratize access to justice for all Minnesotans. Our optimism is grounded in the belief that by embracing responsible innovation — innovating not in spite of LLMs, but because of them — we can truly uphold our profession's commitment to public protection, fairness, and access to justice.

# MSBA AI/UPL Working Group Recommendations

1. **AI Standing Committee:** That the MSBA establish an AI Standing Committee: 1) to consider whether Minnesota should adopt the work of other organizations who have assessed LLM use in the context of lawyers existing ethical duties; 2) to further explore potential use cases, and 3) to pay close attention to the ABA's parallel work on this topic. *The AI Standing Committee shall operate in accordance with the MSBA Bylaws.*
2. **Access to Justice Legal Sandbox:**
  - a. **Creation of Sandbox:** That the MSBA pursue creation of an Access to Justice Legal Sandbox to better harness the potential of LLMs in serving access-to-justice initiatives. This regulatory sandbox would provide a controlled environment for organizations to use LLMs in innovative ways, without the fear of UPL prosecution. By permitting experimentation and evaluation, this sandbox could foster legal innovation while ensuring that the deployment of these technologies is both safe and beneficial.
  - b. **Initial Sandbox Pilots:** That the MSBA pursue a pilot project to “test out” Generative AI in an acute area of need, such as housing or immigration and that the MSBA create a cross-stakeholder AI Standing Committee to further define and refine such a pilot, including representatives from the Attorney General's Office, the Courts, legal aid experts in the target areas who have close familiarity with the needs, as well as private legal professionals.

*The AI Standing Committee will continue to study the sandbox/pilot project proposals and make recommendations to the MSBA Board of Governors.*

3. **Educational Sessions:** That the MSBA provide educational sessions to its members regarding LLMs and their implications today, including discussing how legal practice might be affected in the near future. *The AI Standing Committee is directed to create educational sessions and/or make recommendations to the Board of Governors related to particular programs.*
4. **Risk-Based Framework:** That Minnesota adopt a risk-based regulatory framework to assessing the risks and benefits of using LLMs in legal contexts, akin to approaches taken by the U.S. government and the European Union. *The AI Standing Committee is directed to continue to study this proposal and make recommendations to the Board of Governors.*
5. **Opinion Letter:** That the MSBA seek a draft opinion letter stating that organizations seeking to assist SRLs in the manner outlined in Section 5 should not be subject to prosecution under the unauthorized practice of law (UPL) statute. *The AI Standing Committee is asked to submit a draft request letter for the MSBA President to send to the Office of Lawyers Professional Responsibility requesting that it issue an advisory opinion.*
6. **AI Standing Committee Oversight:** That the AI Standing Committee be authorized to oversee — and give reports to the MSBA regarding — all of the initiatives above.

NOTE: Recommendations language in italics was added by the MSBA Assembly prior to adoption.

## V. AI, UPL, and the Justice Gap

MINNESOTA STATE BAR ASSOCIATION

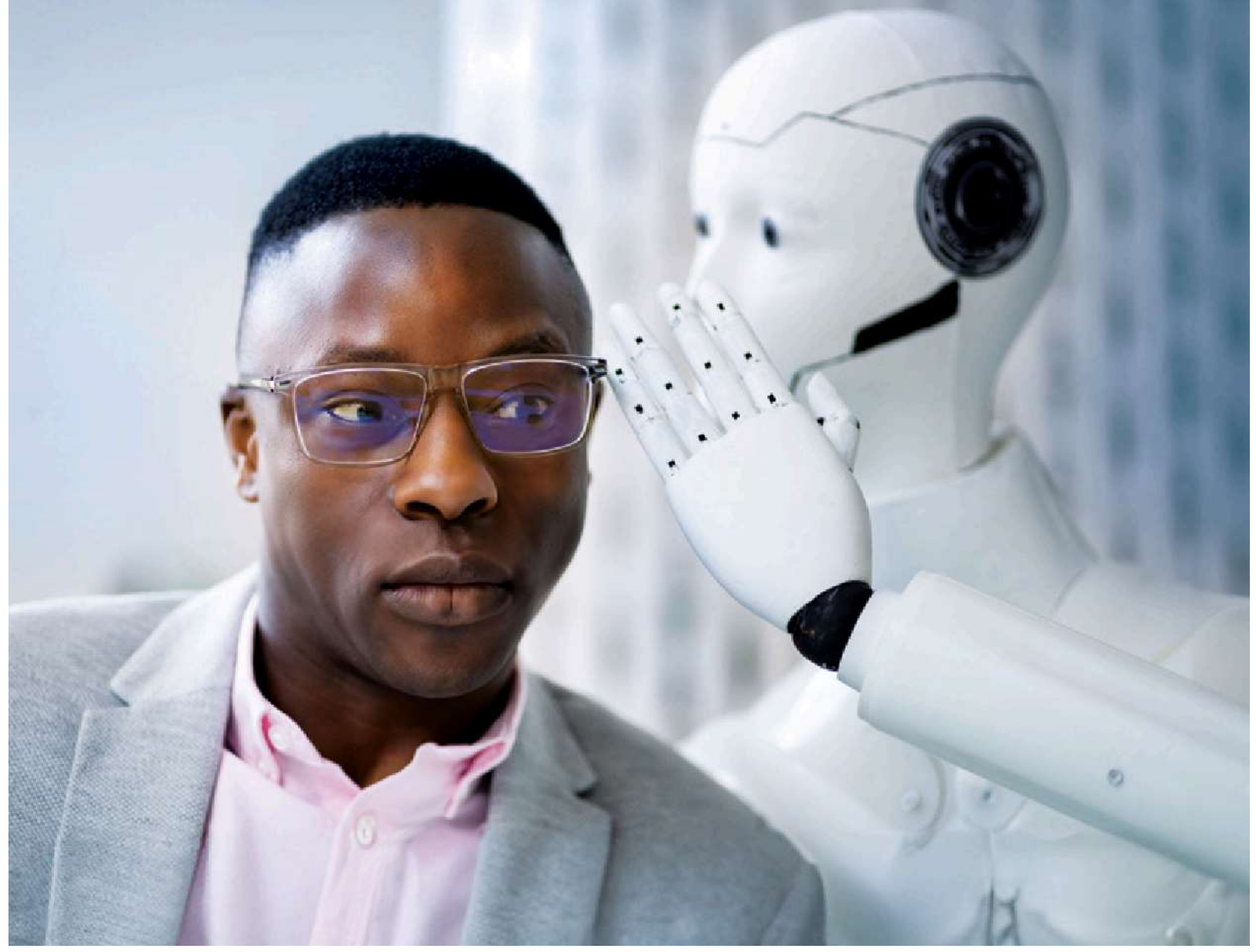
APRIL 2024

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*of Minnesota*

## AI, UPL, AND THE JUSTICE GAP

A PROFESSION AT THE CROSSROADS





# AI, UPL, AND THE JUSTICE GAP



# A PROFESSION AT THE CROSSROADS

BY DAMIEN RIEHL ✉ [damienriehl@gmail.com](mailto:damienriehl@gmail.com)

Since November 2022, when ChatGPT raised the world’s consciousness of the power of generative AI tools such as large language models (LLMs), the legal profession has debated a particular question: Might LLMs—and the companies that run them—be performing the unauthorized practice of law (UPL)?

In many states, including Minnesota, the UPL statutes prohibit “prepar[ing] legal documents” and giving “legal advice.”<sup>1</sup> Central to the UPL debate is the distinction between two concepts: “legal information” and “legal advice.” The caveat is familiar—but does the distinction make sense anymore?

Historically, “legal information” has included primary law (statutes, regulations, case law, administrative opinions) as well as secondary materials (treatises, articles, commentaries on the law). Legal information encompasses abstract legal concepts (such as the elements of a breach of contract claim), as well as the particulars of black-letter law—all as provided by legislators, judges, and regulators.

Legal information is the foundation of our legal system; it must be accessible to all. We’re all *bound* by the law—so we all must have *access* to it. As the Supreme Court noted in 2020, “Every citizen is presumed to know the law, and... ‘all should have free access’ to its contents.”<sup>2</sup> That access to legal information is provided by various free resources, such as Google Scholar (for cases) and Cornell’s Legal Information Institute (for statutes).

In contrast, “legal advice”—that certain something that only lawyers are authorized to provide—has traditionally been viewed as applying legal information to *specific facts*. Throughout human history, the only entities that could apply law to specific facts have been humans. But with the advent of LLMs, machines are increasingly capable of applying the law to specific facts (or, if you prefer, applying specific facts to law). As such, we now must confront novel questions about whether LLMs providing “legal information” might also be supplying “legal advice.” Indeed, if you upload a statute into an LLM and ask it to consider how *your* specific facts apply to that statute, the LLM will provide a response. And that response might be shockingly similar to the words that a lawyer would write. Maybe even better.

Those LLMs are also likely to provide the same types of disclaimers that you provide in offering details about your firm and its practice areas on your website: “This is not legal advice.” Of course, these disclaimers help keep lawyers from creating attorney-client relationships. Do they *also* keep consumers from believing that any attorney-client relationship exists when those consumers use tools like LLMs?

Beauty is in the eye of the beholder; legal advice is in the eye of the consumer. Would any consumer think that Google or Microsoft, when their tools expressly announce “I am not a lawyer,” is acting as their lawyer?

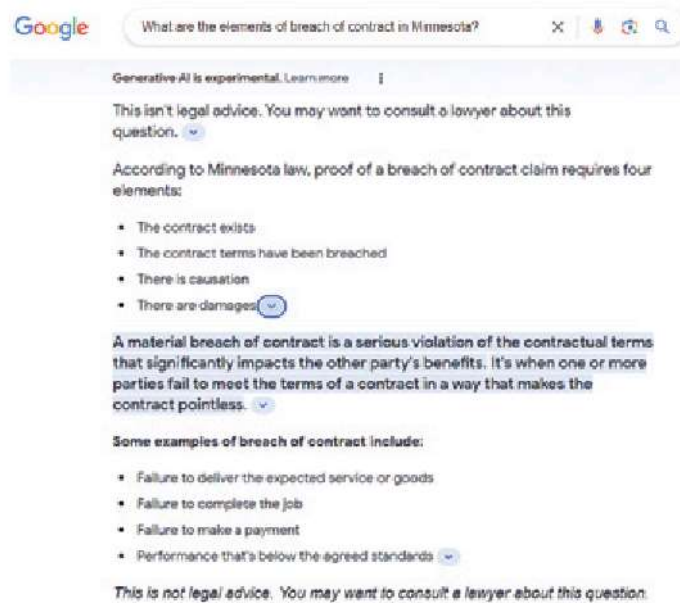
## LLMs’ role in providing legal information

The newfound ability of LLMs to provide more useful legal information potentially challenges traditional notions of “legal advice.” For decades, millions of consumers (and, if we’re being honest, most lawyers) have turned to Google and Google Scholar to answer legal questions. “What are the elements of a breach-of-contract claim in Minnesota?” Has anyone believed that all these years, Google has been providing “legal advice”? Of course not.

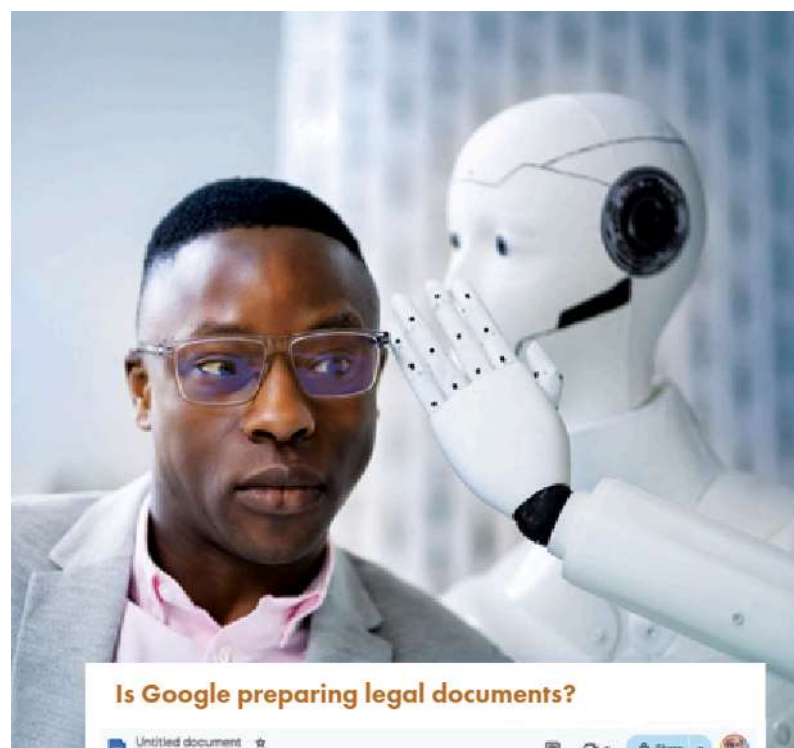
Google is often the tool of first resort for lawyers and consumers alike. Unlike lawyers, low-income and middle-class consumers often rely on Google as their *only* source of legal information. The role of “legal information” is so important—and our help of low-income persons has been so poor—that Google has, for decades, been the primary way that consumers find and interpret legal information.

Today, in addition to pointing users to primary law, Google also provides generative AI answers. For example, if you ask Google the question, “What are the elements of breach of contract in Minnesota?” — Google can now provide a narrative answer:

Note Google’s prominent disclaimers: “This isn’t legal advice,” “You may want to consult a lawyer about this question”—on *both sides* of the answer.



An important question: Given those disclaimers (or even without them), would *consumers* view Google’s output as legal advice? Or mere legal information? If you were to poll consumers, what percentage do you think would say that Google is acting as their lawyer—performing the unauthorized practice of law? This is almost certainly “legal information.” Especially given Google’s clear disclaimers.



## Is Google preparing legal documents?

Help me write

Please draft a motion to dismiss a breach of contract claim under Minnesota Law. Allege that the COVID-19 pandemic properly triggered the contract's force majeure clause.

Create

Please draft a motion to dismiss a breach of contract claim under Minnesota Law. Allege

MOTION TO DISMISS

COMES NOW, Defendant, Defendant's Name ("Defendant"), by and through its undersigned counsel, and files this Motion to Dismiss Plaintiff's Complaint for breach of contract pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In support of this Motion, Defendant states as follows:

I. BACKGROUND

1. On or about Date Contract Signed, Plaintiff and Defendant entered into a contract for the purchase and sale of Goods or Services (the "Contract").
2. The Contract included a force majeure clause that excused performance by either party in the event of a "force majeure event."
3. A force majeure event is defined in the Contract as "any event or circumstance beyond the reasonable control of the affected party, including, without limitation, acts of God, natural disasters, war, terrorism, epidemics, pandemics, and government actions."
4. On or about Date Pandemic Declared, the World Health Organization declared COVID-19 a global pandemic.
5. The COVID-19 pandemic has caused widespread disruption to businesses and economies around

Rate this suggestion:

This is a creative writing aid, and is not intended to be factual. [Learn more](#)

Refine

Insert

Now let's go a step further: Consumers ask the same company (e.g., Google) to draft a motion to dismiss using that legal information, applied to specific facts (covid-19, say). Would any consumer consider this "legal advice"—or would they continue thinking that they were just "Googling it"—that is, obtaining legal information?

Here, is Google giving "legal advice"? Is it "prepar[ing] legal documents"? Minn. Stat. §481.02, subs. 1–2 (2023).

If your answer is, "Yes, Google is either providing 'legal advice,' 'prepar[ing] legal documents,' or both," what then? Prosecute Google? Keep Google's service from low-income consumers?

Chief Justice John Roberts, in his *2023 Year-End Report on the Federal Judiciary*, provided these words regarding the power of AI to help low-income individuals: "For those who cannot afford a lawyer, AI can help. It drives new, highly accessible tools that provide answers to basic questions, including where to find templates and court forms, how to fill them out, and where to bring them for presentation to the judge—all without leaving home. These tools [AI] have the welcome potential to smooth out any mismatch between available resources and urgent needs in our court system."<sup>3</sup>

Those words seem pretty clear: Chief Justice Roberts appears to favor using LLMs to help the low-income population bridge the access-to-justice gap. We should, too.

Imagine the converse: "Sorry, poor people, you don't get the good tools. Despite Justice Roberts's words, your reasonable, Google-created motion is prohibited as the unauthorized practice of law, so you're stuck with 'plain old Googling' to draft your more awful motions (that will be more easily dismissed). It's for your own good!"

Or would it be better to interpret the Google tool's output, as shown above, as "legal information" and not "legal advice"?

Of course, we are weighing this decision even as *lawyers themselves* can use LLMs—in products like Westlaw, LexisNexis, and vLex (Fastcase)—to make the practice of law faster and more effective. When a lawyer uses Westlaw or CoCounsel to draft a legal document, is the legal-research company performing the unauthorized practice of law? Of course not. Legal research tools have always been mere "legal information."

What does this mean for equal justice under the law? Do rich people who can afford lawyers get access to the best LLM-based tools while poor people are stuck with Google search? Access to justice, indeed.

The "legal information" well goes deep. The law consists solely of words. Words are information. And LLMs can now reason with that information, applying facts to law. But that seemingly magical application does not magically convert "legal information" into "legal advice."

## UPL or free speech?

Might all the talk about "unauthorized practice of law" implicate another legal concept, "freedom of speech"? Plaintiffs in two cases, *Upsolve* and *Nutt*, have successfully argued that constraints on professional assessments (legal advice and engineering opinions) constitute unconstitutional constraints on free speech.

In *Upsolve v. James*, the Southern District of New York granted *Upsolve* a preliminary injunction, using an "as applied" standard to hold that *Upsolve's* argument (that New York's UPL statute unlawfully constrains *Upsolve's* ability to provide low-income persons information, thereby constraining *Upsolve's* freedom of speech) is likely to succeed on the merits. The case is currently being appealed to the Second Circuit.<sup>4</sup>

In a similar case from North Carolina, *Nutt v. Ritter*, a federal court recently held that the North Carolina Board of Examiners for Engineers and Surveyors violated a retired engineer's free-speech rights. In December, the federal court held that the regulators' attempt to prohibit the retired engineer from providing an engineering report constituted an unconstitutional violation of free speech. The court reasoned that the engineering guild's "interests must give way to the nation's profound national commitment to free speech."<sup>5</sup>

Looking to the *Nutt* case, is "unauthorized practice of engineering" distinguishable from "unauthorized practice of law"?

From a public policy perspective, which is more dangerous: bad legal advice or a bridge collapse? Yet the *Nutt* court still held that the “unauthorized practice of engineering” constrained free speech unconstitutionally. How might Minnesota’s UPL statute, or any state’s, fare under this standard?

These two cases raise similar, difficult questions: Can states continue asserting UPL statutes without impinging on free speech rights? *Upsolve* is before the Second Circuit, and North Carolina federal courts appeal to the Fourth Circuit. Will they both be upheld on appeal? Or are we looking at a circuit split of the sort that the Supreme Court—led by apparent LLM sympathizer John Roberts—will have to resolve? For advocates of crying UPL, these case law developments will likely dampen their optimism.

### Big Tech and the unauthorized practice of law

If you are among the legal professionals who believe Google is performing the unauthorized practice of law and that the district courts have wrongly held that UPL restrictions thwart freedom of speech, what should we do next? Should prosecutors or bar associations prosecute Google for UPL?

If your answer is yes, then we should probably also prosecute Microsoft, which is baking LLMs into Microsoft Word and Outlook. And while we’re at it, we should probably also prosecute Meta (Facebook), whose open-source LLaMA model answers legal questions similarly. And since nearly 100 percent of the largest technology companies are laser-focused on generative AI, we should also probably do blanket UPL prosecutions of every single Big Tech company—including Amazon, since its AWS hosts LLaMa, Claude, and other LLMs.

On the other hand, if we decline to prosecute Big Tech, then do we similarly decline to prosecute smaller players? Or do we prosecute just the small players and not Big Tech? What does that “punching down” demonstrate? That states are unwilling to assert UPL statutes against the *biggest* players in tech for fear of losing legal battles with Big Tech’s Big Law firms, but we’re happy to try taking down smaller players?

If we truly seek to use UPL laws to prevent “consumer harm,” wouldn’t we go after the world’s *largest* companies — Google, Microsoft, Meta — whose wildly popular LLMs are the *most likely* to be used by our would-be consumer clients?

In the end, if we decline to prosecute the world’s largest companies for UPL, then that decision might well nudge us toward LLMs’ most-promising potential benefits, which involve helping bridge the access-to-justice gap.

### WHAT IF BAD THINGS HAPPEN?

Of course, the purpose of UPL statutes is to protect the public. So what will happen if unscrupulous people or companies give bad advice, taking advantage of consumers? There’s a law for that! Actually, there are many laws to address unscrupulous people taking advantage of others. They include laws pertaining to:

- Negligence. “Providing this bad legal information, you failed to fulfill your duty of care.”
- Product liability. “Your legal product lacked sufficient warnings about its limitations.”
- Misrepresentation. “Your legal information and claims of being a ‘robot lawyer’ were false.”
- Unfair or deceptive trade practices. “You deceived me, saying that you were a lawyer.”

- False advertising. “Your advertisement falsely said that you were a lawyer.”
- Breach of contract. “Your terms of service said your coverage included ‘all courts,’ which was false.”
- Consumer protection laws. “This legal product failed to secure client data, resulting in consumer harm.”
- Fraud. “Your representation — that you’re a lawyer — was false, and you knew that it was false.”
- Breach of warranty. “You guaranteed a result, but you failed to deliver.”
- Probably many others. (Plaintiffs’ lawyers, get your thinking caps on!)

Over 200 years, the case law surrounding each of the common-law and statutory claims above is abundant. UPL prosecution is astonishingly rare. But laws regarding “bad people doing bad things” are bountiful.

Given the paucity of UPL caselaw, and the practical impossibility of distinguishing “legal advice” from “legal information” under the new technological regime, the common-law and statutory claims above can sufficiently protect the public from unscrupulous actors. And because the case law is more developed (millions of cases over centuries), the public is more likely to be protected.

Additionally, under each regime, who can sue? A UPL action arguably can be brought *only* by prosecutors or the attorney general’s office. The 10 civil claims listed above can be brought by anyone. Any member of the public who is wronged can sue; there is no need to convince a prosecutor, to wrangle a case based on the weak and minimal UPL case law, or to form a UPL working group. Civil claims democratize suing bad people doing bad things. Anyone can simply sue for negligence, fraud, product liability, or so on—without needing to even utter the term “UPL.”

### Do UPL laws thwart access to justice?

At the heart of this discussion is access to justice (A2J). For years, 80 percent of consumers’ legal needs have been unmet.<sup>6</sup> As Chief Justice Roberts has noted, today’s LLM-based tools might offer a solution. LLMs can augment the capabilities of legal aid organizations. And they can help consumers for whom paying a legal bill for even 15 minutes is impossible.

For decades, low-income and middle-income people’s *de facto* source of legal information has been Google. Today, their *de facto* source of legal information is an LLM like ChatGPT. Which is better?

If the legal profession stands on the claim that LLM-based tools are performing UPL, then it risks perpetuating the status quo. We’re failing badly. And if we do nothing, we’ll continue failing the highest goal of our profession: equal justice for all. If we instead embrace the promise of LLMs to serve broad swaths of the public that we have left unserved for decades, then perhaps we can help to bridge the massive justice gap.

### Potential solutions to address the A2J gap

AI can improve access to justice. Legal Aid organizations can and should leverage LLM tools, effectively expanding their reach. If legal services transition from traditional methods to more efficient, LLM-driven approaches, they could serve more constituents—and provide even more tailored services to people who need them most. *Pro se* litigants can evolve from “Google-assisted” cannon fodder for lawyers into LLM-enabled parties for whom “equal justice for all” can be referenced with a straight face.

If lawyers increase their productivity with LLMs, they could expand their services by going down-market—and thereby help address that 80 percent of legal needs that are currently unmet. Economists call that an “untapped market.” Today, that low-income latent market is willing to pay what it can for reliable legal services, and with LLM-enabled efficiencies, lawyers could serve that market and make more money in the aggregate.

By embracing this potential future, lawyers could make more money, serve more people, and provide wider societal benefits.

#### COURTS CAN ACHIEVE MORE EFFICIENT WORKFLOWS

When I clerked for the Minnesota Court of Appeals, and subsequently the U.S. District Court for the District of Minnesota, I had a front-seat view of our courts’ litigation firehose. Judges and their clerks work tirelessly, but over time judicial caseloads have nonetheless become more voluminous.

What if LLMs were to help courts with that workload, allowing human judges to better serve justice? Some possible applications:

- **Bench memos.** What if an LLM could draft judicial clerks’ bench memos, performing in minutes what would normally take clerks all day? For each claim, summarize the parties’ positions (which may be spread over many documents): “Plaintiff argues X, defendant argues Y, the law appears to support \_\_\_.” With LLMs, building that tool is trivial (I’ve already built one), and it can create a bench memo in seconds.
- **Clerks for the clerkless.** For those judges who lack law clerks (such as ALJs and some rural judges), the LLM-backed tools could help in more efficiently processing their caseloads.
- **Substantive analyses.** What if an LLM could programmatically identify weak or missing elements of claims? For example: “For the breach-of-contract claim, plaintiff lacks evidence supporting Element 3 (causation).” This is the work that human clerks do today, but slowly. If LLMs can expedite it (with no sacrifice in quality, likely even an improvement), humans will be able to more quickly identify cases’ strengths and weaknesses.

IF LAWYERS INCREASE THEIR PRODUCTIVITY WITH LLMs, THEY COULD EXPAND THEIR SERVICES BY GOING DOWN-MARKET—AND THEREBY HELP ADDRESS THAT 80 PERCENT OF LEGAL NEEDS THAT ARE CURRENTLY UNMET.

This future should consist not of machines deciding cases, but of tools *aiding* judges and their clerks. Just as e-discovery eased the crushing burden of millions of client documents, LLMs can help judges and their clerks sift through their hundreds of cases. These LLM-backed tools can help separate the litigants’ wheat from the chaff more quickly, enabling the human jurists (and their clerks) to more quickly exercise their human judgment.

When I clerked for Chief Judge Michael J. Davis, he would often repeat the maxim: “Justice delayed is justice denied.” LLMs can effectively expedite justice.

#### Conclusion: Where do we go?

The legal profession stands at a crossroads. Embracing generative AI tools such as LLMs can significantly improve legal practice and access to justice. If we’re able to assess potential concerns about free speech and guild protectionism, we might move forward with using tools to benefit the public.

The line between “legal information” and “legal advice” has *always* been blurry. And with LLMs, it has become virtually non-existent. Legal tools can incorporate facts into law, providing legal information that can be indistinguishable from the work of human lawyers. But paradoxically, the technology that can do this near-magical work could also provide lawyers with *additional* work if corporations leverage LLM-enabled lowered costs by giving lawyers more legal work. (One example might be regulatory work that, pre-LLM, was simply too expensive to undertake.) These tools can also enable lawyers and allied professionals to serve a low-income population that has traditionally been unserved.

If lawyers, judges, prosecutors, and bar associations decline to raise the UPL alarm and instead embrace LLMs’ benefits to both the public and to the profession as encouraged by Chief Justice Roberts, our profession will continue to have ample work, while also providing improved access to justice. We can do well by doing good. ▲

#### NOTES

<sup>1</sup> Minn. Stat. §481.02, subds. 1–2 (2023).

<sup>2</sup> *Georgia v. Public.Resource.org, Inc.*, 140 S. Ct. 1498 (2020).

<sup>3</sup> Chief Justice John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary* (12/31/2023), available at <https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf>

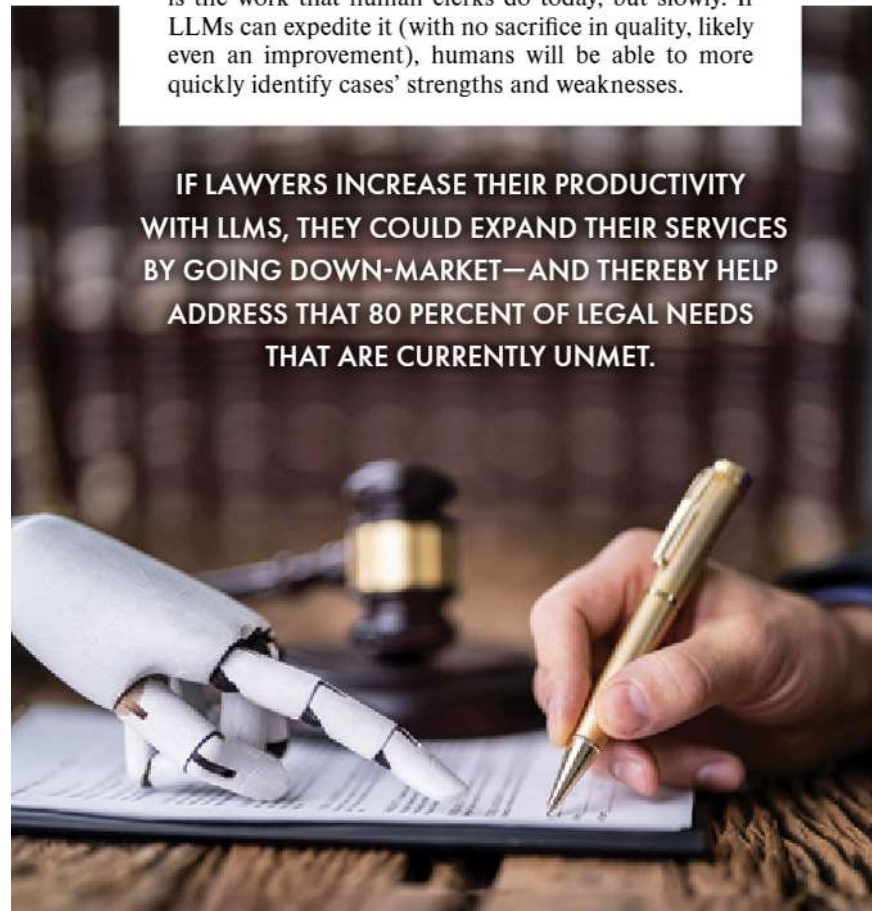
<sup>4</sup> *Upsolve, Inc. v. James*, Case No. 1:22-cv-00627-PAC (S.D.N.Y. 5/24/2022), available at [https://www.docketalarm.com/cases/New\\_York\\_Southern\\_District\\_Court/1-22-cv-00627/Upsolve\\_Inc\\_et\\_al\\_v\\_James/68/](https://www.docketalarm.com/cases/New_York_Southern_District_Court/1-22-cv-00627/Upsolve_Inc_et_al_v_James/68/), appealed to Case No. 22-1345 (2d Cir.), available at [https://www.docketalarm.com/cases/US\\_Court\\_of\\_Appeals\\_Second\\_Circuit/22-1345/Upsolve\\_Inc\\_v\\_James/](https://www.docketalarm.com/cases/US_Court_of_Appeals_Second_Circuit/22-1345/Upsolve_Inc_v_James/)

<sup>5</sup> *Nutt v. Ritter*, Case No. 7:21-cv-00106 (E.D.N.C. 12/20/2023), available at [https://www.docketalarm.com/cases/North\\_Carolina\\_Eastern\\_District\\_Court/7-21-cv-00106/Nutt\\_v\\_Ritter\\_et\\_al/63/](https://www.docketalarm.com/cases/North_Carolina_Eastern_District_Court/7-21-cv-00106/Nutt_v_Ritter_et_al/63/)

<sup>6</sup> Legal Services Corporation, *The Unmet Need for Legal Aid*, available at <https://www.lsc.gov/about-lsc/what-legal-aid/unmet-need-legal-aid>



DAMIEN RIEHL is a lawyer, vLex employee, and chair of the Minnesota State Bar Association’s working group exploring the access-to-justice potential of generative AI and examining whether AI constitutes the unauthorized practice of law—but any views in this article are his own, not those of his employer, the MSBA, or the working group.







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