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BALANCING CONSUMER INTERESTS IN A DIGITAL AGE: A NEW APPROACH TO REGULATING THE UNAUTHORIZED PRACTICE OF LAW

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Abstract: States have traditionally relied on unauthorized practice of law statutes and court rules to restrict nonlawyers from providing legal services. A majority of courts assess compliance with these statutes by applying set practice of law definitions and restrictive court precedent to nonlawyer activity. These methods of enforcement have failed to balance consumer protection concerns with the public's need for access to affordable legal services. Most state practice of law definitions have proven inflexible, broadly barring the practice of law by nonlawyers, with few exceptions. Courts interpreting unauthorized practice statutes have created bright-line rules that favor consumer protection, failing to incorporate additional factors such as the reliability of the nonlawyer service. These approaches are ill-equipped to adapt to changing technologies, such as the development of interactive software and online programs that enable nonlawyers to provide document preparation services to specific consumers. States should incorporate a test that requires the assessment of four factors significant to legal access and consumer protection concerns into their unauthorized practice of law statutes or court rules. Such a test would assist courts in determining whether a particular nonlawyer service is beneficial to consumers, and would provide the flexibility necessary for states to adapt more readily to new technologies.

Erin and her husband would like to obtain an uncontested divorce.¹ The couple considers hiring an attorney, but they cannot afford the \$228 hourly rate.² Erin has heard that uncontested divorces are relatively simple, particularly when there are no children involved. She believes she can submit the legal forms herself, but would like the assistance of a document preparation service, which would select and prepare the appropriate forms for her. While exploring several nonlawyer Internet services, Erin finds LawDocs.com.³ LawDocs.com prepares uncontested divorce papers online. The service consists of a two-step process. First, a consumer must submit responses to specific questions. Trained nonlawyers at LawDocs.com then use the information to prepare the customized forms, delivering the documents to the consumer within two

1. Hypothetical created by author.

2. The average hourly rate for lawyers in the United States is \$228. See Jennifer Mulrean, *Get an Online Divorce*, MSN Money, at <http://moneycentral.msn.com/content/CollegeandFamily/Suddenlysingle/P56205.asp> (last visited Jan. 11, 2004) (citing SURVEY OF LAW FIRM ECONOMICS (2002)).

3. Fictional company and website created by author.

days. For Erin and her husband the total cost of the service would be approximately \$250. The couple is interested in LawDocs.com, which would enable them to obtain the divorce at a more affordable price, but they are concerned about the service's reliability and confidentiality.

The experience of Erin and her husband illustrates some of the benefits and concerns associated with nonlawyer legal services. While nonlawyers may provide consumers with economical alternatives to legal representation, their services also raise consumer protection concerns. For example, the couple's knowledge of LawDocs.com's reputation would be restricted to the information provided by the company's website and the Better Business Bureau. Erin and her husband would not know whether LawDocs.com has misrepresented its level of experience or reliability. Unlike lawyers, nonlawyer services generally are not regulated by state bar associations, are not required to acquire specific levels of training, and are less likely to be disciplined for poor performance.⁴ In addition, because the state legal rules of professional conduct apply only to lawyers,⁵ information submitted to a nonlawyer does not enjoy the same protection against conflicts of interest and breaches of confidentiality.

States generally regulate the unauthorized practice of law through statutes and court rules that restrict the types of services nonlawyers can provide.⁶ States take one of two main approaches to the regulation of the unauthorized practice of law: (1) the development and enforcement of a practice of law definition, created by statute or court rule, or (2) the establishment, by a state court, of bright-line rules for what is not the practice of law.⁷ These approaches lack the flexibility necessary to strike a proper balance between legal access and consumer protection concerns.⁸ Moreover, these approaches are incapable of keeping pace with the development of interactive software and online technology.⁹

Without attempting to define the practice of law, this Comment proposes that in the interest of protecting consumer interests, state

4. See Margaret G. Tebo, *Self-Serve Legal Aid*, A.B.A. J., Aug. 2002, at 38, 42.

5. See MODEL RULES OF PROF'L CONDUCT pt. 1, introductory cmt. (2002) (establishing the ABA Model Rules of Professional Conduct as a basis for regulating lawyers).

6. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 (2000); see also Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, AM. B. FOUND. RES. J. 159, 161 (1980).

7. See *infra* Part II.B–C.

8. See *infra* Part II.B–C.

9. See *infra* Part II.B–C.

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lawmakers should adopt a test with four factors for courts to apply when determining whether a given activity is the unauthorized practice of law. This determination would take place within the framework of a general unauthorized practice of law statute or practice of law definition. The adoption of this proposed test would enable states to retain general practice of law definitions capable of adapting to innovative products and beneficial nonlawyer services.¹⁰ Part I of this Comment discusses the development of the unauthorized practice of law and the consumer protection and access to justice considerations raised by nonlawyer activities. Part II assesses current methods of defining and regulating the practice of law. In response to the shortcomings of existing approaches, Part III argues that state lawmakers should adopt a test that requires courts to weigh legal access and consumer protection concerns when deciding whether nonlawyers can engage in the practice of law.

I. PROSCRIPTIONS ON THE UNAUTHORIZED PRACTICE OF LAW ATTEMPT SIMULTANEOUSLY TO PROTECT CONSUMERS AND PROVIDE ACCESS TO JUSTICE

States have regulated the practice of law, through statutes and court rules, since the founding of the legal profession in America.¹¹ Traditionally, states have employed unauthorized practice regulations as a means of protecting both consumers and the interests of the legal profession.¹² With the unmet legal needs of consumers on the rise, however, members of the legal profession are beginning to recognize that these regulations must strike a balance between protecting consumers and protecting access to legal resources.¹³

A. *Regulation of the Unauthorized Practice of Law Has Been Motivated by Both Consumer Protection Concerns and the Private Interests of the Legal Profession*

A combination of public interest and personal interest considerations has motivated states to implement unauthorized practice restrictions.¹⁴

10. See *infra* Part III.C.

11. See Christensen, *supra* note 6, at 161.

12. See *id.*

13. See *id.* at 202; see also AM. BAR ASS'N COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 126 (1995).

14. See Christensen, *supra* note 6, at 161.

The American Bar Association (ABA) supports practice of law restrictions as necessary to protect consumers from excessive risks of harm.¹⁵ Members of the legal profession have cited various problems in allowing nonlawyers to practice law. First, nonlawyers sometimes advise clients on complex legal issues without understanding the intricacies involved.¹⁶ Erroneous advice can seriously harm a client's case and lead to further expenses and litigation.¹⁷ Second, clients may have false expectations as to the expertise of the nonlawyer or the scope of the service provided.¹⁸ Consumers expect legal service providers to have legal training or experience and often anticipate that nonlawyers will effectively assess their legal needs.¹⁹

Finally, clients of nonlawyers practicing law forgo the protection afforded by state rules of professional conduct regarding conflicts of interest and confidentiality, and by attorney-client privileges.²⁰ Conflicts of interest routinely emerge when nonlawyers represent clients with directly adverse interests²¹ or when nonlawyers stand to benefit from the sale of a legal instrument that may not be appropriate for a particular consumer.²² For example, an insurance agent's objective in creating an estate plan for a customer may be the sale of an insurance policy rather than the customer's best interests.²³ Consumers using services provided by nonlawyers are also more vulnerable to breaches of confidentiality,²⁴ particularly when nonlawyers fail to adhere to comprehensive privacy policies or to take reasonable precautions to prevent the unintentional dissemination of confidential information.²⁵ In addition, due to the

15. See AM. BAR ASS'N COMM'N ON NONLAWYER PRACTICE, *supra* note 13, at 126–27.

16. See Tebo, *supra* note 4, at 41–42.

17. See *id.*

18. See *id.* at 40.

19. See *id.*

20. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 (2000); see also *id.* § 70 (stating that “[p]rivileged persons . . . are the client . . . the client’s lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation”).

21. See MODEL RULES OF PROF’L CONDUCT R. 1.7 (2002) (noting that a conflict of interest is created when lawyers represent clients with directly adverse interests).

22. See *In re Mid-Am. Living Trust Assocs., Inc.*, 927 S.W.2d 855, 860 (Mo. 1996) (noting that “a conflict of interest exists between those who benefit from the sale of a particular legal instrument and the client for whom that legal instrument may not be appropriate”).

23. See Christensen, *supra* note 6, at 206.

24. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4.

25. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. (requiring lawyers to take “reasonable precautions to prevent . . . information from coming into the hands of unintended recipients”).

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absence of an attorney-client privilege,²⁶ courts may compel nonlawyers to testify about communications involving their clients.²⁷ Nonlawyers generally seek to avoid some of these problems by providing disclaimers that inform consumers of potential conflicts of interest or the absence of an attorney-client privilege.²⁸ These disclaimers, however, may lack important information and are often ignored by consumers.²⁹

Despite the legal profession's concerns about nonlawyer services and products, some commentators argue that there is relatively little evidence to suggest that such activities pose a high risk to consumers.³⁰ Injured consumers do not initiate many court cases involving the unauthorized practice of law; rather, state bar committees usually prosecute these cases after conducting an independent committee investigation.³¹ Neither the secondary legal literature nor court decisions suggest that the public perceives unauthorized practice as a substantial danger.³² In addition, consumer groups and governmental agencies have criticized certain practice of law restrictions as anti-competitive and costly to consumers.³³ Some contend that a primary motivating factor behind

26. Communications between nonlawyers and clients are generally not privileged unless the communication is made to a person "who is a lawyer or who the client or prospective client reasonably believes to be a lawyer." See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 70, 72. However, in rare instances courts have extended the attorney-client privilege to nonlawyers who are "lawfully performing the functions of an attorney, such as representing a client in an administrative proceeding." See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 183 (2d ed. 1994).

27. See, e.g., *Hunt v. Maricopa County Employees Merit Sys. Comm.*, 619 P.2d 1036, 1041 (Ariz. 1980) (denying statutory privilege in a disciplinary hearing).

28. See Tebo, *supra* note 4, at 40.

29. See *id.*

30. See Christensen, *supra* note 6, at 203; see also Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 43 (1981).

31. See Christensen, *supra* note 6, at 203. States generally enforce the unauthorized practice of law through either court orders or the advisory rulings of bar committees. Penalties may range from civil fines and injunctions to criminal fines and imprisonment. Enforcement, however, has been inconsistent, with several states not actively enforcing their unlawful practice of law regulations. Some states have indicated that insufficient funding frustrates enforcement efforts. See AM. BAR ASS'N COMM'N ON NONLAWYER PRACTICE, *supra* note 13, at 23, 119; see also AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, 1999 SURVEY OF UNAUTHORIZED PRACTICE OF LAW COMMITTEES 1-2 (1999).

32. See Christensen, *supra* note 6, at 201; see also Rhode, *supra* note 30, at 43.

33. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 (2000).

unlawful practice regulations is self-interest on the part of the legal profession.³⁴

B. The Legal Profession Has Recognized a Need To Protect Public Access to Nonlawyer Services

The legal profession's interest in protecting consumers by restricting nonlawyer activity is inconsistent with its interest in enhancing public access to legal services.³⁵ According to an ABA study, "as many as 70% to 80% or more of low-income persons are unable to obtain legal assistance even when they need and want it."³⁶ The cost of attorney services has been a leading factor in the growth of pro se litigation.³⁷ A 1991 study by the National Center for State Courts found that only twenty-eight percent of divorces proceed with both parties represented by an attorney,³⁸ and attorneys draft only half of all estate documents and document real estate transactions nationwide.³⁹ Many low- and moderate-income households simply cannot afford the cost of personal legal services.⁴⁰ Even households that can afford such services sometimes opt to resolve simple legal transactions and claims themselves, rather than paying an attorney.⁴¹

Nonlawyers can provide unrepresented consumers with economical alternatives to lawyer services. Traditional nonlawyer services include self-help books and do-it-yourself kits, both of which garnered popularity and attracted judicial scrutiny in the 1960s and 1970s.⁴² Businesses also provide personalized nonlawyer legal services in many

34. See RONALD D. ROTUNDA, LEGAL ETHICS—THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 39-2 (2002–2003).

35. See AM. BAR ASS'N COMM'N ON NONLAWYER PRACTICE, *supra* note 13, at 126.

36. See *id.* at 77.

37. William Hornsby, *Improving the Delivery of Affordable Legal Services Through the Internet: A Blueprint for the Shift to a Digital Paradigm* (Nov. 1999), at <http://www.unbundledlaw.org/program/program.htm>.

38. See Hornsby, *supra* note 37.

39. See Tebo, *supra* note 4, at 40.

40. See *id.*

41. See *id.*

42. Do-it-yourself kits provide consumers with legal forms and instructions on specific areas of law, such as family law, tax law, or wills. See Fla. Bar v. Stupica, 300 So. 2d 683, 684–85 (Fla. 1974); see also Or. State Bar v. Gilchrist, 538 P.2d 913, 914 (Or. 1975). For cases examining traditional nonlawyer services, see, for example, State v. Cramer, 249 N.W.2d 1, 2 (Mich. 1976) (divorce kits); N.Y. County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984 (App. Div.), *rev'd*, 234 N.E.2d 459 (N.Y. 1967) (self-help books); Gilchrist, 538 P.2d at 913 (divorce kits).

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states.⁴³ These businesses include tax preparation services, debt collection agencies, title examination companies, accounting firms, trust departments of banking institutions, and real estate agencies.⁴⁴

The emergence of interactive computer technologies has spurred a new wave of products, contributing to the recent expansion of nonlawyer services. These products assist consumers in preparing legal documents in a variety of areas including business incorporation, living trusts, powers of attorney, uncontested divorce, and copyright applications.⁴⁵ The programs take consumers through a systematic interview process, select the state-appropriate legal forms, and assemble the documents based on consumer information.⁴⁶ Software programs, like Quicken® WillMaker, use decision-tree software to select the documents and input the consumer information.⁴⁷ In contrast, online services, such as LegalZoom™, generally have nonlawyers select and complete the consumer forms via the Internet.⁴⁸ These services enable nonlawyers to customize documents while avoiding traditional in-person consultations.

II. EXISTING METHODS FOR REGULATING THE UNAUTHORIZED PRACTICE OF LAW DISCOURAGE BROAD CONSUMER ACCESS TO INTERACTIVE TECHNOLOGIES

The unauthorized practice of law is the practice of law by a person, generally a nonlawyer, who lacks authorization to practice in a given jurisdiction.⁴⁹ Some states regulate the unauthorized practice of law through the implementation of detailed definitions of the practice of law. Other states have shied away from creating a particularized definition of the practice of law, relying instead on courts' interpretations of broad practice of law definitions and unauthorized practice of law regulations.⁵⁰ Neither of these approaches, however, ensures access to interactive technologies.

43. See AM. BAR ASS'N COMM'N ON NONLAWYER PRACTICE, *supra* note 13, at 43.

44. See *id.* at 43–44.

45. See, e.g., Quicken® WillMaker Plus 2004, available at <http://www.nolo.com> (last modified Jan. 29, 2004); LegalZoom™, at <http://www.legalzoom.com> (last modified Jan. 29, 2004).

46. See, e.g., sources cited *supra* note 45.

47. See Quicken® WillMaker Plus 2004, *supra* note 45.

48. See LegalZoom™, *supra* note 45.

49. See BLACK'S LAW DICTIONARY 1192 (7th ed. 1999).

50. See *infra* Part II.C.

A. The Difficulty in Crafting a Practice of Law Definition

Courts have found applying the unauthorized practice of law to specific nonlawyer activities to be a challenge because of the difficulty states have had defining the practice of law.⁵¹ States take two approaches to defining the practice of law. Some states provide only a general definition. For example, New Mexico defines the practice of law by court rule simply as:

(1) representation of parties before judicial or administrative bodies; (2) preparation of pleadings and other papers, incident to actions and special proceedings; (3) management of such actions and proceedings; and (4) noncourt-related activities, such as: (a) giving legal advice and counsel; (b) rendering a service which requires use of legal knowledge or skill; and (c) preparing instruments and contracts by which legal rights are secured.⁵²

A general practice of law definition does not preserve access to specific nonlawyer activities.

In contrast, other states define the practice of law and then take an additional step, offering specific exceptions that allow for certain nonlawyer activities. For example, Washington provides eleven specific exceptions to the practice of law, allowing nonlawyers to engage in certain activities, such as serving as courthouse facilitators and mediators, participating in labor negotiations, and selling legal forms.⁵³ Most states follow this second approach and authorize nonlawyers to perform limited legal services in specific areas.⁵⁴ Depending on the state, these services may include drafting certain legal documents and attending (or in some cases participating) in administrative proceedings.⁵⁵

Despite state efforts to define the practice of law, several courts have noted that an all-encompassing practice of law definition is not feasible because “such practice must necessarily change with the ever-changing business and social order.”⁵⁶ Some members of the legal profession

51. See *infra* Part II.B.1.

52. N.M. R. ANN. 20-102.

53. See WASH. CT. GEN. R. 24.

54. See AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., *supra* note 31, at 2.

55. See *id.*

56. See Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1191–92 (Fla. 1978) (quoting State v. Cramer, 249 N.W.2d 1, 7 (Mich. 1976)); see also Iowa Supreme Court Comm. on Unauthorized Practice of Law v. Sturgeon, 635 N.W.2d 679, 685 (Iowa 2001); *In re Campaign for Ratepayers' Rights*, 634

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argue that a single definition cannot work in every situation because whether a person is engaged in the practice of law depends on context (i.e., if a client reasonably believes he or she has hired a lawyer, then the service provider is practicing law).⁵⁷ The Federal Trade Commission (FTC) has also criticized state use of broad practice of law definitions for its failure to accommodate access to emerging technologies. According to the FTC, under a broad practice of law definition, “[i]nteractive web sites that help consumers write their own legal documents might be found to be practicing law, and Internet-based lenders would likely find that they could not complete real estate or loan closings without hiring a local attorney in the state where the property is located.”⁵⁸

Even with the limitations inherent in a set practice of law definition,⁵⁹ the ABA and several states have recently shown a renewed interest in creating comprehensive practice of law definitions. According to the ABA, this movement has been in response to an increasing number of situations in which nonlawyers provide services that are difficult to classify as constituting the practice of law.⁶⁰ Technological advancements in the provision of nonlawyer services have contributed to this ambiguity.⁶¹ The ABA believes practice of law definitions encourage consistent enforcement of unauthorized practice of law statutes and reduce the growing uncertainty associated with courts’ interpretations of the unauthorized practice of law.⁶²

A.2d 1345, 1351 (N.H. 1993); *Palmer v. Unauthorized Practice Comm.*, 438 S.W.2d 374, 376 (Tex. Civ. App. 1969) (stating “[c]ertainly, the Supreme Court of Texas does not and cannot comprehensively define beforehand what constitutes the practice of law in Texas”).

57. See Margaret G. Tebo, *Defining Moment on Defining Law Practice: Critics Say Proposal Could Limit Access to Low-Cost Legal Services*, 2 A.B.A. J. EREPORT 6 (Feb. 14, 2003).

58. Margaret G. Tebo, *Legal Definition: ABA’s Proposal on Practice of Law Draws Federal Departments’ Objections*, 2 A.B.A. J. EREPORT 2 (Jan. 17, 2003).

59. See *supra* notes 56–58 and accompanying text.

60. See LISH WHITSON, AM. BAR ASS’N TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT 1 (2003), available at http://www.abanet.org/cpr/model-def/taskforce_rpt_803.pdf.

61. See, e.g., *infra* notes 118–19 and accompanying text.

62. See WHITSON, *supra* note 60, at 1–2.

B. Current Practice of Law Definitions Do Not Accommodate Interactive Technologies

State and ABA efforts to define the practice of law have been unsuccessful in creating a definition that balances consumer protection and legal access concerns. Only one state, Texas, has created a practice of law definition that preserves access to interactive technologies, but this access has come at the expense of consumer protection.⁶³ Although the ABA encourages states to weigh competing consumer interests when crafting practice of law definitions,⁶⁴ the ABA has not been able to provide an example of a practice of law definition that effectively balances these concerns.⁶⁵

1. Most State Practice of Law Definitions Do Not Provide Exceptions for Interactive Technologies

States generally favor consumer protection at the expense of legal access, classifying most nonlawyer activities as the practice of law.⁶⁶ Several state definitions have narrow exceptions allowing nonlawyers to provide limited services, such as the preparation of legal documents by real estate agents or tax accountants.⁶⁷ Three states—Washington, Arizona, and Texas—have adopted definitions that allow for greater nonlawyer involvement in the preparation and sale of legal documents.⁶⁸ To varying degrees, these definitions place fewer restrictions on nonlawyer activity than the definitions followed by other states.

Washington's practice of law definition, adopted by court rule in 2001,⁶⁹ broadly defines the practice of law to include in-court representation; the giving of legal advice or counsel for a fee; and the selecting, drafting, or completing of legal documents or agreements that affect the legal rights of entities or persons.⁷⁰ The definition then provides eleven exceptions to the rule, permitting certain nonlawyer

63. See *infra* notes 84–89 and accompanying text.

64. See *infra* notes 94–99 and accompanying text.

65. See *infra* notes 90–93 and accompanying text.

66. See generally *State Definitions of the Practice of Law*, at http://www.abanet.org/cpr/model-def/model_def_statutes.pdf (last visited Oct. 30, 2003) (listing state practice of law definitions).

67. See *id.*

68. See *infra* notes 70–73, 77, 85 and accompanying text.

69. See WASH. CT. GEN. R. 24.

70. See *id.*

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activities regardless of whether they constitute the practice of law.⁷¹ The eighth exception provides for the “[s]ale of legal forms in any format.”⁷² The eleventh exception is a catchall provision that allows for the practice of law by nonlawyers, when permitted by the Washington State Supreme Court.⁷³

Because Washington’s practice of law definition is relatively new, its application to interactive technologies remains untested. For example, the eighth exception, allowing for the sale of legal forms, may not extend to interactive services, such as Quicken® WillMaker, which involve actual document preparation.⁷⁴ In addition, the Washington State Supreme Court has not yet used the new deference accorded to it under the eleventh exception to expand the scope of the exceptions to include interactive technologies.⁷⁵

Arizona’s practice of law definition attempts to balance consumer protection concerns with access to legal services by allowing only “certified” nonlawyers to prepare legal documents.⁷⁶ Arizona defines the practice of law to include the preparation of “any document in any medium intended to affect or secure legal rights for a specific person or entity,” but provides an exception authorizing document preparation by certified nonlawyers.⁷⁷ To obtain certification, an individual must satisfy the required combination of education (legal or non-legal) and legal experience, and must receive a minimum of ten hours of continuing

71. The exceptions in the Washington definition include:

(1) Practicing law authorized by a limited license . . . (2) Serving as a court house facilitator pursuant to court rule. (3) Acting as a lay representative authorized by administrative agencies or tribunals. (4) Serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator. (5) Participation in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements. (6) Providing assistance to another to complete a form provided by a court for protection . . . when no fee is charged to do so. (7) Acting as a legislative lobbyist. (8) Sale of legal forms in any format. (9) Activities which are preempted by Federal law. (10) Serving in a neutral capacity as a clerk or court employee providing information to the public pursuant to Supreme Court Order. (11) Such other activities that the Supreme Court has determined by published opinion do not constitute the unlicensed or unauthorized practice of law or that have been permitted under a regulatory system established by the Supreme Court.

Id.

72. *Id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *See* ARIZ. SUP. CT. R. 31(a), available at <http://www.supreme.state.az.us/media/pdf/uplrule.pdf>.

77. *Id.*

education credits each year.⁷⁸ In addition, beginning in 2005, Arizona regulations will require all nonlawyers providing legal services to pass a standardized examination.⁷⁹

Although Arizona's certification process allows for greater nonlawyer activity, it does not accommodate interactive technologies. The guidelines for certification in Arizona do not explain how a nonlawyer or business may bring an interactive service into compliance. The rules enable entities to obtain certification by designating a principal who maintains valid certification as a document preparer.⁸⁰ While this may allow nonlawyers employed by services like LegalZoom™ to obtain certification, the "document preparer" for products like Quicken® is a software program.⁸¹ The guidelines do not address whether these software programs may obtain certification by designating a principal. Even assuming such interactive technologies are certifiable, it is still unclear whether these services would fall outside the scope of permissible activity. Arizona's regulation allows document preparers to provide general legal information, but does not allow them to provide specific advice, opinions, or recommendations to consumers.⁸² Because interactive technologies tailor their services to the needs of particular consumers,⁸³ these programs may not comply with the Arizona regulation.

Texas is the only state with a practice of law definition that allows expansive consumer use of interactive technologies.⁸⁴ The statute provides a broad exception to the practice of law, permitting nonlawyers to display and sell computer software and similar products if the products clearly and conspicuously state that they are not a substitute for the advice of an attorney.⁸⁵ This exception enhances consumer access to

78. See Ariz. Admin. Order No. 2003-14 at 5, 11 (Jan. 16, 2003), available at <http://www.supreme.state.az.us/orders/admorder/Orders03/2003-14.pdf>.

79. See *id.* at 7.

80. See *id.* at 6.

81. See Quicken® WillMaker Plus 2004, *supra* note 45.

82. See Ariz. Admin. Order No. 2003-14, at 9.

83. See LegalZoom™, *supra* note 45.

84. TEX. GOV'T CODE ANN. § 81.101(c) (Vernon Supp. 2002). The Texas legislature amended the state's original, more restrictive, definition of the practice of law in response to a federal district court decision that held that nonlawyers providing interactive legal document preparation software were engaged in the unauthorized practice of law. See *Unauthorized Practice Comm. v. Parsons Tech., Inc.*, No. Civ. A. 3:97-CV-2859-H, 1999 WL 47235, at *1 (N.D. Tex.), *vacated*, 179 F.3d 956 (5th Cir. 1999); see also *infra* note 138 and accompanying text.

85. TEX. GOV'T CODE ANN. § 81.101(c).

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legal services by protecting a wide range of nonlawyer activity, presumably including products such as Quicken® WillMaker and LegalZoom™.⁸⁶

Critics have raised concerns, however, regarding the statute's sweeping assertion that software and similar products do not constitute the practice of law.⁸⁷ Some note that with the advancement of technology, new software and online programs could expand the scope of the exception beyond its intended reach.⁸⁸ In addition, the statute does not address reliability concerns, such as whether a nonlawyer is qualified to provide a specific service.⁸⁹ Consequently, consumers must discern whether a particular product is dependable based on limited information.

2. *The ABA Approach to Defining the Practice of Law Does Not Accommodate Emerging Technologies*

In September 2002, a task force for the ABA, charged with the responsibility of drafting a model definition of the practice of law, released a proposed definition to the public.⁹⁰ The proposed definition broadly defined the practice of law, allowing nonlawyers to provide legal services under four narrow exceptions.⁹¹ A variety of organizations instantly criticized the definition as being overly restrictive and hampering access to affordable legal services.⁹² Rather than revising the proposed definition, the ABA determined that a model definition was simply not a viable solution and instead issued a general report.⁹³

In its report, the ABA recommends that all states adopt a definition of the practice of law.⁹⁴ The report does not provide an example of an

86. *See id.*

87. *See, e.g.,* Steve French, Note, *When Public Policies Collide . . . Legal "Self-Help" Software and the Unauthorized Practice of Law*, 27 RUTGERS COMPUTER & TECH. L.J. 93, 113 (2001).

88. *See id.*

89. *See* TEX. GOV'T CODE ANN. § 81.101.

90. American Bar Association Task Force on the Model Definition of the Practice of Law, Draft Definition of the Practice of Law (Sept. 18, 2002), at http://www.abanet.org/cpr/model_def_definition.html.

91. The four exceptions permitted were: (1) the practice of law as authorized by a limited license; (2) pro se representation; (3) serving as a mediator, arbitrator, conciliator or facilitator; and (4) providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct. *See id.*

92. *See* Tebo, *supra* note 57.

93. *See generally* WHITSON, *supra* note 60.

94. *See id.* at 13.

effective practice of law definition, but rather urges states to balance the potential costs and benefits to consumers by considering four factors.⁹⁵ First, states should strive towards establishing minimum qualifications that nonlawyers must satisfy in order to practice law.⁹⁶ Second, states should ensure the competence of nonlawyers by requiring education, experience, training, certification or licensing, or supervision by a lawyer.⁹⁷ Third, states should determine what level of professional accountability should be required of a nonlawyer.⁹⁸ Finally, states should assess the costs and benefits associated with nonlawyer activities to determine the appropriate scope of their practice of law definitions.⁹⁹

Although the ABA's suggested approach encourages states to consider important consumer protection and legal access concerns, it still advocates for a comprehensive practice of law definition. Because current practice of law definitions lack the flexibility necessary to protect consumers while preserving consumer access to beneficial nonlawyer services and emerging technologies,¹⁰⁰ it is not clear that states will be able to create a definition that adequately addresses consumer interests.

C. Case Interpretation of the Unauthorized Practice of Law Does Not Provide an Exception for Interactive Technologies

States without detailed practice of law definitions place greater reliance on court interpretation of the unauthorized practice of law. The bright-line rules established by these courts have the potential to exclude consumer access to interactive technologies.¹⁰¹ Two common approaches have emerged in this area. Under the majority approach (general-specific test), nonlawyers may give legal information and advice, provided the advice is general and not tailored to an individual consumer.¹⁰² Nonlawyers violate the general-specific test when they

95. *See id.* at 5.

96. *See id.* at 6.

97. *See id.* at 7.

98. *See id.* at 8.

99. *See id.* at 9.

100. *See infra* notes 170–71 and accompanying text.

101. *See, e.g.,* Unauthorized Practice Comm. v. Parsons Tech., Inc., No. Civ. A. 3:97-CV-2859-H, 1999 WL 47235, at *1 (N.D. Tex.) (enjoining the sale of Quicken® Family Lawyer '99), *vacated*, 179 F.3d 956 (5th Cir. 1999).

102. *See* N.Y. County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984, 998 (App. Div.) (Stevens, J., dissenting), *rev'd*, 234 N.E.2d 459 (N.Y. 1967).

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provide specific legal advice unless the activity falls within a state exception.¹⁰³ A court following this test may decide that unauthorized practice statutes prohibit interactive technologies because products using such technologies provide specific legal advice. A minority of court decisions take a more restrictive approach, finding that even nonlawyers providing general legal information and advice may be unlawfully practicing law in some instances.¹⁰⁴ These decisions restrict consumer access to most interactive technologies. In contrast to these two approaches, Washington courts have adopted a unique approach that attempts to balance consumer protection and legal access concerns.¹⁰⁵ This approach, however, does not provide set guidelines for determining when interactive technologies constitute the unauthorized practice of law.

1. The Majority General-Specific Approach Does Not Provide an Exception for Consumer Use of Interactive Technologies

The general-specific test prohibits nonlawyers from providing specific legal advice to consumers, but permits the distribution of general advice.¹⁰⁶ In *New York County Lawyers' Association v. Dacey*,¹⁰⁷ the New York Court of Appeals overturned the lower court decision and adopted the general-specific approach proposed by the dissent.¹⁰⁸ The issue in *Dacey* was whether distribution of a book that provided legal forms, general legal advice, and instructions to assist users in the completion of the forms constituted the unauthorized practice of law.¹⁰⁹ An intermediate New York state appellate court held that under the existing New York statute, the legal information and advice provided in the book constituted the unauthorized practice of law.¹¹⁰ The dissent insisted that providing general legal advice is not the practice of law, arguing that only "personal advice on a specific problem peculiar to a designated or readily identifiable person" could constitute the practice of

103. *See id.*

104. *See infra* Part II.C.2.

105. *See infra* Part II.C.3.

106. *Dacey*, 283 N.Y.S.2d at 998 (Stevens, J., dissenting).

107. 234 N.E.2d 459 (N.Y. 1967).

108. *See Dacey*, 234 N.E.2d at 459 (reversing the Appellate Division and dismissing the petition on dissenting opinion).

109. *Dacey*, 283 N.Y.S.2d at 989.

110. *Id.* at 995.

law.¹¹¹ In addition, the dissent noted that the book had been sold for more than a year without any evidence to suggest consumers had been harmed or inconvenienced by the general advice.¹¹²

Subsequent decisions by state courts both within and outside of New York have endorsed the general-specific test. These courts have recognized that nonlawyers providing general legal advice do not create a relationship of trust and confidence with consumers.¹¹³ Consequently, general legal advice does not raise the same consumer protection concerns as the distribution of specific legal advice.¹¹⁴ For example, in *Oregon State Bar v. Gilchrist*,¹¹⁵ the Oregon State Supreme Court held that it was permissible under the state's broad practice of law statute to publish or sell divorce kits, provided the vendor did not have personal contact with their customers in the nature of consultation, explanation, recommendation, or advice.¹¹⁶ Citing *Dacey*, the court concluded that nonlawyers could render general advice on common problems.¹¹⁷

Application of the general-specific test to interactive technologies raises new questions of interpretation. In particular, courts must determine whether interactive programs provide general or specific advice. The Oregon State Bar considered this question in a formal opinion.¹¹⁸ Referencing *Gilchrist*, the opinion suggested that a bright line exists between those who provide consumers with information in text or database form and those who personally exercise judgment in providing specific legal advice to particular individuals.¹¹⁹ According to the formal opinion, if a nonlawyer generates legal advice from a database using "decision-tree" software, it does not constitute the practice of law.¹²⁰ However, if nonlawyers provide the same advice during an online

111. *Id.* at 998 (Stevens, J., dissenting).

112. *See id.* at 998–99 (Stevens, J., dissenting).

113. *See, e.g., State v. Cramer*, 249 N.W.2d 1, 9 (Mich. 1976); *People v. Divorce Associated & Publ'g Ltd.*, 407 N.Y.S.2d 142, 144 (App. Div. 1978); *Or. State Bar v. Gilchrist*, 538 P.2d 913, 917 (Or. 1975).

114. *See, e.g., Cramer*, 249 N.W.2d at 9; *Divorce Associated*, 407 N.Y.S.2d at 144; *Gilchrist*, 538 P.2d at 917.

115. 538 P.2d 913, 917 (Or. 1975).

116. *Id.* at 913.

117. *See id.* at 917. For additional cases prohibiting nonlawyers from providing specific legal advice, see *Cramer*, 249 N.W.2d at 8–9; *Divorce Associated*, 407 N.Y.S.2d at 142.

118. *See Or. State Bar Ass'n Bd. of Governors*, Formal Op. 1994-137, 1994 WL 455098, at *1.

119. *See id.* at *2.

120. *See id.*

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session, this advice constitutes the practice of law.¹²¹ Thus, the Oregon State Bar's interpretation of the general-specific test would likely prohibit online services like LegalZoom™ that use nonlawyers to prepare legal documents, and allow programs like Quicken®. Other states, however, may prohibit nonlawyers from distributing decision-tree software programs like Quicken®, finding that they too provide specific advice by tailoring legal documents to individual consumers.

2. *The Minority Approach Restricts Access to Most Interactive Technologies*

A minority of courts have held that even general legal information and advice provided by nonlawyers may constitute the unauthorized practice of law.¹²² Although the Texas legislature has recently adopted a less-restrictive practice of law definition,¹²³ Texas cases prior to the adoption of this definition provide perhaps the most developed case law for the minority approach.¹²⁴ In these cases, Texas courts focused on whether “legal skill or knowledge” was required to perform the service.¹²⁵ Because all activities requiring legal skill constituted the practice of law, nonlawyers could not provide even basic legal information.¹²⁶

In determining whether a service required “legal skill or knowledge,” the Texas courts considered both the complexity of the area of law in which the nonlawyer was practicing and the type of legal service provided.¹²⁷ For example, in *Palmer v. Unauthorized Practice Committee*,¹²⁸ a Texas appellate court concluded that certain areas of

121. *See id.*

122. *See, e.g.,* *People v. Laden*, 893 P.2d 771, 772 (Colo. 1995); *Fla. Bar v. Stupica*, 300 So. 2d 683, 687 (Fla. 1974); *Fadia v. Unauthorized Practice Comm.*, 830 S.W.2d 162, 164 (Tex. App. 1992).

123. *See* TEX. GOV'T CODE ANN. § 81.101 (Vernon Supp. 2002); *see also supra* notes 84–85 and accompanying text.

124. *See, e.g.,* *Unauthorized Practice Comm. v. Parsons Tech., Inc.*, No. Civ. A. 3:97-CV-2859-H, 1999 WL 47235, at *6 (N.D. Tex.), *vacated*, 179 F.3d 956 (5th Cir. 1999); *Unauthorized Practice Comm. v. Cortez*, 692 S.W.2d 47, 50 (Tex. 1985); *Fadia*, 830 S.W.2d at 162; *Palmer v. Unauthorized Practice Comm.*, 438 S.W.2d 374, 376 (Tex. Civ. App. 1969).

125. *See, e.g., Fadia*, 830 S.W.2d at 164; *Cortez*, 692 S.W.2d at 50. The term “legal skill or knowledge” was adopted from Texas' former practice of law definition. TEX. GOV'T CODE ANN. § 81.101(a) (Vernon Supp. 1998) (amended 1999).

126. *See Fadia*, 830 S.W.2d at 164 (citing *Palmer*, 438 S.W.2d at 376).

127. *See, e.g., id.*; *see also Cortez*, 692 S.W.2d at 50.

128. 438 S.W.2d 374 (Tex. Civ. App. 1969).

law, such as trusts, taxation, estates, and perpetuities, require such an immense amount of knowledge that they necessarily involve the practice of law requiring the skill of a licensed attorney.¹²⁹ The nonlawyer's lack of education and legal training compared to the complexity of the legal issues involved also concerned the court.¹³⁰ Another Texas court focused on the activity provided, rather than the area of law at issue. In *Unauthorized Practice Committee v. Cortez*,¹³¹ the court concluded that assisting a client in the filing of certain immigration forms required legal skill because the forms furnished immigration authorities with the alien's address, increasing the likelihood of deportation.¹³² Thus, legal skill was required to determine whether the forms should be filed.

The Texas decisions also evaluated the propensity of nonlawyer legal services to mislead consumers.¹³³ In both *Palmer* and *Fadia v. Unauthorized Practice Committee*,¹³⁴ the courts noted that advertisements and manuals implying that all testamentary dispositions could be standardized may create a false sense of security among consumers.¹³⁵ Similarly, the *Cortez* court expressed concern that the nonlawyer was misleading customers by informing them that she could not help with their immigration cases without suggesting other avenues that may be available to them.¹³⁶

Texas' experience with the unauthorized practice of law demonstrates the important role that specific restrictions within an unauthorized practice of law statute play in courts' determinations of the scope of legal services nonlawyers can provide. The legal skill or knowledge test that emerged in Texas stemmed from a restrictive practice of law definition that classified legal instructions and form selection as the practice of law.¹³⁷ Consequently, the Texas cases described above demonstrate how the language of a state's unauthorized practice of law

129. *See id.* at 374.

130. *See id.* at 375.

131. 692 S.W.2d 47 (Tex. 1985).

132. *Id.* at 47, 50.

133. *See, e.g., Fadia v. Unauthorized Practice of Law Comm.*, 830 S.W.2d 162, 165 (Tex. App. 1992); *see also Cortez*, 692 S.W.2d at 50.

134. 830 S.W.2d 162 (Tex. App. 1992).

135. *See Fadia*, 830 S.W.2d at 162, 165; *Palmer*, 438 S.W.2d at 374, 376.

136. *See Cortez*, 692 S.W.2d at 50.

137. *See* TEX. GOV'T CODE ANN. § 81.101(a) (Vernon Supp. 1998) (amended 1999); *see also supra* notes 124–26 and accompanying text.

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statute or practice of law definition can limit a court's flexibility to rule on individual cases.

Texas' minority position prevailed until 1999, when Texas' legislature amended the practice of law definition in response to *Unauthorized Practice Committee of Law v. Parsons Technology, Inc.*¹³⁸ In *Parsons*, a federal district court enjoined the sale of Quicken® Family Lawyer '99 (QFL) as the unauthorized practice of law.¹³⁹ QFL used decision-tree software to assist users in the selection and completion of legal forms.¹⁴⁰ The *Parsons* court did not distinguish QFL because a database was generating the legal advice. Instead, the court echoed *Palmer, Fadia, and Cortez*¹⁴¹ in noting that nonlawyers cannot engage in form selection or the preparation of customized legal documents.¹⁴² The U.S. Court of Appeals for the Fifth Circuit ultimately vacated the *Parsons* decision¹⁴³ after the Texas legislature amended the state's unauthorized practice statute to protect access to a variety of nonlawyer services, including how-to books, kits, and interactive technologies.¹⁴⁴

Texas is not the only state to have applied the minority test when interpreting the unlawful practice of law. Like Texas, the Florida courts used to apply the "legal skill or knowledge" test,¹⁴⁵ but later reevaluated their position and found persuasive reasons for adopting the general-specific test.¹⁴⁶ Colorado continues to follow the minority approach. As recently as 1995, the Colorado State Supreme Court affirmed that the counseling and sale of "living trust" documents by a nonlawyer amounts to the unauthorized practice of law.¹⁴⁷

138. No. Civ. A. 3:97CV-2859-H, 1999 WL 47235 (N.D. Tex.), *vacated*, 179 F.3d 956 (5th Cir. 1999).

139. *See id.* at *6.

140. *See id.*

141. *See supra* notes 127–36 and accompanying text.

142. *See Parsons*, 1999 WL 47235, at *6. The court expressed concern over QFL's packaging, which stated that its forms were valid in forty-nine states and had been updated by legal experts. The *Parsons* court noted that these statements created an air of reliability and could mislead consumers into depending on them. *Id.*

143. *See Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956, 956 (5th Cir. 1999).

144. TEX. GOV'T CODE ANN. § 81.101(c) (Vernon Supp. 2002).

145. *See, e.g.*, Fla. Bar v. Stupica, 300 So. 2d 683, 687 (Fla. 1974).

146. *See Fla. Bar v. Brumbaugh*, 355 So. 2d 1186, 1193 (Fla. 1978).

147. *See People v. Laden*, 893 P.2d 771, 772 (Colo. 1995). Courts in Florida, Ohio, and Missouri have similarly held that the preparation of trust documents by nonlawyers constitutes the unauthorized practice of law. *See, e.g., In re Mid-Am. Living Trust Assocs., Inc.*, 927 S.W.2d 855, 871 (Mo. 1996); *In re Fla. Bar Advisory Opinion—Nonlawyer Preparation of Living Trusts*, 613

Proponents of the minority approach insist that an expansive interpretation of the practice of law is consistent with protecting the public welfare.¹⁴⁸ An incorrect assertion by a nonlawyer can result in substantial consumer liability, needless litigation, or unjust results.¹⁴⁹ A seemingly simple decision, such as when to use a particular form, may involve complex legal analysis and require extensive research.¹⁵⁰ Opponents of this approach assert that in advancing consumer protection concerns, minority states limit consumer access to nonlawyer services and threaten the availability of legal literature.¹⁵¹ Consequently, consumers may be restricted from using interactive technologies such as Quicken® WillMaker or LegalZoom™.

3. *Washington's Approach Does Not Provide Set Guidelines for Determining when Interactive Technologies Constitute the Unauthorized Practice of Law*

Washington courts have developed a unique standard for assessing the legality of nonlawyer activities. Once a court deems a nonlawyer to be practicing law, it weighs consumer protection concerns against the benefits of enhanced legal access to determine whether the activity should be permitted.¹⁵² If the court concludes that the nonlawyer service is in the public's best interest, the activity is permitted, provided the nonlawyer adheres to the standard of care of a practicing attorney.¹⁵³

The Washington State Supreme Court discussed this approach in *Jones v. Allstate Insurance Co.*¹⁵⁴ The court weighed the competing interests at stake in the case and held that although a claims adjuster was practicing law by selecting and preparing certain legal instruments, the

So. 2d 426, 427 (Fla. 1992); *Cleveland Bar Ass'n. v. Yurich*, 642 N.E.2d 79, 84 (Ohio Bd. Unauth. Prac. 1994).

148. *See, e.g., Palmer v. Unauthorized Practice Comm.*, 438 S.W.2d 374, 376–77 (Tex. Civ. App. 1969) (determining that Texas' unauthorized practice statute was enacted in the interest of public welfare and safety).

149. *See Stupica*, 300 So. 2d at 686–87 (“[a]n incorrect assertion can result in perjury, libel or contempt; a warranty deed, misused for a quitclaim of limited interests, can result in substantial liability”).

150. *See id.* at 687.

151. *See Brumbaugh*, 355 So. 2d at 1192; *see also* N.Y. County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984, 998–1001 (App. Div.) (Stevens, J., dissenting), *rev'd*, 234 N.E.2d 459 (N.Y. 1967).

152. *See Jones v. Allstate Ins. Co.*, 146 Wash. 2d 291, 303, 45 P.3d 1068, 1075 (2002) (en banc).

153. *See id.* at 305, 45 P.3d at 1075.

154. 146 Wash. 2d 291, 45 P.3d 1068 (2002) (en banc).

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risk of harm to the public was low as compared to the benefits associated with convenient and low cost services.¹⁵⁵ Consequently, the court held that claims adjusters may offer document preparation services, provided they meet the standard of care of a practicing attorney.¹⁵⁶ Washington courts have also made similar exceptions for mortgage lenders and real estate brokers.¹⁵⁷

Washington's approach is unique in that it seeks to balance consumer protection and legal access concerns. In balancing these concerns, however, Washington courts have not established a set of factors to guide their analysis. For example, in *In re Disciplinary Proceedings Against Droker*,¹⁵⁸ the Washington State Supreme Court would not permit a nonlawyer to draft escrow instructions, select forms, draft clauses modifying form legal documents, or explain to buyers and sellers the meaning and effect of the documents they drafted, finding that these activities created too great a risk of harm to consumers.¹⁵⁹ This decision and others¹⁶⁰ contrast with the court's decision in *Jones* to permit claims adjusters to select and complete legal documents and to advise third parties to sign such documents.¹⁶¹ Thus, it is unclear whether the courts would enjoin interactive technologies, which involve the selection and completion of legal documents and the drafting of instructions and explanations.

In sum, the development of interactive technologies by nonlawyers has forced the legal profession to seek better methods of regulating the unauthorized practice of law. Some states have responded by expanding their practice of law definitions and establishing guidelines through court interpretation. Fixed definitions and bright-line rules, however, jeopardize the flexibility necessary to keep pace with emerging technologies. At the same time, a failure to identify the factors used for

155. *See id.* at 304–05, 45 P.3d at 1075–76.

156. *See id.* at 305, 45 P.3d at 1075–76.

157. *See, e.g.,* Perkins v. CTX Mortgage Co., 137 Wash. 2d 93, 106, 969 P.2d 93, 100 (1999) (en banc); *see also* Cultum v. Heritage House Realtors, Inc., 103 Wash. 2d 623, 630, 694 P.2d 630, 634–35 (1985) (en banc).

158. 59 Wash. 2d 707, 370 P.2d 242 (1962).

159. *See id.* at 719, 370 P.2d at 248.

160. *See, e.g.,* Wash. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n, 91 Wash. 2d 48, 586 P.2d 870 (1978) (holding that the selection and completion of loan documents constituted the unauthorized practice of law).

161. *See Jones*, 146 Wash. 2d at 305, 45 P.3d at 1075.

interpreting the unauthorized practice of law may result in a loss of predictability and accountability in the application of these regulations.

III. A FOUR FACTOR TEST FOR COURTS TO CONSIDER
WOULD PRESERVE ACCESS TO EMERGING
TECHNOLOGIES WHILE PROTECTING CONSUMERS FROM
UNDESIRABLE NONLAWYER ACTIVITY

The methods that states have developed for interpreting state unauthorized practice of law regulations have failed to reconcile competing legal access and consumer protection concerns.¹⁶² Whether a nonlawyer activity constitutes the practice of law is heavily dependent on the factual situation at hand¹⁶³ and should not be resolved based on inflexible definitions and bright-line rules. Applying a test with specific factors to each case would better enable courts to weigh the costs and benefits of allowing a particular nonlawyer service¹⁶⁴ and to adapt more effectively to innovative legal products.¹⁶⁵ Under this test, courts would first determine whether the nonlawyer directed legal advice to the specific problem of an identifiable person.¹⁶⁶ If so, then the court would independently weigh four factors: the reliability of the service, the potential for a conflict of interest, the service's potential to mislead consumers, and whether the nonlawyer has addressed confidentiality and privacy concerns.¹⁶⁷ The test also would ensure greater consistency and predictability among the courts.¹⁶⁸ However, the test cannot provide the required flexibility if courts interpret it within the framework of a restrictive unauthorized practice of law regulation that prohibits most nonlawyer activities. Therefore, only states with less restrictive unauthorized practice of law regulations and practice of law definitions could apply this test.

162. *See supra* Part II.B–C.

163. *See supra* note 57 and accompanying text.

164. *See infra* notes 232–34 and accompanying text.

165. *See infra* notes 232–34 and accompanying text.

166. *See infra* Part III.B.1.

167. *See infra* Part III.B.2–5.

168. *See infra* Part III.C.

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A. *The Need for a Comprehensive Test*

States rely on inflexible state practice of law definitions and case precedent in determining whether a nonlawyer legal service violates unauthorized practice of law statutes and court rules.¹⁶⁹ An inflexible practice of law definition restricts the ability of courts and committees to assess all of the factors relevant in determining whether a particular service is beneficial to consumers. Consequently, when applied, these definitions either overly restrict nonlawyer activity or fail to provide appropriate consumer protection.

1. *Inflexible Practice of Law Definitions Do Not Adequately Protect Consumer Interests*

Current practice of law definitions do not successfully balance consumer protection and legal access concerns. At the expense of consumer access to legal services, most states have instituted restrictive practice of law definitions intended to protect consumers from unreliable nonlawyer services and to protect the legal profession from increased competition.¹⁷⁰ Texas' practice of law definition is at the other extreme, broadly protecting consumer access to all interactive technologies to the detriment of consumer protection.¹⁷¹

State attempts to build exceptions into their practice of law definitions have not proven effective. Washington provides a catchall exception affording the state supreme court broad discretion to determine when the state's unauthorized practice of law regulation should exempt a particular activity.¹⁷² The Washington State Supreme Court, however, has been unable to articulate a consistent standard for interpreting these nonlawyer activities.¹⁷³ Arizona allows nonlawyers to offer such services, provided certification is obtained.¹⁷⁴ But, because the certification guidelines do not allow document preparers to provide specific legal advice, Arizona's approach may impede access to

169. *See supra* Part II.B–C.

170. *See* Christensen, *supra* note 6, at 161.

171. *See supra* notes 84–89 and accompanying text.

172. *See* WASH. CT. GEN. R. 24.

173. *See supra* notes 158–61 and accompanying text.

174. *See generally* ARIZ. SUP. CT. R. 31(a), available at <http://www.supreme.state.az.us/media/pdf/uplrule.pdf>.

document services such as Quicken® WillMaker.¹⁷⁵ Only Texas has a practice of law definition that protects access to a broad range of document preparation services.¹⁷⁶ The Texas definition, however, protects consumer access at the expense of consumer protection. Under Texas' statute, nonlawyers can provide legal services despite evidence that the service is unreliable.¹⁷⁷

The ABA approach encourages states to create a comprehensive definition of the practice of law, taking into consideration consumer protection and legal access considerations.¹⁷⁸ No state practice of law definition, however, has achieved a constructive balance between these competing consumer interests.¹⁷⁹ The more restrictive and over-particularized a practice of law definition is, the less capable it is of being adapted to new practices and legal services. The ABA itself was not able to draft a model definition that adequately balances these concerns.¹⁸⁰ Consequently, it is unlikely that the ABA approach will prove successful.

2. *The Insufficiency of Court Interpretation*

The approaches adopted by courts for interpreting state practice of law definitions have not fared much better than restrictive practice of law definitions in protecting consumer interests. The general-specific test, favored by a majority of courts, prohibits nonlawyers from providing specific legal advice to consumers.¹⁸¹ This approach fails to recognize that it may be appropriate for a nonlawyer to provide specific advice in some circumstances. The test does not consider such factors as whether the nonlawyer is particularly well qualified to provide legal advice or whether the nonlawyer is practicing in a standardized area of law. Under the majority approach, an experienced paralegal cannot provide specific legal advice regarding an uncontested divorce, despite evidence that the paralegal is providing a valuable legal service to society.¹⁸²

175. *See supra* notes 81–83 and accompanying text.

176. *See supra* notes 84–86 and accompanying text.

177. *See supra* note 89 and accompanying text.

178. *See* WHITSON, *supra* note 60, at 13.

179. *See supra* notes 172–73 and accompanying text.

180. *See supra* notes 90–93 and accompanying text.

181. *See supra* note 106 and accompanying text.

182. *See supra* note 106 and accompanying text.

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In addition, the general-specific test creates a bright-line rule that is inflexible and ambiguous when applied to interactive software and other technologies.¹⁸³ Interactive programs, such as LegalZoom™, enable consumers to provide personal information to nonlawyers who use the information to customize legal forms.¹⁸⁴ Because online services like LegalZoom™ provide legal advice to a “readily identifiable person” based on that person’s “specific problem,”¹⁸⁵ courts can easily conclude, as the Oregon State Bar has,¹⁸⁶ that these interactive services provide specific legal advice and are prohibited under state unauthorized practice statutes and court rules.

Courts applying the minority test are even more restrictive, often classifying general legal instructions as the practice of law.¹⁸⁷ This approach protects consumers at the expense of consumer access to legal services by making it more difficult for consumers to obtain the legal information from nonlawyers they need to make sound choices.¹⁸⁸ Because general legal advice constitutes the practice of law,¹⁸⁹ nonlawyers cannot provide document preparation services such as LegalZoom™ or Quicken® WillMaker. In addition, the approach threatens the availability of literature describing relevant procedural and substantive law.¹⁹⁰

The general-specific test and the minority approach do not balance consumer protection with access to legal services. Interpretation of the general-specific test’s bright-line rule will become increasingly difficult with the development of interactive software and online technology.¹⁹¹ The minority approach has been even less successful in providing access to legal services, leading several courts to overturn decisions relying on this approach.¹⁹² The inadequacies of these approaches demonstrate the need for a test with flexible factors.

183. *See supra* notes 118–20 and accompanying text.

184. *See* LegalZoom™, *supra* note 45.

185. *See* N.Y. County Lawyers’ Ass’n v. Dacey, 283 N.Y.S.2d 984, 998 (App. Div.) (Stevens, J., dissenting), *rev’d*, 234 N.E.2d 459 (N.Y. 1967) (establishing the general-specific test).

186. *See* Or. State Bar Ass’n Bd. of Governors, Formal Op. 1994-137, 1994 WL 455098, at *2.

187. *See supra* notes 122–26 and accompanying text.

188. *See supra* note 148 and accompanying text.

189. *See, e.g.*, Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. Civ. A. 3:97CV-2859-H, 1999 WL 47235, at *6 (N.D. Tex.), *vacated*, 179 F.3d 956 (5th Cir. 1999).

190. *See* Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1192 (Fla. 1978).

191. *See supra* notes 118–19 and accompanying text.

192. *See supra* notes 145–46 and accompanying text.

B. A Proposed Test

Because current approaches do not adequately balance consumer protection and access to justice concerns, courts should adopt a test with four factors to determine when nonlawyer services violate unauthorized practice of law regulations. Unlike the ABA's balancing approach, the proposed test does not attempt to define the practice of law, preferring instead courts' application of the factors on a case-by-case basis. The test provides courts with an effective means of clarifying and interpreting state unauthorized practice of law regulations as applied to nonlawyers. States that have adopted practice of law definitions should keep these definitions as general and non-restrictive as possible. Courts would then use the proposed test to determine whether specific nonlawyer activities constitute the unauthorized practice of law. For states without practice of law definitions, the test would provide a consistent standard for classifying nonlawyer activities.

The factors selected for the test represent the overriding concerns expressed by courts in determining whether to enjoin a nonlawyer activity as a violation of an unauthorized practice of law regulation.¹⁹³ Specifically defining these factors will help to preserve consistency and predictability among the courts. At the same time, this test still enables courts to maintain sufficient discretion to adapt to changing approaches in the law by determining which factors deserve particular emphasis.

1. Is the Legal Advice Directed to the Specific Problem of an Identifiable Person?

Initially, courts should assess whether a particular nonlawyer activity provides general or specific advice. A majority of courts have identified this threshold question as a relevant consideration.¹⁹⁴ These courts have consistently held that general legal advice does not constitute the practice of law¹⁹⁵ because nonlawyers providing general legal advice do not create a relationship of trust and confidence with consumers.¹⁹⁶ When nonlawyers provide specific legal advice, however, the potential

193. *See infra* Part III.B.2–5.

194. *See supra* Part II.C.1.

195. *See supra* Part II.C.1.

196. *See* N.Y. County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984, 998 (App. Div.) (Stevens, J., dissenting), *rev'd*, 234 N.E.2d 459 (N.Y. 1967).

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for harm increases because consumers place greater reliance on advice specific to their case.¹⁹⁷

While the majority approach automatically classifies services providing specific legal advice as the unauthorized practice of law,¹⁹⁸ the proposed test applies additional factors before making such a determination. This approach enables courts to weigh consumer protection and legal access concerns prior to determining whether to prohibit a nonlawyer service. The proposed test protects access to beneficial nonlawyer services that involve specific legal advice, such as property transactions by real estate agents, an exception approved by several states.¹⁹⁹ Changes in technology particularly warrant such an approach because emerging interactive technologies challenge the general-specific distinction.

An example of specific advice involves legal consultation or recommendation between a nonlawyer and a consumer.²⁰⁰ Books, kits, and seminars lack such a relationship and rarely involve the transmission of specific advice.²⁰¹ The advent of online document preparation services like LegalZoom™, however, enables nonlawyers to tailor legal documents to individual consumers without assuming a personal relationship.²⁰² One state has already prohibited these online services.²⁰³ Rather than excluding these services as the unauthorized practice of law, the proposed test would assess the activity under four factors.

2. *Is the Nonlawyer Service Reliable?*

Once courts identify a nonlawyer service as providing specific legal advice, they must then assess the service's reliability. Several courts have identified reliability as a relevant consideration because of the devastating effects poor legal advice can have on consumers.²⁰⁴ As a New York court noted in *People v. Divorce Associated and Publishing*

197. *See id.* (noting that general legal advice raises fewer consumer protection concerns because consumers do not rely on the selection and judgment of nonlawyers providing general advice).

198. *See supra* note 106 and accompanying text.

199. *See* AM. BAR ASS'N STANDING COMM. ON CLIENT PROT., *supra* note 31, at 2.

200. *See supra* notes 106–17 and accompanying text.

201. *See supra* notes 106–17 and accompanying text.

202. *See supra* notes 118–21 and accompanying text.

203. *See* Or. State Bar Ass'n Bd. of Governors, Formal Op. 1994-137, 1994 WL 455098, at *1.

204. *See* Tebo, *supra* note 4, at 41–42.

Ltd.,²⁰⁵ mistaken advice can jeopardize a client's case and can lead to additional expense and litigation.²⁰⁶ Conversely, a demonstrably reliable service does not raise the same concerns. The dissent in *Dacey* recognized as much, noting that the book at issue had been published and sold for more than a year without a showing that it had exploited the public or led its members astray.²⁰⁷ Thus, the proposed test should account for reliability in assessing whether a product violates state unauthorized practice of law regulations.

In assessing the reliability of a particular product or service, courts should focus on a number of factors. First, they should consider the education and experience of the nonlawyer. In *Palmer*, the court noted that the nonlawyer had not completed high school and was untrained in the law.²⁰⁸ A showing of significant legal experience, however, may overcome a lack of education.²⁰⁹ In Arizona, a high school diploma is sufficient for certification as a legal document preparer when combined with a minimum of two years of law-related experience.²¹⁰ Education and experience are appropriate considerations because they demonstrate to the court whether a nonlawyer has the necessary skills to provide a legal service independently.

Second, a court should evaluate the complexity of the nonlawyer service. For example, if the service involves a complicated area of law, it is more likely that someone without expertise in that area will be unreliable. *Palmer* noted that the areas of trust, tax, and estate law are highly complicated, requiring additional expertise.²¹¹ In contrast, as the court noted in *Florida Bar v. Brumbaugh*,²¹² certain areas of law such as the uncontested dissolution of marriage are less complex and have more easily standardized services,²¹³ raising fewer reliability concerns.

205. 407 N.Y.S.2d 142 (App. Div. 1978).

206. *See id.* at 144–45.

207. *See* N.Y. County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984, 998–99 (App. Div.) (Stevens, J., dissenting), *rev'd*, 234 N.E.2d 459 (N.Y. 1967).

208. *See* *Palmer v. Unauthorized Practice Comm.*, 438 S.W.2d 374, 375 (Tex. Civ. App. 1969).

209. *See* Ariz. Admin. Order No. 2003-14, at 9 (Jan. 16, 2003), available at <http://www.supreme.state.az.us/orders/admorder/Orders03/2003-14.pdf>.

210. *See id.*

211. *See Palmer*, 438 S.W.2d at 376.

212. 355 So. 2d 1186 (Fla. 1978).

213. *See id.* at 1193.

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Third, a court should establish whether a licensed attorney has reviewed the legal product or service for legal accuracy.²¹⁴ Particularly when the nonlawyer lacks significant education or expertise, supervision by an attorney suggests greater reliability of the service. Finally, as expressed by the *Divorce Associated* court, an indication that the product is erroneous and inadequate would demonstrate the product's unreliability.²¹⁵ If, after evaluation of these factors, a court deems the product or service to be unreliable and to pose a threat to consumers, such a finding would be sufficient for the court to enjoin the activity as the unauthorized practice of law.

3. *Is There Potential for a Conflict of Interest?*

Courts should next consider whether a particular nonlawyer legal service presents a conflict of interest. A conflict of interest may arise if a nonlawyer provides document preparation services or specific legal advice to directly adverse parties.²¹⁶ Nonlawyers may also have personal interest conflicts. For example, banks and trust marketing corporations that stand to benefit from the sale of legal instruments face conflicting interests when providing clients with specific legal advice regarding estate-planning services.²¹⁷

Courts should assess nonlawyer conflicts of interest in accordance with the applicable state rules of professional conduct for attorneys.²¹⁸ Because nonlawyers create a relationship of trust and confidence when providing specific legal advice to consumers,²¹⁹ states should hold them to the same conflict of interest standard as attorneys.²²⁰ Holding nonlawyers performing legal services to this same standard would protect consumers against the most serious conflicts of interest. A court

214. See *Fadia v. Unauthorized Practice of Law Comm.*, 830 S.W.2d 162, 165 (Tex. App. 1992) (noting that the defendant had not had his will manual reviewed by a licensed attorney).

215. See *People v. Divorce Associated & Publ'g Ltd.*, 407 N.Y.S.2d 142, 144 (App. Div. 1978).

216. See *supra* note 21 and accompanying text.

217. See *In re Mid-Am. Living Trust Assocs., Inc.*, 927 S.W.2d 855, 860 (Mo. 1996) (noting that "a conflict of interest exists between those who benefit from the sale of a particular legal instrument and the client for whom that legal instrument may not be appropriate").

218. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

219. See *N.Y. County Lawyers' Ass'n v. Dacey*, 283 N.Y.S.2d 984, 998 (App. Div.) (Stevens, J., dissenting), *rev'd*, 234 N.E.2d 459 (N.Y. 1967).

220. See GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 575 (3d ed. 1999).

may enjoin nonlawyer activities that fail to follow these guidelines for violating state unauthorized practice of law regulations.

4. *Does the Service Have the Potential To Mislead Consumers?*

A court should also assess the likelihood that a product's advertising, disclaimers, or advice will mislead consumers. Erroneous specific legal advice can seriously harm consumers.²²¹ The Texas decisions recognized the importance that nonlawyers accurately portray the inherent risks of their services and not overstate their abilities.²²² For example, the *Palmer* and *Fadia* courts found that a combination of the advertisements and the product itself misled consumers by creating the false impression that all testamentary dispositions may be standardized.²²³ A product may also create false expectations as to its reliability. The *Parsons* court found that a product's packaging increased the likelihood that consumers would be misled into relying on the product by advertising that its forms were valid in forty-nine states and had been reviewed by legal experts.²²⁴ The inadequacy of the product's disclaimer, which only actively appeared the first time a consumer used the program, compounded the potential for false impressions.²²⁵

If nonlawyers are seriously misleading consumers by misrepresenting their services or the law, a court should find that consumer protection concerns outweigh the product's potential benefits and enjoin the activity. A comprehensive disclaimer may remedy minor misconceptions, but it should not protect nonlawyers that critically mislead consumers.

5. *Has the Nonlawyer Addressed Confidentiality and Privacy Concerns?*

The final factor that courts should consider is whether the product or service addresses confidentiality concerns. States have recognized limited confidentiality protections between nonlawyers and clients in

221. See Tebo, *supra* note 4, at 41–42.

222. See *supra* notes 133–36 and accompanying text.

223. See *Fadia v. Unauthorized Practice of Law Comm.*, 830 S.W.2d 162, 165 (Tex. App. 1992); *Palmer v. Unauthorized Practice Comm.*, 438 S.W.2d 374, 376 (Tex. Civ. App. 1969); see also *Unauthorized Practice Comm. v. Cortez*, 692 S.W.2d 47, 50 (Tex. 1985).

224. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ. A. 3:97CV-2589-H, 1999 WL 47235, at *6 (N.D. Tex.), *vacated*, 179 F.3d 956 (5th Cir. 1999).

225. See *id.*

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some instances. For example, tax advice, communicated between a taxpayer and a federally authorized accountant-tax practitioner, is subject to general protections of confidentiality.²²⁶ In general, however, the protection that clients receive under the attorney-client privilege is not available when clients provide personal legal information to nonlawyers.²²⁷ As a result, courts may compel nonlawyers to testify about communications involving the client.²²⁸ Courts should require that nonlawyers disclose this risk to clients at the outset of the relationship. Nonlawyers could satisfy this requirement by way of a written disclaimer, provided the disclaimer is unambiguous and is shown to all clients prior to use of the product or service. If consumers solicit a nonlawyer's services after reading the disclaimer, then they are presumed to have impliedly consented to the lack of privilege, much like consumers can waive their right to confidentiality with their lawyers.²²⁹

Nonlawyers should also address basic privacy concerns by providing consumers with comprehensive privacy policies and ensuring that interactive web-based products have proper data encryption and security devices. The ABA Model Rules of Professional Conduct require that attorneys take "reasonable precautions to prevent . . . information from coming into the hands of unintended recipients," while noting that this duty "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy."²³⁰ Because a breach of confidentiality may cause embarrassment or prove legally damaging to the consumer,²³¹ nonlawyers providing legal services should be held to a comparable standard as that applied to lawyers in a particular state. Thus, in states that have adopted the ABA Model Rules, nonlawyers should be required to take reasonable precautions to prevent the careless disclosure of sensitive information. If a product or service fails to reasonably protect consumers' privacy and confidentiality, or consumers are not informed

226. See HAZARD, *supra* note 220, at 226.

227. See *supra* note 26 and accompanying text.

228. See, e.g., *Hunt v. Maricopa County Employees Merit Sys. Comm.*, 619 P.2d 1036, 1041 (Ariz. 1980).

229. See HAZARD, *supra* note 220, at 271 (noting that the Model Rules of Professional Conduct allow for the disclosure of any client confidence if the client consents after consultation with the lawyer).

230. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (2002).

231. See *id.* (noting that clients are encouraged to provide embarrassing or legally damaging information to their attorneys).

of the lack of an attorney-client privilege, the court should enjoin the activity for violating unauthorized practice of law regulations.

C. *Application of the Test*

The proposed test would provide courts with a more flexible method of interpreting unauthorized practice statutes and court rules for two reasons. First, adoption of the test would enable courts and committees to consider a variety of factors in determining whether a particular nonlawyer activity violates an unauthorized practice of law regulation.²³² These factors evaluate the benefits that consumers receive from the service as well as the risks associated with its use,²³³ allowing courts to base their decisions on the consumers' interests rather than on the classification of the type of service being provided. Second, the flexibility of the test would permit courts to apply the standard to new technologies without having to alter the structure of the test—a major benefit over all-encompassing definitions, which must continuously change to incorporate new services into their system of classification.²³⁴

The proposed test does not compromise the predictability of unauthorized practice regulations. By first asking whether a practice complies with the general-specific test's bright-line rule, the test incorporates a standard already in use by the majority of state courts.²³⁵ Nonlawyers providing general legal advice are under the same standards as they were with the general-specific test. The proposed test simply enables nonlawyers to provide certain specific legal advice if they are able to satisfy the four factors.²³⁶

Although these additional considerations allow for greater discretion than a bright-line rule, they still provide nonlawyers with a predictable framework for determining whether a particular activity constitutes the unauthorized practice of law. Lawyers interpret and abide by these factors in practice.²³⁷ There is no reason to suspect that nonlawyers

232. *See supra* Part III.B.2–5.

233. *See supra* Part III.B.2–5.

234. *See supra* note 57 and accompanying text.

235. *See supra* notes 194–96 and accompanying text.

236. *See supra* notes 198–99 and accompanying text.

237. The Model Rules of Professional Conduct address concerns regarding reliability, conflicts of interest, misrepresentation, and confidentiality. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.6, 1.7, 4.1, 7.2 (2002). Lawyers in a majority of states are regulated by some version of these rules. *See HAZARD, supra* note 220, at 115.

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could not do the same because they would be aware of the standards they must meet to practice law. And while the proposed test affords the courts with greater discretion in determining which activities constitute the unauthorized practice of law, it also limits this discretion by requiring courts to support their conclusions based on the four factors.

Washington and Texas serve as two useful examples of how to incorporate the proposed test into a less restrictive practice of law definition. Washington established its practice of law definition by court rule, providing a catchall exception for activities that the state's supreme court determines do not constitute the unauthorized practice of law.²³⁸ The Washington State Supreme Court currently evaluates nonlawyer activities that fall within this exception by weighing consumer protection and legal access concerns.²³⁹ However, the court has been inconsistent in balancing these competing concerns and has not established guidelines that nonlawyers can follow.²⁴⁰ Adopting the proposed test would provide the court with a set of factors to adhere to in determining when to permit a nonlawyer to practice law, promoting greater consistency and predictability among Washington State Supreme Court opinions.

Texas' practice of law definition is a statutory provision that allows for the display and sale of computer software and similar products if those products clearly and conspicuously state that they are not a substitute for the advice of an attorney.²⁴¹ Although this broad exception to the practice of law preserves legal access to a variety of nonlawyer services, the exception does little to protect consumers from harmful nonlawyer products. Texas should adopt the proposed test as a subset of the state's practice of law statute, so that nonlawyers providing computer software and similar products remain subject to assessments of reliability, misrepresentation, conflicts of interest, and confidentiality.

IV. CONCLUSION

State courts and bar committees have struggled to create an all-encompassing rule that describes when a nonlawyer activity constitutes the practice of law. The result has been a myriad of inconsistent practice of law definitions and unauthorized practice decisions that fail to strike

238. See WASH. CT. GEN. R. 24.

239. See *Jones v. Allstate Ins. Co.*, 146 Wash. 2d 291, 303, 45 P.3d 1068, 1075 (2002) (en banc).

240. See *supra* notes 158–61 and accompanying text.

241. See TEX. GOV'T CODE ANN. § 81.101 (Vernon Supp. 2002).

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an appropriate balance between consumer protection and legal access concerns. Rather than attempting to define the practice of law, the proposed test provides a set of four factors that courts and committees should apply within the framework of less-restrictive state unauthorized practice regulations or practice of law definitions to determine whether nonlawyers are engaged in the unauthorized practice of law. These factors are central to the unauthorized practice debate. Incorporating them into the proposed test provides courts and committees with a crucial tool for determining when nonlawyer services serve consumers' interests.