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Does LegalZoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law

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Abstract

At a time of economic dislocation in the legal profession, it is likely that bar regulators will turn their attention to pursuing lay entities that appear to be engaged in the unauthorized practice of law. One prominent target of these efforts is LegalZoom, an online document preparer that has come under increasing pressure from the organized bar for its marketing and sale of basic legal documents. As regulatory pressure against LegalZoom and similar companies continues to mount, it is worth considering whether there may be unanticipated consequences from pursuing these unauthorized practice claims. In several well-known instances, lay people have successfully defended against such claims by asserting that the law-related activities they wanted to pursue were protected by the First Amendment.

The article first sketches some potential problems with the reflexive assumption that LegalZoom and its fellow travelers are engaged in the unauthorized practice of law. Even assuming that the practice of preparing routine legal documents for consumers runs afoul of many unauthorized practice statutes, however, there remains an open question of whether these statutes may themselves interfere with First Amendment guarantees. In particular, to the extent that these statutes broadly sweep vast amounts of law-related speech within their scope, they may infringe on free speech rights. The article sets forth some of the possible First Amendment arguments available to document preparers, without extensive elaboration, to call attention to the possibility that they may be raised in defense to an unauthorized practice prosecution. It concludes with a caution about aggressive pursuit of these online document preparers without careful consideration of the possible risks involved. A successful First Amendment challenge to an unauthorized practice statute could have repercussions far beyond the world of LegalZoom.

DOES LEGALZOOM HAVE FIRST AMENDMENT RIGHTS? SOME THOUGHTS ABOUT FREEDOM OF SPEECH AND THE UNAUTHORIZED PRACTICE OF LAW

CATHERINE J. LANCTOT*

INTRODUCTION

Historians may look back on the first decade of the twenty-first century as a watershed moment for the American legal profession. The explosive growth of huge law firms at the turn of the century is now being countered by what some fear may be a precipitous decline, tied in many ways to the plummeting economic fortunes of their large corporate clients.[1] At the other end of the spectrum of legal services, rapid technological developments have created a host of online options for consumers of basic legal services, including document preparation services.[2] As the legal profession struggles to reinvent itself, job prospects for law school graduates are at their lowest ebb in generations.[3] It seems that even a law degree is not recession proof.

In the past, one weapon that the organized bar has used to protect itself during economic hard times is the principle of unauthorized practice of law—guarding its market for legal services against the barbarians at the gate.[4] Although pursuing lay people for intruding into the business of lawyers is an ongoing regulatory tactic, studies have shown that such enforcement actions inspire particular devotion during times when business is scarce for licensed lawyers.[5] It would not be surprising, then, to anticipate that charges of

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1. *See* Nathan Koppel, *Bar Raised for Law-Grad Jobs*, WALL ST. J., May 5, 2010, http://online.wsj.com/article/SB10001424052748704866204575224350917718446.html ("[L]aw firms, judges, the government and other employers have drastically cut hiring in the economic downturn. Large corporate law firms have been hit particularly hard. The nation's 100 highest-grossing corporate firms last year reported an average revenue decline of 3.4%, the first overall drop in more than 20 years.")

2. Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 815 (2002); *see also* Chris Johnson, *Leveraging Technology to Deliver Legal Services*, 23 HARV. J.L. & TECH. 259 (2009) (providing a recent overview of the business model for these services).

3. *See* Katy Hopkins, *Law Jobs Will Be Harder to Come By*, U.S. NEWS & WORLD REP., June 25, 2010, http://www.usnews.com/education/articles/2010/06/25/law-jobs-will-be-harder-to-come-by (describing drastic cuts in summer and post-graduate opportunities with questionable prospects for growth in the near future).

4. For a comprehensive look at this history, see Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV 1 (1981).

5. *See* Debra Baker, *Is This Woman a Threat to Lawyers?: A Resurgence in Unauthorized*

unauthorized practice of law will be pressed with renewed vigor in coming days.

Before the legal profession turns its attention yet again to stamping out the unauthorized practice of law, it is essential to consider the broader ramifications of such a crusade. Charging lay people with practicing law without a license has many inherent pitfalls. The first, which I have discussed at length in the past, is that lawyers are incapable of defining just what is meant by "the practice of law."[6] The second, which is a little-explored corollary of the first, is that the lack of consensus on what constitutes the practice of law may generate constitutional issues.[7] In particular, attempting to enforce a broad and amorphous definition of "unauthorized practice" carries with it the risk of a successful First Amendment challenge.[8]

The collision of two equally muddled doctrines—unauthorized practice on the one hand, and the First Amendment on the other—may itself be responsible for the dearth of systematic examinations of this issue. Indeed, lawyers may respond with reflexive disdain to the notion that anyone has a First Amendment right to practice law. But it is a mistake to give short shrift to this question, because some of the activities that might trigger unauthorized practice claims today have a substantial speech component. In several well-known instances, lay people have defended against claims of unauthorized practice by asserting that the law-related activities they wanted to pursue were protected by the First Amendment.[9] After all, the law is a "speaking profession," and the speech/conduct distinction that First Amendment jurisprudence has attempted to identify can be difficult to discern.[10] Moreover, the targets of recent unauthorized practice claims are no longer simply lay individuals, but today may be large companies doing millions of dollars of business.[11] These companies are likely to leave no stone unturned in defending their livelihood against what they characterize as nothing more than economic protectionism by an elite profession.

In this Article, I describe the activities of the most successful online

Practice Complaints is Raising Questions about Whether the Court of Public Opinion Will Judge Lawyers as Guardians of the Common Good or Protectors of Their Own Turf, 85 A.B.A. J., 54, 56 (June 1999) (attributing an increase in unauthorized practice of law cases to a perceived growth in legal services market competition from traditionally non-legal businesses).

6. *See* Lanctot, *Scriveners in Cyberspace, supra* note 2, at 849-50 (discussing the different varieties of legal services offered to lay people and whether they may constitute unauthorized law practice).

7. *See id.* at 852 (discussing potential First Amendment challenges to enforcement of "unauthorized practice of law" statutes).

8. *Id.*

9. *See, e.g.*, *id.* at 826, 836 (reviewing N.Y. Cnty. Lawyers' Ass'n v. Dacey, 234 N.E.2d 459 (N.Y. 1967), and Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 1999 U.S. Dist. LEXIS 813 (N.D. Tex. Jan 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999)).

10. *See generally* Eugene Volokh, SPEECH AS CONDUCT: GENERALLY APPLICABLE LAWS, ILLEGAL COURSES OF CONDUCT, "SITUATION-ALTERING UTTERANCES," AND THE UNCHARTED ZONES, 90 Cornell L. Rev. 1277 (2005).

11. *See Business Formations*, http://www.legalzoom.com/business-formations/business-formations.html (last visited Mar. 18, 2011) (outlining the company's business services).

document preparer, LegalZoom, and the mounting campaign against it from the organized bar and disgruntled consumers. I then briefly sketch some potential problems with the reflexive assumption that LegalZoom and its fellow travelers are engaged in the unauthorized practice of law. Even assuming that the practice of preparing routine legal documents for consumers runs afoul of many unauthorized practice statutes, however, there remains an open question of whether these statutes may themselves interfere with First Amendment guarantees. In particular, to the extent that these statutes broadly sweep vast amounts of law-related speech within their scope, they may infringe on free speech rights. Below, I lay out some of the possible First Amendment arguments available to document preparers, without extensive elaboration, to call attention to the possibility that they may be raised in defense to an unauthorized practice prosecution. I conclude this Article by sounding a caution about aggressive pursuit of these online document preparers without careful consideration of the possible risks involved. A successful First Amendment challenge to an unauthorized practice statute could have repercussions far beyond the world of LegalZoom.

I. LEGALZOOM AND ITS CHALLENGE TO THE LEGAL PROFESSION

The best illustration of the emerging dilemma is the online document preparation service known as LegalZoom. Founded in 2001 by two former big firm associates in Hollywood, California, LegalZoom has been extraordinarily successful over the last decade and currently boasts "over 1,000,000 satisfied customers" and roughly 400 employees.[12] LegalZoom offers the creation of basic legal documents such as incorporation papers, simple wills, uncontested divorces, and trademark registration.[13] Using an online questionnaire, customers can build "an effective legal document" step-by-step, generally in under fifteen minutes.[14] Co-founder Robert Shapiro, a California attorney best known for his role on the O.J. Simpson defense team, is touted as one of the "top attorneys" behind the development of the site.[15] Under its business model, a customer who wants a simple will can choose either the "Standard," "Gold," or "Premium" service.[16] All packages include the "LegalZoom Peace of Mind Review," which not only includes "hundreds of automated checks," but also careful review by "document specialists" for grammar, spelling, and completeness of information.[17]

12. *Lawsuits Challenge LegalZoom Document Business*, L.A. DAILY NEWS, June 20, 2010, http://www.losangelesdailynews.org/lawsuits-challenge-legalzoom-document-business/; *Nonprofits Overview*, http://www.legalzoom.com/non-profits/non-profit-corporation-overview.html (last visited Mar. 18, 2011).

13. LEGALZOOM, http://www.legalzoom.com/ (last visited Mar. 18, 2011).

14. *Id.*

15. *Management Team*, http://www.legalzoom.com/about-us/management-team#2680 (last visited Mar. 18, 2011).

16. *Last Will Package Details*, http://www.legalzoom.com/legal-wills/wills-packages.html (last visited Mar. 18, 2011).

17. *Id.*; *Peace of Mind Review*, http://www.legalzoom.com/peace-of-mind-popup.html (last visited Mar. 18, 2011).

Many companies tried to develop a similar business model at the turn of the twentieth century, but most of them did not succeed.[18] One of the most noted entrants into the pool of legal document preparation was the highly-touted franchise We The People, which also offered legal document preparation, but in a bricks-and-mortar setting.[19] We The People was one of the earliest do-it-yourself bankruptcy form preparation companies. The company went national with a great publicity splash in 2003, when it entered into a "strategic alliance" with former New York City mayor Rudolph Guiliani's consulting firm.[20] At its pinnacle, We The People boasted more than 1000 franchises in thirty states.[21] But the franchise became enmeshed in litigation in multiple states over allegations that it was engaged in the unauthorized practice of law by providing bankruptcy services.[22] Ultimately, the company entered into settlement agreements with the United States Trustee in several states to stop assisting customers with bankruptcy forms.[23] In February 2010, We The People filed for bankruptcy in Delaware, having experienced a loss of $2.5 million in 2009, with revenues of $1.4 million.[24]

Similarly controversial since its inception, in recent years LegalZoom has been the target of multiple unauthorized practice challenges. The Authorized Practice Committee of the North Carolina State Bar investigated LegalZoom's practices and sent the company a cease-and-desist letter on May 5, 2008.[25] The Committee expressly rejected LegalZoom's contention that it was not offering any legal advice, explaining: "Legal advice includes the selection of terms and clauses within a legal document as well as the selection of which

18. *See* Kenneth L. Carson, *Legalize It? Lawyers Practicing Across State Lines*, 46 BOS. B.J. 18, 20 (2002) (providing early, and sometimes extravagant, predictions of success for such companies).

19. WE THE PEOPLE, http://www.wethepeopleusa.com/ (last visited Mar. 18, 2011).

20. *Giuliani Partners and We The People Form Strategic Alliance*, BUSINESS WIRE, Sept. 29, 2003, http://www.businesswire.com/news/home/20030929005127/en/Giuliani-Partners-PeopleForm-Strategic%20-Alliance; Melinda Ligos, *Moving In on New York Lawyers*, N.Y. TIMES, Feb. 15, 2004, http://www.nytimes.com/2004/02/15/business/private-sector-moving-in-on-new-york-lawyers.html; Julie Sloane, *First Kill The Lawyers . . . On the Price for Basic Legal Paperwork*, CNNMONEY.COM, April 1, 2004, http://money.cnn.com/magazines/fsb/fsb_archive/2004/04/01/366651/index.htm. Guiliani Partners severed its relationship with the company soon after it sold out to Dollar Financial in the wake of multiple expensive settlements with bankruptcy trustees. Nathan Vardi, *The Company He Keeps*, FORBES, Nov. 13, 2006, http://www.forbes.com/forbes/2006/1113/138_2.html.

21. Richard Acello, *We the Pauper*, ABA J., May 1, 2010, http://www.abajournal.com/magazine/article/we_the_pauper/.

22. *Id.*

23. *See* Sloane, *supra* note 20 ("The concept [of online legal document preparation services] has proved controversial among—guess who?—lawyers, who have filed complaints against We the People in 13 states. So far the company has settled most of those actions and remains in every state in which it has set up shop. . . . Bankruptcy lawyers have been particularly vocal, and complaints in seven states focus specifically on We the People's bankruptcy services."); *see also* Ligos, *supra* note 20 (noting that We the People "has been the target of 29 lawsuits by lawyers, state bar associations and other critics").

24. Acello, *supra* note 21.

25. *See* N.C. State Bar Authorized Practice Comm., *Letter of Caution Cease and Desist Re: Allegation of Unauthorized Practice of Law, File No. 07AP0011*, LEGAL ZOOM (May 5, 2008), http://www.directlaw.com/LegalZoom%2020080326%20LOC.pdf.

template to use."[26] When one prepares a legal document for another, he necessarily gives legal advice; although the customer chooses the type of legal document from those available through LegalZoom, LegalZoom ultimately controls the content.[27] "Regardless," stated the Committee, "the North Carolina statutes do not permit legal document preparation services even if they are not accompanied by 'legal' advice."[28] The Committee further refused to liken LegalZoom's services to those of a scrivener, noting that its document preparation requires automated software.[29] This software was "designed in accordance with the judgment of LegalZoom," and therefore its operation equates to the practice of law.[30]

On December 12, 2008, the Supreme Court of Ohio's Board on the Unauthorized Practice of Law issued its Advisory Opinion UPL 2008-03, in which it took the same position as the North Carolina State Bar Authorized Practice Commission.[31] The Committee argued that there was a significant difference between the conduct of online document preparers and the "traditional and permissible activities of a scrivener," explaining that the "clerical act of filling out a form legal document is not the practice of law if it consists of typing or writing verbatim the information provided by a customer into the blanks of a form selected by the customer."[32] The activity of the scrivener "does not require the application of legal knowledge or legal skill possessed by attorneys."[33] An online service, in contrast, utilizes user responses to a question set in order to select the proper clauses, provisions, terms and forms that are required to accomplish the desired result.[34] This process intrinsically requires the practice of law through the automated decision-making system. [35]

Connecticut Bar Opinion 2008-01 similarly denounced LegalZoom's activities. "Their conduct goes well beyond mere stenographic completion of documents provided by a customer," explained the Opinion.[36] Like its counterpart in Ohio, the Connecticut Bar Association Committee on the Unauthorized Practice of Law (UPL) highlighted the fact that these types of services utilize both "legal research and legal experience" to prepare the

26. *Id.* at 2.
27. *Id*.
28. *Id.*
29. *Id.*
30. *Id.*
31. Legal Document Preparation by Online Services, Advisory Opinion UPL 2008-03 (Bd. on the Unauthorized Practice of Law of the S. Ct. of Ohio Dec. 12, 2008), *available at* http://www.sconet.state.oh.us/Boards/UPL/advisory_opinions/UPLAdvOp_08_03.pdf.
32. *Id.* at 1.
33. *Id.*
34. *See id.* at 3 ("The service . . . select[s] the appropriate legal form or the most appropriate provisions/clauses for a legal form based on a consumer's answers to online questions.").
35. *See id.* ("This conduct constitutes the practice of law because legal advice is inherently given when one selects and prepares the appropriate legal document for another, or selects relevant terms, clauses, averments or other provisions for a form legal document or pleading, based on responses to specific questions.").
36. We The People and LegalZoom Document Preparation Services, Informal Opinion 2008-01 at 3, Conn. Bar Assoc. Comm. on the Unauthorized Practice of Law (2008).

appropriate documents so as to serve the needs of a given customer.[37] This opinion also characterized the presence of "[s]upervising attorneys [and] experts" as cost-based evidence that legal advice is still being administered during the document preparation process.[38]

Yet another bar opinion followed the same approach in March 2010, when the UPL Committee of the Pennsylvania Bar Association issued Formal Opinion 2010-01.[39] Following closely on the analysis of the other bar opinions to have addressed the issue, the Committee asserted that the documents prepared by such services are "legal documents including pleadings, agreements, wills, trusts, etc., which . . . require the abstract understanding of legal principles with a refined skill in their concrete application, i.e., the exercise of legal judgment."[40] The Committee argued that the exercise of legal judgment occurred "not only in selection of the appropriate legal 'form' but also in applying the facts of a particular 'client's' [customer's] unique circumstances."[41] Although the Committee acknowledged that "anyone may sell 'forms' or provide solely clerical assistance in completing them, it is clear from the advertising and the fees being charged by LDPS that [they] are offering more than rote forms to be typed upon by a clerk."[42]

Two groups of disaffected LegalZoom customers have recently filed suit. On December 18, 2009, a class action complaint was filed in Jefferson City, Missouri in the case of *Janson v. LegalZoom*,[43] alleging that the online company was engaged in the unauthorized practice of law in violation of a Missouri statute.[44] LegalZoom removed the case to federal district court on February 5, 2010, contending that the amount in controversy in terms of potential refunds sought was in excess of $5 million,[45] and the district court certified the case as a class action in December 2010.[46] Katherine Webster, who asserted that she had to hire a lawyer in order to remedy the problems with a living will she purchased through LegalZoom, filed a similar lawsuit in Los Angeles Superior Court on May 27, 2010.[47] General Counsel Chas Rampenthal asserted that the company's success had made it a ripe target for litigation. "I'm not certain why all these lawsuits have been brought in this time frame, but I would have to say the company is (increasingly) a recognized name brand when it comes to

37. *Id.* at 3.

38. *See id.* ("[The] involvement [of legal staff] would be an unnecessary expense to any stenographic activity. The involvement adds value only if they are giving legal advice.").

39. Legal Document Preparation by Online and In-Person Services, Formal Opinion 2010-01 (Penn. Bar Assoc. Unauthorized Practice of Law Comm. Mar. 10, 2010), *available at* http://www.pabar.org/public/committees/unautpra/Opinions/2010-01LglDocumentPreparation.pdf.

40. *Id.* at 5-6.

41. *Id.* at 6.

42. *Id.*

43. Janson v. LegalZoom.com, Inc., 271 F.R.D. 506, 506 (W.D. Mo. 2010).

44. *Id*.

45. *See Janson v. LegalZoom.com, Inc.*, 727 F. Supp. 2d 782, 784 (W.D. Mo. 2010) (noting that LegalZoom removed the case to the District Court).

46. *Janson,* 271 F.R.D. at 513.

47. Webster v. LegalZoom.com, Inc., No. BC438637 (L.A. Super. Ct. filed May 27, 2010).

delivery of legal services by a nonlawyer, and that could be a factor."[48]

Most recently, the Washington state Attorney General negotiated a settlement agreement with LegalZoom in September 2010, requiring the company to stop comparing its services to those of licensed attorneys, and to refrain from providing Washington consumers with individualized legal advice concerning a self-help form. [49]

Other lawsuits may be on the horizon. A lawsuit brought against LegalZoom in Alabama state court was voluntarily dismissed on January 21, 2011, but the plaintiff's attorney indicated that he intended to have the suit brought by another party, either by a district attorney or by a bar association. "There's no dispute that LegalZoom does what we allege they do," he asserted. In response, Chas Rampenthal claimed that the dismissal was a victory for LegalZoom, insisting: "It's an access to justice issue. The decision shows that this attorney's attempt to block the right of Alabama residents to use legal software and self-help websites should never have begun. We view the decision to dismiss the case as an important legal victory for LegalZoom and the public as a whole. After multiple court rejections of his arguments, Mr. Dodd finally understood that his case had no merit and decided to dismiss the lawsuit in its entirety." [50]

II. IS LEGALZOOM ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW?

Despite the views of many bar regulators, the question of whether preparation of legal documents by LegalZoom and similar companies constitutes the unauthorized practice of law is far from settled. Critical to that determination is resolving whether these companies provide "legal advice" in the process of preparing these documents.[51] Legal document preparers generally assert that they act as nothing more than scriveners, simply entering data provided by their customers into designated forms.[52] Bar regulators and disappointed clients insist that the act of determining how to use raw information, including the selection of the proper form, is legal advice, and thus the unauthorized practice of law.[53]

A significant part of the problem is the legal profession's notorious inability to produce a principled definition of the practice of law. I have

48. Alfred Lee, *Firm's Paper Trail Targeted*, L.A. BUS. J., June 14, 2010, http://www.labusinessjournal.com/news/2010/jun/14/firms-paper-trail-targeted/.

49. Debra Cassens Weiss, *Wash. AG's Settlement with LegalZoom Bars Fee Comparisons Absent Disclosure*, A.B.A. J., Sep. 21, 2010), http://www.abajournal.com/news/article/wash._ags_settlement_with_legalzoom_bars_fee_comparisons_absent_disclosure/.

50 See "Alabama Suit Against Legal Zoom Dismissed, ttp://blog.al.com/businessnews/2011/02/alabama_suit_against_legalzoom.html; see also http://www.reuters.com/article/2011/02/01/idUS170730+01-Feb-2011+GNW20110201

51. *See* Lanctot, *Scriveners in Cyberspace, supra* note 2, at 849 ("The first question to consider about sites like . . . LegalZoom is whether the services they provide could be said to constitute the practice of law . . . .").

52. *Id.* at 849-50.

53. *Id.* at 849 ("[S]electing which form to use, giving advice about which information ought to be included in a form, or soliciting information from a lay person and then making determinations about how to use the information in the form is the equivalent of practicing law.").

previously examined this issue at some length,[54] but it merits additional consideration today. As early as 1969, the Model Code of Professional Responsibility expressly noted the difficulty of giving a comprehensive definition of the practice of law, providing the following explanation:

> the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the [lawyer's] professional judgment . . . is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client . . . .[55]

The Model Rules of Professional Conduct did not even attempt this much of a definition, stating what could charitably be described as obvious: "The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."[56]

In the Third Restatement of the Law Governing Lawyers, the American Law Institute similarly proved incapable of developing a working definition of "the practice of law." As finalized in 2000, the Restatement does not offer a definition, and the Reporter's Note simply acknowledges that despite courts' occasional attempts to "define unauthorized practice by general formulations," none of these attempts "seems adequately to describe the line between permissible and impermissible nonlawyer services, such as a definition based on application of difficult areas of the law to specific situations."[57] It added: "[m]any courts refuse to propound comprehensive definitions, preferring to deal with situations on their individual facts."[58]

It should not be surprising, then, that the most elaborate attempt in recent years to provide a more workable definition for the practice of law also ended in failure. In mid-2002, the Board of Governors of the American Bar Association (ABA) established a Task Force on the Model Definition of the Practice of Law. ABA President Alfred P. Carleton issued a "Challenge Statement" explaining the purpose for the Task Force, noting that increasingly, "nonlawyers are providing services that are difficult to categorize under current statutes and case law as being . . . the delivery of legal services."[59] The uncertainty surrounding the definition of the practice of law may be responsible, in part, "for the spotty enforcement of unauthorized practice of

54. *Id.* at 811-12.

55. MODEL CODE OF PROF'L RESPONSIBILITY EC 3-5 (1982).

56. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. (2001).

57. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4: UNAUTHORIZED PRACTICE BY A NONLAWYER reporter's note cmt. c (2000).

58. *Id.*

59. Task Force on the Model Definition of the Practice of Law Challenge Statement, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_challenge.html (last visited April 7, 2011).

law statutes."[60] Some jurisdictions have recently "taken steps to codify a definition of the practice of law so as to attack" an increasing number of problems related to the providing of legal services by nonlawyers. [61] Carleton added that "given the Association's leadership role in this area, it is appropriate for it to consider anew the need to present a model definition to address on a national stage these issues and to aid other jurisdictions that may wish to take action."[62]

In response to this call for action, the draft definition used by the Task Force, dated September 18, 2002, provided:

> A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another: (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others; (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person; (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or (4) Negotiating legal rights or responsibilities on behalf of a person.[63]

The Task Force devoted nearly a year to study, hearings, and comment from a host of interested parties.[64] Objections came from lawyers and nonlawyers alike, including a forceful objection from the Department of Justice and Federal Trade Commission that the proposed rule would inhibit economic competition and hurt consumers.[65]

Despite its extensive effort, the ABA could not find its way through the thicket of issues surrounding the definition of the practice of law. It simply abandoned its draft definition, on the putative theory that "the necessary balancing test for determining who should be permitted to provide services that are included within the definition of the practice of law is best done at the state level."[66] While admitting that a definition of the practice of law is "an important step in protecting the public from unqualified service providers, eliminating uncertainty for persons working in law-related areas about the propriety of their conduct and enhancing the availability of services that are

60. *Id.*

61. *Id.* These jurisdictions include Washington, Arizona, and the District of Columbia. *Id.*

62. *Id.*

63. AMERICAN BAR ASSOCIATION, TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT TO THE HOUSE OF DELEGATES (2002), *as reprinted in* John Gibeaut, *Another Try: ABA Task Force Takes a Shot at Defining the Practice of Law*, 88 A.B.A.J. 18, 19 (Dec. 2002) [hereinafter ABA Task Force Report].

64. For an overview of the work of the Task Force, see Anthony J. Luppino, *Multidisciplinary Business Planning Firms: Expanding the Regulatory Tent Without Creating a Circus*, 35 SETON HALL L. REV. 109, 130-41 (2004).

65. Comments on the American Bar Association's Proposed Model Definition of the Practice of Law (Dec. 20, 2002), *available at* http://www.ftc.gov/opa/2002/12/lettertoaba.shtm.

66. AM. BAR ASS'N TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, GUIDELINES FOR THE ADOPTION OF A DEFINITION OF THE PRACTICE OF LAW, 2 (2003).

included within the definition of the practice of law," the Task Force could not agree on what that definition should be.[67] It cautioned that the "potential for harm is too quickly discounted by those who want to expand the field of who may provide services within the definition of the practice of law and too easily found by those who want to restrict the practice of law to lawyers."[68] The best that it could do was to urge the overarching premise that "the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity."[69] It concluded:

> The process of balancing harm and benefit is not an easy one. There is no simple formula. It requires an exercise of discretion and judgment based on the best available evidence. Each jurisdiction should weigh concerns for public protection and consumer safety, access to justice, preservation of individual choice, judicial economy, maintenance of professional standards, efficient operation of the marketplace, costs of regulation and implementation of public policy.[70]

The ABA Task Force Report ultimately took the unhelpful position that jurisdictions should apply "common sense" in defining the practice of law.[71]

This abdication of responsibility to define the practice of law by the largest organization of lawyers in America sheds considerable light on the complexity of the issue. On the one hand, the profession takes the position that the practice of law is not susceptible to definition, and on the other hand, the profession wants the authority to punish nonlawyers who engage in this undefined practice of law. Trying to have it both ways produces the definitional dilemma, and I have previously cautioned that "[r]esting a fundamental regulatory principle of the legal profession on such a formless concept creates its own set of problems when lawyers seek to prevent lay people from encroaching on their professional territory."[72]

With that said, it is certainly true that the activities of online document preparers pose serious questions under any traditional definition of "practice of law." Generally, state bar associations and courts have drawn a distinction between giving generic legal information and giving personalized legal advice. For purposes of determining whether an attorney has created a professional relationship with a potential client, for example, as long as the communication was simply "information" rather than advice tailored to the particular

67. *Id.* at 1.

68. *Id.*

69. *See* ABA Task Force Report, *supra* note 63. In its original draft, issued by the ABA Task Force on the Model Definition of the Practice of Law on September 18, 2002, the "practice of law" was defined 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*." (emphasis added).

70. ABA Task Force Report, *supra* note 63, at 6. The report then considers, in detail, particular factors to be considered.

71. *Id.* at 4.

72. Lanctot, *Scriveners in Cyberspace, supra* note 2, at 812-13.

circumstances of that potential client, there is no attorney-client relationship.[73] Similarly, unauthorized practice prosecutions often have focused on whether the service provided by the lay practitioner was tailored or customized to a set of individualized facts.[74] Online document preparers like LegalZoom seem to provide services that include both the selection of legal forms for consumers based upon information they provide, and the determination of how to insert specific consumer information into the blank forms. As I have argued in the past, to the extent that this process resembles the application of general legal principles to a specific set of facts, it might qualify as "legal advice."[75]

The line between "legal information" and "legal advice" remains murky under unauthorized practice of law principles. But what are the implications of this ill-defined concept under the First Amendment? In particular, does the First Amendment protect at least some aspects of nonlawyer speech about the law? The answer to this question suggests the possibility that LegalZoom and its fellow scriveners may have some colorable claims of free speech protection that must not be ignored by bar regulators.

III. NONLAWYERS AND THE FIRST AMENDMENT RIGHT TO PUBLISH A BOOK ABOUT THE LAW

Let us begin with first principles, offered here in their simplest form. Freedom of speech is a fundamental right receiving heightened judicial protection.[76] The presumption is in favor of the speaker, and the burden of proof ordinarily is on the government actor seeking to suppress the speech.[77] In order to punish speech, the government must generally show either that the expression at issue is not "speech" protected by the First Amendment, or that the expression falls within one of those categories that the Supreme Court has defined as entitled to little or no judicial protection against suppression.[78] Otherwise, the central tenet of First Amendment jurisprudence is that speech will be protected against government censorship, regardless of how "offensive" it may be.[79] In light of the heavy presumption in favor of speech, it makes sense when considering a novel First Amendment problem to begin with the presumption that the speech will be protected before considering potential justifications for its suppression, rather than automatically assuming that it can be banned.

As an illustration, let us consider the deceptively simple question of

73. Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Perils and the Promise*, 49 DUKE L.J. 147, 177-78 (1999).

74. Lanctot, *Scriveners in Cyberspace, supra* note 2, at 850-52.

75. *Id.*

76. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964).

77. Rubin v. Coors Brewing Co., 514 U.S. 476, 486-87 (1995).

78. United States v. Stevens, 130 S. Ct. 1577, 1584-85 (2010); United States v. O'Brien, 391 U.S. 367, 376-77 (1968).

79. Carey v. Population Serv., Int'l., 431 U.S. 678, 701 (1977) ("At least where obscenity is not involved . . . the fact that protected speech may be offensive to some does not justify its suppression.").

whether a lay person has a First Amendment right to publish a book advocating that others take certain actions with respect to their legal rights or responsibilities. We begin with a book because it is a publication that cannot be tailored to an individual reader's personalized set of facts. A book about the law contains generic information, but cannot—at least under current technological restrictions—offer personalized advice. If we can establish the outer bounds on the state's ability to regulate the publication of legal information, we would be able to define at least some category of lay "legal" activity that would be plainly protected by the First Amendment

Imagine a hypothetical book, authored by a nonlawyer, called *You Can Avoid Lawyers!*, arguing that the legal profession is nothing but a powerful moneyed elite, deliberately maintaining a stranglehold on legal services in order to further its own selfish economic interests. Assume that the book advocates that lay people no longer consult lawyers for advice for simple transactions like wills, uncontested divorces, and leases, and argues that those situations can be easily handled by filling in a standard form. Is this book protected by the First Amendment?

One would assume that it is obvious that lay people must have a First Amendment right to speak and write about legal topics and to offer general opinions about the law. Nevertheless, one of the most notorious lawsuits in the world of unauthorized practice of law attempted to criminalize the publication of a book about the law.[80] The book was the national best-seller *How to Avoid Probate* by an estate planner named Norman Dacey.[81] Dacey ultimately prevailed by asserting his First Amendment rights to publish his book, but the questions generated by this litigation more than forty years ago have yet to be definitively resolved.[82]

Although I have elsewhere reviewed the Dacey litigation in some detail,[83] a brief recap here will serve to focus our attention on the murky dividing line between "information" and "advice." Dacey was not a lawyer but rather an entrepreneurial estate planner.[84] He had developed his own approach to the problems of the probate system and published a book that advocated use of a particular legal device to avoid these problems.[85] The book so captivated the public that it became the best-selling nonfiction book of 1966, outstripping what would have seemed to have been a far more captivating read, the infamous best-seller by Masters and Johnson entitled *Human Sexual Response*.[86]

The organized bar was far less captivated by Dacey's work. The

80. Grievance Comm. of the Bar of Fairfield Cnty. v. Dacey, 222 A.2d 339 (Conn. 1966).

81. NORMAN F. DACEY, HOW TO AVOID PROBATE! (1965).

82. Dacey v. N.Y. Cnty. Lawyer's Ass'n, 290 F. Supp. 835 (S.D.N.Y 1968); Lanctot, *Scriveners in Cyberspace, supra* note 2, at 827-29.

83. Lanctot, *Scriveners in Cyberspace, supra* note 2, at 822.

84. Edwin McDowell, *Book Notes*, N.Y. TIMES, Mar. 7, 1990, at C23.

85. *See id.* (noting that Dacey instructed his readers on setting up their estates without the help of lawyers, who were profiting "at the expense of widows and children," and advised them to place their assets in a living trust for future beneficiaries.).

86. *Id.*

Connecticut Bar Association brought the first lawsuit to prevent Dacey from assisting lay people to fill out the forms he had devised.[87] This case focused on actual personalized legal "advice" rather than the booklet in question.[88] In contrast, the action filed by the New York County Lawyers' Association against Dacey sought to enjoin the sale and distribution of his book.[89] Indeed, the trial court saw no difference between the personalized "advice" Dacey had been giving in Connecticut and the "advice" he gave to the readers in *How to Avoid Probate!*, declaring that "what Dacey did in Connecticut with a small pamphlet supplemented by a confrontation and which was thereupon enjoined, he is doing now through his enormously enlarged and radically changed [b]ook."[90] "As best he can," the court explained, "he makes the confrontation through the [b]ook by selection, advice, guidance, instructions, questions, fitting and fashioning to individual need and by sale and further solicited sale on request of forms to fit a precise need in a given situation."[91]

The court gave short shrift to Dacey's claim that he had a free speech right to publish his book, calling it "ill-considered" and noting that even the New York Civil Liberties Union took the position that "unauthorized practice of law like libel can claim no talismanic immunity from constitutional limitations."[92] The court contended that "[u]nauthorized practice of law cannot be transferred to the [b]ook and by that device to attain the security of a constitutional umbrella to immunize against the power of the court to reach unlawful practice of the law."[93] Dacey was convicted of a misdemeanor for willfully engaging in the unauthorized practice of law and permanently enjoined from disseminating his book or any legal forms.[94] He faced a $250 fine and thirty days in jail.[95]

The Appellate Division upheld Dacey's conviction over a strong dissent in October 1967, detecting no meaningful difference between direct interaction with individual clients and publication of a book advocating a particular course of action.[96] As the Appellate Division explained, the purchaser believed

87. *Grievance Comm. of Fairfield*, 222 A.2d at 341-42 (Conn. 1966).

88. *Id.* at 347 ("When the information given is directed toward a particular person and his needs and to a particular instrument prepared for his execution, it is no longer within the 'general information' classification but has become legal advice embraced within the phrase 'practice of law.' That was the case here."). The motion was not filed to enjoin the distribution of *How to Avoid Probate!* but rather Dacey's thirty-page booklet, "A Modern Plan For Your Tomorrows," which included trust and will forms. *Id.* at 342-43.

89. N.Y. Cnty. Lawyers' Ass'n v. Dacey, 282 N.Y.S.2d 985, 986 (N.Y. Sup. Ct. 1967), *aff'd in part, rev'd in part*, 283 N.Y.S.2d 984 (N.Y. App. Div. 1967), *rev'd*, 234 N.E.2d 459 (N.Y. 1967).

90. *Id.* at 994.

91. *Id.* at 994.

92. *Id.* at 988, 995.

93. *Id.* at 995.

94. N.Y. Cnty. Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984, 987 (N.Y. App. Div. 1967), *rev'd*, 234 N.E.2d 459 (N.Y. 1967). The order banned Dacey from "advising or recommending to the public in the State of New York . . . that any 'form' . . . is legally sufficient, suitable or proper for use for any specific legal purpose." *Id.* at 987-88.

95. *Probate: Taking Dacey Off the Hook*, TIME, Jan. 12, 1968, *available at* http://www.time.com/ time/magazine/article/0,9171,837669,00.html.

96. *See Dacey*, 283 N.Y.S.2d at 991("It is immaterial that Dacey has no face-to-face dealings nor

that with the book he was obtaining the legal counsel of a fully qualified expert.[97]

Dacey persisted, and he finally achieved victory on his constitutional claim in the New York Court of Appeals in December 1967.[98] The Court of Appeals adopted the dissenting opinion in the Appellate Division as its own.[99] Tellingly, that opinion drew a sharp distinction between the "publication of a legal text which purports to say what the law is" and the "essential of legal practice [which is] the representation and the advising of a particular person in a particular situation."[100] Dacey had not engaged in the unauthorized practice of law merely by publishing a book advocating that others should take certain steps to protect their assets from probate because "[a]t most the book assumes to offer general advice on common problems, and does not purport to give personal advice on a specific problem peculiar to a designated or readily identified person."[101]

Most noteworthy for our purposes is the acknowledgment that substantial First Amendment issues also precluded punishing Dacey for publishing his book, particularly at a time when free speech protection was not as robust as it is today. Gravely concerned over the prior restraint issues inherent in an injunction against the sale or publication of a book, the court noted that *How to Avoid Probate!* posed no "substantive evil imminently threatening the public."[102] If advertisements for the book proved to be "false and misleading," they might be subject to restriction under commercial speech doctrine.[103] Otherwise, there was no constitutional basis for the book's suppression.[104] In a plain slap at bar regulators, the court proclaimed, "That it is not palatable to a segment of society which conceives it as an encroachment of their special rights hardly justifies banning the book."[105] Noting that other books purporting to provide legal advice or criticizing law have already been published, the court reminded that "[i]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."[106] With this reversal by the Court of Appeals, Dacey's victory appeared complete. Dacey, however, was not yet finished.

Never one to back down from a fight, Dacey promptly sued the New York

a confidential relationship with particular clients.").

97. *Id.*

98. N.Y. Cnty. Lawyers' Ass'n v. Dacey, 234 N.E.2d 459 (N.Y. 1967).

99. *Id.*

100. *Dacey*, 283 N.Y.S.2d at 997-98 (Stevens, J., dissenting).

101. *Id.* at 998 (Stevens, J., dissenting). The opinion further noted that there was no factual record to show that there had been any harmful effect from the sale or use of Dacey's book, stating "[e]very individual has a right to represent himself if he chooses to do so, and to assume the risks attendant upon what could prove a precarious undertaking." *Id.* at 998-99 (Stevens, J., dissenting).

102. *Id.* at 1000 (Stevens, J., dissenting).

103. *Id.* (Stevens, J., dissenting)

104. *Id.* at 1001 (Stevens, J., dissenting) ("Unless we are to extend a rule of suppression beyond the obscene, the libelous, utterances of or tending to incitement, and matters similarly characterized, there is no warrant for the action here taken.").

105. *Dacey*, 283 N.Y.S.2d at 1000-01 (Stevens, J., dissenting).

106. *Id.* 2d at 1001 (Stevens, J., dissenting) (quoting Bridges v. California, 314 U.S. 252, 270 (1941)).

County Lawyers' Association for violating his constitutional rights by attempting to suppress publication and sale of his book.[107] In rejecting the New York County Lawyers' Association's claim of immunity against suit,[108] Judge Irving Kaufman reiterated the First Amendment concerns implicated by the Association's actions against Dacey:

> The argument Dacey sought to press upon the public—the virtue of which we do not pass upon—was that the infirmities of the probate system required every thoughtful person to avoid the administration of his estate by the probate court. Given this viewpoint, the forms which comprised the bulk of *How [t]o Avoid Probate*! buttressed Dacey's argument that the goal he advocated was not only desirable but feasible. Dacey's book was therefore protected by the [F]irst [A]mendment's guarantee of free speech and any attempt to suppress it on the ground that it constituted the unauthorized practice of law must be scrutinized with extreme care.[109]

The *Dacey* litigation thus provides valuable evidence that First Amendment concerns must be taken seriously when the bar attempts to suppress lay speech about the law.

Despite the ringing defense of free speech for lay people as early as 1967, the issue of banning books about the law remains far from settled, particularly when the law at issue involves the federal income tax. Consider the litigation against tax protester Irwin Schiff, an ardent opponent of the constitutionality of the income tax.[110] While serving a prison term for tax evasion, Schiff wrote his magnum opus, *The Federal Mafia: How the Government Illegally Imposes and Unlawfully Collects Income Taxes*, in which he insisted that there was no legal or constitutional basis for the federal income tax or the Internal Revenue Service.[111] In 2003, the United States Department of Justice obtained a preliminary injunction banning the sale and distribution of various tax protest materials, including Schiff's book and other information distributed through

107. Dacey v. N.Y. Cnty. Lawyers Ass'n, 423 F.2d 188, 190 (2d Cir. 1969).

108. *Id.* at 194. The court did not foreclose the possibility of immunity from suit for actions the Association might take against other individuals. *See id.* ("We do not suggest, however, that immunity would be unavailable to the Association in a case in which it had sought to enjoin an unauthorized practitioner from proffering to specific individuals legal advice relating to their specific problems or had instituted proceedings to disbar an attorney.").

109. *Id.* at 193. Further, without passing on the allegations, the court noted that the inherent conflict of interest for the Association in suppressing a potential competitor also weighed against treating the Association the same way as a judge or public prosecutor. *See id.* at 193-94 ("We merely note the inevitable presence of a possible conflict of interest between the purposes served by the Association and its conception of the public interest whenever it exercises its statutory power to initiate contempt proceedings under § 750, subd. B and secures an injunction against the sale and distribution of a book critical of the profession.").

110. *See, e.g.*, Schiff v. United States, 919 F.2d 830 (2d Cir. 1990); United States v. Schiff, 801 F.2d 108 (2d Cir. 1986); Newman v. Schiff, 778 F.2d 460 (8th Cir. 1985); Schiff v. Comm'r, 751 F.2d 116 (2d Cir. 1984); United States v. Schiff, 647 F.2d 163 (2d Cir. 1981).

111. United States v. Heath, 525 F.3d 451, 453 (6th Cir. 2008).

various websites.[112]

In support of its issuance of the injunction, the United States District Court for the District of Nevada described the content of the *The Federal Mafia* as "largely autobiographical, containing . . . Schiff's anti-tax and anti-government diatribes and theories" intermingled with his "postulations about the voluntariness of income tax, and how federal income tax assessment is the true tax scam."[113] The book hypes Schiff as a "tax consultant," holding his experience in "accounting, economics, actuarial science and law as qualifications for his services."[114] In fulfilling its marketing promise as a resource to avoid paying taxes, *The Federal Mafia* "contains specific instructions on how to stop employers from withholding taxes by submitting an 'exempt' W-4, and how to file 'zero income' tax returns."[115]

Schiff's claim that he had a First Amendment right to publish this book was joined by the American Civil Liberties Union (ACLU), the Association of American Publishers, the American Booksellers Foundation for Free Expression, the Freedom to Read Foundation of the American Library Association, and the PEN American Center.[116] Indeed, the ACLU argued that Schiff's book did not rise to the level of incitement or aiding and abetting of a prospective crime, but rather insisted that it constituted "pure speech."[117] It further contended that the book could not be banned as false and misleading commercial speech, noting that the mere fact that a book is sold does not automatically reduce the constitutional protection afforded to the work.[118]

The district court ultimately rejected Schiff's free speech claims as unwarranted, in the belief that his book and other promotional materials constituted "false, misleading and deceptive commercial speech, incitement, and aiding and abetting illegal conduct."[119] In applying a "commercial speech standard to expression," the Court found that the First Amendment did not protect Schiff's book itself in so far as it advertised his fraudulent tax scheme.[120] Unpersuaded by the large amount of autobiographical and political material in the book, the court insisted that "the commercial speech components of *The Federal Mafia* are not 'inextricably intertwined' with its protected expression."[121] Indeed, like Norman Dacey's *How to Avoid Probate*!,

112. United States v. Schiff, 269 F. Supp. 2d 1262, 1264 (D. Nev. 2003), *aff'd*, 379 F.3d 621 (9th Cir. 2001). *See also Schiff*, 379 F.3d at 624 ("26 U.S.C. §§ 6700 and 6701 . . . penalize persons who organize, market, or promote tax evasion schemes.").

113. *Schiff*, 269 F. Supp. 2d at 1267, *aff'd on other grounds*, 379 F.3d 621 (9th Cir. 2004).

114. *Id.*

115. *Id*.

116. Post Hearing Brief for ACLU of Nevada et al. as Amici Curiae Supporting Defendants, United States v. Schiff, 269 F. Supp. 2d 1262 (May 1, 2003), http://www.aclu.org/files/FilesPDFs/schiff.pdf.

117. *Id.* at 16.

118. *Id.* at 6.

119. *Schiff*, 269 F. Supp. 2d at 1272.

120. *Id*. at 1276. "There is no dispute that while the First Amendment protects commercial speech generally, it does not protect false commercial speech." *Id.* at 1273 n.6.

121. *Id.* at 1277 (citing Cincinnati v. Discovery Network, Inc. 507 U.S. 410, 426 n.21 (1993); Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 474-75 (1989)).

Schiff's work was nothing more than a "how-to manual directed to specific individuals seeking instructions, sample forms, and attachable affidavits to be used in the filing of false income tax returns and submission of false W-4s."[122] Schiff's book does not provide the reader with "information or advocacy on tax reform in general, and then leave the reader to act on his own judgment, or consider the advice of legitimate tax professionals before engaging in conduct of legal significance."[123] The information therein directs the reader "to other materials, seminars and personal assistance to achieve" the aforementioned in falsifying federal documents.[124]

The Ninth Circuit affirmed this holding in 2004,[125] on the grounds that Schiff's book constituted commercial speech under *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York.*[126] Noting that the definition of "commercial speech" was "critical" to its analysis, *Schiff* acknowledged that the federal government's position was that "commercial speech" reaches not only advertising, but also "expression related solely to the economic interests of the speaker and its audience."[127] Here, the court explained: "[t]he extravagant claims made in *The Federal Mafia* are designed to convince readers that they can lawfully avoid paying their income taxes so that the readers will buy other products in Schiff's line."[128] Noting various portions of the book, which encourage readers to accept Schiff's income-tax theories, the court stated that "[a]ll of these things under discussion within the book are made to assure the taxpayer that the taxpayer can legitimately follow these suggestions and forms."[129] Thus, the book "is an integral part of Schiff's whole program to market his various products for taxpayers to utilize his forms and techniques to avoid paying income tax."[130] The court further argued that the expressive and political aspects of Schiff's book were not "inextricably intertwined" with the commercial aspects, because "Schiff can relate his long history with the IRS and explain his unorthodox tax theories without simultaneously urging his readers to buy his products."[131]

Despite the potentially sweeping implications of a federal court opinion upholding the criminalization of selling a book, scholarly commentary on the *Schiff* litigation has been surprisingly sparse.[132] Nevertheless, some recent

122. *Schiff*, 269 F. Supp. 2d at 1279.
123. *Id*.
124. *Id*.
125. United States v. Schiff, 379 F.3d 621, 631 (9th Cir. 2004).
126. 447 U.S. 557 (1980).
127. *Schiff*, 379 F.3d at 626-27 (quoting *Central Hudson*, 447 U.S. at 561).
128. *Id.* at 627.
129. *Id.* at 627-28.
130. *Id.* at 628.
131. *Id.* at 629.
132. The only extensive discussion of *Schiff* appears in a student note, Jacqueline K. Hall, Comment, *United States v. Schiff: Commercial Speech Regulation or Free Speech Infringement?* 36 SETON HALL L. REV. 551 (2006). Hall concludes that *The Federal Mafia* was political speech entitled to the full protection of the First Amendment because it "fits no definition of commercial speech and cannot be likened to promotional pamphlets or training manuals," but rather "convincingly criticizes the practices of the government of the United States." *Id.* at 588-89.

opinions have reflected more nuanced views of the First Amendment concerns implicated by these types of lay publications about the law. In *United States v. Bell*,[133] the Third Circuit considered whether tax protester Thurston Bell's website, "promoting and selling unlawful tax advice," was entitled to First Amendment protection.[134] The lower court had held that the website was nothing more than "the internet version of a television 'infomercial'"[135] and thus his "bogus tax advice" could be punished as false and misleading commercial speech, which enjoys no First Amendment protection.[136] Bell argued that the permanent injunction barred his political advocacy, which could not be treated as commercial speech.[137] In response, the court noted that "[p]ackaging a commercial message with token political commentary does not insulate commercial speech from appropriate restrictions."[138] Despite this holding, the court determined that unless the injunction was read narrowly, it might in fact intrude upon Bell's First Amendment rights.[139] In particular, the court rejected the notion that Bell's "advocacy" for his ideas on his website constituted "incitement" under *Brandenburg v. Ohio*,[140] noting that "the case does not support an affirmative ban of material posted on a website advocating against the income tax."[141]

Most recently, in a 2009 opinion, the Seventh Circuit upheld an injunction issued against the sale of a book entitled *The Law That Never Was*, which made the familiar argument of tax opponents that the Sixteenth Amendment had never been properly ratified.[142] Its author, William Benson, packaged his book with other legal materials and sold it as a "Sixteenth Amendment Reliance Package" or "Reliance Defense Package" for $3500, apparently promising

133. 414 F.3d 474 (3d Cir. 2005).

134. *Id.* at 475.

135. United States v. Bell, 238 F. Supp. 2d 696, 703 (M.D. Pa. 2003).

136. *Bell*, 414 F.3d at 478.

137. Bell's argument was twofold. First, he contended that the district court erred in finding that the materials on his website—www.nite.org—were false commercial speech, unprotected by the First Amendment. Second, he argued that the injunction was overly broad in that it potentially restricted him from advocating resistance to the tax laws of the United States—speech for which he claimed protection in that it does not incite imminent lawless action. *Id.* at 478.

138. *Id.* at 480.

139. *See id.* at 483 ("[T]he offending portions of Bell's speech may be restricted adequately on other grounds, including false commercial speech . . . and aiding-and-abetting violations of the tax laws, without raising constitutional questions or distorting *Brandenburg*."). For an example of other courts construing injunctions against tax protestors without reliance on *Brandenburg*, see *Schiff*, 379 F.3d at 629. ("Because we can uphold the injunction as an appropriate restriction on fraudulent commercial speech, we do not need to address the alternate [basis] cited by the district court to support the injunction, inciting imminent lawless behavior.").

140. *See* 395 U.S. 444, 447 (1969) ("[C]onstitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). *See also* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.").

141. *Bell*, 414 F.3d at 483.

142. United States v. Benson, 561 F.3d 718, 728 (7th Cir. 2009).

customers that his materials would serve as a defense to criminal prosecution for tax evasion.[143] In rejecting Benson's free speech claims, the Court of Appeals asserted that his views on the putatively invalid ratification of the Sixteenth Amendment were "false" and that the "Packages" that he was selling were clearly commercial speech.[144] Nevertheless, it is noteworthy that the court conceded that Benson retained the First Amendment right to sell his book and otherwise to distribute his views on the Sixteenth Amendment.[145] Indeed, the government disclaimed any intention to foreclose him from distributing miscellaneous public records related to judicial decisions[146] or from engaging in the mere sale of his book.[147] He was only foreclosed from "claiming the ability to rely on it to avoid prosecution."[148]

In light of this precedent, the question of whether a lay person has a First Amendment right to publish material advocating that others take certain actions with respect to their legal rights or responsibilities seems far less settled than originally supposed. The opinions of the New York Court of Appeals and the Second Circuit in *Dacey* suggest that the First Amendment protects the publication of a book about the law.[149] The tax protester opinions indicate greater complexity. In particular, the more carefully reasoned opinions in this area indicate potential dangers with sweeping bans on all speech rather than a more calibrated approach. Speech that is advocacy may be protected, but speech that furthers a fraudulent scheme is not.[150]

I do not wish to overstate a connection between the sale of tax protester materials and the sale of blank legal documents, but I do want to call attention to the similarities. Both *Dacey* and *Schiff* involved the sale of a book, with accompanying forms and instructions, in furtherance of a particular theory to which the author subscribes.[151] Dacey believed that lay people could avoid the evils of the probate system by applying his theories.[152] Schiff believed that lay people can avoid the evils of the federal income-tax system by applying his

143. *Id.* at 720-21.

144. *Id.* at 726.

145. *Id.* at 725. "Benson may openly share his views about the ratification of the Sixteenth Amendment or the tyranny of the federal government and IRS. It is not illegal for Benson to urge his followers to take political action. . . . [A]ccording to our great tradition of tolerating nutty opinions, the marketplace of ideas remains open to Benson." *Id.* at 726.

146. *Id.* at 725.

147. *Benson*, 561 F.3d at 725 n.2.

148. *See* United States v. Schulz, 529 F. Supp. 2d 341, 355 (N.D.N.Y. 2007), *aff'd*, 2008 U.S. App. LEXIS 3706 (2d. Cir. 2008) (noting that much of tax protestor's speech is "protected speech," such as speeches on constitutionality of Sixteenth Amendment, but the fraudulent tax-shelter scheme could be punished either as speech facilitating an unlawful act, fraudulent commercial speech, or incitement of illegal conduct).

149. *Dacey*, 423 F.2d at 193; *Dacey*, 283 N.Y.S.2d at 1000-01 (Stevens, J., dissenting).

150. *Schiff*, 269 F. Supp. 2d at 1280 ("It is well-settled precedent that the First Amendment protects an individual's right to disagree with the law and to advocate the violation of a law. There is no protection, however, for speech or advocacy that is directed toward producing imminent lawless action.") (internal citations omitted).

151. *Schiff,* 269 F. Supp. 2d at 1267; *Dacey,* 283 N.Y.S.2d at 988.

152. *Dacey,* 283 N.Y.S.2d at 991.

theories.[153] Both authors were selling their books for profit.[154] Both authors found themselves on the receiving end of a criminal prosecution.[155] Of course, the theory for suppressing Dacey's book was that it constituted the unauthorized practice of law, while the theory for suppressing Schiff's book was that it is fraudulent commercial speech.[156] But if Dacey's book were to be published today, the question arises whether it too could now be legitimately suppressed under commercial speech doctrine. Indeed, if the commercial speech doctrine in *Schiff* is an accurate statement of Supreme Court jurisprudence, it would seem to provide a powerful weapon for bar regulators to defeat any First Amendment challenge to unauthorized practice prosecutions.

What is the relevance of this precedent to the LegalZoom conundrum? First, it suggests that there is some constitutional protection for nonlawyer advocacy about the law. Second, it indicates that the government may attempt to use the less stringent tests for commercial speech to justify its regulation. Third, it cautions that simply calling something "commercial speech" does not make it so.

IV. IS ADVOCATING THAT CONSUMERS SHOULD NOT HIRE LAWYERS PROTECTED SPEECH?

LegalZoom and other lay legal document preparers are not publishing books about the law. Nevertheless, much of their written material on their websites and elsewhere might well be characterized as "advocacy." To the extent that these companies attempt to convince consumers that they should not hire lawyers to prepare certain documents, is this speech protected under the First Amendment? If we can answer this question, then we can at least establish some principles for determining with more precision where the line between "legal information" and "legal advice" might appropriately be drawn.

The answer to this question may again seem to be obvious. Indeed, the Supreme Court has repeatedly acknowledged that speech urging others to take action to enforce their rights implicates First Amendment concerns.[157] As early as 1945, in its 5-4 decision in *Thomas v. Collins*,[158] the Court struck down as a prior restraint a state requirement that labor organizers register with the government before "soliciting" workers to join unions.[159] Texas had contended that its regulation targeted conduct, in the form of "business practices," rather

153. *Schiff*, 269 F. Supp. 2d at 1267.

154. *Id.*; *Dacey,* 283 N.Y.S.2d at 991.

155. Schiff was prosecuted for engaging in "fraudulent or deceptive conduct that substantially interferes with the proper administration of the IRS Code." *Schiff*, 269 F. Supp. 2d at 1265. Dacey was prosecuted for "criminal contempt" arising from "unauthorized practice of law within the State of New York." *Dacey*, 283 N.Y.S.2d at 987.

156. *Schiff*, 269 F. Supp. 2d at 1272; *Dacey*, 283 N.Y.S.2d at 987-88.

157. *Brandenburg*, 395 U.S. at 447 ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy or the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

158. 323 U.S. 516 (1945).

159. *Id.* at 518.

than speech.[160] Writing for the majority, Justice Rutledge noted that the state law's effect "was to prohibit Thomas not only to solicit members and memberships, but also to speak in advocacy of the cause of trade unionism in Texas, without having first procured the card."[161]

In his concurring opinion, Justice Jackson wrestled with the difference between "advocacy" and "practice." He argued there was a rough distinction, whereby a state could prohibit an unlicensed person from practicing law as a vocation, but could not prohibit that person from speaking about any kinds or rights or advocating that his audience organize based on his speech.[162]

> So the state . . . may regulate one who makes a business or a livelihood of soliciting funds or memberships for unions. But I do not think it can prohibit one, even if he is a salaried labor leader, from making an address to a public meeting of workmen, telling them their rights as he sees them and urging them to unite in general or to join a specific union.[163]

Jackson's concurrence identifies the threshold concern of distinguishing between conduct and speech.

Assuming that *Thomas* establishes some general principle that the state may not punish advocacy of taking certain economic action by claiming that it is an "act" rather than "speech," the question remains whether encouraging lay people to avoid lawyers when they need a divorce or a will would qualify as protected advocacy within the meaning of the First Amendment. An instructive early case is the Supreme Court's 1967 decision in *United Mine Workers v. Illinois State Bar Ass'n*.[164] In that case, the Illinois State Bar Association obtained an injunction against the local affiliate of the United Mine Workers for employing an attorney on its staff to represent union members in workers compensation claims, on the grounds that it was "unauthorized practice of law opinions."[165] The Supreme Court reversed, stating: "We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights."[166] It explained: "[B]road rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms."[167]

Most noteworthy about this opinion is that the litigation at issue was not aimed at the vindication of constitutional rights, but rather at the arguably

160. *Id.* at 526.
161. *Id.* at 536.
162. *Id.* at 544.
163. *Id.* at 544-45.
164. 389 U.S. 217 (1967).
165. *Id.* at 218.
166. *Id.* at 221-222.
167. *Id.* at 222.

more mundane enforcement of workers compensation claims.[168] Indeed, the Illinois Supreme Court found that representation in workers compensation claims did not implicate political speech and association.[169] Nevertheless, Justice Black identified broader concerns raised by the attempt to invoke the unauthorized practice statute here:

> The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button*, but the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.[170]

Similarly, in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar,*[171] the Court reversed an injunction preventing a labor union from advising its members to seek representation from particular lawyers as violative of the First Amendment.[172] The Court explained:

> It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow.[173]

The Court found that the right of the union members to consult with each other necessarily included the right to select a spokesperson to give the best advice.[174] Further the right of the workers to advise their fellow members on legal assistance and recommendations of lawyers was "an inseparable part of this constitutionally guaranteed right to assist and advise each other."[175] As to the objection that this constituted unauthorized practice, the Court responded that "[t]he railroad workers, by recommending competent lawyers to each other, obviously are not themselves engaging in the practice of law, nor are

168. *Id.* at 218.
169. *See, e.g.,* Illinois State Bar Ass'n v. United Mine Workers, 219 N.E.2d 503, 509 (Ill. 1966), *vacated,* 389 US. 217 (1967) (distinguishing "constitutionally protected political expression" from "bodily injury litigation").
170. 389 U.S. at 223 (quoting *Thomas*, 323 U.S. at 531).
171. 377 U.S. 1 (1964).
172. *Id.* at 8.
173. *Id.* at 5-6
174. *Id.* at 6.
175. *Id.* at 7.

they or the lawyers whom they select parties to any soliciting of business."[176]

Of course, when the legal issue at stake itself implicates important constitutional issues, the Court has been particularly protective of free speech rights to litigate those issues. In 1963, for example, the Supreme Court confronted the use of unauthorized practice statutes against civil rights groups in *National Association for the Advancement of Colored People v. Button.*[177] The Court rejected the attempt by the state of Virginia to ban litigation activities by the NAACP Defense Fund, including the referral of potential litigants to particular attorneys.[178] The Court noted that litigation was a method of political expression for the NAACP Defense Fund who utilized lawsuits as a form of advocacy and "a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country."[179]

Applying strict scrutiny, the Court held that Virginia did not have a compelling interest, "[f]or a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."[180] Similarly, in *In Re Primus,*[181] the Supreme Court held that the state could not constitutionally ban solicitation of prospective litigants by nonprofit organizations that engage in litigation as a form of political expression.[182] The Court treated such solicitation as an aspect of the right of freedom of association, which outweighed the state's interest in guarding against the evils of solicitation of clients for purposes of economic gain.[183]

In its 2001 opinion in *Legal Services Corp. v. Velazquez,*[184] the Supreme Court struck down a federal law that prevented lawyers who receive grants from the Legal Services Corporation from arguing against the constitutionality of any existing welfare law.[185] Writing for the five-justice majority, Justice Kennedy rejected the argument that such a restriction was a legitimate regulation of government-sponsored speech under *Rust* v. *Sullivan.*[186] He

176. *Id.* at 6-7.

177. 371 U.S. 415 (1963).

178. *Id.* at 426 ("Specifically the court held that, under the expanded definition, such activities on the part of NAACP, the Virginia Conference, and the Defense Fund constituted 'fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability, and which they channel to the enrichment of certain lawyers employed by them, at no cost to the litigants and over which the litigants have no control.'" (quoting NAACP v. Harrison, 202 Va. 142, 155 (1960))).

179. *Id.* at 429.

180. *Id.* at 439.

181. 436 U.S. 412 (1978).

182. *Id.* at 434.

183. *Id.* at 436-37 (stating that "considerations of undue commercialization of the legal profession are of marginal force where, as here, a nonprofit organization offers its services free of charge").

184. 531 U.S. 533 (2001).

185. *Id.* at 537. "As interpreted by the LSC and by the Government, the restriction prevents an attorney from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application is violative of the United States Constitution." *Id.*

186. *Id.* at 543; *see* Rust v. Sullivan, 500 U.S. 173 (1991) (upholding a law forbidding recipients

explained that "[t]here can be little doubt that the LSC Act funds constitutionally protected expression"[187] because the program was "designed to facilitate private speech, not to promote a governmental message."[188] In spite of the receipt of government funds, the LSC-funded lawyer is acting on the behalf of her indigent client and in opposition to the government's denial of benefits and thus "[t]he lawyer is not the government's speaker."[189] Thus, Justice Kennedy explained, "[t]he advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept."[190]

The Court further explained that a restriction on what arguments may be presented in litigation "distorts the legal system by altering the traditional role of the attorneys."[191] Justice Kennedy added:

> By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. Congress cannot wrest the law from the Constitution which is its source.[192]

Thus, he largely rested this holding on a threat of "severe impairment of the judicial function."[193] Moreover, it has recognized that even litigation about "mundane" matters may be protected by the First Amendment.[194] The precedent certainly seems broad enough to protect our hypothetical best-seller *You Can Avoid Lawyers!*.

But what happens when the advocacy is combined with other documents, such as legal forms, that purport to put the advocacy into action? A tax protester may be able to advocate that the Sixteenth Amendment is invalid, but if he furnishes legal forms to assist others to accomplish that objective, he may no longer be able to claim the shield of the First Amendment. On the other hand, Norman Dacey's best-seller was deemed to be protected free speech even though it was coupled with legal forms.[195] For tax protester cases, the forms transform the advocacy into either incitement or fraudulent commercial speech.[196] For online document preparers, the question is whether the sale of forms transforms the advocacy into "legal advice," and therefore the conduct of unauthorized practice of law, or into fraudulent commercial speech. In

of Title X funding from discussing abortion with patients).

187. *Legal Services Corp.*, 531 U.S. at 548.

188. *Id.* at 542.

189. *Id.*

190. *Id.* at 542-43.

191. *Id.* at 544.

192. *Id.* at 545.

193. *Legal Services Corp.*, 531 U.S. at 546.

194. *See pp. 121-23 above.*

195. *Dacey*, 423 F.2d at 193.

196. *See* United States v. Kaun, 827 F.2d 1144 (7d Cir. 1987) (declaring the actions of tax protesters who promoted not paying taxes to be fraudulent speech); *Bell*, 414 F.3d 474 (deciding that the actions of a tax protesting website incited illegal activity).

order to answer this question, we must consider two issues separately: whether the sale of blank legal forms is protected free speech, and whether filling in the legal forms on behalf of another alters the equation.

V. IS THERE A FIRST AMENDMENT RIGHT TO SELL BLANK LEGAL FORMS?

As I explained above, the *Dacey* litigation in New York suggests that nonlawyers do have First Amendment rights to disseminate information about the law, as long as the information does not constitute personalized legal advice.[197] It bears noting, however, that an arm of the Connecticut State Bar also brought an action against Dacey around the same time. The claim was based not on a book as in New York, but his distribution of a thirty-page booklet advocating use of the so-called "Dacey Trust" and "Dacey Will," and his meeting with "clients" to assist them in filling out the forms.[198] The Connecticut Supreme Court ultimately held that Dacey's activities presented a "sordid picture" and constituted unauthorized practice, explaining: "The determination that a given form should be followed without change is as much an exercise of legal judgment as is a determination that it should be changed in given particulars. In either case, legal judgment is used in the adaptation of the form to the specific needs and situation of the client."[199]

In a previous article, I extensively canvassed the case law relating to "scriveners" as it relates to unauthorized practice of law.[200] The question at issue here is whether there is any First Amendment right to be a scrivener on behalf of another. Courts occasionally have addressed this issue in passing. In the 1969 case of *Palmer v. Unauthorized Practice Committee of the State Bar of Texas,*[201] the court enjoined the sale of blank will forms by a lay person, on the theory that a form is "almost a will itself" and is "misleading and certainly will lead to unfortunate consequences for any layman who might rely upon the 'form' and the definitions attached."[202] *Palmer* briefly acknowledged and then dismissed a possible free speech challenge to its holding, noting that "[c]onstitutional rights of speech, publication and obligation of contract are not absolute, and in a given case where the public interest is involved, courts are entitled to strike a balance between fundamental constitutional freedoms and the state's interest in the welfare of its citizens."[203] As the statute at hand was "enacted in the interest of public welfare and safety for the purpose of prohibiting the practice of law by unqualified and unlicensed persons under

197. *See Dacey*, 423 F.2d at 193 (explaining how Dacey's book, which included legal forms, could be protected by the First Amendment's guarantee of free speech, and how trying to suppress that speech based on the idea that it constituted unauthorized practice of law should be scrutinized).

198. Grievance Committee of Bar of Fairfield County v. Dacey, 154 Conn. 129, 133 (Conn. 1966).

199. *Id.* at 141.

200. *See* Lanctot, *Scriveners in Cyberspace*, *supra* note 2 at 829-36 (discussing how courts have addressed the preparation of standard legal forms by lay people).

201. 438 S.W.2d 374 (Tex. Civ. App. 1969).

202. *Id.* at 376.

203. *Id.* at 376-77.

the State's police power,"[204] the constitutional guarantees of freedom of expression and of contract had to "yield to permit the rendition of such decree as is necessary for the reasonable protection of the public."[205] Obviously reflecting a far less sophisticated approach to the First Amendment than would be expected today, *Palmer* nevertheless stands as evidence of the mechanical rejection of free speech claims in unauthorized practice cases.[206]

Despite *Palmer*'s precedent, the constitutional issue with respect to publication of legal information reemerged in 1998.[207] The Texas Bar's Unauthorized Practice of Law Committee attempted to enjoin the sale of a CD-ROM entitled "Quicken Family Lawyer."[208] The software contained one hundred different legal forms and instructions on how to fill them out.[209] As such, the software resembled a legal form book. Unlike the form book however, the software prompted a user for certain information—such as state of residence—and then would identify particular forms as being suitable for that particular state.[210] Answers input by the user to other questions would likewise generate forms specifically marked as appropriate to the provided information.[211] If the user decided to review a particular legal form, the software again had a series of prompts to assist in filling in the blanks, and altered the form accordingly.

In 1999, a federal district court held that the sale of this computer software in Texas constituted unauthorized practice of law and was unprotected by the First Amendment.[212] Judge Barefoot Sanders concluded that the software "purports to select" the appropriate document, "customizes the documents" and "creates an air of reliability about the documents, which increases the likelihood that an individual user will be misled into relying on them."[213] As to the constitutional issue, the court explained that application of the unauthorized practice statute here did not "substantially burden" more speech than necessary, and that the government's interest would be achieved

204. *Id.* at 377.

205. *Id.*

206. *See, e.g.*, Fadia v. Unauthorized Practice of Law Committee, 830 S.W.2d 162 (Tex. App. 1992). The Texas Court of Appeals upheld an injunction forbidding the sale of a book entitled *You and Your Will: A Do-It-Yourself Manual*. The book apparently included "information on how to prepare a will," as well as "fill-in-the-blank forms." *Id.* at 163. "Because a will secures legal rights and involves the giving of advice requiring the use of legal skill or knowledge, the preparation of a will involves the practice of law." *Id.* at 164. The court rejected the invitation to overrule *Palmer* as a request to "legislate from the bench," and treated the First Amendment issue as not preserved for appeal. *Id.*

207. *Unauthorized Practice of Law Comm.*, 1999 U.S. Dist. LEXIS 813. The Unauthorized Practice of Law Committee of the Texas Bar (UPLC), made up of six Texas lawyers and three lay citizens appointed by the Supreme Court of Texas, has the responsibility for enforcing Texas' authorized practice of law statutes. *Id.* at *2. For a detailed discussion of this case, see Lanctot, *Scriveners in Cyberspace*, *supra* note 2, at 836.

208. *Unauthorized Practice of Law Comm.*, 1999 U.S. Dist. LEXIS 813, at *2.

209. *Id.*

210. *Id.* at *5

211. *Id.*

212. *Id.* at *18.

213. *Id*.

"less effectively absent the regulation."[214] It candidly stated:

> Absent the regulation, as it is being applied in this case, the State's ability to combat the unauthorized practice of law in the computer age would be hindered. The State possesses an interest in protecting the uninformed and unwary from overly-simplistic legal advice. The UPLC does not seek to prevent the simple provision of information concerning legal rights; rather, it seeks to prevent the citizens of Texas from being lulled into a false sense of security that if they use QFL they will have a "legally valid" document that's "tailored to [their] situation" and "best meets their needs." If the UPLC is prevented from prosecuting Parsons, the State's interests in preventing those who are not authorized to practice law from giving legal advice would be less effectively achieved. [215]

The First Amendment holding did not last for long. After a vigorous lobbying campaign, the Texas State Legislature amended its unauthorized practice of law statute to permit the sale of software like Quicken Family Lawyer.[216] In response, the Fifth Circuit vacated and remanded the district court's opinion in *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*,[217] without ever reaching the constitutional question.[218] Since *Parsons*, no court decision has addressed the constitutional question presented by the sale of blank legal forms.

In my view, a blank legal form for a will, a simple divorce, or a lease, would presumptively qualify as "speech" under the First Amendment in light of the cases previously discussed. The more pressing question is whether the government would have a plausible defense for restricting such speech. Commercial speech doctrine provides a tempting refuge for bar regulators who wish to prosecute lay people who sell legal publications or other legal products, and so the argument merits close examination here.

For purposes of analyzing this thread of First Amendment doctrine, let us assume the following: first, assume the publication (whether it is a book, a blank legal form, or a software package) is not tailored to the particular needs of an individual consumer. Rather, the consumer purchases the item, and then makes the decision about what information to insert into the form. This is true even in the case of Quicken Family Lawyer, where the actual personalization of

214. *Unauthorized Practice of Law Comm.*, 1999 U.S. Dist. LEXIS 813, at *29.

215. *Id.* at *29-30.

216. *See* Julee Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 132 n.84 (2000) (explaining the passage of the new legislation in Texas that ultimately allowed the sale of software such as Quicken Family Lawyer). As ultimately adopted, the amendment to Sec. 81.101 read: "[T]he 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney." 1999 Tex. Sess. Law Serv. Ch. 799 (H.B 1507) (West).

217. 179 F.3d 956.

218. *Id.*

the document is done by the user, not by the seller, through the process of providing certain information and receiving certain forms in return for the request. Second, we will assume that the author is advocating a position on how some legal problem should be resolved.

Although much debated, the basic contours of commercial speech doctrine are well established. The traditional test articulated in *Central Hudson* may only command a slim majority of support on the current Supreme Court, but it remains the benchmark for evaluating commercial speech claims:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[219]

Of course, the threshold question is whether the speech in question can fairly be characterized as "commercial speech" for purposes of applying the *Central Hudson* test.[220] In particular, the question raised by lay publications about the law is whether they can be treated as commercial speech, either by virtue of being offered for sale themselves, or because they are intertwined with proposals that urge readers to purchase other products, or because they constitute "expression related solely to the economic interests of the speaker and its audience," as the government successfully argued in *Schiff*.[221]

The mere fact that a publication is sold for a profit cannot itself suffice to characterize its content as "commercial speech."[222] Indeed, were that the rule, the scope of First Amendment protection would be reduced to almost nothing. The Court has previously noted that the mere fact that speech is made for a profit does not convert it to speech that proposes a commercial transaction, noting: "Some of our most valued forms of fully protected speech are uttered for a profit."[223] Nevertheless, the doctrine permits the government to ban speech that advertises an illegal product, or commercial speech that is false or misleading.[224]

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219. *Central Hudson*, 447 U.S. at 566.

220. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (asking more broadly "whether speech which does 'no more than propose a commercial transaction' is so removed from any 'exposition of ideas' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government' that it lacks all protection" (citations omitted) (internal quotation marks omitted)).

221. 379 F.3d at 626-27 (quoting *Central Hudson*, 447 U.S. at 561).

222. *Fox*, 492 U.S. at 482.

223. *Id.*

224. *See generally* Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55 (1999) (reviewing the evolution of the definition of commercial speech and the problems with definitional boundaries).

Only by contorting the meaning of "advertising" can one consider a book of will forms to be commercial speech, or even a book touting a particular method of avoiding probate. Defining generic lay speech about the law as commercial speech would be inconsistent with the First Amendment. A book or CD-ROM containing will forms is not itself commercial speech even if one charges money for it. Categorizing such speech as commercial speech would be designed simply to guard the legal profession against economic competition.[225]

In addition, it is well established that if noncommercial speech is "inextricably intertwined" with commercial speech, then the Court will treat the entire content as protected.[226] In *Riley v. National Federation of the Blind of North Carolina,*[227] the Supreme Court explained: "[W]here . . . the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. . . . Therefore, we apply our test for fully protected expression."[228]

Similarly, in *Board of Trustees of the State University of New York v. Fox*, the Court considered the constitutionality of a school regulation that generally prohibited commercial enterprises from operating on state campuses.[229] Students challenging the regulation argued that some commercial activities, such as "Tupperware parties," inextricably intertwined speech proposing that the listeners purchase certain products with more general speech about topics of public interest.[230] Here, however, the Court found that unlike *Riley*, the mere presence of some discussion of matters of "home economics" did not suffice to convert commercial speech into noncommercial speech.[231] Because the home economic elements did not convert the presentations into intertwined educational speech, the speech merely linked products with protected elements and remained commercial speech, warranting no constitutional protection.[232]

Several years ago, the issue of intertwined commercial and noncommercial speech briefly surfaced before the Supreme Court in the high-profile litigation in *Nike, Inc. v. Kasky*.[233] Nike had embarked upon a public relations campaign to defend itself against charges that it mistreated workers in foreign facilities and had been sued under California state law for allegedly unfair and deceptive practices.[234] The trial court sustained Nike's demurrer to

225. *See generally* Ronald D. Rotunda, *Lawyer Advertising and the Philosophical Origins of the Commercial Speech Doctrine*, 36 U. RICH. L. REV. 91, 124-36 (2002) (arguing that the government should not regulate commercial speech in order to change consumer habits, but should only seek to encourage rational decision-making).

226. Riley v. Nat'l Fed'n of the Blind of North Carolina, 487 U.S. 781, 796 (1988).

227. *Id.*

228. *Id.*

229. 492 U.S. at 471-72.

230. *Id.* at 473-74.

231. *Id.* at 474 ("No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.").

232. *Id.* at 474-75 (citing *Central Hudson*, 447 U.S. at 562 n.5).

233. 539 U.S. 654 (2003) (per curiam), *cert. dismissed as improvidently granted*.

234. *Id.* at 656 (Stevens, J., concurring).

the complaint that its speech was protected under the First Amendment, which respondent then appealed numerous times until the Supreme Court granted certiorari.[235] In a concurring opinion in support of the dismissal of certiorari, Justice Stevens, joined by Justices Ginsburg and Souter, explained the difficulties of the First Amendment issue raised in *Nike*.

Justice Stevens took the position that the speech at issue in *Nike* intertwined noncommercial speech, including "debate on an issue of public importance," with commercial speech.[236] Accepting the facts and claims alleged in the complaint as true, Nike's statements included "significant factual misstatements" meant to "generate sales."[237] These factual misstatements justified a regulatory interest to protect consumers from false statements of fact, which the court provides no "constitutional value."[238] But the same communications "were part of ongoing discussion and debate about important public issues."[239] This discussion and debate was deserving of protection "from the chilling effect of the prospect of expensive litigation."[240]

In contrast, Justices Breyer and O'Connor argued that the case should have been considered on its merits, and that the speech should not have been treated as commercial speech because it addressed a matter of public concern.[241] First, Justice Breyer noted that in commercial speech cases the First Amendment "'embraces at least the liberty to discuss publicly and truthfully all matters of public concern.'"[242] He further explained that the communications at issue had both "commercial and noncommercial (public-issue-oriented) elements" that were "inextricably intertwined."[243] The constitutional issue raised in Nike has yet to be fully resolved.

One might anticipate the argument that the sale of a blank legal form to another converts the document into commercial speech. Of course, the Supreme Court has never taken the position that mere sale of one's words converts the expression automatically into commercial speech. But even if that extreme view of commercial speech were to be adopted, under *Central Hudson* and its progeny, the government may ban commercial speech only if it is "false, misleading, or proposes an illegal transaction."[244] Unless bar regulators are prepared to take the position that all blank legal forms are inherently

235. *Id.* at 656-57.
236. *Id.* at 663.
237. *Id.* at 663-64.
238. *Id.* at 664 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)).
239. *Nike, Inc.*, 539 U.S. at 664.
240. *Id.*
241. *Id.* at 667 (Breyer, J., dissenting).
242. *Id.* at 676 (citing Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 534 (1980)). Justice Breyer further noted that under Supreme Court defamation jurisprudence, speech implicating matters of public concern must be given "breathing space" in order to survive. *Id.* (citing *New York Times Co.*, 376 U.S. at 272).
243. *Id.* at 676-677 (citing *Riley*, 487 U.S. at 796).
244. *Va. State Bd. of Pharmacy*, 425 U.S. at 749; *see also Central Hudson*, 447 U.S. at 564 (discussing limits on government power to regulate speech that is not misleading or related to unlawful activities).

fraudulent or misleading, this blanket argument seems unlikely to prevail. A lay person who publishes a book entitled *You Pay Too Much In Taxes*, or *You Don't Need A Lawyer* has not necessarily engaged in commercial speech just because the book is offered for sale, even if the book includes blank legal forms designed to effectuate the author's proposed solution. Careful application of traditional First Amendment principles would require, at a minimum, that the book be examined to see whether it contains aspects which propose a commercial transaction (e.g., "buy my special will forms"). Even if such commercial speech aspects are present in the publication, if they are "inextricably intertwined" with noncommercial speech elements, the entire work will be treated as core First Amendment speech and will be afforded the highest degree of constitutional protection.

The constitutional question raised by LegalZoom and other document preparers must then boil down to this: if advocating that lay people should not pay lawyers to prepare simple legal documents is protected speech, and if blank legal forms are also protected speech, then what is it about the entry of consumer information into those forms that creates unprotected speech? This question has received almost no attention to date, and may prove critical as bar regulators begin to take action against these legal scriveners. As a final matter, let us turn briefly to this question.

VI. DOES FILLING OUT LEGAL FORMS FOR A PAYING CUSTOMER REMOVE FIRST AMENDMENT PROTECTION?

The arguments made by bar regulators with respect to the preparation of legal forms by LegalZoom and others generally center on the assertion that filling out the forms is the same as giving "legal advice." Assuming that this would be sustainable under a particular unauthorized practice of law statute, would a First Amendment challenge to such an assertion even pass the threshold for a nonfrivolous defense? These issues are obviously quite complext. Although a fuller exploration of these arguments must await another day, I will briefly sketch out three likely responses to be raised to such an assertion.

A. Objection 1: "It's Not Speech. Giving Legal Advice Is Conduct and Thus Not Protected by the First Amendment."

As a threshold matter, bar regulators are likely to argue that what a company likeLegalZoom does is not speech, but the "conduct" of "the unauthorized practice of law." By characterizing the preparation of these forms as "legal advice," then, the bar converts what might otherwise be protected speech between lay entities to the conduct of practicing law without a license.

In order to appreciate the nuances of this argument, consider why practicing law without a license is banned in the first place. Plainly it is not solely because the content of the speech itself is somehow dangerous to society, as the prohibition does not hinge on whether the "legal advice" given was good or bad. Indeed, the reason such "speech" may be banned is not

because of its content, but because of the identity of the speaker.[245] In other words, the "advice" to a lay person to "sue before Friday because the statute of limitations will expire" is permissible if the speaker is a lawyer and thus authorized by the state to make such a statement, but it presumably is forbidden without that license. One could also imagine an argument that the state is in fact suppressing the communication of a message by the lay speaker—the message that no lawyer is necessary to provide the information.

Is the mere invocation that something is "legal advice" sufficient to place it within the hands of the state to regulate or ban? The Court has not specifically addressed the question of lay persons giving advice about the law, although it was raised by Justice Douglas in dissenting to the dismissal of *Hackin v. Arizona.*[246] In *Hackin*, a nonlawyer was convicted of unauthorized practice of law because he represented an indigent prisoner in a habeas action.[247] Justice Douglas would have heard the First Amendment challenge, explaining: "[w]hether a State, under guise of protecting its citizens from legal quacks and charlatans, can make criminals of those who, in good faith and for no personal profit, assist the indigent to assert their constitutional rights is a substantial question this Court should answer."[248] Justice Douglas argued that the lack of adequate legal services for the poor called for innovative solutions, including permitting limited lay representation in some matters not requiring a lawyer's skill.[249] He noted: "The line that marks the area into which the layman may not step except at his peril is not clear. I am by no means sure the line was properly drawn by the court below where no lawyer could be found and this layman apparently served without a fee."[250] Perhaps foreshadowing the current debate, Justice Douglas warned:

> [S]tatutes with the broad sweep of the Arizona provision now before this Court would appear to have the potential to "freeze out" the imaginative new attempts to assist indigents realize equal justice, merely because lay persons participate. . . . It may well be that until the goal of free *legal* assistance to the indigent in all areas of the law is achieved, the poor are not harmed by well-meaning, charitable assistance of laymen. On the contrary, for the majority of indigents . . . lay assistance may be the only

245. *See Janson*, 727 F. Supp. 2d 782 (discussing the unauthorized practice of law); *Dacey*, 282 N.Y.S. 2d at 995 (discussing the unauthorized practice of law).

246. 389 U.S. 143 (1967) (appeal dismissed for want of substantial federal question).

247. *Id.* at 143-44 (Douglas, J., dissenting). The lay person in question graduated from an unaccredited law school and was refused admission to the Arizona Bar. *Id.* at 144 (Douglas, J. dissenting).

248. *Id*. at 144 (Douglas, J. dissenting).

249. *Id.* at 151-52(Douglas, J. dissenting).

250. *Id.* at 150 (Douglas, J. dissenting). Douglas went on to state that "[b]roadly phrased unauthorized-practice-of-law statutes such as that at issue here could make criminal many of the activities regularly done by social workers who assist the poor in obtaining welfare and attempt to help them solve domestic problems. Such statutes would also tend to deter programs in which experienced welfare recipients represent other, less articulate, recipients before local welfare departments." *Hackin*, 389 U.S. at 150(Douglas, J. dissenting).

> hope for achieving equal justice at this time.[251]

Justice Douglas's dissent notwithstanding, the Court has yet to enter this fray.

Additional insight into the First Amendment issues presented by "advice-giving" may be gleaned from the Supreme Court's 1985 opinion in *Lowe v. Securities and Exchange Commission*.[252] In *Lowe*, the Court overturned a ruling of the SEC that forbade the publication of semimonthly newsletters containing investment advice and commentary.[253] The SEC's position was based on the fact that the publishers had been convicted of various securities violations and that they were not registered as investment advisers as required by federal law.[254] The newsletter "contained general commentary about the securities and bullion markets, reviews of market indicators and investment strategies, and specific recommendations for buying, selling, or holding stocks and bullion."[255] They also advertised a hotline that readers could call to get current investment advice.[256] Although the newsletter was supposed to be a semimonthly publication, only eight issues were published during the fifteen months after the 1981 order.[257]

Although the District Court distinguished between "nonpersonalized" advice and "person-to-person" advice in fashioning relief, the Second Circuit held that both types of advice could appropriately be enjoined.[258] The lower courts were unable to agree on whether such advice-giving was fraudulent commercial speech and thus bannable, or protected free speech that had been improperly enjoined.[259] The Court carefully reviewed the statutory scheme and concluded that the publishers here did not meet the statutory definition of "investment adviser;" however, it determined that the publishers did fall under the statutory exclusion for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation."[260]

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251. *Id*. at 151-52 (Douglas, J. dissenting) (emphasis in original).
252. 472 U.S. 181.
253. *Id*. at 211.
254. *Id*. at 184, 197.
255. *Id.* at 185.
256. *Id*.
257. *Id*. at 185.
258. 472 U.S. at 186-87. The view of the majority was that the words of the statute drew no distinction between personalized and impersonal advice. *Id*. at 187.
259. *Id*. at 187-88. In fact, the Court of Appeals invoked the unauthorized practice of law when it reasoned that an injunction which required that the publishers "not sell their views as to the purchase, sale, or holding of certain securities is no different from saying that a disbarred lawyer may not sell legal advice." *Id.* at 188 (citing SEC v. Lowe, 725 F.2d 892, 902 (2d Cir. 1984)).
260. *Id*. at 209-11. The Court further explained:

> Congress did not intend to exclude publications that are distributed by investment advisers as a normal part of the business of servicing their clients. The legislative history plainly demonstrates that Congress was primarily interested in regulating the business of rendering personalized investment advice, including publishing activities that are a normal incident thereto. On the other hand, Congress, plainly sensitive to First Amendment

The Court's First Amendment concerns focused on the doctrine of prior restraint, as developed in such cases as *Near v. Minnesota*[261] and *Lovell v. City of Griffin.*[262] The Court noted that the legislative history expressly mentioned *Lovell* and explained: "The reasoning of *Lovell*, particularly since the case was cited in the legislative history, supports a broad reading of the exclusion for publishers."[263] Here, "[b]ecause the content of petitioners' newsletters was completely disinterested, and because they were offered to the general public on a regular schedule, they are described by the plain language of the exclusion."[264] The Court summarized later, "[t]he mere fact that a publication contains advice and comment about specific securities does not give it the personalized character that identifies a professional investment adviser."[265] The majority read the statutory exclusion broadly to exclude these newsletters, thereby avoiding a potential First Amendment difficulty.

Three justices would have reached the First Amendment question and held that the federal statute was unconstitutional as applied to the newsletter publisher.[266] Justice White, joined by Chief Justice Burger and Justice Rehnquist, argued: "One does not have to read the Court's opinion very closely to realize that its interpretation of the Act is in fact based on a thinly disguised conviction that the Act is unconstitutional as applied to prohibit publication of newsletters by unregistered advisers."[267] Indeed, Justice White described the case as "a collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment."[268] He explained that the government plainly has the power to regulate entry into a profession, even if that profession encompasses aspects of free speech:[269]

> Perhaps the most obvious example of a "speaking profession" that is subject to governmental licensing is the legal profession. Although a lawyer's work is almost entirely devoted to the sort of communicative acts that, viewed in

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> concerns, wanted to make clear that it did not seek to regulate the press through the licensing of nonpersonalized publishing activities.

Id. at 204.

261. 283 U.S. 697 (1931).
262. 303 U.S. 444 (1938).
263. *Lowe*, 472 U.S. at 205.
264. *Id.* at 206.
265. *Id.* at 208.
266. *Id.* at 211.
267. *Id.* at 226.
268. *Id.* at 228.
269. *Lowe*, 472 U.S. at 228 (Justice White continued: "The Court determined long ago that although '[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, . . . there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed . . . for the protection of society.' *Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889). Regulations on entry into a profession, as a general matter, are constitutional if they 'have a rational connection with the applicant's fitness or capacity to practice' the profession. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 239 (1957).").

> isolation, fall within the First Amendment's protection, we have never doubted that "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar . . . ."[270]

Justice White recognized the government's argument "that these same principles support the legitimacy of its regulation of the investment advisory profession, whether conducted through publications or through personal client-adviser relationships."[271] He drew a sharp distinction however, between restricting entry into a profession and licensing the speech of the press:[272] "At some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment."[273]

Although he acknowledged that the state has the power to regulate professional conduct, Justice White argued that the line between regulating conduct and regulating free speech should be drawn where the advice is personalized to a particular set of facts.[274] "These ideas help to locate the point where regulation of a profession leaves off and prohibitions on speech begin."[275] When an individual exercises judgment with respect to the specific facts and circumstances of a particular client, that person "is properly viewed as engaging in the practice of a profession."[276] Because such speech is merely "incidental to the conduct of the profession," the government does run afoul of the First Amendment when it "limits the class of persons who may practice the profession."[277] If the "speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted," then government regulation is subject to the First Amendment.[278] He encouraged the identification of the "personal nexus between professional and client," and concluded that government interference of speech outside this nexus should be considered an illegitimate regulation in violation of the First Amendment.[279]

The concurring justices also noted that they did not believe applying the commercial speech doctrine would alter their decision because the statute reaches fully protected speech as well; even under this doctrine, the government could not make an adequate showing that the means used to restrict speech were narrowly tailored.[280] Characterizing the restrictions as

270. *Id*. at 228-29.
271. *Id.* at 229.
272. *See Thomas*, 323 U.S. at 541 (overturning petitioner's contempt of court jail sentence because the order requiring him to obtain a license before speaking publicly was declared unconstitutional).
273. *Lowe*, 472 U.S. at 230.
274. *Id.* at 232.
275. *Id*.
276. *Id.*
277. *Id*.
278. *Id.*
279. *Lowe*, 472 U.S. at 232.
280. *Id.* at 234-35.

"extreme" and "drastic," Justice White asserted that the statute, as applied to the activities at issue, "is too blunt an instrument to survive even the reduced level of scrutiny called for by restrictions on commercial speech."[281]

Lowe suggests that applying a state unauthorized practice statute to the publication of generic legal information, or even "advice," might also run afoul of the First Amendment, and that this is true even if money exchanges hands in return for the advice.[282] The traditional reticence about defining the practice of law by statute or regulation could prove highly problematic. Moreover, the line between personalized and non-personalized advice that played such an important part in that case would also be implicated here. It is difficult to see whether there would be a meaningful distinction between *You Can Avoid Lawyers*, with forms to facilitate that purpose, and a hypothetical *How to Make a Killing on the Stock Market*. At a minimum, the likely attempt to treat on-line legal scriveners as engaged in "mere conduct" and not "protected speech" will require careful analysis. It is not as apparent as some may believe that filling out a legal form for someone else is nothing more than the "conduct" of practicing law without a license. The fact that LegalZoom itself disclaims any guarantee of legal accuracy may also undermine this claim.[283] In light of the precedent outlined above, there must be great care taken in a blanket assertion that this activity has no colorable First Amendment component.

B. Objection 2: "Even Where Conduct and Speech Are Intertwined, The State May Still Regulate or Ban The Speech As Long As It Satisfies Intermediate Scrutiny."

The second objection that may find some traction will likely be an argument that even if the challenged state action reaches both protected speech and conduct, the state's restriction will be upheld as long as it meets the test set out by the Supreme Court in *O'Brien v. United States*. As Chief Justice Warren explained in that well-known opinion, "when speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." The test set down by the Supreme Court in *O'Brien* permits such a regulation to be upheld if "it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

281. *Id*. at 235.

282. *See id*. at 210 ("The dangers of fraud, deception, or overreaching that motivated the enactment of the statute are present in personalized communications but are not replicated in publications that are advertised and sold in an open market."); *id.* at 232 (White, J., concurring) ("Where the personal nexus between professional and client does not exist, . . . government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment command that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.'").

283 http://www.legalzoom.com/disclaimer.html

restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." [284]

The first two elements of the *O'Brien* test would appear to be easily met by a state seeking to enforce its unauthorized practice statute against a scrivener like LegalZoom. First, the state would assert that regulation of the legal profession and the determination of what constitutes the unauthorized practice of law are squarely within the State's constitutional power. "Since the founding of the Republic," the Supreme Court has proclaimed, "the licensing and regulation of lawyers has been left exclusively to the States . . . . [They] prescribe the qualifications for admission to practice and the standards of professional conduct." [285] Second, the State would argue that punishing the preparation of legal documents by unlicensed lay scriveners would serve the important government purpose of protecting consumers and of ensuring the integrity of the attorney licensing system. It seems unlikely that either of these points would engender serious debate.

More problematic for the State, however, may be the third and fourth parts of the *O'Brien* test. The third prong requires that the government's interest be "unrelated to the suppression of free expression." This aspect of the test has proven to be the downfall of other state statutes that have been struck down under O'Brien for their lack of viewpoint neutrality, most notably in the controversial flag-burning case of *Texas v. Johnson*.[286] The question here would be whether the state's interest in punishing the preparation of routine legal documents by lay people was "unrelated" to the speech component of their activity. Of course, the state would argue that its interest in consumer protection and in ensuring that only licensed lawyers engage in law practice is unrelated to any kind of viewpoint discrimination. But a company like LegalZoom may well assert that the state's interest in suppressing its activities reflects hostility to the underlying message that consumers do not need to pay lawyers such high fees for routine legal documents.

The fourth part of the *O'Brien* test could provide an even greater hurdle for a state regulator. This final part of the test requires that the "incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Whether this part of the test imposes a "narrowly tailored" requirement or some lesser test is immaterial to the larger question, which is whether the typical state unauthorized practice statute could ever be sustained under this inquiry.

It is here that the legal profession's persistent refusal to reach consensus on the definition of the "practice of law" could have serious practical consequences. Sustaining a claim that an unauthorized practice statute restricts free speech no more than what is essential to the furtherance of an important state interest will be quite difficult if that statute does not clearly define what precisely constitutes the practice of law. The need for a carefully drawn statute is apparent in light of the foregoing discussion of the many First

[284] 391 U.S. 367, 376-77 (1968).
[285] Leis v. Flynt, 439 U.S.438, 442 (1979)
[286] 491 U.S. 397 (1989)

Amendment interests implicated when nonlawyers speak about the law. It is by no means obvious that a state will be able to sustain a successful prosecution of an online legal document preparer by relying on a standardless unauthorized practice statute. "I know it when I see it" is no longer the standard for determining First Amendment protection for allegedly obscene materials[287] (if it ever was) and it is unlikely to provide safe harbor for a First Amendment challenge to unauthorized practice statutes if the issue is ever joined.

C. Objection 3: "Selling a Completed Legal Form Without a Law License Is Fraudulent Commercial Speech."

The last argument to keep in mind as these legal issues unfold is the contention that when a book is sold in conjunction with blank legal forms, and the book purports to "advise" others on how to achieve particular legal objectives with these forms, the entire work is "commercial speech."[288] Once the work has been categorized as commercial speech, if the government can show that the speech is "false or misleading"—that is, that the legal forms will not achieve the desired objectives—then it may be suppressed entirely.[289] This is the same rationale used by the federal government to suppress the sale of the materials at issue in *Schiff*.[290]

What are the contours of commercial speech? As previously noted, the traditional definition of commercial speech is speech that "propose[s] a commercial transaction."[291] A broader interpretation appears in *Central Hudson*, which defines commercial speech as "related solely to the economic interests of the speaker and its audience."[292] But determining whether particular speech constitutes commercial speech may be difficult.[293] A number of hurdles would have to be overcome before a bar regulator could confidently rely on a commercial speech defense to shut down online scrivener activities.

First, the sale of legal forms that had been completed by the scrivener at the direction of a purchaser would have to qualify as "commercial speech." By

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[287] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); Lanctot, Scriveners, at 812..

288. *See Schiff*, 269 F. Supp. 2d at 1277-79 (discussing permissible government regulation of commercial speech).

289. *See id*. (discussing regulation of commercial speech).

290. *See Schiff*, 379 F.3d at 630 (finding that the District Court for the District of Nevada was acting within its discretion when it enjoined *The Federal Mafia* as fraudulent commercial speech).

291. *Discovery Network, Inc.*, 507 U.S. at 422 (quoting Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 66 (1983)) (describing the "core notion" of commercial speech); *see Fox*, 492 U.S. at 482 ("[T]hey do not consist of speech that *proposes* a commercial transaction, which is what defines commercial speech." (citation omitted)); *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (considering "whether speech which does 'no more than propose a commercial transaction'" lacks constitutional protection (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973))).

292. *Central Hudson*, 447 U.S. at 561.

293. *See Bolger*, 463 U.S. at 81 (1983) (Stevens, J., concurring) ("Even if it may not intend to do so, the Court's opinion creates the impression that 'commercial speech' is a fairly definite category of communication . . . . That impression may not be wholly warranted.").

way of analogy, it seems highly unlikely that a court would hold that similar activity by a licensed attorney would constitute commercial speech. One might respond that the difference is that the attorney is "practicing law" when he or she completes the form, but the scrivener is simply selling a commercial product. But assuming that the question of whether the form preparation constitutes "the practice of law" remains unclear, the definitional difficulties again become apparent. Categorizing a will prepared by an online scrivener as "commercial speech" seems to be an unwarranted extension of that category, and the inconsistency in the case law discussed above suggests a need for caution at this preliminary stage.

Even if the preparation and sale of routine legal documents by online scriveners like LegalZoom were to be analyzed under the rubric of commercial speech, other unsettled issues would then emerge. Doubtless the state would seek to characterize these documents as false, fraudulent, or misleading commercial speech, which then would receive no First Amendment protection. For many, if not most, lawyers, this proposition would appear to be self-evident. In their view, the offering for sale of these documents by nonlawyers is designed to induce reliance by consumers on the legal validity of the completed work. But that argument may not be as easily advanced as some may believe.

Keep in mind that LegalZoom takes great pains to disclaim any reliance on its documents as reflecting the application of legal principles to a set of facts. Its disclaimer expressly provides that it is "not a law firm," and that its service is "not a substitute for the advice of an attorney, further noting: "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." LegalZoom states further that: "At no time do we review your answers for legal sufficiency, draw legal conclusions, provide legal advice or apply the law to the facts of your particular situation."[294]

Disclaimers may not necessarily provide a shield against consumers who claim to have been defrauded or misled. As I have argued elsewhere, lawyers themselves must beware of relying too heavily on website disclaimers as a mechanism for avoiding potential liability for providing specific legal advice online.[295] I do not take a position as to whether the LegalZoom disclaimer, or others like it, would suffice to undermine a claim that all legal documents generated for consumers by nonlawyers are presumptively false, fraudulent, or misleading. Instead, I simply sound the warning note. A blanket assertion that all work product performed by these online scriveners is excluded from constitutional protection as false or fraudulent commercial speech may not automatically succeed.

Assuming that the state would argue in the alternative that its regulation of the sale of completed legal forms could be sustained under the traditional *Central Hudson* test, still more constitutional questions linger. Like the *O'Brien*

[294] http://www.legalzoom.com/disclaimer.html
[295] Lanctot, 49 Duke L.J. at 186-96.

test discussed previously, the *Central Hudson* analysis also examines "whether the asserted governmental interest is substantial." Moreover, the *Central Hudson* analysis focuses similarly on "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[296] As in the *O'Brien* analysis, the state again would be forced to rely on its unauthorized practice statute, which typically would not define with specificity what constitutes the practice of law, to argue that its regulation "directly advances" the protection of consumers from unlicensed lay practitioners and is not drawn more broadly than necessary.

Even though commercial speech doctrine may appear to be a viable way to counter free speech claims by online scriveners like LegalZoom, the likelihood of success remains uncertain at best. Commercial speech doctrine might successfully be used to regulate the marketing and advertising of these services to consumers, by requiring more prominent disclaimers or by limiting the claims made with respect to the benefit of bypassing legal assistance. But extending that doctrine to the underlying documents themselves has potential weaknesses that should not be ignored.

CONCLUSION

The challenge to the legal profession posed by LegalZoom and other online scriveners may be a more knotty problem than many lawyers seem to appreciate. As we have seen, the bar's long-standing failure to reach consensus on what constitutes the practice of law may have consequences in unanticipated ways. First is the unresolved question over whether the completion of routine legal forms for consumers while disclaiming any responsibility for their accuracy constitutes the unauthorized practice of law. The absence of a clear definition of "practice of law" provides at least some refuge for legal scriveners.

Second, and perhaps of greater concern, the vagueness and ambiguity inherent in the definition of unauthorized practice may have unintended consequences if a legal scrivener like LegalZoom presses a First Amendment defense. The legal profession has deliberately left itself free to define a host of activities as "unauthorized practice" on an as-needed basis. This flexibility may have served the bar's regulatory needs in the past, but it could prove fatal to enforcing unauthorized practice laws in the face of a serious First Amendment challenge. The broad and standardless definition of "practice of law" could then collide with the requirement of specificity and narrow tailoring that underlies many aspects of relevant First Amendment doctrine. Whether or not these First Amendment arguments may succeed ultimately in the courts is less important than the fact that they have a sufficient basis to complicate any action for unauthorized practice.

At bottom, the policy question about what the organized bar should do about LegalZoom and its colleagues simply cannot be decided in a vacuum. Confronting these online scriveners through the mechanism of unauthorized practice actions could have serious regulatory repercussions. The moral certainty many lawyers

[296] Cited supra.

possess that these companies are practicing law without a license is not a sufficient basis for triggering litigation against them that could boomerang.

For too long, the legal profession has been able to avoid engaging in the difficult process of defining, once and for all, what constitutes the practice of law. It may not be able to sustain that approach much longer. The organized bar may believe that it can easily stamp out the threat posed by LegalZoom and others. It must be cautious that it not bring the day of reckoning upon itself instead.