RE-REGULATING UPL IN AN AGE OF AI

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TABLE OF CONTENTS

INTRODUCTION

Like many states, New York has a justice problem. Debt collectors bring "clearly meritless" lawsuits against defendants who do not actually owe the amounts claimed, who do not receive notice of the suits, and who default an estimated 70-90% of the time.[1] Citizens of New York discover these meritless default judgments when their wages are garnered or their credit scores plummet, and some must file for personal bankruptcy as a result.[2] Even when defendants have notice of such lawsuits, the amounts in controversy are often too small to justify hiring a lawyer, even if defendants could afford one.

New York nonprofit Upsolve has a potential solution to this justice problem. The group created software and a training program for volunteers to help these defendants fill out New York's one-page answer form, asserting defenses such as improper service, lack of

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[1] Upsolve, Inc. v. James, 604 F. Supp. 3d 97, 103 (S.D.N.Y. 2022).

[2] *Id.*

standing, or unconscionability.[3] The software is good news for defendants in debt collection cases, who are often novices in judicial procedure and commonly lose in court without assistance.[4] But there is one major problem: Upsolve's assistance might be illegal under New York law.

Also like many states, New York prohibits the unauthorized practice of law (or "UPL). Under New York law, the state attorney general may bring a civil action against a person or company not licensed to practice law in the state for the "unlawful practice of law."[5]

In 2022, Upsolve brought suit, seeking a preliminary injunction of New York's UPL statutes on the basis that they would violate Upsolve's First Amendment right to free speech.[6] For the purposes of the preliminary injunction, both parties stipulated that the software would constitute the "unauthorized practice of law."[7] The district court agreed and issued the injunction, prohibiting New York's attorney general from enforcing the state's UPL rules against Upsolve or its volunteer advocates.[8]

But the question of whether use of the software constitutes the "unauthorized practice of law" is not so clear cut. One of the key challenges of UPL cases is that there is no clear consensus on what activities constitute the "practice of law."[9] Can software "practice law?" If software *can* practice law, does its use without a license to practice constitute UPL? To put it differently, if software can perform tasks that were historically considered to qualify as the practice of law and the use of such software could close some persistent justice gaps that human lawyers cannot address, do we

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[3] *Id.* at 104.

[4] *See generally* Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL'Y REV. 91 (2017) (detailing abuses by the debt-collection industry).

[5] N.Y. Jud. Law § 476-a (McKinney 2024).

[6] *Upsolve*, 604 F. Supp. 3d at 103.

[7] *Id.* at 105.

[8] *Id.* at 121. As of this writing, the case is on appeal in the U.S. Court of Appeals for the Second Circuit. Notice of Interlocutory Appeal, Upsolve, Inc. v. James, No. 22-00627 (S.D.N.Y. June 22, 2022), ECF No. 77.

[9] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c. (AM. L. INST. 2000) (stating that "definitions and tests employed by courts to delineate unauthorized practice by nonlawyers have been vague or conclusory."); Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 723 (2007) ("This confusion regarding what constitutes UPL is one of the major obstacles to effective enforcement of the rule against UPL because it provides a weak foundation upon which to build law.").

advance the goals of UPL regulations by blocking that help as unauthorized?

This is especially important with the rise of large language models (LLMs) and generative pretrained transformer (GPT) tools such as GPT-4 from OpenAI, Claude 3 from Anthropic, and Gemini from Google, as well as a new breed of retrieval-augmented generation (RAG) tools that work in conjunction with GPT tools.[10] As of this writing, some of the most advanced legal technology companies in the world, including vLex, Thomson Reuters, and LexisNexis—and a raft of new, well-funded entrants in the legal information market—are creating AI tools that can survey the world's law and apply it to the facts of a case as a matter of routine. The capabilities of LLMs to synthesize case law, statutes, and secondary treatises—and to use that synthetic understanding to answer legal questions—have potential to perform vastly more legal work at scale and to transform the practice of law. Indeed, in 2023, researchers showed that GPT-4 significantly outperformed bar exam takers on the entire Uniform Bar Examination, including both the multiple-choice Multistate Bar Examination as well as the Multistate

[10] Large Language Models (or "LLMs") are artificial neural networks trained on massive data sets. They are one type of tech called "generative AI" because they can create unexpected, emergent text outputs with minimal prompting. LLMs are useful for tasks such as summarization, language translation, creating new text based on prompting, and increasingly, answering questions. *See Large Language Model*, WIKIPEDIA, https://en.wikipedia.org/wiki/Large_language_model [https://perma.cc/TCL4-8J9T]. Generative Pretrained Transformers (or "GPT" tools) are a subset of LLMs using "transformer" architecture. *See* Ashish Vaswani, Noam Shazeer, Niki Parmar, Jakob Uszkoreit, Llion Jones, Aidan N. Gomez, Lukasz Kaiser & Illia Polosukhin, *Attention Is All You Need*, 31ST CONF. ON NEURAL INFO. PROCESSING SYS. (2017), https://arxiv.org/abs/1706.03762 [https://perma.cc/GM72-7FXA]. Retrieval-Augmented Generation (or "RAG") tools effectively break research tasks into two steps, first retrieving relevant documents, then passing both a request as well as the relevant documents, with specific prompting, into an LLM. *See* Patrick Lewis, Ethan Perez, Aleksandra Piktus, Fabio Petroni, Vladimir Karpukhin, Naman Goyal, Heinrich Kuttler, Mike Lewis, Wen-tau Yih, Tim Rocktaschel, Sebastian Riedel & Douwe Kiela, *Retrieval-Augmented Generation for Knowledge-Intensive NLP Tasks*, ARXIV (Apr. 12, 2021), https://arxiv.org/abs/2005.11401 [https://perma.cc/9SBU-T842]. For a terrific summary of how LLM tools work, see Stephen Wolfram, *What is ChatGPT Doing ... and Why Does it Work?*, STEPHEN WOLFRAM WRITINGS BLOG, (Feb. 14, 2023), https://writings.stephenwolfram.com/2023/02/what-is-chatgpt-doing-and-why-does-it-work/ [https://perma.cc/FB9T-Z23Z].

Essay Exam and Multistate Performance Test, shaking the foundations of the existing UPL debate.[11]

This Essay argues that state legislatures should re-evaluate laws that govern the practice of law by software providers that are not licensed to practice, with the explicit goal of expanding legal assistance to more people. It does not make explicit recommendations to state supreme courts or bar associations about UPL regulations for lawyers. Part I reviews the history of UPL statutes and their stated goals of protecting clients. It points out that UPL statutes are relatively new in American jurisprudence, impossibly vague, selectively enforced, and do not adequately protect consumers. Part II proposes a new framework for regulating increasingly powerful software and artificial intelligence, with a focus on consumer protection, transparency, and competent legal assistance.[12]

I. WHAT WE MEAN BY THE UNAUTHORIZED PRACTICE OF LAW

A. History of UPL in America

It is easy to imagine that UPL regulations date from antiquity, or English common law, but in fact, they are a relatively new phenomenon. For more than 200 years in the United States, from colonial times until the late 1920s, it was generally considered legal for unlicensed practitioners to assist people in exercising their legal rights, activities that today would clearly be considered the practice of law.[13] Until the mid-twentieth century, the only activity prohibited for unlicensed individuals was in-court client representation.[14] For

[11] Daniel Martin Katz, Michael J. Bommarito, Shang Gao & Pablo Arredondo, *GPT-4 Passes the Bar Exam* (Mar. 15, 2023) (unpublished manuscript) (on file with author).

[12] This Essay analyzes the UPL impact of legal AI software used directly by consumers. The reasoning would not apply to legal AI tools marketed and sold directly to lawyers, such as Vincent AI from vLex or Co-Counsel by Casetext. Lawyers who use assistive AI tools, even if those tools automate functions that were traditionally considered the practice of law, are still licensed to practice law. Although lawyers would likely be required to "supervise" AI tools under Model Rule 5.3, they would not be in violation of Model Rule 5.5, which prohibits the Unauthorized Practice of Law. *See* MODEL RULES OF PRO. CONDUCT r. 5.3 and 5.5 (AM. BAR ASS'N 2019); *see also* Michael Loy, *Legal Liability for Artificially Intelligent "Robot Lawyers",* 26 LEWIS & CLARK L. REV. 951, 958 (2022). Regulation of lawyers is not within the scope of this Essay.

[13] Hoppock, *supra* note 9, at 721.

[14] *See* Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans,* 44 CASE W. RES. L. REV. 531, 567 (1994).

most of American history, anyone could prepare filings before the court, fill out forms, draft legal documents, or other tasks considered "administrative" without being admitted to practice law.[15]

Early America's limited prohibition of *only* in-court client representation has roots in English law. English law distinguishes between barristers, who represent clients in court, and solicitors, who handle other legal matters for clients.[16] Indeed, in English law, the "bar" was a physical barrier in court that separated the public from officers of the court: admission to "the bar" meant that barristers were required to demonstrate their qualifications to cross the physical bar. (This requirement is the origin of the term "bar exam" in American law.) Of course, American law does not distinguish between the skills of barristers versus those of solicitors, and it makes no distinction between administrative form filling and representation of clients in court.[17]

Although early American courts permitted many legal tasks to be performed without a law license, during the Great Depression in the late 1920s, virtually every state set up a committee to investigate the unauthorized practice of law, and many passed regulations regarding unauthorized practice.[18] These regulations were designed to protect clients from legal assistance that was incomplete, incompetent, negligent, or fraudulent—both from lawyers practicing outside of the jurisdiction in which they were licensed and from people who were not licensed to practice law at all. Although almost all fifty state legislatures have passed statutes to prohibit UPL,[19] for most of the twentieth century, these prohibitions took many different forms. However, they had one thing in common: states drafted UPL statutes at a time when automated, humanlike legal help did not yet exist.[20]

Given that state statutes prohibiting UPL vary widely, in the late 1900s, the American Bar Association (ABA) proposed the Model Rules of Professional Conduct (Model Rules) to standardize the regulations. In 1969, the ABA adopted the Model Code of Professional Responsibility, and the ABA House of Delegates

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[15] *Id.*

[16] *See* Walter M. Bastian, *The Profession of Law in England and America: Its Origins and Distinctions*, 46 ABA J. 817, 817–19 (1960).

[17] *Id.* at 819.

[18] Cramton, *supra* note 14, at 567.

[19] Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2585 (1999). For a comprehensive list of state UPL statutes, see BATTERED WOMEN'S JUSTICE PROJECT, UNAUTHORIZED PRACTICE OF LAW (2019).

[20] RENEE KNAKE JEFFERSON, LAW DEMOCRATIZED: A BLUEPRINT FOR SOLVING THE JUSTICE CRISIS 59 (2023).

adopted the more modern Model Rules in 1983.[21] State supreme courts and bar associations by and large adopted the ABA's Model Rules framework.[22] Among the adopted provisions was Rule 5.5, which prohibits, among other things, lawyers from practicing in a jurisdiction in which they are not licensed.[23] The Model Rules regulate lawyers, but do not regulate anyone who is not licensed as a lawyer. So, paralegals, accountants, court clerks, and software are not regulated by the Model Rules.[24]

However, even as the Model Rules helped to harmonize the regulation of lawyers, almost every state has maintained completely unstandardized statutes or regulations prohibiting someone who does not have a law degree from engaging in the unauthorized practice of law.[25] The penalties for violating UPL rules can be severe, ranging from fines to criminal charges:[26] two-thirds of states have made UPL a criminal misdemeanor, and in a few states, it is a felony.[27] Today, all fifty states and the District of Columbia prohibit the unauthorized practice of law.[28]

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[21] *Model Rules of Professional Conduct*, AM. BAR ASS'N., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ [https://perma.cc/7T72-K5Z5].

[22] *See* Jaliz Maldonado, *California Aligns New Rules with ABA Rules of Professional Conduct*, NAT'L L. REV. (Aug. 29, 2018), https://www.natlawreview.com/article/california-aligns-new-rules-aba-rules-professional-conduct [https://perma.cc/9ZFL-2SG2] (discussing California's decision to become the last of fifty states to adopt rules modeled after the ABA Model Rules of Professional Conduct).

[23] MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS'N 2019).

[24] *Id.*; Denckla, *supra* note 19, at 2581.

[25] *See* AM. BAR ASS'N, APPENDIX A: STATE DEFINITIONS OF THE PRACTICE OF LAW,
https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/model_def_statutes.pdf [https://perma.cc/V79V-NV3N]; Denckla, *supra* note 19.

[26] Denckla, *supra* note 19, at 2585.

[27] *See, e.g.*, N.Y. EDUC. LAW § 6512 (McKinney 2019) ("Anyone not authorized to practice under this title who practices or offers to practice or holds himself out as being able to practice in any profession in which a license is a prerequisite to the practice of the acts, . . . or who aids or abets an unlicensed person to practice a profession . . . . shall be guilty of a class E felony."); *see also* ALA. CODE § 34-3-1 (2023) (noting that the penalty for unlawful practice of law is a fine of up to $500 or imprisonment of up to six months, or both); S.C. CODE ANN. § 40-5-310 (2022) (noting that practicing law without admittance to the South Carolina Bar entails a fine of up to $5,000 or imprisonment of up to five years, or both).

[28] Hoppock, *supra* note 9, at 722.

B. UPL Regulations Are Designed to Protect Consumers

UPL regulations exist to protect consumers, not lawyers, judges, or the legal profession. The ABA's Model Rule 5.5 says this plainly. The purpose of the rule is to protect "the public against rendition of legal services by unqualified persons."[29]

In the post-Model Rules era, states typically protect clients by imposing a set of licensure requirements, designed to serve as proxies for expertise. Most administer *ex ante* tests of competence, requiring that lawyers graduate from an accredited law school, pass the state's bar exam, and pass the state's character and fitness background check. Many states require that lawyers pass the Multistate Professional Responsibility Examination and take mandatory continuing legal education annually. The license of a lawyer is restricted to the state or court to which they are admitted, presumably to make sure they are an expert in the law of the state in which they were educated. Licensed practitioners who meet these prerequisites are licensed to practice law—from the most mundane to the most exotic questions of law. A lawyer admitted to practice law in Florida may practice real estate law, divorce law, securities law, or appellate litigation in the state. But an expert family lawyer licensed to practice in Virginia may not practice family law across state lines in West Virginia.

However, none of these requirements guarantees that lawyers will not provide incompetent, ineffective, or negligent counsel to clients. Indeed, lawyers with impeccable licensure credentials commit malpractice every day in the jurisdictions where they are licensed to practice. And of course, there are many unlicensed professionals who give expert, competent advice every day.[30] Professionals such as accountants and real estate agents regularly engage in the practice of law in their daily work without consequence.[31] State bar associations, supreme courts, and legislatures have passed UPL rules and regulations to provide ex ante

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[29] MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS'N 2016); *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. b (AM. L. INST. 2000) (explaining that the rules were established to protect clients from the "significant risk of harm believed to be threatened by the nonlawyer practitioner's incompetence or lack of ethical constraints.").

[30] *In re* Dissolving Comm'n on Unauthorized Prac. of Law, 242 P.3d 1282, 1283 (Mont. 2010) ("[T]he array of persons and institutions that provide legal or legally-related services to members of the public are, literally, too numerous to list. To name but a very few, by way of example, these include bankers, realtors, vehicle sales and finance persons, mortgage companies, stockbrokers, financial planners, insurance agents, health care providers, and accountants.").

[31] JEFFERSON, *supra* note 20, at 58.

protections, but our history shows that they are both overinclusive (over-protecting consumers from competent assistance) and underinclusive (failing to protect from incompetent lawyering, and failing to protect consumers from the dangers of navigating legal processes with no assistance).

It is important to note that unauthorized practice is illegal regardless of whether the advice given was competent, and there is no requirement of harm to clients. In a 1981 study, Professor Deborah Rhode found that, among all UPL cases brought against an unlicensed practitioner, only 11% involved specific allegations of some harm to the client.[32] Even when an unlicensed individual provides excellent support to a client, if it is deemed to be the practice of law, it is illegal, which runs counter to the purpose of protecting consumers.

Finally, UPL regulations are not the only protections against incompetent representation from licensed lawyers. Clients who receive incompetent help from lawyers, unlicensed individuals, or software still have recourse without UPL regulations. They can still bring malpractice claims, as well as contracts or tort claims, such as negligence, consumer protection, misrepresentation, fraud, false advertising, or products liability.[33]

C. Nobody Knows What Constitutes the "Practice of Law"

Thus far, this Essay has established that UPL rules exist to protect consumers by prohibiting the practice of law without a license. In a way, that's the easy part of the analysis. What exactly constitutes the "practice of law?" In short, no one really knows.

The American Bar Association Taskforce on the Model Definition of the Practice of Law offered the following proposed draft definition in September 2002:

> The "practice of law" is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law. . . . A person is presumed to be practicing law

[32] Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 43 (1981); *see also* Damien Riehl, *AI, UPL, and the Justice Gap*, MINN. STATE BAR ASS'N (Apr. 1, 2024), https://www.mnbar.org/resources/publications/bench-bar/2024/04/01/ai-upl-and-the-justice-gapj [https://perma.cc/RZV4-Y4QY].

[33] Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 698 (2002).

> when engaging in any of the following conduct on behalf of another:
>
> (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;
>
> (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;
>
> (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or
>
> (4) Negotiating legal rights or responsibilities on behalf of a person.[34]

One year later, the ABA gave up trying to define the "practice of law" for purposes of the Model Rules. The task force suggested that regulators use "common sense" when divining what constitutes the practice of law.[35]

The Third Restatement of the Law Governing Lawyers, which summarizes the Model Rules as applied in the states, recognizes that states and courts have left the practice of law effectively undefined:

> Courts have occasionally attempted to define unauthorized practice by general formulations, none of which seems adequate to describe the line between permissible and impermissible non-lawyer services, such as a definition based on application of difficult areas of the law to specific situations. . . . Many courts refuse to propound comprehensive definitions, preferring to deal with situations on their individual facts.[36]

It continues, stating that the "definitions and tests employed by courts to delineate unauthorized practice by nonlawyers have been vague or conclusory."[37] The Restatement's publisher, the American

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[34] *Definition of the Practice of Law Draft (9/18/02)*, AM. BAR ASS'N (Sept. 18, 2002), https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition/ [https://perma.cc/CC64-XFL5].

[35] TASK FORCE ON THE MODEL DEFINITION OF THE PRAC. OF L., AM. BAR ASS'N, REPORT 5 (2003).

[36] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. c (AM. L. INST. 2000).

[37] *Id.*

Law Institute, has since declined to create a Restatement of the definition of UPL given how inconsistent state rulings are.[38]

Lawyers complete many tasks in their practices. Some of them are ministerial, like placing phone calls or writing e-mails. Some are educational, like researching procedure, finding the right form, or conducting legal research. Lawyers follow processes and checklists, review memos, and decide on next steps. Of course, many of these tasks in law offices are also conducted by unlicensed staff, but under the supervision of a licensed attorney. Which of these tasks constitutes the practice of law? The case-by-case adjudication of the question is so inconsistent that, despite efforts by scholars, the American Law Institute, the American Bar Association, and others, no one has divined a universal way of determining what is permissible and what is forbidden as the practice of law.[39] Indeed, an ABA document compiling the various approaches taken by states to define the practice of law comprises thirty-one dense pages of fine print.[40]

The State Bar of Montana evaluated the question carefully, establishing a commission to study the issue. After careful study, instead of recommending a definition, the Bar dissolved the commission, saying:

> [W]e conclude that the array of persons and institutions that provide legal or legally-related services to members of the public are, literally, too numerous to list. To name but a very few, by way of example, these include bankers, realtors, vehicle sales and finance persons, mortgage companies, stock brokers, financial planners, insurance agents, health care providers, and accountants. Within the broad definition of § 37-61-201, MCA, it may be that some of these professions and businesses "practice law" in one fashion or another in, for example, filling out legal forms, giving advice about "what this or that means" in a form or contract, in estate and retirement planning, in obtaining informed consent, in buying and selling property, and in giving tax advice. Federal and state administrative agencies regulate many of these professions and businesses via rules and

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[38] *Id.*

[39] *See, e.g.*, *In re* Dissolving Comm'n on Unauthorized Prac. of Law, 242 P.3d 1282, 1283 (Mont. 2010) (dissolving the Bar's Commission on the unauthorized practice of law); Utah State Bar v. Summerhayes & Hayden, Pub. Adjusters, 905 P.2d 867, 869 (Utah 1995); Denver Bar Assn' v. Pub. Utilities Comm'n, 391 P.2d 467, 471 (Colo. 1964) (en banc); State *ex. rel.* Frieson v. Isner, 285 S.E.2d 641, 650 n.2 (W. Va. 1981).

[40] AM. BAR ASS'N, *supra* note 25.

> regulations; federal and state consumer protection laws and other statutory schemes may be implicated in the activities of these professions and fields; and individuals and non-human entities may be liable in actions in law and in equity for their conduct. Furthermore, what constitutes the practice of law, not to mention what practice is authorized and what is unauthorized is, by no means, clearly defined.[41]

D. Common Ground on UPL

State bar associations and legislators face a conundrum. To protect consumers, they have adopted or adapted the ABA's Model Rules or passed statutes restricting the unauthorized practice of law to prevent ineffective, unethical, or incompetent people from providing negligent advice to clients. Still, there is precious little guidance about what is and is not within that definition.

Although the boundary is unclear, there are nevertheless some legal activities that clearly fall on one side of the line or the other. Courts and scholars have reached a broad consensus that certain activities—appearing in court, preparing pleadings, drafting documents that define people's rights (such as deeds, wills, and trusts), and providing legal advice—constitute the practice of law.[42] Others have noted that negotiation for clients and general dispute resolution on behalf of clients are also typically considered the practice of law.[43]

In addition, commentators generally observe a difference between generic legal information and personalized legal advice. Authors may write books about the law and legal rights without practicing law because that is more like providing generic legal information. By contrast, when a person or company applies the law to specific facts or advises a client about a specific course of action, courts have found this to constitute the practice of law.[44]

Further, any jurisdiction may explicitly permit unlicensed advisors to perform tasks that are considered or near enough to, the practice of law. Twenty-one jurisdictions authorize unlicensed practitioners to provide some kind of legal services in limited areas.[45]

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[41] *In re* Dissolving Comm'n on UPL, 242 P.3d at 1283.

[42] Thomas E. Spahn, *Is Your Artificial Intelligence Guilty of the Unauthorized Practice of Law?,* 24 RICH. J.L. & TECH. 2, 9 (2018).

[43] JEFFERSON, *supra* note 20, at 57.

[44] *Id.*; Catherine J. Lanctot, *Does LegalZoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law,* 20 TEMP. POL. & CIV. RTS. L. REV. 255, 265 (2011).

[45] AM. BAR ASS'N STANDING COMMITTEE ON CLIENT PROTECTION, 2015 SURVEY OF UNAUTHORIZED PRACTICE OF LAW COMMITTEES REPORT 2 (2015).

Many states, such as New York and Massachusetts, do not consider basic form-filling to be legal practice at all, and allow unlicensed people to assist consumers with many forms directly.[46] And courts have recognized the "scrivener's exception," which allows typists or data entry technicians to "record information that another provides without engaging in [the unauthorized practice of law] as long as [the typists] do not also provide advice or express legal judgments."[47]

Perhaps the most common ground exists in the selective enforcement of UPL laws. Not every violation of the rules harms consumers. As the State Bar of Montana pointed out, tax professionals, accountants, realtors, mortgage companies, and others frequently apply the law to the specific facts of their clients' cases.[48] State bar associations, attorneys general, and state supreme courts are already under-resourced and over-worked, so strict enforcement across the boundaries is rare.[49]

II. HOW SHOULD REGULATORS STRIKE THE RIGHT BALANCE WHEN DECIDING WHETHER SOFTWARE CAN BE CONSIDERED THE "PRACTICE OF LAW?"

With only a few exceptions, regulators have not brought UPL actions against makers of software.[50] After all, software at best has only filled forms for users, for the most part safely within the "scrivener's exception" for data entry and simple, pre-programmed decision trees. Generative AI has changed that calculation.

Today, generative pretrained transformers such as GPT-4 from OpenAI, Google's Gemini, Claude from Anthropic, or Llama 2 from Meta can produce text that looks much more like legal advice, or might even appear to apply the law to the specific facts in a query.[51]

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[46] MASS. R. PRO. CONDUCT 5.5 (2015).

[47] *In re* Peterson, No. 19-24045, 2022 WL 1800949, at *82 (Bankr. D. Md. June 1, 2022) (quoting LegalZoom, Inc. v. N.C. State Bar, No. 11-1511 at *10 (N.C. Super. Ct. Mar. 24, 2014)).

[48] *In re* Dissolving Comm'n on Unauthorized Prac. of Law, 242 P.3d 1282, 1283 (Mont. 2010).

[49] Hoppock, *supra* note 9, at 730–32.

[50] For a comprehensive discussion of state UPL cases, *see* Spahn, *supra* note 42.

[51] As of this writing, these technologies are new and modern. Of course, within a small number of years, their technical capabilities will be greatly surpassed. The ability of software to provide legal advice will greatly exceed the primitive abilities of GPT tools, which, although seemingly very advanced at the time of this writing, do little more than use trained and tuned neural networks to approximate the next word or words in a statistically likely answer.

They also far surpass the capacity of software available at the time state legislators passed UPL statutes. Legal generative AI tools far outstrip the capacities of conventional legal research software such as vLex, Fastcase, Westlaw, or LexisNexis, the rules-based AI services used by TurboTax, or bankruptcy petition preparation software such as NextChapter. Regulators may have dismissed such indexing, retrieval, or form-filling software as information, not advice. Will the same be true of the new generation of transformer-based neural networks? What about the generation of software that follows it?

Generative AI, and especially legal-specific tools, have great potential to assist self-represented litigants or unrepresented individuals in addressing the access to justice gap in civil legal matters. Considering the potential benefit to consumers, state legislatures should re-evaluate the scope of UPL laws in order to expand assistance while still protecting consumers from negligent or fraudulent legal services.

A. Protecting Consumers

Any discussion of protecting consumers must begin with the fact that so few Americans get help from lawyers with their legal issues. This Part will address how regulators can protect consumers while striking a balance that does not chill innovation that might help address the justice gap nor dampen the potential for generative legal AI tools to help consumers.

In her foundational survey *Accessing Justice in the Contemporary USA*, Rebecca Sandefur found that 66% of adults surveyed experienced at least one civil legal issue—such as employment issues, government benefits, insurance, or housing—in the prior eighteen months.[52] According to respondents, almost half of those situations resulted in severe consequences such as an assault or threat, damage to relationships, fear, loss of income, or damage to health.[53]

The survey respondents could certainly have benefited from legal assistance, but only 22% got that help. The vast majority tried to manage the legal issues on their own (46%) or did nothing at all (16%).[54] This trend persists over time. The Legal Services Corporation's 2017 Justice Gap Report showed that in the prior year, 71% of low-income households experienced at least one civil legal

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[52] *See* REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 12 (2014).

[53] *Id.* at 10.

[54] *Id.* at 12.

problem, but they sought professional legal help in only 20% of the issues they faced.[55] These issues overwhelmingly affect people of limited means, those who are unable to retain a lawyer, do not qualify for legal aid, or have limited access to free legal help through pro bono lawyers.[56]

In general, millions of American families, small businesses, and individuals need legal help they cannot afford. Legal aid clinics are stretched beyond capacity nationwide, and there is a yawning gap between people who qualify for legal aid and those who can afford the rates of licensed legal professionals. By some estimates, "U.S. lawyers would have to increase their pro bono efforts . . . to over nine hundred hours each to provide some measure of assistance to all households with legal needs."[57]

But the conversation cannot stop with unmet legal needs. There are plenty of legal AI tools marketed to consumers that are completely incompetent to resolve legal issues. Worse, LLMs are made to produce confident, authoritative-sounding answers, even when the tools have no answer at all. In particular, general-purpose transformers such as ChatGPT have famously "hallucinated," creating phony cases with Bluebook-perfect citations (albeit to cases that do not exist).[58]

In addition, unlike specialized legal tools, many foundation models use user prompts to further train the models. Samsung banned the use of ChatGPT after it discovered an engineer uploaded sensitive internal source code into a prompt that was then used to train the ChatGPT model.[59] In one particularly egregious example, Google's Bard model advertised that it did not expose user queries or chats, but they reportedly started showing up in Google search

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[55] LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6–7 (2017).

[56] Denckla, *supra* note 19, at 2581.

[57] Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, 143 DAEDALUS 83, 87 (2014); *see also* AM. BAR ASS'N COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 14 (2016).

[58] *See, e.g.*, Benjamin Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, N.Y. TIMES (May 27, 2023), https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html [https://perma.cc/EV8C-CG2Q].

[59] Mark Gurman, *Samsung Bans Staff's AI Use After Spotting ChatGPT Data Leak*, BLOOMBERG (May 1, 2023, 8:48 PM), https://www.bloomberg.com/news/articles/2023-05-02/samsung-bans-chatgpt-and-other-generative-ai-use-by-staff-after-leak [https://perma.cc/C8SM-GN22].

results anyway.[60] It is already difficult for lawyers and engineers to audit the privacy policies of generative AI engines—imagine how much more difficult it will be for self-represented parties to keep the details of their own legal matters confidential.

There are many reasons for regulators to seek to protect consumers from fraudulent, incomplete, or incompetent legal AI solutions. But UPL rules are a blunt instrument to accomplish those goals. They punish the providers of services, whether the consumers have been educated about the risks or not, regardless of the sophistication of the user, and regardless of whether any consumer has suffered harm. In addition, there are responsible legal AI tools that address the issues of hallucination, transparency, and confidentiality.[61] Even though UPL statutes might protect a small number of consumers, they would punish ethical and unethical companies alike.

On the other hand, it should not be the role of regulators to intervene in a market interaction between a consumer and a merchant for services when the merchant is transparent and honest about what's being sold. There are many risks to consumers, but not all merchants are subject to licensure and criminal penalties. Bankers, accountants, mortgage brokers, and others assist people with important matters daily, and in many cases, as long as they are forthright about which licenses they possess, they are not subject to criminal sanctions for providing services also offered by more licensed peers.

Clients who can afford to hire an attorney, or retain one to represent them for free, also have a qualified Sixth Amendment right to counsel of choice, even if that counsel is not licensed to practice law in that jurisdiction. In *United States v. Gonzalez-Lopez*, the federal trial court denied *pro hac vice* admission to the defendant's lawyer.[62] The U.S. Supreme Court reversed, holding that the defendant had a qualified Sixth Amendment right to the defense lawyer of his or her choice.[63] The Court's logic would likely protect a client's Sixth Amendment right to choose assistance from software, even if that software has no license to provide legal services.

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[60] Joe Hindy, *Be Careful with Bard: Google Search Showing Private Chatbot Snippets*, PC MAG. (Sept. 26, 2023), https://www.pcmag.com/news/be-careful-with-bard-google-search-showing-private-chatbot-snippets [https://perma.cc/9LLV-CL6L].

[61] *See, e.g.*, *How Generative AI Is Changing the Legal Industry*, TECH FOR NON-TECHIES (Feb. 21, 2024), https://www.techfornontechies.co/blog/how-generative-ai-is-changing-the-legal-industry [https://perma.cc/JB4N-E9WN].

[62] U.S. v. Gonzalez-Lopez, 548 U.S. 140, 140 (2006).

[63] *Id.* at 144.

In addition, as the *Upsolve* court held, software publishers may have an additional First Amendment right to publish software that provides legal assistance.[64] Even if regulators as third parties (as opposed to clients on their own behalf) sought to enforce UPL regulations against software publishers, those companies or the people who use their products may have constitutional defenses that supersede UPL statutes.

It is true that regulators have a legitimate concern that some software companies may not protect consumers or will provide incompetent service to unwitting people. And regulators need to protect consumers from faulty legal advice software every bit as much as they need to be protected against unqualified human advisers. But finding the most competent tools to be a violation of UPL statutes might prevent clients from getting any help at all, missing key opportunities to narrow the justice gap at scale and undermining the important values undergirding UPL regulations.

Responsible generative AI tools have good potential to help guide consumers who face legal problems. Regulators need to balance the need to protect consumers from deceptive or incompetent providers with the need to promote innovation to reach the vast majority of consumers who frequently face legal issues on their own and are at a significant disadvantage.[65] If one lawyer provided incompetent assistance to 80% of their clients, we would seriously reconsider whether they should continue to practice law. If all lawyers are failing to provide competent assistance to 80% of all clients, we should seriously reconsider whether we are protecting clients by blocking solutions that could supplement the assistance that licensed lawyers provide.

B. AI Software Might Not Be Prohibited by UPL

Increasingly capable generative AI services may automate functions traditionally performed by lawyers, but that does not necessarily mean that they run afoul of UPL statutes. For example, eDiscovery software replaced the judgment of lawyers about

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[64] Upsolve, Inc. v. James, 604 F. Supp. 3d 97, 121(S.D.N.Y. 2022).

[65] *See, e.g.*, Jordan Furlong, *Could Generative AI Help Solve the Law's Access Dilemma?*, SUBSTACK (Feb. 27, 2024), https://jordanfurlong.substack.com/p/could-generative-ai-help-solve-the [https://perma.cc/SG5Z-WD59]; Olga V. Mack, *Beyond Basics: Navigating Unauthorized Practice of Law Risks in Legal Tech Innovations*, ABOVE THE LAW (Feb. 15, 2024, 11:20 AM), https://abovethelaw.com/legal-innovation-center/2024/02/15/beyond-basics-navigating-unauthorized-practice-of-law-risks-in-legal-tech-innovations/ [https://perma.cc/56TB-UCYV].

whether documents were responsive or privileged, but no eDiscovery software has been found guilty of UPL; instead, grateful lawyers have offloaded tedious review tasks to software.

State UPL regulations vary considerably, but the definition of the practice of law usually includes the exercise of professional judgment, representing a client in court, deciding what steps to take, and applying the law to the specific facts of a client.[66] Legal software that competently takes on administrative tasks, such as research, form filling, or modification of templates for contracts or motions, would not necessarily even qualify as the practice of law. Some states, such as New York and Massachusetts, do not consider such administrative tasks and even allow unlicensed individuals to help people complete such forms.[67]

One of the hallmarks of legal representation is the formation of a lawyer-client relationship, which typically involves an engagement letter, conflict checks, and the formation of attorney-client privilege. Generative AI products do not produce any of these artifacts, nor pretend to form an attorney-client relationship. Instead, LLMs and generative AI tools use neural networks and predictive text to provide information to users, similar to paper guides about court procedure or form books directed towards pro se litigants. Courts have held that the publication of such form books is more like general information than advice and have held that they are not the practice of law.[68]

Software companies may also have valid constitutional defenses to prosecution for unauthorized practice. Legal AI providers have due process rights to occupational freedom that states may be unlawfully restricting with UPL laws.[69] Publishers of AI software may also have First Amendment protections against UPL restrictions.[70]

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[66] Brooke K. Brimo, *How Should Legal Ethics Rules Apply When Artificial Intelligence Assists Pro Se Litigants?*, 35 GEO. J. LEGAL ETHICS 549, 556 (2022).

[67] Ed Walters, *The Model Rules of Autonomous Conduct: Ethical Responsibilities of Lawyers and Artificial Intelligence*, 35 GA. ST. U. L. REV. 1073, 1089–90 (2019) (citing MASS. RULES PROF'L CONDUCT R. 5.5 (2015)).

[68] Brimo, *supra* note 65, at 557.

[69] Joseph J. Avery, Patricia Sánchez Abril & Alissa del Riego, *ChatGPT, Esq.: Recasting Unauthorized Practice of Law in the Era of Generative AI*, 26 YALE J. L. & TECH. 64, 101 (2024) (citing David E. Bernstein, *The Due Process Right to Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L. J. F. 287, 289 n.9 (2016)).

[70] *Id.* at 101–02 (citing Clark Neily, *Beating Rubber-Stamps into Gavels: A Fresh Look at Occupational Freedom*, 126 YALE L. J. FORUM. 304, 306 n.26 (2016)).

Perhaps most importantly, consumers using a legal AI tool would not be confused about whether they were using a lawyer. UPL regulations are designed to protect consumers from deception. As long as software products are not engaged in fraudulent or deceptive behavior, provide administrative assistance, clear disclaimers, and information instead of advice, states should not find them in violation of UPL statutes.

UPL cases are rarely filed against software providers,[71] but as generative AI tools become better able to assist consumers, the ambiguity about whether UPL laws apply might chill innovation. UPL rules have little to say about the quality of services offered; they would prohibit competent assistive tools as well as incompetent providers. Such rules create no incentive for software companies to improve the quality of assistance they offer – the better the help they provide, the more likely they will be considered to be practicing law. Regulators should strive to protect the interests of UPL in a precise way, to allow innovation in serving consumers at the same time they protect consumers from fraud or incompetence.

C. Deterring Fraudulent, Negligent, or Incompetent Legal AI Providers

Not all legal AI products will stay within the aforementioned guidelines. This Part surveys several tools available to regulators to protect consumers of legal services. UPL regulations are one of those tools, but they are not the only tools, and they are likely not the most flexible. In the last Part, this Essay addressed the need for scalable solutions to help consumers with legal problems and suggested that generative AI tools may provide an avenue for closing the justice gap. But regulating software companies with UPL regulations gives those companies no consistent guidance about what is permissible and what is not. There is no uniformity across states (or in many cases, within a single state) about what constitutes the practice of law. Enforcement authority varies from state to state, and there are many different authorities who have the authority to prosecute UPL.[72]

To protect consumer rights, we can look elsewhere. In a few states, consumers can deter unethical, deceptive, or incompetent providers of legal services, whether licensed or not, with private rights of action against the provider. Alabama, Arkansas, the District of Columbia, Texas, Washington, and West Virginia authorize a consumer of legal services to bring a civil action against a party who

[71] *See* Spahn, *supra* note 42.
[72] Hoppock, *supra* note 9, at 720–21.

violates UPL regulations.[73] In addition to private enforcement of UPL statutes, clients who are harmed can bring other private rights of action against providers for negligence, fraud, or under state consumer protection statutes.

Civil damages may deter software companies (and law firms) from fraudulent or negligent provision of legal services, and indeed, civil fines are a popular enforcement mechanism to govern the behavior of companies.[74] Fines for negligent advice create an incentive for software companies who provide legal services to consumers to improve their products; they are not criminal sanctions, and they penalize companies only when they are negligent.[75] They compensate consumers who are harmed, whereas state-sponsored UPL prohibitions and criminal sanctions do not. And they are pursued by consumers who are harmed in some way, not other market participants who have not suffered harm. Still, to make good on the promise of civil penalties would require many more states to expand legal malpractice claims beyond lawyers, authorizing individuals to bring claims against unlicensed individuals and corporations.

In addition to private rights of action for UPL, individuals can bring false advertising claims against legal AI providers who misrepresent themselves or the nature of their relationship with consumers.[76] Individuals can bring false advertising claims against anyone offering legal services, whether they are licensed or not.[77] And they can bring claims under state law or under the Lanham Act's prohibition of advertisements that misrepresent the "nature, characteristics, qualities, or geographic origin" of goods or services.[78] Software that holds itself out as a "robot lawyer," or promises to provide services that it cannot, may be prosecuted under state or federal law. In addition, states may require that AI software meet certain quality standards before they permit its use by consumers.[79]

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[73] *Id.* at 733–34.

[74] W. Bradley Wendel, *Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What do Honor and Shame Have to Do with Civil Discovery Practice*?, 71 FORDHAM L. REV. 1567, 1605–11 (2003).

[75] *See* Julian Moradian, *A New Era of Legal Services: The Elimination of Unauthorized Practice of Law Rules to Accompany the Growth of Legal Software*, 12 WM. & MARY BUS. L. REV. 247, 265 (2020).

[76] *Id.* at 265–66.

[77] *Id.*

[78] 15 U.S.C. § 1125.

[79] For a good summary of minimum quality standards, see Jessica R. Gunder, *Why Can't I Have a Robot Lawyer? Limits on the Right to Appear Pro Se*, 98 TUL. L. REV. (forthcoming 2024) (manuscript at 3).

Companies who create these products can insure against the risk of providing legal assistance to consumers but cannot purchase UPL insurance. Software companies purchase errors and omissions (E&O) liability insurance, or professional liability insurance, to cover the cost of their mistakes. One key tool that states could use to protect consumers would be to require a minimum amount of E&O liability insurance for companies that provide legal services. This is an approach taken by states that have authorized private companies to conduct autonomous vehicle (AV) testing. In those cases, states seek to promote innovation in AVs, so they authorize testing in controlled environments.[80] But in many cases, they also require the companies that provide those vehicles to carry a minimum amount of liability insurance.[81]

This practice protects consumers by guaranteeing an insurance fund that can pay if they are injured. Beyond that, it also guarantees that companies authorized to act in that environment are large, established, and responsible enough to be able to afford to purchase insurance. And as with mandatory automobile insurance or professional liability insurance, insurers themselves are regulators; they use market forces to set rates and to promote best practices among their insureds.[82]

In addition, regulators should aim to protect consumers from deceptive practices. Software that holds itself out to be a lawyer, or licensed to practice law, should still be regulated by consumer fraud regulations or UPL statutes. Software companies should place conspicuous notifications in their software telling customers that they are not forming an attorney-client relationship, there is no attorney-client privilege, and that the software is not acting as a lawyer. And as with any software product, legal assistive AI should not claim to be more competent than it is.

Post hoc remedies are imperfect. For example, some clients may not realize that software will have negligently made a mistake, and

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[80] *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., FEDERAL AUTOMATED VEHICLES POLICY 39 (2016).

[81] *See, e.g.*, CAL. CODE REGS. tit.13, § 227.04 (2024) (requiring companies to carry at least $5 million of liability insurance); D.C. CODE § 50-2352.01 (2023) (same); FLA. STAT. § 627.749 (2024) (requiring testing companies to carry more than $1 million in primary liability insurance and to provide the state a surety bond or proof of insurance of $5 million or more); NEV. REV. STAT. § 482A.060 (2024) (requiring a cash deposit or a surety bond of at least $5 million).

[82] *See* Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 217–28 (2012) (explaining how insurance companies regulate corporate risk more precisely and effectively than government institutions).

others may not be able to fund a private lawsuit for damages."[83] However, this Part has shown that private lawsuits have the potential to be much more precise instruments of regulation than UPL statutes. They can promote consistency and innovation among software companies, deter negligent behavior, and target actual damages to clients, not hypothetical ones.

CONCLUSION

The new generation of AI software is a phase change in the capability of machines. We are right on the cusp of a new generation of software services that can help clients like never before. In many cases, lawyers and law firms will use these new tools to help their clients in novel ways. But clients will also increasingly use these tools themselves, many inevitably without the help of a licensed lawyer.

Although these tools are new, clients are already turning to AI tools to help them with legal problems. GPT tools and retrieval-augmented generation tools are better than ever at answering questions, navigating procedure, and drafting documents. With a persistent, unaddressed, access-to-justice gap, it is naïve to believe that 80% of consumers will continue to do nothing when software can help at a very low cost.

The definition of the "unauthorized practice of law" has always been vague, but there has been a consensus that if software can perform the task, the task does not constitute the practice of law.[84] As of the November 30, 2022, launch of ChatGPT, that is no longer true. AI tools of today are nothing like the "robot lawyer" of marketing claims, but software can also very clearly perform tasks that would have historically been called UPL.[85]

At the same time that software developers are creating generative software that is increasingly skilled at performing legal tasks, our profession is failing at meeting civil legal needs. The alarm has been sounded time and again, most persuasively by Deborah Rhode, Rebecca Sandefur, and the American Bar Association in the 2010s. Yet more than a decade later, our civil legal system seems unsuited to answer the alarm.

For a century, state regulators have sought to protect clients from fraudulent providers of legal services through regulation of UPL. The Model Rules, as adopted by states, offer a consistent framework to

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[83] Hoppock, *supra* note 9, at 736.

[84] *See supra* Part II (discussing the scrivener's exception).

[85] *See, e.g.*, Dana Remus & Frank Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law*, 30 GEO. J. LEGAL ETHICS 501 (2017).

regulate licensed lawyers. But it is time for us to re-evaluate state UPL statutes designed to regulate people and companies that are not licensed to practice law. Even if we could come up with a consistent definition (we can't), asking whether software "practices law" misses the point. The better question is how, in a changed world, to promote the values, rooted in protecting consumers, that undergird UPL regulations. In an attempt to protect those consumers from fraud, our current civil legal system instead perpetuates an access to justice crisis. The central question for regulators now is how to create assistance for those consumers at scale, while protecting them from fraud, deception, and malpractice.

In seeking to balance these interests, states should support responsible software developers in their aims to help consumers. Regulators should promote new service models that scale, especially software, to reach clients who fall through the cracks of hourly law firm business models or the limited remit of legal services.

But regulators should also keep those software companies honest by providing remedies to clients who are subject to deception or who suffer harm. States should require providers to disclose whether they are licensed to practice law, and to distinguish between providing information and legal advice. And unlicensed providers should be required to carry insurance to cover their liability, should they ever be found responsible.

Not every change in legal software requires a change in the rules, but generative legal AI is different. Because GPT tools can perform more functions that traditionally count as the practice of law, they both create opportunities for clients, and demand a re-examination of our assumptions about UPL statutes. Many have called for an update of UPL statutes and rules, and generative AI should serve as a catalyst for the profession to answer that call.