LET'S KILL ALL THE LAWYERS…UNLESS WE NEED THEM: AN EXAMINATION OF ESTATE PLANNERS' LIABILITY WITH THE RISE OF DO-IT-YOURSELF LEGAL WORK

Comment

by William Strong-Ott

I. SIMPLIFY, SIMPLIFY, SIMPLIFY

Imagine the following scenario: a lovely family living in the idyllic suburbs of Rhode Island.[1] This family consists of two intelligent daughters, a loving mother, and an ailing father.[2] The two parents own a small business

1. *See* Michael R. McElroy, *Dangers of the Pro Se Explosion*, R.I.B.J. 3 (2013).
2. *See id*.

that has operated in their community for years and have typically employed a lawyer for any legal issues that have arisen from that business.[3] The father, as of yet, has failed to create a last will and testament.[4] Watching the sad, slow decline of their father, the two educated daughters prudently decide to create a will for their father.[5] To that end, the precocious progeny cast off into the stormy sea that is the Internet in search of a form to create a will for the family patriarch.[6] Whether they sailed to the port of LegalZoom.com (LegalZoom) on their search, or perhaps just landed on the dubious shore of their Google search results, the daughters succeed in discovering a form to create a will.[7] Without hesitation the daughters fill out the form and have their father sign the document, an event that both daughters unfortunately witness.[8] Unbeknownst to the two girls, they have just disinherited themselves from their father's estate.[9] According to chapter six of the General Laws of Rhode Island: "If any person shall attest the execution of any will or codicil to whom any beneficial devise . . . shall be thereby given or made, the devise . . . shall, so far only as concerns that person attesting the execution of the will, . . . be utterly null and void."[10] It seems as though the daughters have run aground. Fortunately for the marooned girls, the will first left everything to the mother, who is still alive; the oversight will ultimately be harmless.[11]

The president of the Rhode Island Bar association last year recounted a less embellished version of this story detailing near disaster.[12] While this cautionary tale is based on personal anecdote, such problems are far from localized; indeed, various reiterations of the same basic plot are becoming more common across the country.[13] The use of online legal service providers, such as LegalZoom and RocketLawyer.com (RocketLawyer), has dramatically increased nationwide in the past few years.[14] In the face of a challenging economic environment and the overwhelming pervasiveness of the Internet, "it is no surprise that online web-sites such as LegalZoom.com, offering the production of estate planning documents at a fraction of what an

3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. R.I. GEN. LAWS ANN. § 33-6-1 (West 2015).
11. *See* McElroy, *supra* note 1.
12. *See id.*
13. *See* Rania Combs, *Do-It-Yourself Estate Planning Mistake Disinherits Child*, TEXAS WILLS & TRUSTS ONLINE (Apr. 14, 2010), http://www.texaswillsandtrustslaw.com/2010/04/14/do-it-yourself-estate-planning-mistake-disinherits-child/ [https://perma.cc/NV8J-6ZWY].
14. *See* Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-it-Yourself Estate Planning*, 38 EST. PLN. 27, 27 (2011).

attorney would charge, have proliferated."[15] Such services, along with the benefits of being inexpensive and convenient, also offer the user the opportunity to create a will behind the anonymity of the Internet.[16] Such privacy allows a potential "testator to express personal values, wishes, regrets, and dreams for the future."[17] While the positive aspects of online legal services providers cannot be ignored, the risks to consumers and practitioners alike are also manifest (as illustrated by Part I of this comment).[18] This comment will examine the hurdles and pitfalls that accompany the increasingly pervasive "do-it-yourself" (DIY) approach to legal services, with special attention paid to the risks practitioners bear as they navigate the technological jungle that is the modern legal age.[19] However, the trend toward DIY legal work is not without precedent; indeed, one of the chief harbingers of the DIY movement is the rise in popularity for unbundled legal services.[20] Because of the relatively new (in terms of historical legal trends) penchant for DIY legal work, litigation surrounding unbundled legal services offers a analogous glimpse into the liabilities that practitioners may face as they come into more frequent contact with wills and other legal documents that were created using forms or other DIY methods.[21] Much of the liability associated with such trends stems from the ethical obligations of attorneys to adequately represent their clients, as such this comment will also peer into the void of attorney morality and the malpractice concerns that walk hand-in-hand with the practice of law in the 21st century, particularly in the context of unbundled and DIY legal services.[22]

II. DIGITIZING THE STICKS FROM THE BUNDLE

Before this examination may begin in earnest, it will be useful to discuss exactly how these online legal services providers operate. DIY services, such as LegalZoom, "offer[] customers, via [their] website[s], access to . . . Internet-based software that allows [customers] to create legal documents that include a last will and testament . . .[, they] advertise[] nationwide as a low-cost alternative to hiring a lawyer."[23] Typical DIY software prompts users to fill in blanks on a specialized graphic user interface with answers that are then transferred into the ostensibly correct place in a particular legal

15. *See id.*
16. *See id.* at 31.
17. *Id.*
18. *See id.*; Jonathan G. Blattmachr, *Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve*, 36 ACTEC J. 1, 3 (2010).
19. *See infra* Parts III–V.
20. *See infra* Parts II.A–C.
21. *See infra* Parts III–V.
22. *See infra* Parts IV–V.
23. LegalZoom.com, Inc. v. McIllwain, 429 S.W.3d 261, 262 (Ark. 2013, *reh'g denied*) (Nov. 14, 2013), *cert. denied*, 134 S. Ct. 1563 (U.S. 2014).

document; upon completing this "interview" process, the program prompts the user to pay a fee whereupon the legal document is sent via mail to the customer.[24] For example, on LegalZoom for $250, a user is able to create a simple, generic trust.[25] LegalZoom claimed that, according to AttorneyFee .com, one of its customers would save more than $500 by using LegalZoom, as opposed to a typical attorney.[26] Such a process may be used in establishing anything from legal entities (e.g., limited liability corporations and partnerships) to creating living trusts to filing for divorce.[27]

A. Legal Ludites? Past Problems Concerning DIY Providers

It should be no surprise that significant controversy, and resulting litigation has surrounded these online legal service providers for over a decade.[28] The primary source of conflict with regards to such websites revolves around the so-called "unauthorized practice of law."[29] Regulations against the unauthorized practice of law grew out of the concern that the public may be bamboozled by charlatans masquerading as lawyers.[30] To guard against amateurish or inadequate legal work performed for well-meaning clients, many states passed laws prohibiting such unauthorized practice.[31] Today these laws have become the sword with which lawyers now seek to defend themselves against such inexpensive and convenient (albeit potentially risky) DIY form providers.[32] One of the more famous cases is *Janson v. LegalZoom.com, Inc.*, in which a Missouri court found that LegalZoom was engaged in the unauthorized practice of law because they were offering a service and not a product.[33]

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24. *See Confirmation of Purchase Page*, LEGALZOOM, http://www.legalzoom.com [https://perma.cc/5C24-ECDV] (last visited Jan. 26, 2016) (follow the "Living Trust" hyperlink, found under the "Wills & Trusts" heading, then select "Get Started" and fill in the blanks as prompted).

25. *See id.*

26. *See id.*

27. *See* ROCKETLAWYER, https://www.rocketlawyer.com/ [https://perma.cc/3RFM-9VU7] (last visited Feb. 2, 2016).

28. Colleen M. Garlick, *Guidance by Clicks: The Unauthorized Practice of Law in a Technology Driven World*, 19 TRINITY L. REV. 267, 283 (2014).

29. *See id.* at 268–70.

30. *See id.* at 274–76.

31. *See id.*

32. *See* Goffe & Haller, *supra* note 14, at 31 (observing that "[o]ne method of defending our profession is to use the power of the law to attack do-it-yourself estate planning providers.").

33. *See* Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1065 (W.D. Mo. 2011) (holding that "[t]here is little or no difference between [a human programming a computer to create a legal document] and a lawyer in Missouri asking a client a series of questions and then preparing a legal document based on the answers provided and applicable Missouri law.").

B. Moving Toward the Future

There is, however, a recent trend across the country of courts beginning to shy away from holding that websites like LegalZoom or RocketLawyer are engaged in the unauthorized practice of law.[34] Such a shift in perception is evidenced by a recent case out of North Carolina that arose from a cease and desist order handed down by the State Bar disallowing LegalZoom from any further unauthorized practice of law.[35] LegalZoom appealed, and, in the spring of 2014, a superior court of North Carolina deferred on the question of whether LegalZoom was engaged in the unauthorized practice of law.[36] Instead, the court cited the need for a more developed factual record on how complex legal documents were prepared by LegalZoom.[37] Even more recently and significantly, the South Carolina Supreme Court announced, after reviewing a special recommendation from an appointed referee, that LegalZoom was not engaged in the unauthorized practice of law.[38] Instead, the court compared the work of LegalZoom with the occupation of a "scrivener."[39] Despite the dubious advantages that accompany such service providers offering quick and cheap legal work, the writing on the wall portends that a shift towards DIY and online services is a permanent one; practitioners would do well to redirect their efforts from combating this legal evolution towards understanding and integrating with it.[40]

C. Unbundling?

The turn towards the simplification and separation of the legal profession into self-contained and discrete areas is nothing new; the trend of unbundling has its foundations firmly grounded in the end of the 20th century.[41] Citing a 1994 study by the American Bar Association (ABA), Forrest Mosten (regarded as one of the original promoters of "unbundling" legal services) points out that almost two-thirds of Americans never have

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34. *See* Steve French, *When Public Policies Collide . . . Legal "Self-Help" Software and the Unauthorized Practice of Law*, 27 RUTGERS COMPUTER & TECH. L.J. 93, 129–30 (2001) (remarking that "[t]he response of the legal community in general, then, and of unauthorized practice of law committees and state judiciaries in particular, should not be focused on enforcing unauthorized practice of law definitions and regulations best left to another era.").

35. *See* LegalZoom.com, Inc. v. N. C. State Bar, 11 CVS 15111, 2014 WL 1213242 (N.C. Super. Mar. 24, 2014).

36. *See id.*

37. *See id.*

38. *See* Press Release, LegalZoom, South Carolina Supreme Court Approves LegalZoom Business (Apr. 22, 2014) (on file with author).

39. *See id.*

40. Blattmachr, *supra* note 18, at 44, 49–50 (recommending ways in which practitioners can bring their practice and their firms up to date in the world of modern legal work).

41. *See* Forrest S. Mosten, *Unbundling Legal Services a Key Component in the Future of Access to Justice*, 57-JAN OR. ST. B. BULL. 9 (1997).

their legal needs addressed by the justice system.[42] The reason that "millions of Americans who feel the symptoms of legal disease" never step through the doors of a lawyer's office is simple: attorneys' services are cost prohibitive for most Americans.[43] Mosten notes that the majority of lawyers only offer clients full-service legal work and that such work does not come cheaply.[44] The solution, Mosten proposes, is to unbundle; unpacking the typical service of a lawyer into small, affordable tasks is a simple way to provide legal access to a much greater swath of the American population, especially to those at low or moderate income levels.[45] The trend towards unbundling legal services was no mere passing fad either; the steady march towards totally unbundled legal services has continued to build momentum.[46] Technology has only fanned the flame of unbundling.[47] For instance, Axiom Law is a relatively new company built on the idea that certain legal tasks can be outsourced from a business's in-house counsel to an outside company instead, thereby reducing the burden on the in-house legal team.[48] Such companies serving the private sector have formed for substantially the same reason that unbundling has grown ever more popular among those attorneys serving the public: cost reduction.[49]

D. The Ghost of Representation Present

The practice of unbundling has walked hand-in-hand with a relatively novel form of legal work known as "ghostwriting."[50] Ghostwriting can be done in a variety of legal fields and typically occurs when a client, who wishes to pursue a legal cause of action or defense pro se, seeks the limited

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42. *Id.*

43. *See id.*; A.B.A. Consortium on Legal Servs. & the Pub., *Legal Needs and Civil Justice, A Survey of Americans: Major Findings from the Comprehensive Legal Needs Study* (1994).

44. *See* Mosten, *supra* note 41, at 9.

45. *See id.* at 9–10.

46. *See* Amy Dunn Johnson, *Unbundled Legal Services: A Revolution Whose Time Has Come*, 49 SUM ARK. LAW. 28, 30 (2014). "The Cardozo Law School-based 'Justice Index' indicates that more than 80% of litigants nationally appear without a lawyer in such important civil matters as debt collection, child custody and support, foreclosures, and evictions. The American Bar Association's 2014 World Justice Project Rule of Law Index shows the United States ranking 65th out of 100 countries for access to and affordability of civil legal services and the lowest among all industrialized nations surveyed. The trend toward self-representation is not only indicative of the growing inability of average Arkansans to afford legal representation, but it is also the result of a flourishing DIY movement among the lay public occasioned by the widespread availability of information on the Internet." *Id.*

47. *See id.* at 28.

48. *See* William Peacock, *Axiom: A LegalZoom for In-House? Blame BigLaw*, FINDLAW (Apr. 10, 2013, 11:53 AM), http://blogs.findlaw.com/in_house/2013/04/axiom-a-legalzoom-for-in-house-blame-biglaw.html [https://perma.cc/7ZYG-FVGD].

49. *See id.* (noting that companies trying to remain competitive have begun to shy away from "Big Law" because the big law firms have "lost sight of customer service and providing value at a reasonable cost, and it's left companies willing to take risks by handing out work to non-lawyer non-law non-firms.").

50. *See* J. Vincent Aprile II, *Ghostwriter: A New Legal Superhero?*, 26 NO. 2 GPSOLO 26 (2009).

help of a lawyer in composing a legal document (e.g., a pleading or motion).[51] The value of ghostwriting to the legal community and the general populace is found, by and large, in the same place as that of DIY and unbundled legal work: minimization of costs, with the result of greater legal access to a larger number of people.[52]

This type of legal work is not without its critics however; many courts rebel at the idea that they may not be fully apprised of who is truly coming before them.[53] The chief objection to such a practice is that, as a matter of judicial discretion, courts will apply more liberal standards to pro se filings; therefore, pro se litigants, who have sought the advice and assistance of an attorney will gain "the unwarranted advantage of having a liberal pleading standard applied [to themselves] whilst holding the [opposing party] to a more demanding scrutiny."[54] However, this critique is often rebutted by contentions that either a judge will be able to detect the influence of an attorney within the submitted documents or that, even if a court does apply a more liberal standard to an ostensibly pro se document (which was in fact drafted by or with the help of an attorney) such assistance would have no real effect on the proceedings of the court.[55] Other criticisms mostly focus on how ghostwriting may violate a lawyer's duty of candor to the tribunal, as described in the Model Rules of Professional Conduct (MRPC).[56] These objections to the practice of ghostwriting have been rejected by the American Bar Association (ABA) in an ethics opinion written on the subject of unbundled legal services, especially in the context of ghostwriting.[57] Indeed, the ABA opinion dismisses "the assumption that the failure of the lawyer to disclose the legal assistance provided would mislead the court."[58] The ABA almost seems to take the opinion that what courts do not know will not hurt them; because of the nature of ghostwriting, an assisting attorney does not make representations to a tribunal vis-à-vis a ghostwritten document (those representations are instead made by the pro se litigant), and unless a pro se litigant specifically makes a false representation that the litigant has not sought the help of a lawyer, no ethical lines are crossed.[59]

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51. *See id*.

52. Salman Bhojani, *Attorney Ghostwriting for Pro Se Litigants-A Practical and Bright-Line Solution to Resolve the Split of Authority Among Federal Circuits and State Bar Associations*, 65 SMU L. REV. 653, 657 (2012).

53. *See* Aprile, *supra* note 50.

54. *See* Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1148 (2002) (quoting Johnson v. Bd. of County Com'rs for County of Fremont, 868 F. Supp. 1226, 1231 (D. Colo. 1994), *aff'd in part, disapproved in part*, 85 F.3d 489 (10th Cir. 1996)).

55. *See* Aprile II, *supra* note 50; Goldschmidt, *supra* note 54, at 1157–58.

56. Goldschmidt, *supra* note 54, at 1159 (referencing MODEL RULES OF PROF'L CONDUCT R. 3.3 (2014)).

57. *See* Aprile II, *supra* note 50.

58. *See id*. at 27.

59. *See id*.

III. SIMPLY NOT GOOD ENOUGH

Although much has been made in the world of legal scholarship (and in this comment) of the increasing influence that technology and cost-sensitivity have had on the practice of law, little has been said of the risks and liabilities that walk hand-in-hand with such development.[60] Such, it seems, is the way of human progress: to leap without looking. So that we might learn from the lessons of the past, a discussion of the attendant problems that have plagued both the customers and lawyers, whom have engaged with these DIY and unbundled service providers, will now ensue.[61]

A. LegalGloom: Practitioners' Opinions on DIY Legal Services

To begin, take the creation of a will: because the requirements for the valid execution of a will vary wildly by jurisdiction, "[a] fill-in-the-blank or one-size-fits-all form may or may not follow the requirements for a validly executed document."[62] Additionally, if an individual creates a will tomorrow on LegalZoom, the likelihood that estate planning law will be the same on the day of the will's creation as it is on the day the will is probated is quite low; without the attentions of an attorney, a testator may be unable to adapt to such changes.[63]

In 2012, Consumer Reports released a review of wills created by the most prominent DIY legal services providers: LegalZoom, RocketLawyer, Nolo, and Quicken.[64] Professor Gerry Beyer, of the Texas Tech University School of Law, was the primary reviewer of the documents that were created by each of these different programs.[65] Of the different programs, Beyer opined that Quicken provided the most "competent" will.[66] However, Beyer noted that RocketLawyer also created a document that sufficed for simplistic situations; although he advised that a testator "consult[] a lawyer for more complex situations."[67] Indeed, in plain defiance of what may be jokingly referred to as "the Goldilocks standard," the services examined by Consumer Report were either too flexible in the sort of document that they would create

60. *See supra* Parts I–II.

61. *See infra* Part III.A–V.

62. *See* Goffe & Haller, *supra* note 14, at 28–29; *Legal DIY Websites Are No Match for a Pro*, CONSUMERREPORTS (Sept. 2012) http://www.consumerreports.org/cro/magazine/2012/09/legal-diy-websites-are-no-match-for-a-pro/index.htm [https://perma.cc/PKB7-LHPV] (noting that "Rocket Lawyer and LegalZoom documents didn't always appear tailored to [a] jurisdiction, [namely] Westchester County, N.Y. The LegalZoom lease advises conflicting parties to 'go to the presiding judge of the county,' an office that doesn't exist.").

63. *See* Goffe & Haller, *supra* note 14, at 28–29.

64. *See* Consumer Reports, *supra* note 62.

65. *See id.*

66. *See id.*

67. *Id.*

or not flexible enough to create a practical document.[68] Beyer concludes that the bottom line is that while these sites offer good "document prep," most customers, if looking for a reliable legal document, would be "better off consulting a lawyer."[69]

As further empirical data for the risks inherent in the impersonal experience of DIY legal document creation, an attorney recently blogged about a lawyer in Minnesota who, after ordering a will from LegalZoom, posted the will on the Internet so that estate-planning professionals could critique the document.[70] For context, this Minnesota attorney "is married, and has two children: one from a previous marriage and the other from his current marriage."[71] Some of the problems found in the will were as follows:

> 1. It failed to include an alternate trustee in the event the named trustee predeceases him or is unable or unwilling to serve.
> 2. It failed to include a self-proving affidavit, which means that witnesses would have to be tracked down in the event of his death to testify to the validity of the will.
> 3. It failed to provide guidance about beneficiary designations on non-probate assets which [sic] pass outside the will.
> 4. It failed to include a provision that would allow him to direct the disposition of personal property in a separate document.
> 5. It failed to address the contingency of the death of his children, or the birth or adoption of a third child.
> 6. It failed to include spendthrift provision in any of the trusts, which protect the trust assets from the trust beneficiary's creditors.[72]

The blogger also noted that the will had bequeathed all of the assets to the new wife of this Minnesota attorney, potentially opening the door to a situation in which the new wife could exclude her stepchild from any of his father's property.[73]

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68. *See id.* "[Quicken], for instance, won't let a child's trust go beyond age 35, though the law puts no upper age limits on when a trust must dissolve. In other instances, they are too flexible; after we finished the Rocket Lawyer interview, the program allowed us to edit the completed will. LegalZoom let us put anything we liked in the special-directives section, the part of the will where you can include issues not addressed in the interview. Both features could lead a user to add clauses that contradict other parts of the will." *Id.*

69. *Id.*

70. *See* Rania Combs, *LegalZoom vs. Lawyer: What You Don't Know Can Hurt You*, TEX. WILLS & TR. ONLINE (Apr. 14, 2010), http://www.texaswillsandtrustslaw.com/2010/05/24/legalzoom-vs-lawyer-what-you-dont-know-can-hurt-you/ [https://perma.cc/ZF3M-9TXY].

71. *Id.*

72. *Id.*

73. *See id.*

In another blog, an attorney who specializes in the creation and management of gun trusts remarked on the many problems he had encountered when dealing with such trusts created by forms (online or otherwise).[74] The most common problem he had encountered was that, in community property states like Texas, laymen had failed to consider whether the property that would be owned by the trust was meant to remain separate property or to become community property, causing problems in cases of divorce and death.[75] However, numerous other snags can occur depending on the provisions that may or may not be included in a generic trust.[76] For example, some generic trusts invest the Trustee with exceptional power over the property and authority of the Grantor; such provisions are often unanticipated by the trust-creator in the potentially hasty or uniformed process of DIY legal document creation and can lead to unintended consequences, especially in the somewhat legally dubious area of gun trusts.[77]

The inherent conflict of DIY or unbundled legal service providers attempting to sell customers simple solutions to complex legal quandaries is apparent; glitches and, therefore, litigation is almost an inevitable result.[78] Indeed, such issues have just begun to reach the boiling point throughout the country; for instance, in an unreported California case, Katherine Webster complained that she was forced to hire an attorney to repair the damage to a living will that she ordered from LegalZoom.[79] Nor are these websites blind to the potential problems that they can create; in fact, one online legal services provider, Nolo, has recently requested that its users not use its program to create gun trusts.[80] Nolo's website explains that "[g]un trusts are complicated because they: . . . may need to last for more than one generation[,] may have multiple trustees, and . . . must address both state and federal weapons laws."[81] Instead, Nolo advises its users to "get personalized

74. *See* Bartholomew Roberts, *The Difference Between Form Trusts and Lawyer-Drafted Gun Trusts*, THE FIRING LINE (June 17, 2013, 2:05 PM), http://thefiringline.com/forums/showthread.php?t=527153 [https://perma.cc/6HW5-J5RK].

75. *See id.*

76. *See id.*

77. *See id.* (noting even more problems such as "no provisions for what happens if a Grantor, Trustee or Beneficiary becomes a prohibited person[;]. . . . no provisions dealing with tax issues raised by gifting [National Firearms Act] items to a trust (more important in transferable machineguns or items with a value of greater than $10,000 in a single year)[;]. . . . [t]he [generic] trust isn't really designed to have multiple Trustees[;]. . . . no provisions dealing with waste.").

78. *See infra* Part III.B.1–3.

79. *See* Catherine J. Lanctot, *Does Legalzoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 260 (2011).

80. *See Can I Use a Nolo Living Trust to Make a Gun Trust?*, NOLO (last viewed Oct. 17, 2014), http://www.nolo.com/legal-encyclopedia/can-i-nolo-living-trust-gun-trust.html [https://perma.cc/BEW8-KGBA].

81. *Id.*

legal advice from an expert on gun laws."[82] Even LegalZoom, anticipating changes in estate and probate law throughout the country, recommends that its clientele "[s]tay[] informed and consult[] an attorney who specializes in wills and estate planning [as their] best bet[]" to maintain a legal and functional will.[83] It seems that attorneys may be less dispensable than previously imagined.

B. Suing a Ghost

On account of how recent the trend towards DIY and unbundled document creation is, relative to other forms of legal document production and litigation, there is not a great deal of case law or scholarship concerning the liability of attorneys, who have advised individuals concerning documents created using DIY programs.[84] Although there is concern regarding the malpractice liability of attorneys that engage in the sort of limited scope representation typified by ghostwriting, few claims have actually materialized against these attorneys.[85] Indeed, as Mosten points out:

> [i]n a 1994 written opinion, a federal district judge in Colorado e[x]coriated a lawyer who ghostwrote court pleadings for a pro se litigant and indicated that such conduct may be punished by sanctions or contempt for committing a fraud on the court. Such statements by judicial officers cannot help but have a chilling effect on lawyers who are considering unbundling and who desire to serve clients within the client's ability to pay.[86]

As a result of ambiguity and the lack of direct guidance concerning the area of malpractice liability in regards to limited attorney opinions on DIY documents, the analysis of this issue will proceed by analogy.[87]

Ghostwriting seems to be a particularly similar practice to the sort of representation a client may request from a lawyer when the client requests an evaluation of, for instance, a will created on LegalZoom.[88] What limited law there is concerning practitioner liability regarding the issue of limited scope representation does offer some useful (and potentially mind-easing) information.[89]

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82. *Id.*

83. Michelle Fabio, *Top Reasons to Update Your Will Today*, LEGALZOOM (Aug. 2009), https://www.legalzoom.com/articles/top-reasons-to-update-your-will-today [https://perma.cc/9CYR-DF2N].

84. *See infra* Sections V–VI.

85. *See, e.g.*, Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1114 (2002).

86. *See* Mosten, *supra* note 41, at 14.

87. *See infra* Parts III.B.1–3, IV–V.

88. *See* Aprile II, *supra* note 50.

89. *See infra* Part V.A–C.

1. Shalaby v. Jacobowitz

In a 2003 case that came before the United States court in the Northern District of California, the plaintiff and attorney, Andrew Shalaby, sued the Eviction Defense Center (EDC) and two of its lawyers for, among other things, ghostwriting pleadings for tenants being threatened with eviction from their apartments.[90] Shalaby previously worked for a landlord to remove a tenant, Carolyn King, for unlawful retainer of a property.[91] King responded ostensibly pro se to the action initiated by Shalaby, at the direction of the landlord, and the two parties settled the issue.[92] However, King apparently enlisted the services of a lawyer, who worked for the EDC, Ann Omura, in dealing with the legal action conducted by Shalaby.[93] Shalaby subsequently brought suit against the EDC, Omura, as well as Ira Jacobowitz, another attorney for the EDC, "for abuse of process, barratry, fraud and intentional infliction of emotional distress from Omura's [ghostwritten pleadings on behalf of King]."[94] The court dismissed the suit pursuant to a motion by Omura under a California code designed to prevent suits that "chill[] the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[95] After a slew of further cases, and precipitated by the prior dismissal, Shalaby initiated a final action against Jacobowitz, claiming that Shalaby had "a federally-protected right to not have the pro [se] opposing party's papers ghostwritten by an attorney."[96]

In deciding this case, the district court discussed the disposition of various tribunals on the practice of ghostwriting.[97] Citing cases from California to Colorado to Virginia, which all viewed the practice of ghostwriting with disapproval, the district court finally concluded that Shalaby "provide[d] no support . . . for the proposition that an attorney representing a party in litigation has a federally-protected right to not have the pro [se] opposing party's papers ghostwritten by an attorney."[98] The court summarily dismissed Shalaby's claim.[99] Furthermore, the court declined to render an advisory opinion condemning the practice of ghostwriting, despite citation to case law that viewed ghostwriting as a violation of the ethical duties of a lawyer.[100] Perhaps the discomfort that courts feel towards these

90. *See* Shalaby v. Jacobowitz, C 03-0227-CRB, 2003 WL 1907664, at *1 (N.D. Cal. Apr. 11, 2003), *aff'd*, 138 Fed. Appx. 10 (9th Cir. 2005).
91. *See id.*
92. *See id.*
93. *See id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *See id.*
98. *Id.*
99. *See id.*
100. *See id.*

unbundled services that lawyers provide to clients is lessening with time and a more nuanced understanding of the benefits that such practices may provide; this fact may be evidenced by a more recent case out of New York.[101]

2. In re Fengling Liu

In 2009, the Committee on Attorney Admissions and Grievances for the Second Circuit recommended that Fengling Liu be publically reprimanded for, among other things, ghostwriting petitions for ostensibly pro se petitioners before the court.[102] Liu responded to the admonishment concerning her ghostwriting with an acknowledgement that she "had helped clients draft petitions for review that were then filed *pro se* in this Court without her involvement being disclosed;" she explained that the reason she had done so, however, was primarily to ensure that her clients did not miss filing deadlines.[103]

The Second Circuit, recognizing that it had yet to address the practice of attorneys drafting documents for pro se clients without disclosing the fact of their involvement, proceeded to address its stance on the issue of ghostwriting.[104] The court embarked on a thorough investigation of how other courts, as well as how local and national Bar committees, have treated the issue of attorney ghostwriting.[105] It is noteworthy that the court prefaces its analysis of this issue by remarking, "the following [opinions] are representative of the range of views on the subject and suggest a possible trend toward greater acceptance of various forms of ghostwriting."[106]

The court began with the "1987 opinion of the New York City Bar's Committed on Professional and Judicial Ethics," which allowed lawyers to assist pro se litigants in preparing pleadings without identifying themselves, so long as the prepared document noted "that it had been prepared by counsel."[107] However, the court also reviewed the opinion of the New York State Bar Association Committee on Professional Ethics on the same subject, which required attorneys, who intended to provide limited scope representation to their clients, to not only advise their clients on the consequences of the limited representation, but also to disclose their name to the court and adverse parties.[108] Both of these stances on ghostwriting are contrasted to the recent opinion of the ABA, previously mentioned in this comment, that dismissed the concerns of courts that pro se litigants, who have engaged the ghostwriting services of an attorney, will garner an unfair

101. *See In re* Fengling Liu, 664 F.3d 367, 368 (2d Cir. 2011).
102. *See id.* at 369.
103. *Id.*
104. *See id.*
105. *See id.* at 370.
106. *Id.* at 367, 370.
107. *Id.*
108. *Id.*

advantage by taking advantage of the more liberal standards applied by courts to pro se filings.[109] Indeed, the stance of the ABA expressly allows such limited scope representation without disclosure of the identity of the assisting attorney.[110] In 2010, an opinion issued by the Committee on Professional Ethics for the New York County Lawyers' Association aligned very closely with the stance of the previously promulgated ABA opinion; however, it did stress that such representation should only be allowed with the informed consent of the client.[111] The court, playing the role of the augur, interpreted these recent ethics opinions as auspices of the changing attitude of the legal world generally towards favoring the practice of ghostwriting.[112]

In its disposition of disciplinary investigation against Liu, the court declined to find that Liu violated her ethical duty of candor.[113] Indeed, the tribunal resolved the issue, saying that "[i]n light of this Court's lack of any rule or precedent governing attorney ghostwriting, and the various authorities that permit that practice, we conclude that Liu could not have been aware of any general obligation to disclose her participation to this Court."[114] The court also eschewed the notion that Liu may have acted in bad faith or that she ought to have been aware of a prohibition against ghostwriting since no such prohibition existed in New York.[115] The court even seemed to approve of Liu's motives for ghostwriting pleadings for her clients, saying that such a practice actually "demonstrated concern for her clients rather than a desire to mislead this Court or opposing parties."[116]

3. Future Lawn, Inc. v. Steinberg

In a 2008 Ohio case, involving a somewhat complicated sequence of events and attorney involvement in those events, a state appellate court took

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109. *See id.* at 370–71, (citing A.B.A. Standing Comm. On Ethics & Prof'l Resp., Formal Op. 07-446, *Undisclosed Legal Assistance to Pro Se Litigants* (2207)). "'[I]f the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal' and, in any event, when a pleading is of higher quality, there will be no reason to apply liberal construction. On the other hand, according to the ABA opinion, '[i]f the assistance has been ineffective, the *pro se* litigant will not have secured an unfair advantage.' The opinion concluded that, '[b]ecause there is no reasonable concern that a litigant appearing *pro se* will receive an unfair benefit from a tribunal as a result of behind-the-scenes legal assistance, the nature or extent of such assistance is immaterial and need not be disclosed.'" *Id.*

110. *Id.* at 370.

111. *See id.* at 371.

112. *See id.* (quoting Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 273 (2010)). "Almost all of the federal cases and state ethics opinions opposing ghostwriting were issued before the May 2007 ABA opinion. Because most states look to the ABA Model Rules when adopting and amending their own rules of professional conduct, the coming years may see a number of courts and states take a more relaxed stance on ghostwriting." *Id.*

113. *See id.* at 372.

114. *Id.*

115. *See id.*

116. *Id.* at 373.

up an issue involving the scope of an attorney representation in a particular matter and whether an attorney had obligations to inform his clients on matters outside of those he was employed to examine.[117] In 1995, Future Law, Inc. (FLI) engaged the services of the law firm, Eastman and Smith (Eastman), to resolve a billing dispute with a client.[118] However, FLI itself was unable to meet the fee schedule agreed upon with Eastman for its services.[119] Following nonpayment of the fees owed to Eastman, the firm severed the attorney-client relationship with FLI; FLI subsequently hired another attorney, Jack Brady, to "investigate the issue of [Eastman's] fees for legal services[.]"[120] Over the course of the next few years, a complex array of litigation commenced, during which Brady recommended that FLI contact yet another attorney, Harold Steinberg, who was experienced in the area of legal malpractice, to investigate the possibility that Eastman had committed malpractice; FLI followed Brady's recommendation and hired Steinberg.[121] Eastman eventually moved for summary judgment on the billing dispute, successfully arguing that FLI had failed to bring the claim within the one-year statute of limitation period for legal malpractice.[122] Following this, Brady severed ties with FLI, also alleging that the company had failed to pay the agreed upon fees.[123] FLI counterclaimed with a legal malpractice action against Brady, which was also unsuccessful because it was untimely.[124] In response, FLI subsequently sued Steinberg, claiming that the attorney had committed malpractice himself by not advising FLI of the claim for malpractice against Brady.[125]

Steinberg's defense to FLI's malpractice suit was that he was engaged to research a potential malpractice claim against Eastman, not Brady, therefore he had no duty to inform FLI of the possibility of a malpractice claim against Brady because the scope of his representation did not extend to that issue.[126] In laying out the elements of a malpractice claim, the court noted that the question of whether a certain duty exists for an attorney in a negligence action is a question of law.[127] "Absent duty there can be no

117. *See* Future Lawn, Inc. v. Steinberg, 2008 WL 3582801 (Ohio App. Aug. 15 2008).
118. *See id.* at ¶¶ 2–3.
119. *See id.* at ¶¶ 5–6.
120. *Id.* at ¶ 7.
121. *See id.* at ¶ 9.
122. *See id.* at ¶ 11.
123. *See id.* at ¶ 12.
124. *See id.*
125. *See id.* at ¶ 14.
126. *See id.* at ¶ 15.
127. *See id.* at ¶ 28 (citing Vahila v. Hall, 674 N.E.2d 1164, (Ohio 1997)). "[T]o establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss." *id.*

breach."[128] FLI cited to the Ohio Code of Professional Responsibility, "[a] lawyer should exert his best efforts to insure that decisions of his client are made only after the client is informed of relevant considerations[,]" to support their contention that client consent is a prerequisite to limiting the scope of an attorney representation.[129] However, the Ohio court was unimpressed by this argument, holding that there is no such requirement in Ohio and, indeed, an attorney's duties to his client only extend as far as what the client initially engaged the attorney to investigate.[130]

IV. LIABILITY: THE WATCHWORD OF THE PRUDENT ATTORNEY

In reflecting on the above cases, the trend towards allowing attorneys to begin representing their clients in discrete tasks without engaging the traditional full services of the attorney seems, if not the future of legal practice generally, at least a more common way of providing access to legal services to more Americans than ever before.[131] However, there will always be dissatisfied clients, and the risk that a particular legal fact or process will be overlooked increases relative to the limitations on the services that the client is requesting of the lawyer.[132] The inquiry naturally becomes: how do we balance this risk as the steady march towards DIY and unbundled legal services marches on? If nothing else, these cases serve as an indication that, despite the evolving attitudes of the judiciary, the world of legal scholarship has yet to truly come to terms with DIY and unbundled legal work.[133] Indeed, accepting such apparent deficiencies of the product offered by these DIY legal service providers as well as the complications of unbundle representation, it is unsurprising that dissatisfied customers turn to flesh and blood attorneys to supplement these sorts of documents; however, it is equally unsurprising that cost-sensitive clients (who resorted to such programs as LegalZoom or attorneys offering ghostwriting services in the first place) would be unwilling or unable to shell out the cash for the full services of a lawyer.[134]

In a blog post on his website, Robert Mansour, a wills and trusts attorney in California, notes that "[o]ften, in the scope of [his] practice, [he is] asked

128. *Id.* at ¶ 15.

129. *Id.* at ¶ 32–33. "Appellants find support for their proposition that consultation and consent are required antecedent to limiting representation in several cases from foreign jurisdictions, which appellants concede are for the most part premised on the Model Rules of Professional Conduct. Even though the Model Rules were not adopted in Ohio until after the time relevant here." *Id.*

130. *See id.* at ¶ 34.

131. *See supra* Parts IV–V.

132. *See supra* Parts IV–V.

133. *See supra* Parts III.B.1–3.

134. *See, e.g.*, Fisher-Brandveen & Klempner, *supra* note 85, at 1111.

to review documents that [his] clients already have."[135] Many times, Mansour continues, these documents were created with either a program like LegalZoom or by another attorney.[136] In reviewing his clients' documents for thoroughness, he remarks that "what [he] find[s] more often than not is documents that aren't bad. . . .[sic] they just leave too many things to interpretation."[137] Also, many important issues to the clients are either entirely not addressed or inadequately addressed.[138] Those "holes" in the plan can lead to trouble.[139] The sort of trouble Mansour is talking about arises typically from a conflict of interpretation among family members of the deceased testator.[140] "If people differ on how to handle the estate . . . and the documents offer little direction as to what to do in certain circumstances, entry-level estate planning documents aren't going to offer much guidance."[141] "It's what the documents leave unaddressed that is often the problem."[142] The natural question attorneys, who are in the same position as Mansour, may ask themselves is, "Am I liable for any deficiencies in a legal document, which I reviewed but did not go through the formal process to create?"[143] Such a question will be the focus of the remainder of this comment.[144]

A. In the Shadow of Malpractice

Recall again the tale of the two daughters creating a will for their father from the opening of this comment.[145] Now imagine that, before the father passed away, the daughters consulted an attorney, such as Robert Mansour, regarding the will that they created using a form. When the daughters visit this lawyer, they do not intend to create an entirely new will; they do not want to spend the money and time that such a creation would cost. Instead, all they want from their attorney is an opinion concerning whether or not the will is legal and will probate properly. Unaware that the daughters witnessed the signing of the document because of the truncated nature of the daughters' relationship with the attorney, he advises the daughters that the will they created, while simple, should probate just fine.[146] Now, fast forward in time

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135. Robert Mansour, *It's Often What is "NOT" in Your Trust That is the Problem*, LAW OFFS. OF ROBERT M. MANSOUR (Sept. 13, 2014), http://www.mansourlaw.com/blog/its-often-what-is-not-in-your-trust-that-is-the-problem [https://perma.cc/X3EL-7VCJ].

136. *See id.*

137. *Id.*

138. *See id.*

139. *See id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *See* Mosten, *supra* note 41, at 12–14.

144. *See infra* Parts IV–V.

145. *See supra* Part I.

146. *See supra* Part I.

to after the father's death; the pitiable daughters have just learned that they inadvertently disinherited themselves because of a technical oversight.[147] The question of liability now becomes particularly important to the attorney that gave the daughters his legal opinion concerning the DIY form will.[148] Is the attorney liable to the daughters for improperly advising them concerning the state of Rhode Island law?[149] Is malpractice possible?

Suits for legal malpractice are an uncomfortable subject for many attorneys to discuss.[150] Conscious of their place in a legal community, lawyers often will not even meet with a client concerning a legal malpractice claim.[151] Even when an attorney does consent to such a meeting, he should "state at the outset that he is reluctant to commence an action of that character unless it is fully justified and that therefore he must be advised of all the facts before he commits himself to accepting the case."[152] However, such a suit may be commenced, at least under Texas law, if a plaintiff may allege the following factors: "(1) that the defendant attorney owed the plaintiff a duty; (2) that the attorney breached that duty; (3) that the breach was the proximate cause of the plaintiff's injury; and (4) that damages occurred."[153] Established by case law, an attorney only owes a duty of care only to his client.[154] According to the Third Restatement of Law Governing Lawyers:

> A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services[.][155]

Naturally, the aggrieved party in the case of a faulty will is not the decedent, who was the only individual in privity with his estate planner; and thus, the only person to whom the attorney owed a duty of care.[156] However, there is a typical exception to this so-called "privity-barrier" in the case of estate planning.[157]

147. *See supra* Part I.
148. *See supra* Part I.
149. *See id.*
150. *See* 14 Am. Jur. Trials 265 (Originally published in 1968).
151. *See id.*
152. *Id.*
153. Gunn v. Minton, 133 S. Ct. 1059, 1065 (2013).
154. *See* Barcelo v. Elliott, 923 S.W.2d 575, 577 (Tex. 1996).
155. *See* RESTATEMENT (THIRD) OF L. GOVERNING LAWS, § 14 (2000).
156. *See Barcelo*, 923 S.W.2d at 577–79.
157. *See id.* at 578–79.

1. A Relevant Aside: Malpractice and Estate Planning for the Other Forty-Nine

For the rest of the country, estate planning particularly offers unique opportunities for dissatisfied clients to sue attorneys for malpractice. Because these suits come most often from the beneficiaries of a will, for instance, the attorney sued is not often in privity with any of the plaintiffs.[158] Normally, a lack of privity would be a complete bar to suit; however, in the middle of the twentieth century, a shift occurred, which dropped the privity requirement for suit only against estate-planning attorneys.[159] There are several approaches to suits for malpractice, depending upon jurisdiction; however, the safeguards attorneys should take remain relatively consistent throughout jurisdictions.[160] These safeguards mostly include a thorough investigation of a client's background and then a careful review of any legal documents drawn up in the course of that relationship.[161] However, such safeguards are increasingly difficult to put into place with the rise in pro se representation, along with a desire for affordable legal services.[162]

2. Lone Star Malpractice and Estate Planning

The Texas Supreme Court has demonstrated in an important case, *Barcelo v. Elliott*, some reluctance to allow this exception permitting suits against attorneys, whom were not in privity with the plaintiff, into Texas jurisprudence; this recalcitrance lasted for quite a while.[163] Citing the need to prevent "clients [from losing] control over the attorney-client relationship," thereby subjecting an attorney "to almost unlimited liability[,]" the court declined to allow beneficiaries of a will to initiate an action against an estate planner.[164] The court in *Barcelo* did, however, acknowledge that most other states had "relaxed the privity barrier in the estate planning context."[165] However, at the time, the court thought it more important to

158. See Bradley E.S. Fogel, *Estate Planning Malpractice: Special Issues in Need of Special Care*, SOLO L. TRENDS & NEWS (May 2005), http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/0506_estate_estateplanning.html [https://perma.cc/PS6W-ZC3U]; *Estate Planning Traps: Risk Management Handouts of Lawyers Mutual*, LAWS. MUTUAL (Aug. 2009) http://files.www.lawyersmutualnc.com/risk-management-resources/risk-management-handouts/estate-planning-traps/ Estate_Planning.pdf [https://perma.cc/A32P-XG2Z].

159. *See Estate Planning Traps*, *supra* note 158.

160. *See id.*

161. *See id.*

162. *See id.*

163. *See* Barcelo v. Elliott, 923 S.W.2d 575, 577–79 (Tex. 1996).

164. *Id.*

165. *Id.*

preserve a bright-line privity rule than subject estate planners to third-party liability.[166]

While the Supreme Court of Texas has not explicitly overruled its decision in *Barcelo* disallowing third-party suits against estate planning attorneys, in recent years the court declined to extend the prohibition in the case of personal representatives bringing a claim against a testator's estate planner; the court also opened the door to suits by an estate's executor outside of the context of estate planning.[167] Regardless of the disposition of the Texas high court, the majority of the country allows suits by beneficiaries of a will against the estate planner of that will.[168] Indeed, even the Restatement Third of the Law Governing Lawyers imposes a duty of care on a lawyer to nonclients, among the beneficiaries.[169]

3. The Winter of Malpractice and the Chilling of Unbundled Legal Services

Increased risks of malpractice have been, in the words of Forrest Mosten, a "barrier to unbundling" since the idea of unbundling legal services began to grow in popularity.[170] "Malpractice exposure exists for lawyers who render incomplete advice or who fail to give needed advice in areas ancillary to the client's presenting a problem."[171] Mosten cites an older California case, *Nichols v. Keller*, as evidence of the sort of malpractice claims that could plague an attorney who offers unbundled advice.[172] In *Nichols*, the

166. *See id.* at 578–79 (stating that "we are unable to craft a bright-line rule that allows a lawsuit to proceed where alleged malpractice causes a will or trust to fail in a manner that casts no real doubt on the testator's intentions, while prohibiting actions in other situations. We believe the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent. This will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.").

167. *Compare* Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 782 (Tex. 2006) (holding that "allowing estate-planning malpractice suits may help 'provide accountability and thus an incentive for lawyers to use greater care in estate planning.' Limiting estate-planning malpractice suits to those brought by either the client or the client's personal representative strikes the appropriate balance between providing accountability for attorney negligence and protecting the sanctity of the attorney-client relationship."), *with* Smith v. O'Donnell, 288 S.W.3d 417, 419 (Tex. 2009) (finding that suits brought by beneficiaries, however not in their capacity as beneficiaries, of a will against the estate-planning attorney are not barred by the rule from *Barcelo*).

168. *See Barcelo*, 923 S.W.2d at 577.

169. *See* RESTATEMENT (THIRD) OF L. GOVERNING LAWS. § 51 (2000). A lawyer owed a duty of care "to a nonclient when and to the extent that:(a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach; (c) the nonclient is not reasonably able to protect its rights; and (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client." *Id.*

170. Mosten, *supra* note 41, at 12.

171. *Id.*

172. *See id.*

Court of Appeals for the Fifth District of California quote the venerable words of Justice Brandeis:

> The duty of a lawyer today is not that of a solver of legal conundrums: he is indeed a counsellor at law. Knowledge of the law is of course essential to his efficiency, but the law bears to his profession a relation very similar to that which medicine does to that of the physicians. The apothecary can prepare the dose, the more intelligent one even knows the specific for most common diseases. It requires but a mediocre physician to administer the proper drug for the patient who correctly and fully describes his ailment. The great physicians are those who in addition to that knowledge of therapeutics which is open to all, know not merely the human body but the human mind and emotions, so as to make themselves the proper diagnosis—to know the truth which their patients fail to disclose. . . .[173]

The court in *Nichols* interprets Justice Brandeis' language to imply that the duty of a lawyer is to advise his client of all possible legal avenues available to the client.[174] Because legal laymen are, by their nature, uninformed in most facets of the law, even if a client engages an attorney for a particular task, it is the duty of that attorney to adequately coax from his client any information that could be the basis of as of yet undiscovered legal claims.[175] The litigation in *Nichols* involved a worker's compensation claim, however, the attorneys for the injured worker failed to advise their client of a possible third-party claim—a claim that the client did not discover was available to him until after the statute of limitations on it had already expired.[176] Mosten argues that such an exacting requirement on legal professionals does seem at odds with the methodology of unbundling.[177] Mosten explains that "[i]f legal research is required and the lawyer is only authorized to spend 30 minutes, a rushed or an inadequate job might lead to wrong advice."[178] Moreover, Mosten points out that frequently the clients, who are interested in purchasing an unbundled legal service, are very cost-sensitive and will be "extremely vigilant about lawyer overbilling."[179] This DIY mindset, which continues to exert more influence over the legal profession, can be a pitfall for attorneys unprepared for the relatively novel methods of "discrete task representation."[180]

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173. Nichols v. Keller, 19 Cal. Rptr. 2d 601, 610 (Cal. Ct. App. 1993).
174. *See id.*
175. *See id.*
176. *See id.*
177. *See* Mosten, *supra* note 41, at 12–14.
178. *Id.*
179. *Id.*
180. *Id.*

What is more, unbundled or online legal service providers often disclaim all malpractice liability when they offer their services.[181] Such a disclaimer may come in the form of stating that the particular program or site is "not permitted to engage in the practice of law."[182] Similarly, the program "cannot guarantee the results or outcome of your particular procedure."[183] Even services, such as those offered by Axiom Law, have not failed to attract detractors.[184] Indeed, one such practitioner, Richard Granat (an attorney who specializes in the burgeoning area of "virtual law"), remarks that because Axiom is not a law firm, but instead a provider of unbundled legal services, "in-house counsel assumes the risk of malpractice when they contract with Axiom."[185] Granat does note, however, that the services provided by Axiom and companies like it are gaining popularity because those companies are able to provide quality legal work at a far lower price tag than offered by a big firm.[186]

The threat of malpractice suits is real for a majority of lawyers as they begin to move into the modern age of legal practice.[187] With the rise of unbundled and DIY legal services as a more popular form of legal recourse, the risks of malpractice will have to be evaluated more closely. Unbundled legal services are, for many attorneys—especially solo practitioners, the way forward in the changing legal market, especially in the case of estate planners, similar to the practitioner who assisted the daughters from the opening hypothetical.[188] All parties do not reside in Texas, so an estate planner is more than likely liable for any harm that resulted from his failure to fully appreciate the nature of a situation, like the situation posed from the opening hypothetical of this comment.[189]

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181. *See* Seth L. Laver, *Legal Zoom's Business Model Prompt Ethical Debate*, PROF'L LIAB. MATTERS (May 6, 2014), http://professionalliabilitymatters.com/2014/05/06/legal-zooms-business-model-prompts-ethical-debate/ [https://perma.cc/LL7Z-D92X].

182. *LegalZoom Disclaimer*, LEGALZOOM, https://www.legalzoom.com/disclaimer.html [https://perma.cc./SXG8-MQM3] (last visited Nov. 7, 2014). "LegalZoom is not a law firm, and the employees of LegalZoom are not acting as your attorney. LegalZoom's legal document service is not a substitute for the advice of an attorney. LegalZoom cannot provide legal advice and can only provide self-help services at your specific direction. LegalZoom is not permitted to engage in the practice of law. LegalZoom is prohibited from providing any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, remedies, defenses, options, selection of forms or strategies." *Id.*

183. *LegalZoom Satisfaction Guarantee*, LEGALZOOM, http://www.legalzoom.com/satisfaction-guarantee.html [https://perma.cc/4B82-JKD2] (last visited Nov. 7, 2014).

184. *See* Richard Granat, *Is Axiom Law a Law Firm?*, ELAWYERING BLOG (Apr. 8, 2013), http://www.elawyeringredux.com/2013/04/articles/outsourcing/is-axiom-law-a-law-firm/ [https://perma.cc/Q4BG-AFR9].

185. *See id*.

186. *See id.* (observing that "[b]y enabling corporate counsel to get done certain kinds of legal work that ordinarily would be provided by outside counsel at a much higher price, Axiom has opened up a major market be simply segmenting the kind of work that can be done more efficiently in-house with help from Axiom.").

187. *See supra* Part III.B.1–3.

188. *See supra* Part I.

189. *See supra* Part I.

V. CONTRACTING FOR INCOMPETENCE

Perhaps the hinging point of this discussion concerning the limiting of practitioner liability, with regard to DIY and unbundled legal services, is the competence of a lawyer to represent his client.[190] All of the previously examined cases and, indeed, the discussion thus far envoke the issue of whether an attorney competently represented his clients in the legal matters they faced.[191] Logically, the concept of limited scope representation runs counter to the notion of a lawyer fully "inquir[ing] into and analy[zing] . . . the factual and legal elements of the problem, and us[ing the] methods and procedures meeting the standards of competent practitioners."[192] In other words, in limiting the scope of representation, a client is actually requesting that his attorney provide incompetent legal services.[193] While the MRPC, as promulgated by the ABA, prescribe the standards of competence that a lawyer must meet in order to ethically represent his client, Rule 1.1 (titled "Competence") also implicitly conceives of curtailing competence for the purposes of providing limited scope legal representation (as well as DIY and unbundled legal services).[194] Moreover, evidencing the ABA's train of thought concerning the issue of limited competence, the next rule of the MRPC is Rule 1.2, which describes the scope of representation between client and lawyer.[195] The practice of limiting the scope of representation is not a concept unfamiliar to the ABA or attorneys across the country; however, limiting representation, and thereby, liability in the context of documents created online or through the use of forms is a practice as of yet unaddressed.[196] The analogous practices of unbundling legal service and ghostwriting, and their attendant malpractice risks, may act as a lantern in the night that is practitioner liability to guide attorneys through the dark when they encounter clients seeking opinions on DIY documents.[197] The mechanisms that define the attorney-client relationship, as well as deal with the issue of attorney liability, with regard to these practices offer a plausible

190. *See* MODEL RULES PROF'L CONDUCT R. 1.1. *See, e.g.*, TEX. RULES PROF'L CONDUCT R. 1.02 (stating "(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless: (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or (2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.").

191. *See supra* Parts II–IV.

192. MODEL RULES PROF'L CONDUCT R. 1.1.

193. *See id.* (stating "[a]n agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible.").

194. *See id.*

195. MODEL RULES PROF'L CONDUCT R. 1.2.

196. *See id.*

197. *See supra* Parts III–IV.

path that practitioners may take when contracting with clients regarding rendering opinions on DIY legal documents and issues.[198]

A. Recommending Incompetence

Rule 1.8(h) of the MRPC states that, "A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement[.]"[199] However, just as the scope of representation may be limited by agreement between the client and his attorney in the case of lawyers engaged in discrete tasks for clients (e.g., ghostwriting a pleading), it is the proposition of this comment that the restriction placed on the limitation of liability by Rule 1.8 be abrogated in favor of a rule requiring the informed consent of the client in order to waive liability in the context of providing unbundled services, as well as issuing opinions on DIY documents. Indeed, Forest Mosten even "propose[s] that civil immunity be statutorily granted to unbundling lawyers in respect to any lawyering task or matter not specifically undertaken by the lawyer if a legislatively approved discrete task engagement letter agreement is signed by the client."[200] Mosten acknowledges that, at present, the force of public opinion does not support this sort of liability limitation, a fact that he believes will "retard[] [the] growth [of unbundling] as most lawyers will be afraid to offer these services."[201]

When Mosten made that observation, it indeed may have been true; however, today the tide of judicial disposition, as heralded by the changing opinions of organizations like the ABA, may be shifting towards relaxing the standards of liability imposed on attorneys who unbundle.[202] It is the proposition of this comment that opinions and other legal services rendered for clients who have used forms, the Internet, or a computer program to create a legal document outside of any attorney-client relationship, not be left behind. While complete immunity from malpractice liability might be a fantasy, it seems that a well-drafted agreement limiting the scope of representation may do the work of immunity.[203]

The ABA, anticipating the shift towards unbundling, released a report in 2003 entitled *Handbook on Limited Scope Legal Assistance*, addressing how lawyers should handle moving towards unbundled legal services.[204] In discussing the issue of malpractice liability in regards to such limited scope representation, the report noted a New Jersey case, in which the court found

198. *See infra* Part V.B.
199. MODEL RULES PROF'L CONDUCT R. 1.8(h)(1).
200. *See* Forest Mosten, *Unbundling Legal Services*, 40 no. 1 JUDGES' J. 15, 17 (2001).
201. *See id.*
202. *See* MARK H. TUOHEY III, ET AL., HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE, 49 (2003).
203. *See id.* at 52–58.
204. *See id.*

that "by developing good limited-service practices, lawyers can avoid malpractice liability."[205] That case involved a divorce settlement agreement that was reviewed by an attorney that expressly noted his limited involvement in the retainer agreement he sent to his client.[206] Although the court noted that Rule 1.8 would naturally preclude the attorney from limiting his liability in regards to the services he offered, the court did find that the express limitation of the scope of his assistance found in the retainer letter insulated him from the particular malpractice claim brought by his dissatisfied client.[207]

B. The Realm of Forms

Courts across the country, taking note of the increasing prevalence of unbundled legal services, have offered suggestions for forms that limit the scope of liability.[208] However, these forms fail to contemplate an attorney issuing a limited opinion of, or performing a limited service on a DIY document.[209] As a practical guide for attorneys navigating these troubled waters, a form (based on that suggested by the Maine Supreme Judicial Court) is produced below.[210] A provision dealing with such DIY documents has been added in italics:

Date: _____, 20____.

1. The client, _____, retains the attorney, _____, to perform limited legal services in the following matter: _____.

2. The client seeks the following services from the attorney (indicate by writing "yes" or "no"):

a. ___ Legal advice: office visits, telephone calls, fax, mail, e-mail;

b. ___ Advice about availability of alternative means to resolving the dispute, including mediation and arbitration;

c. ___ Evaluation of client self-diagnosis of the case and advising client about legal rights and responsibilities;

d. ___ Guidance and procedural information for filing or serving documents;

e. ___ Review pleadings and other documents prepared by client;

f. ___ Suggest documents to be prepared;

g. ___ Draft pleadings, motions, and other documents;

h. ___ Factual investigation: contacting witnesses, public record searches, in-depth interview of client;

i. ___ Assistance with computer support programs;

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205. *See id.* at 54.
206. *See id.* at 57.
207. *See id.*
208. *See, e.g.*, *id.* at app. 8, 20–23.
209. *See id.*
210. *Id.*

j ___ Legal research and analysis;

k. ___ Evaluate settlement options;

l. ___ Discovery: interrogatories, depositions, requests for document production;

m. ___ Planning for negotiations;

n. ___ Planning for court appearances;

[o.] ___ Standby telephone assistance during negotiations or settlement conferences;

p. ___ Referring client to expert witnesses. special masters, or other counsel;

q. ___ Counseling client about an appeal;

r. ___ Procedural assistance with an appeal and assisting with substantive legal argument in an appeal;

s. ___ Provide preventive planning and/or schedule legal checkups;

t. ___ *Seeking an opinion or services concerning the legal validity of documents created using online software, consumer software, or other pre-fabricated forms*;

u. ___ Other: _____

3. The client shall pay the attorney for those limited services as follows:

a. Hourly Fee:

The current hourly fee charged by the attorney or the attorney's law firm for services under this agreement is as follows:

i. Attorney: $ _____
ii. Associate: $ _____
iii. Paralegal: $ _____
iv. Law Clerk: $ _____

Unless a different fee arrangement is established in clause b.) of this paragraph, the hourly fee shall be payable at the time of the service. Time will be charged in increments of one-tenth of an hour, rounded off for each particular activity to the nearest one-tenth of an hour.

b. Payment from Deposit:

For a continuing consulting role, client will pay to attorney a deposit of $_____, to be received by attorney on or before _____, _____, and to be applied against attorney fees and costs incurred by client. This amount will be deposited by attorney in attorney trust account. Client authorizes attorney to withdraw funds from the trust account to pay attorney fees and costs as they are incurred by client. The deposit is refundable. If, at the termination of services under this agreement, the total amount incurred by client for attorney fees and costs is less than the amount of the deposit, the difference will be refunded to client. Any balance due shall be paid within thirty days of the termination of services.

c. Costs:

Client shall pay attorney out-of-pocket costs incurred in connection with this agreement, including long distance telephone and fax costs, photocopy expense and postage. All costs payable to third parties in connection with client case, including filing fees, investigation fees, deposition fees, and the like shall be paid directly by client. Attorney shall not advance costs to third parties on client behalf.

4. The client understands that the attorney will exercise his or her best judgment while performing the limited legal services set out above, but also recognizes:

a. the attorney is not promising any particular outcome,

b. the attorney has not made any independent investigation of the facts and is relying entirely on the client limited disclosure of the facts given the duration of the limited services provided, and

c. the attorney has no further obligation to the client after completing the above described limited legal services unless and until both attorney and client enter into another written representation agreement.

5. If any dispute between client and attorney arises under this agreement concerning the payment of fees, the client and attorney shall submit the dispute for fee arbitration in accordance with Rule 9(e)-(k) of the Maine Bar Rules. This arbitration shall be binding upon both parties to this agreement.

WE HAVE EACH READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Signature of client _____

Signature of attorney _____

Date: _____ [211]

VI. WAITING ON THE WORLD TO CHANGE

As the relentless march of time beckons the evolution of society onward, so too must the jurisprudence of that society follow. As is lamented by students, practitioners, and professors alike, the law resists change; firm in its convictions, the law battles the proverbial changing tides of thought, technology, and practice.[212] However, there must eventually come a point when the law of a society accepts that its traditions and practices are outmoded vestiges of a bygone era.[213] Such is the case with the rise of pro se and DIY legal practice, carried on the wings of the digital age.[214] Few legal fields are as susceptible to this change as the practice of estate planning.[215] As practitioners lay down their weapons against change (like the

211. *See id.* at app. 8.
212. *See supra* Part II.A.
213. *See supra* Part II.A.
214. *See supra* Part II.B.
215. *See supra* Part IV.

unauthorized practice of lawsuits against companies like LegalZoom), the necessity to understand the full extent of this change becomes paramount.[216] So as not to fall into the ethical and malpractice snares that attend this evolution, an attorney's primary defense becomes information.[217] While complete immunity from liability for unbundled attorneys may be a mere pipe dream, by apprising clients of all of the risks that this sort of novel practice entails and by requiring that clients to formally acknowledge these risks in a clear and regimented way, practitioners may feel more comfortable in offering their services in such a context.[218]

Recall yet again the opening hypothetical: if the daughters, who had created a will on LegalZoom for their father, then brought that will in to an attorney seeking an opinion concerning the legal sufficiency of the will, and if that lawyer had limited the scope of his involvement pursuant to an agreement in conformity with his state's rules (or at least those laid out by the MRPC), he would have been protected from the worry of ethical violations, as well as the threat of malpractice.[219] While forms may only serve as a stopgap measure until higher courts or the Legislature take up the question of the roles of lawyers in the modern age that demands DIY and unbundled legal services, such forms and agreements will at least allow practitioners to maintain their ethical obligations to their clients until such reform is truly implemented.[220]

216. *See supra* Part II.A.
217. *See supra* Part V.
218. *See id.*
219. *See supra* Part I.
220. *See supra* Part V.