

WHEN CYBERLAWYERING FAILS: WHAT REMEDIES ARE OR SHOULD BE AVAILABLE TO THOSE HARMED FROM RELYING ON “SELF-HELP” LEGAL SOFTWARE?

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I. INTRODUCTION

Imagine a world in which would-be legal clients could avoid the time, hassle, and expense of consulting an attorney simply by logging onto the Internet or inserting a CD-ROM into their personal computer. Regardless of whether this world is seen as desirable (as it likely is to the general public)¹ or threatening (as it may be to the legal profession),² the once-absurd notion of computer technology replacing the traditional functions of lawyers is increasingly becoming a reality.³ As people forgo consultations with attorneys in favor of purchasing computer applications containing legal advice, serious issues arise when the information contained in such software is outdated, incomplete, or otherwise inaccurate and leads to harms suffered by the product’s user.

Advances in computer technology have affected the legal profession profoundly.⁴ With increased acceptance of technological applications in the legal arena, practitioners and non-lawyers alike have come to rely on computer software packages that provide legal assistance and document forms.⁵ In response to the potential for malpractice suits brought against the makers of these “self-help” legal software kits,⁶ some commentators and courts have suggested that publishing such software should not constitute the unauthorized practice of law, leaving the publishers

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1. For an overview of society’s historical and present disdain of the legal system and its implications on the profession, see Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405, 1405–06 (1999).

2. See discussion *infra* Part III.A.2.

3. “Since Shakespeare, people have looked for ways to do away with their lawyers. Now, the Internet may do the trick. A growing array of online ventures is dispensing legal information and advice on everything from estate planning to custody battles . . .” Richard B. Schmitt, *More People Consult the Firm of Cyber, Web & Dot-com*, WALL ST. J., Aug. 2, 1999, at B1.

4. See generally Julee C. Fischer, Note, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 121–53 (2000).

5. See generally Justin D. Leonard, *Cyberlawyering and the Small Business: Software Makes Hard Law (But Good Sense)*, 7 J. SMALL & EMERGING BUS. L. 323, 323–92 (2003).

6. For a discussion regarding the definition and use of self-help software, see *infra* Part II.A.

immune from liability under the traditional scheme of legal malpractice.⁷ While the debate continues as to the nature of these so-called “cyberlawyering” products,⁸ this potential immunity from malpractice claims has led at least one commentator to suggest that there are no adequate remedies available to those injured from relying on deficient self-help legal software packages.⁹

This Note explores what remedies exist for those who allege that the wrongful conduct of publishers of self-help legal software has caused harm and whether, as a matter of policy, any such remedy is desirable. Part II explores the history of self-help legal software and the ways legislatures, courts, and commentators have struggled to deal with this unique development. Part III analyzes the strengths and weaknesses of the various approaches to imputing liability to publishers of self-help legal software. Part IV recommends that providing a remedy for those injured from relying on self-help legal software is appropriate only under certain limited circumstances.

II. BACKGROUND

A. Increased Technology in the Legal Field

Each year, millions of people join the ranks of those who already have access to personal computers (PCs) and the Internet.¹⁰ One billion people or more now use the Internet.¹¹ In addition to traditional computer functions like word-processing and entertainment, computer operators are using their PCs to engage in an increasingly diverse variety of activities, ranging from securing medical diagnoses to obtaining mortgages.¹²

The practice of law is among the many professions dramatically impacted by increasing use of computer technology.¹³ Today, attorneys

7. See, e.g., *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc. (Parsons II)*, 179 F.3d 956, 956 (5th Cir. 1999); Steve French, Note, *When Public Policies Collide . . . Legal “Self-Help” Software and the Unauthorized Practice of Law*, 27 RUTGERS COMPUTER & TECH. L.J. 93, 130 (2001).

8. See generally Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 811–54 (2002).

9. See Marie A. Vida, Note, *Legality of Will-Creating Software: Is the Sale of Computer Software to Assist in Drafting Will Documents Considered the Unauthorized Practice of Law?*, 41 SANTA CLARA L. REV. 231, 249 (2000).

10. Fischer, *supra* note 4, at 123.

11. See Press Release, Computer Industry Almanac, Inc., *Worldwide Internet Users Will Top 1 Billion in 2005* (Sept. 3, 2004), <http://www.c-i-a.com/pr0904.htm>; see also Katie Hafner, *Google to Hire an “Evangelist” of the Internet*, N.Y. TIMES, Sept. 9, 2005, at C14 (“With a billion users and counting, the Internet hardly seems to need an evangelist.”).

12. Fischer, *supra* note 4, at 123.

13. See Jennifer Robinson Boyle, Note, *State v. Pierce: Will Florida Courts Ride the Wave of the Future and Allow Computer Animations in Criminal Trials?*, 19 NOVA L. REV. 371, 411 (1994); Cynthia L. Fountaine, Note, *When is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment*, 71 U. CIN. L. REV. 147, 147 (2002).

rely on computer software and the Internet for many important activities, including organizing records, communicating with clients, and conducting legal research.¹⁴ Like legal practitioners, non-lawyers may use electronic resources to obtain legal information relevant to their lives.¹⁵ Frequently, such people are motivated to use legal software by the desire to forgo the often expensive process of consulting an attorney.¹⁶

Several different sources of legal information and services, ranging from online legal discussion boards¹⁷ to extensive electronic databases containing millions of legal documents,¹⁸ are available via the Internet. However, this Note focuses primarily on what is known as “self-help”¹⁹ or “cyberlawyering”²⁰ software.²¹ These products provide consumers with inexpensive access to legal information and document forms.²² One of the most popular self-help legal software packages is Quicken Family Lawyer.²³ This program gives users access to more than 100 legal forms, including employment agreements, real estate leases, premarital agreements, and wills.²⁴ At the user’s request, the program asks a series of questions related to the desired service and eventually produces a customized legal document.²⁵ For example, when a user of the software wants to create a will, the program asks questions regarding the user’s state of residence, marital status, number of children, and other pertinent inquiries necessary in developing a valid testamentary document.²⁶ Quicken WillMaker Plus can be purchased on CD-ROM for \$49.99.²⁷

14. Barry L. Brickner, *Computer Usage by Michigan Lawyers*, MICH. B.J., Jan. 2004, at 40, 44.

15. See Ted Schneyer, *Introduction: The Future Structure and Regulation of Law Practice*, 44 ARIZ. L. REV. 521, 522 (2002).

16. See William H. Brown, Comment, *Legal Software and the Unauthorized Practice of Law: Protection or Protectionism*, 36 CAL. W. L. REV. 157, 159 (1999).

17. See, e.g., LawInfo.com, Inc., About LawInfo.com, <http://www.lawinfo.com/index.cfm/fuseaction/Client.about> (last visited Sept. 19, 2005) (discussing the manner in which the company connects its customers with experienced attorneys via the Internet).

18. See, e.g., West, Westlaw Information, <http://west.thomson.com/products/westlaw?tf=91&tc=0> (last visited Sept. 19, 2005) (“[Westlaw] provides quick, easy access to West’s vast collection of statutes, case law materials, public records, and other legal resources, along with current news articles and business information.”).

19. “Self-help law can be defined as ‘any activity by a person in pursuit of a legal goal or the completion of a legal task that [does not] involve legal advice or representation by a lawyer.’” Fischer, *supra* note 4, at 121.

20. Cyberlawyering can be defined as “the idea of replacing lawyers with computers.” Leonard, *supra* note 5, at 323.

21. The terms “self-help legal software” and “cyberlawyering products” are used interchangeably in this Note.

22. See Brown, *supra* note 16, at 159.

23. Fountaine, *supra* note 13, at 148.

24. *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc. (Parsons I)*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *1 n.1 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999).

25. For a thorough discussion about the operation of self-help software, see *id.* at *1–2 n.1.

26. French, *supra* note 7, at 118.

27. Nolo, <http://www.nolo.com> (search “Search for Products” for “WillMaker Plus 2006”; then follow “Quicken WillMaker Plus 2006” hyperlink) (last visited Sept. 9, 2005).

Consumers spend an estimated \$10 million or more on self-help legal software products like Quicken WillMaker Plus each year.²⁸

B. Is Self-Help Legal Software the “Unauthorized Practice of Law?”

The rising prominence of self-help legal software has led some to call for extensive regulation.²⁹ Some commentators insist that the law should protect consumers from incurring damages due to their reliance on deficient self-help legal software.³⁰ Practitioners, however, may want regulation to discourage legal self-help so that they can continue to monopolize the lucrative field of providing legal services.³¹ Whether the motivation behind the plea to regulate cyberlawyering products is the desire to protect consumers or the attorneys’ fear of losing clients, one way to regulate self-help legal software is to classify it as the “unauthorized practice of law.”³²

The purpose of classifying an activity as the practice of law is largely to “protect lay individuals from those who attempt to practice law without first obtaining the legal education and certification that would allow them to do so skillfully.”³³ There is no universal standard for what constitutes the practice of law.³⁴ Instead, responsibility for ordering the practice of law rests with courts, bar associations, and state legislatures.³⁵ Some states define the practice of law as including any activity in which lawyers commonly engage; other states have chosen to develop lists of specific activities that qualify as the practice of law.³⁶ Regardless of the test a jurisdiction employs to determine the scope of the practice of law, the inclusion of self-help legal software in that category can have a major impact on the regulation of a non-lawyer’s activities.

Classifying the publication of self-help legal software as the unauthorized practice of law could significantly affect the availability of such programs.³⁷ Generally, only licensed attorneys are permitted to engage in the practice of law³⁸ as defined by the highest court of each

28. Fischer, *supra* note 4, at 125 (citing source from 1998). The related online legal services market was estimated at \$222 million in 2001 and was expected to grow to \$2.8 billion by 2004. See Jennifer 8. Lee, *Dot-Com, Esq.: Legal Guidance, Lawyer Optional*, N.Y. TIMES, Feb. 22, 2001, at G1.

29. See, e.g., Vida, *supra* note 9, at 254.

30. See *id.*

31. See Brown, *supra* note 16, at 172 (“I can’t decide which is more pathetic: Lawyers worried that they can be replaced by software, or clients hoping that software can replace lawyers.” (quoting Michael Newman, *Legally: It’s Software After All*, PITTSBURGH POST-GAZETTE, Feb. 7, 1999, at F5)).

32. See *Parsons I*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *1 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999).

33. Vida, *supra* note 9, at 235.

34. Fountaine, *supra* note 13, at 151.

35. *Id.*; see MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 2 (2003).

36. Fountaine, *supra* note 13, at 151.

37. For example, such classification led to an injunction against the sellers of self-help legal software. See *Parsons I*, 1999 WL 47235, at *1.

38. See MODEL RULES OF PROF’L CONDUCT R. 5.5 (2003).

state.³⁹ Although attorneys who have been admitted to the bar assist in the development of self-help legal software,⁴⁰ publishers and the products themselves (obviously) are not accredited legal practitioners. Therefore, any software, the operation of which constitutes the unauthorized practice of law, subsequently would be banned from production.⁴¹

In 1999, a controversial decision by a federal district court in Texas held that the publication and sale of Quicken Family Lawyer qualified as the unauthorized practice of law.⁴² In so ruling, the court relied in large part on Texas precedent that regarded certain packages of will forms and do-it-yourself manuals as the unauthorized practice of law.⁴³ As with the forms and manuals in the previous cases, the court found that the Quicken Family Lawyer program provided the kind of knowledge and advice traditionally associated with the practice of law.⁴⁴ Accordingly, the software publishers were enjoined from distributing the product in Texas.⁴⁵ In response to the decision, the Texas legislature swiftly acted to amend the definition of the practice of law so as to exclude “the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney.”⁴⁶ In light of the legislative change, the Fifth Circuit vacated the injunction against the distribution of Quicken Family Lawyer.⁴⁷

Even after the decision by the federal district court in Texas and the subsequent response from the Texas legislature, the debate continues as to whether self-help legal software should be classified as the unauthorized practice of law.⁴⁸ Texas remains “the only state with a practice of law definition that allows expansive consumer use of interactive technologies.”⁴⁹

39. Fountaine, *supra* note 13, at 150.

40. French, *supra* note 7, at 123.

41. See *Parsons I*, 1999 WL 47235, at *1.

42. *Id.* at *7.

43. *Id.* at *5 (citing *Palmer v. Unauthorized Practice of Law Comm.*, 438 S.W.2d 374 (Tex. App. 1969); *Fadia v. Unauthorized Practice of Law Comm.*, 830 S.W.2d 162 (Tex. App. 1992)).

44. *Id.* at *6.

45. *Id.* at *10.

46. *Parsons II*, 179 F.3d 956, 956 (5th Cir. 1999). Some suggest that this amendment was made in response to political pressure applied by corporate lobbyists. See Lanctot, *supra* note 8, at 839.

47. *Parsons II*, 179 F.3d at 956.

48. See Brown, *supra* note 16, at 166.

49. Cristina L. Underwood, *Balancing Consumer Interests in a Digital Age: A New Approach to Regulating the Unauthorized Practice of Law*, 79 WASH. L. REV. 437, 448 (2002); see also CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, APPENDIX A: STATE DEFINITIONS OF THE PRACTICE OF LAW (2003), available at http://www.abanet.org/cpr/model-def/model_def_statutes.pdf (listing state statutory and case law concerning the definition of the practice of law). See generally Ctr. for Prof'l Responsibility, Am. Bar Ass'n, Task Force on the Model Definition of the Practice of Law, http://www.abanet.org/cpr/model_def_home.html (last visited Jan. 18, 2006). Utah recently amended its rules of professional practice to permit “publishing legal self-help information by print or electronic media.” UTAH SUP. CT. R. OF PROF'L PRACTICE, ch. 13A, 1.0(c)(1) (2005). As this issue has been debated extensively in numerous other articles, the discussion pertaining to self-help software and the

C. *How Can Software Publishers Be Held Accountable?*

Even if self-help legal software does not constitute the “unauthorized practice of law,” courts and legislatures have not decided how to hold publishers accountable for harms incurred from relying on their products or whether such accountability is appropriate in the first place. Some commentators suggest that if software publishers are not subject to penalties for unauthorized legal practice, people harmed from relying on deficient software will have no legal recourse.⁵⁰ Others suggest that alternative theories of liability (such as products liability) are available to those injured from using self-help legal software.⁵¹ Additionally, the possibility remains that no theory of recovery is necessary for people harmed from relying on such software.⁵² The remainder of this Note evaluates these positions.

III. ANALYSIS

A. *The Need for Remedies*

Commentators have advanced several justifications to explain why users that suffer harm from relying on self-help legal software are entitled to legal protection.⁵³ Four of the most prominent reasons for regulating the self-help legal software market are discussed below.

1. *Protecting the Legal System*

Allowing plaintiffs to recover from publishers of self-help legal software may prevent harm to the legal system.⁵⁴ Self-help legal software may unduly burden the courts by allowing non-lawyers to complete many activities traditionally assigned to licensed attorneys.⁵⁵ It follows that these non-lawyers, due to their inexperience and lack of legal training, will create inferior legal documents, leading to increased litigation and inefficient operation of the courts.⁵⁶

Notably, the fact that unrepresented litigants long have been allowed to participate in the legal system rebuts this argument.⁵⁷ Self-

unauthorized practice of law is provided only as a necessary background for evaluating other possible means of regulating this industry.

50. See Vida, *supra* note 9, at 248–49.

51. See Fountaine, *supra* note 13, at 171.

52. See Fischer, *supra* note 4, at 149.

53. This portion of the analysis is based, in large part, on Fountaine, *supra* note 13, at 168–78. While Professor Fountaine’s article used these interests as possible justifications for classifying publisher activity as the unauthorized practice of law, here the framework is employed to discuss regulation and remedies against software producers in general.

54. Fountaine, *supra* note 13, at 172.

55. See *id.* at 172–73.

56. See *id.* at 173.

help legal software does not promote ignorance of the law, but instead provides a resource to help non-lawyers learn essential law-related information. Consulting a cyberlawyering product can give a non-lawyer the knowledge necessary to conduct business effectively within the legal system. Besides, the courts “have an ample arsenal of sanctions, including the contempt power and other sanctions available through the rules of procedure, to keep litigants and their representatives from abusing the court system.”⁵⁸

2. *Protecting the Attorney-Client Relationship*

Preserving the sanctity of the attorney-client relationship may present another potential reason to regulate self-help legal software.⁵⁹ By using software to personally perform tasks such as preparing legal documents, users cannot claim the protection of the attorney-client relationship, which implicates the professional duties of legal practice.⁶⁰

However, the same concerns that arise when a client deals with an attorney are not necessarily at issue when a user operates a self-help legal software program. Unlike lawyers, self-help legal software packages are not subject to the considerations of confidentiality, conflicts of interest, or other fiduciary duties.⁶¹ Under normal circumstances, a software user is assured that the self-help program will keep the user’s information confidential and will operate exclusively to fulfill the user’s legal needs.⁶² Because cyberlawyering products operate in a substantially different manner than their human lawyer counterparts, the protection of the attorney-client relationship is not a strong justification to provide a remedy against publishers of self-help legal software.

3. *Protecting Licensed Attorneys from Competition*

The desire to protect the monopoly of legal services that licensed attorneys enjoy has led to efforts to curtail the availability of self-help legal software. As one law professor suggests, “When you realize how routinized legal work is, and how much information you can pack into an interactive CD-ROM, then you recognize how easy it is to substitute a computer for a lawyer. That’s a threat.”⁶³

57. See *id.* at 172.

58. *Id.* at 172–73 (citation omitted).

59. See generally Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 168–70 (1999).

60. See Fountaine, *supra* note 13, at 171.

61. See *id.* at 174–75.

62. See Leonard, *supra* note 5, at 379–80. However, one can imagine circumstances under which spyware or some similar technology might compromise the secure status of information entered into a cyberlawyering product. See *id.* at 380.

63. Brown, *supra* note 16, at 170 (quoting New York University law professor Steven Gillers).

While it is likely that the protectionist attitude of lawyers has played some role in the call to create a remedy against publishers of self-help legal software,⁶⁴ the question remains as to whether this justification is legitimate. Generally, the effects of cyberlawyering on traditional lawyers are unclear.⁶⁵ The extensive availability (as opposed to the restrictive regulation) of self-help legal software eventually could improve the legal profession, as consumers will rapidly realize the utility of a lawyer's services in a variety of situations where computer software programs are unable to provide assistance. Lawyers could respond to the potential competition by becoming more informed and providing a greater variety of services to clients.⁶⁶ Even if a negative financial impact on lawyers could be demonstrated, regulation can hardly be justified solely on the basis that attorneys might lose business to publishers of self-help legal software.⁶⁷

4. *Protecting the Public*

The most prevalent justification for supplying plaintiffs with a cause of action against the publishers of self-help legal software is to protect consumers from deficient legal services.⁶⁸ The fear is that "a user may receive incompetent advice that results in an injury for which the user has no adequate remedy."⁶⁹ Typically, when a lawyer gives negligent legal advice upon which the client relies to the client's detriment, the lawyer can be sued for malpractice and may face disciplinary action from the state bar.⁷⁰ It would seem unfair for a software publisher to escape liability in situations where licensed attorneys would be held accountable, at least in situations where each provides essentially the same services.⁷¹ Thus, some argue that "[i]t is the duty of the courts to protect lay individuals from the incompetent actions of lawyers and non-lawyers" alike.⁷²

On its face, protecting the public seems to be a compelling interest justifying a remedy against the publication and sale of products like *Quicken Family Lawyer*.⁷³ However, it is unknown whether such regulations would actually result in the desired outcome of protecting consumers from inadequate products.⁷⁴ To date, no published court

64. See Fischer, *supra* note 4, at 143.

65. See Fountaine, *supra* note 13, at 177.

66. See Fischer, *supra* note 4, at 144.

67. See Fountaine, *supra* note 13, at 176–78.

68. See *id.* at 169.

69. Brown, *supra* note 16, at 167.

70. Vida, *supra* note 9, at 248–49.

71. See *id.* at 252–53.

72. *Id.* at 249.

73. See Fountaine, *supra* note 13, at 170.

74. See Fischer, *supra* note 4, at 139.

decision has directly addressed or arisen from harm caused from relying on legal self-help materials.⁷⁵

B. Potential Remedies

If any of the above rationales justifies recourse against self-help legal software publishers, the next task is to decide what types of remedies potentially are available and which remedies are the most compatible with these unique circumstances. The strengths and weaknesses of three potential remedies are considered below.

1. Legal Malpractice

Traditionally, legal malpractice suits are only available to plaintiffs able to demonstrate the existence of an attorney-client relationship.⁷⁶ As mentioned above, many jurisdictions now define “the practice of law” in a manner that does not include production of self-help legal software.⁷⁷ This seemingly would preclude the creation of an attorney-client relationship in such states and, thus, prohibit claims against software publishers on the basis of legal malpractice.⁷⁸ Nonetheless, some commentators maintain that the only way to provide sufficient consumer protection is to hold software publishers to the same legal malpractice standards that apply to attorneys.⁷⁹

Legal malpractice liability carries with it a heightened duty of care, usually expressed in terms of the knowledge, skill, prudence, and diligence of an ordinary attorney.⁸⁰ Some view the potential for legal malpractice claims as the most significant regulator of attorney behavior.⁸¹ It follows, then, that this cause of action might also have a strong deterrent effect against the potentially negligent services provided by the makers of self-help legal software. Commentators supporting the availability of legal malpractice suits against software publishers emphasize the role of the courts in protecting the public from organizations that are not qualified to provide competent legal advice.⁸²

75. Brown, *supra* note 16, at 168. The Texas decision referred to throughout this Note arose via a lawsuit from the Unauthorized Practice of Law Committee, the state body responsible for enforcing Texas’s unauthorized practice of law statute, not a private party suing for damages. *Parsons I*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *1 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999).

76. Fountaine, *supra* note 13, at 171.

77. See Brown, *supra* note 16, at 166.

78. Fountaine, *supra* note 13, at 171.

79. See Vida, *supra* note 9, at 249–50.

80. See, e.g., *Lucas v. Hamm*, 364 P.2d 685, 689 (Cal. 1961); *Blair v. Ing*, 21 P.3d 452, 464 (Haw. 2001); *Stansbery v. Schroeder*, 412 N.W.2d 447, 450 (Neb. 1987).

81. GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 853–54 (4th ed. 2005).

82. See Vida, *supra* note 9, at 249–50.

Just as classifying self-help legal software as the unauthorized practice of law briefly led to its outright ban in one jurisdiction,⁸³ holding the publishers of these programs accountable under a legal malpractice scheme may have a similar effect.⁸⁴ At the very least, such potential liability might have a chilling effect on the production of self-help legal software.⁸⁵ It is doubtful that many companies would risk producing self-help packages in light of the substantial consequences of being held liable for legal malpractice.⁸⁶ Because this type of remedy could take away a valuable (though not perfect) source of information from consumers, imposing legal malpractice standards on the publishers of self-help legal software arguably is an undesirable form of regulation.

2. *Products Liability*

An alternative potential remedy for consumers harmed due to their reliance on cyberlawyering products is to impose liability on the makers of such programs based on a products liability theory.⁸⁷ Products liability differs from legal malpractice in that the latter claim defines the standard of care with reference to the skill, knowledge, prudence, and diligence of a lawyer of ordinary competence, whereas the former cause of action does not view customary skill or practice as a dispositive issue in determining the applicable standard of care.⁸⁸ Conceivably, “[t]he threat of liability [from a potential products liability suit] will ensure that quality standards are set and satisfied by legal software publishers and have as great, if not greater, a deterrent effect against the incompetent provision of legal services as do the professional obligations imposed on licensed attorneys.”⁸⁹

In light of the ever-evolving nature of law, imposing a products liability standard on self-help legal software publishers might prove to be an overly broad remedy.⁹⁰ Under a products liability scheme, situations might arise in which plaintiffs bring claims against publishers for damages incurred from relying on now-outdated software packages

83. See *Parsons I*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *7 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999).

84. See Fountaine, *supra* note 13, at 171.

85. For a discussion on how liability in other contexts may deter the production of software, see Reid Skibell, *The Phenomenon of Insecure Software in a Security-Focused World*, 8 J. TECH. L. & POL’Y 107, 133 (2003).

86. See *id.*

87. “Products liability” refers to a “manufacturer’s or seller’s tort liability for any damages or injuries suffered by a buyer, user, or bystander as a result of a defective product.” BLACK’S LAW DICTIONARY 1245 (8th ed. 2004); see also Fountaine, *supra* note 13, at 171.

88. HAZARD ET AL., *supra* note 81, at 866–67.

89. Fountaine, *supra* note 13, at 171.

90. “A policy that seeks to ban all certain forms of legal self-help information may be too reactionary.” Brown, *supra* note 16, at 170.

produced several years prior to their use.⁹¹ It would seem unjust to permit recovery under these and similar circumstances.

3. *Fraud*

A final possibility would be to hold publishers of self-help legal software accountable only for fraudulent behavior.⁹² This standard would allow injured parties a narrow recourse for the most blatant false claims and inappropriate misrepresentations.⁹³

Whereas remedies based on legal malpractice or products liability potentially would be unduly detrimental to publishers of self-help legal software,⁹⁴ the opposite might be true of a fraud standard. The possible circumstances under which a successful claim of fraud could be made might be so limited that the standard may deny adequate protection to the consumer.⁹⁵ Reputable publishers of self-help legal software are unlikely to knowingly misrepresent or conceal information about their products that would give rise to liability for fraud. To do so could lead to the destruction of reputation and, eventually, profitability. Instead, most complaints against software publishers likely will result from faulty information unintentionally included in the software package.⁹⁶ This suggests that a fraud standard might be too limited in scope to provide adequate recovery for those harmed from relying on cyberlawyering products.

C. Remedies May Not Be Necessary or Appropriate

Despite the above arguments suggesting the need for, and possible form of, remedies against publishers of self-help legal software, some still oppose allowing a cause of action for injury resulting from use.⁹⁷ The following subparts identify some of the arguments against imposing liability on publishers of self-help legal software.

1. *“Do-it-Yourself”*

People who choose to purchase self-help legal software have voluntarily elected to produce a document without formal legal assistance.⁹⁸ Conversely, people who elect to hire an attorney to assist in

91. See Fountaine, *supra* note 13, at 171–72.

92. See *id.* at 179.

93. Fraud is “[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.” BLACK’S LAW DICTIONARY 685 (8th ed. 2004).

94. See Brown, *supra* note 16, at 170–71.

95. See Vida, *supra* note 9, at 249.

96. As previously mentioned, there have been no published judicial decisions involving a consumer’s reliance on misleading legal software products to date. Brown, *supra* note 16, at 168.

97. See Fischer, *supra* note 4, at 149.

98. See generally *id.* at 151–53.

the creation of an important document pay to acquire competent legal advice.⁹⁹ Thus, one argument against the imposition of liability in this situation is that it would yield an unfair windfall for consumers who voluntarily elect to eschew attorneys. In short, *caveat emptor*.

2. Disclaimers

Almost universally, self-help legal software packages include some kind of disclaimer expressing to consumers purported limitations of liability associated with using the computer program.¹⁰⁰ These disclaimers put consumers on notice that the publisher is not liable for undesirable outcomes reached as a result of using the product.¹⁰¹ When clear statements by software publishers indicate the potential flaws of the products they produce, it arguably is unfair to still permit recovery for those who use the products to their own detriment.¹⁰² Stated simply, a person should not be allowed to recover when they have consciously disregarded the warnings provided by the software publisher.

3. Inappropriate Analogy

Courts and commentators who recommend the broad assertion of liability against legal software producers often analogize the current situation with older cases imposing liability on non-legal professionals for producing books¹⁰³ or do-it-yourself kits¹⁰⁴ that provide advice on how to create legal documents.¹⁰⁵ However, these two examples are not analogous to computer software. While books and forms are unchanging entities, destined to be inflexible from their creation, software products do not necessarily exhibit this kind of rigidity. Self-help legal software is designed to cater to the specific needs of the user by providing advice

99. See Fountaine, *supra* note 13, at 171.

100. One purpose of such disclaimers is to assert that information given by the product does not establish or attempt to establish an attorney-client relationship. Dean R. Dietrich, *Venturing onto the World Wide Web: Ethics Implications for Lawyers*, WIS. LAW., Feb. 1999, at 10, 13.

101. For example, the disclaimer on one version of Quicken Family Lawyer states the following: This program provides forms and information about the law [W]e can provide a form for a lease, along with information on state law and issues frequently addressed in leases. But we cannot decide that our program's lease is appropriate for you. Because we cannot decide which forms are best for your individual situation, you must use your own judgment and, to the extent you believe appropriate, the assistance of a lawyer.

Parsons I, No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *2 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999).

102. See Fischer, *supra* note 4, at 149.

103. See, e.g., *N.Y. County Lawyers' Ass'n v. Dacey*, 283 N.Y.S.2d 984, 992 (N.Y. App. Div. 1967) (holding that publishing a book that prescribes methods of producing and filing legal forms constitutes the practice of law), *rev'd*, 234 N.E.2d 459 (N.Y. 1967).

104. See, e.g., *Fla. Bar v. Stupica*, 300 So. 2d 683, 687 (Fla. 1974) (holding that the publication of a "divorce kit" containing advice on how to secure a no-fault divorce in the state of Florida constituted the unauthorized practice of law).

105. See, e.g., *Parsons I*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *4-7 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999); Vida, *supra* note 9, at 236-39.

based on the user's responses to a series of preliminary questions.¹⁰⁶ Additionally, Internet technology makes it easier to upgrade self-help legal software on a regular basis as compared to the intermittent updating of a book or a package of forms.¹⁰⁷

IV. RECOMMENDATION

Having considered the reasons for imposing a remedy for injuries resulting from reliance on self-help legal software, the potential forms such a remedy might take, and arguments against providing a remedy, it is at last possible to develop a solution that best addresses all relevant concerns.

A. Finding a Remedy in the Publisher's Promise

The proper remedy against publishers of self-help legal software can be illustrated by analyzing two examples of legal disclaimers that publishers have displayed on the packaging or screens of self-help legal software programs. First, one popular cyberlawyering product contained the following disclaimer:

This program is not a substitute for the advice of an attorney. This program provides forms and information about the law, and suggestions on how to use the program. The program cannot and does not provide specific advice for your exact situation, and it cannot decide whether the program's forms are appropriate for you. Because the program cannot decide which forms are best for your individual situation, you must use your own judgment and, to the extent you believe appropriate, the assistance of a lawyer.¹⁰⁸

This product gives adequate warning to the consumer that simply using the software may not lead to the production of a "perfect" legal document. The publisher has sent a clear message to the user indicating some of the shortcomings of the product and the importance of consulting traditional legal resources. Under such circumstances, it hardly can be said that the user is entitled to recover against the software publisher should the product lead to some future harm.

Next, consider a second self-help legal software package with the following "disclaimer":

With Family Lawyer 2004, it's easy to handle your own home and business legal affairs. There are no special skills or knowledge required, and the time commitment is far less than you'd spend in a

106. See Vida, *supra* note 9, at 234-35.

107. See Fountaine, *supra* note 13, at 172.

108. Broderbund, Home & Business Lawyer Deluxe 2005, <http://www.broderbund.com/jump.jsp?itemID=539&mainPID=539&itemType=PRODUCT&RS> (last visited Sept. 19, 2005).

lawyer's office. Plus, you'll know that the job's done right . . . because you did it yourself.¹⁰⁹

This claim could mislead users into thinking that no further advice is needed, thereby justifying a limited remedy for the harmed consumer. The publisher of a product bearing this disclaimer is making declarations that are difficult to support with factual evidence. Assuming that a consumer relied on this statement, she might experience financial harm. Under such circumstances, justice requires at least a limited recovery against the software publisher.

B. Remedies That Go Too Far

Allowing claims of legal malpractice against software publishers is an unnecessarily harsh remedy. Like classifying software production as the unauthorized practice of law, enabling malpractice suits against software publishers could undermine the viability of the self-help legal software industry.¹¹⁰ This result is unjust, considering the valuable information that these products distribute to users and the notice that is provided to consumers regarding the practical limitations of self-help legal software when compared to consultation with a licensed attorney.

Similarly, permitting lawsuits against software publishers under a traditional products liability scheme is an inappropriately overbroad measure. Software users are or should be aware that computer programs cannot adequately substitute for an experienced lawyer's advice under all circumstances. Allowing a consumer to recover damages resulting from a mistake or omission in a self-help product would be unfair. The possibility of an oversight in the information is already accounted for in the relatively low price of the software as compared to the expense of hiring an attorney and acquiring the associated protections of the attorney-client relationship.

C. The Best Fit

As has been demonstrated, a broad recourse against publishers of legal software is largely unwarranted. The threat of holding software publishers accountable under theories of legal malpractice or products liability would work only to discourage the production of these valuable informational resources. The dominant position of attorneys in the legal system, coupled with the ample disclaimers provided in most self-help legal software packages, puts consumers on notice of the limitations and possible negative consequences of relying exclusively on a cyberlawyering product for conducting critical legal transactions. The

109. Amazon.com, Family Lawyer 2004 Home and Business Deluxe, <http://www.amazon.com> (search "Search Amazon.com" for "Family Lawyer 2004"; then follow "Amazon.com: Family Lawyer 2004 Home and Business Deluxe" hyperlink) (last visited Sept. 19, 2005).

110. See *supra* note 37 and accompanying text.

software user has made the conscious decision to save time and money by purchasing software instead of seeking attorney consultation. Therefore, the user is not entitled to the same level of protection afforded to those injured by the unsound advice of a lawyer. Under such circumstances, a broad recovery for damages incurred from relying on self-help legal software generally should not be permitted. However, when the software publisher knowingly or intentionally takes actions or makes statements designed to mislead consumers, a limited recovery is appropriate.

Take, for example, the case of a software publisher that claims to have created its program in consultation with expert probate attorneys and advertises its product as being able to eliminate all the hassle and formalities of executing a valid will, including attestation by witnesses. When a software user fails to secure witnesses to her will, and the will subsequently is denied probate (in a state that does not recognize holographic wills),¹¹¹ fairness requires that the intended beneficiaries of the will be able to recover from the software publisher for its intentional misrepresentations. Any “expert probate attorney” undoubtedly should be aware that most states require at least two witnesses for a will to be valid.

Conversely, imagine a software product that recommends all wills be witnessed by at least two disinterested witnesses and a notary public (a suggestion that would satisfy the execution requirements of all 50 states).¹¹² If a state changes its law shortly after publication of the program to require three witnesses instead of two, the intended beneficiaries of a will produced by a user of the software should not be entitled to recovery because the user’s will was invalid. In this case, the self-help software made a good faith recommendation based on existing law. It would be unreasonable for the publisher to be held responsible for subsequent changes in the law.

Where the software publisher specifically misleads a consumer as to the performance of the product, however, the consumer should be permitted to recover to the extent that damages were incurred from reliance on the software publisher’s fraudulent misrepresentations. Without such a remedy, software publishers would be able to escape liability entirely, even if they acted with malice.

D. What Should Be Done?

It is appropriate for regulators to begin by following the example set by Texas.¹¹³ States should specifically define the practice of law to

111. See, e.g., Probate Act of 1975, 755 ILL. COMP. STAT. 5/4-3 (2003).

112. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 243 (6th ed. 2000).

113. TEX. GOV’T CODE § 81.101 (2005); see also UTAH SUP. CT. R. OF PROF’L PRACTICE, ch. 13A, 1.0(c)(1) (2005).

exclude the publication of self-help legal software. This will help prevent the potential outright prohibition of a valuable informational resource.

While adjusting the definition of the practice of law is the first step in ensuring that the public has access to helpful legal knowledge, more must be done to ensure the future of self-help legal software. State legislatures and courts must go further by acting to curtail the availability of private actions against software publishers and to permit only claims based on fraud. In doing so, the states will maximize the amount of useful legal information available to the public while still providing adequate consumer protection against dishonest or malicious software publishers.

Although many may not be ready to embrace an era in which computer software reduces the need for attorney consultation in certain areas, the desire to preserve and protect traditional roles in the legal profession is not alone a justifiable basis for extensive regulation of or laws limiting self-help legal software. Instead, attorneys should welcome the ability of would-be clients to make informed decisions regarding matters critical to their lives and legal affairs.

V. CONCLUSION

Advances in computer technology have had a major impact on the legal field. Self-help legal software is now readily available, providing a resource capable of supplementing or replacing the services of an attorney in many practice areas such as estate planning. When these cyberlawyering products fail to meet consumer expectations, the publishers should be held liable only in limited circumstances. Remedies should be available to the users of deficient software only when the software publisher has acted fraudulently.