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Regulating Electronic Legal Support Across State and National Boundaries

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REGULATING ELECTRONIC LEGAL SUPPORT ACROSS STATE AND NATIONAL BOUNDARIES

*Cassandra Burke Robertson **

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I. INTRODUCTION

Speculating about the future of lawyer regulation calls to mind the opening tagline of the television show *Torchwood*, in which a time traveler looking back from the future warns current-day characters: “The twenty-first century is when everything changes — and you’ve got to be ready.”¹ *Torchwood* dealt with interplanetary travel and the invasion of alien creatures from distant galaxies. Presumably, the changes confronting near-future legal practice will not be as great. But in a larger sense, the feeling of sudden and comprehensive change still rings true — the world of law practice is changing dramatically, and the regulatory system is struggling to keep up. Twenty years from now, we may well look back on this time as the point when lawyering practices changed so dramatically that our system of lawyer regulation — now

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1. *Torchwood: Quotes*, IMDB, <http://www.imdb.com/title/tt0485301/quotes> (last visited Aug. 9, 2013).

largely governed by the state supreme courts of fifty individual states² — could no longer ensure the integrity of the profession.

Such changes to the legal profession are already underway. The rise of virtual law practice means that legal services can be decoupled from geography, thus facilitating multijurisdictional practice but creating headaches for state-based regulatory systems.³ The difficulty of regulating legal services over the Internet already creates issues significant for bar counsel now, as disciplinary officials struggle to find ways to protect in-state clients who have been harmed by out-of state attorneys.⁴

Some of the most significant changes are less visible and have not yet gotten much publicity, but are likely to pose regulatory challenges in the future. Thus, for example, discussions about the rise of outsourcing and the globalization of legal practice often focus on the larger and more lucrative legal practices.⁵ Nevertheless, globalization is also changing the market for legal services in the relatively hidden corners of legal practice affecting low-profile individual cases. Even now, middle-class Americans are representing themselves in court with the aid of legal advice they obtain from foreign attorneys who they communicate with over the Internet — and some of those legal service providers charge as little as seven dollars an hour.⁶ Given the combination of digital

2. See Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation — Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1249-50 (2003) (“All fifty states regulate lawyer conduct primarily through written rules, typically adapting the ABA’s Rules of Professional Conduct or Code of Professional Responsibility. These rules are primarily enforced through bar disciplinary authorities or separate administrative agencies of the state supreme courts.”).

3. See Jordana Hausman, *Who’s Afraid of the Virtual Lawyers? The Role of Legal Ethics in the Growth and Regulation of Virtual Law Offices*, 25 GEO. J. LEGAL ETHICS 575, 590 (2012) (noting that the rise of virtual legal practice creates new challenges for regulators, and concluding that the current regulatory proposals are “unlikely to go far enough to fully encompass the impact of virtual practice on the nature of the legal profession”); see also Stephanie L. Kimbro, *The Law Office of the Near Future: Practical and Ethical Considerations for Virtual Practice*, 83 N.Y. ST. B.J. 28, 29-33 (2011) (recommending strategies for ethical compliance in the delivery of electronic legal services).

4. See, e.g., Stephen Gillers, *A Gap MJP Created*, LEGAL ETHICS FORUM (Mar. 9, 2013, 9:12 AM), <http://www.legaethicsforum.com/blog/2013/03/a-gap-mjp-created.html>.

5. See, e.g., Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in A Global Age*, 48 SAN DIEGO L. REV. 489, 497 (2011) (“The nationalization of the practice of law is perhaps most visible in the practice of large law firms representing large entity clients.”); see also JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319-20 (1982) (describing the two “hemispheres” of legal work: one emphasizing large law firms and corporate or institutional clients, and the other focusing on the representation of individuals and small businesses).

6. See *infra* note 47.

communications, porous state and national borders, and a growing need for affordable legal services, it is likely that practices now at the margins of legal practice will quickly grow in scope. Technological changes and increasing globalization allow foreign lawyers to compete in the U.S. market for legal service. The downward price movement from this increased competition allows middle-class individuals who would otherwise have represented themselves to hire legal counsel — albeit, in some cases, counsel from individuals not licensed to practice in the client’s jurisdiction, or even in the client’s home country.⁷ Regulators, used to applying rules adopted by individual states to govern the in-state provision of legal services, must somehow adapt to these changing practices. Consequently, lawyer regulation will likely look very different in another couple of decades.

II. GLOBALIZATION AND THE LEGAL NEEDS OF THE MIDDLE CLASS

A combination of three factors is creating a whole new paradigm for the provision of legal services to the middle class — and therefore creating new challenges for lawyer regulation. First, the globalization of business practices means that legal services can cross borders much more easily. Second, the number of litigants attempting to represent themselves in court has increased dramatically. Finally, a growing number of lawyers are providing legal services online through virtual law practices. It was perhaps inevitable that these three trends would collide, and collide they have. Now, consumers accustomed to online shopping in other contexts increasingly seek legal advice and support online — sometimes from lawyers located in the United States, but sometimes from legal practitioners licensed elsewhere.

A. *The Globalization of Legal Practice*

Globalization is a large part of the story. In a segment of cases, litigants have hired attorneys from India and elsewhere to draft litigation documents and to guide them through the legal process.⁸ The role of corporations and wealthier litigants in offshoring legal work has received a large amount of public attention.⁹ Although some have

7. See *infra* notes 59-62.

8. Cassandra Burke Robertson, *The Facebook Disruption: How Social Media May Transform Civil Litigation and Facilitate Access to Justice*, 65 ARK. L. REV. 75, 89 (2012) (discussing globalized outsourcing and ghostwriting).

9. Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 ARIZ. ST. L.J. 125, 137-38 (2011).

expressed fear that legal outsourcing will take work away from lawyers in the United States, the parties in most cases are not merely moving work from the United States to other countries such as India.¹⁰ Instead, they are actually increasing the amount of legal work purchased — with the lower prices available from offshore providers, they are increasing the number of issues for which they seek a legal resolution and increasing the hours of work they dedicate to individual issues.¹¹ Thus, in some cases, outsourcing allows a client to prosecute or defend claims that would otherwise be abandoned or settled.¹² In other cases, the lower cost of offshore services means that a client can leverage resources to fully develop existing claims or defenses — one accounting executive facing white-collar criminal charges was able to hire an Indian firm to research potential defenses, for example, allowing him to mount a broader defense than he could have afforded to do otherwise.¹³

A classic example of the expansion of legal work occasioned by globalization is a case involving Sacha Baron Cohen, the comedian and filmmaker.¹⁴ Cohen's U.K. distributor had been sued over a skit from the *Ali G* television show.¹⁵ Cohen's domestic broadcaster had twice settled libel suits from the same plaintiff.¹⁶ The broadcaster didn't believe that the claim had any merit — a viewer who had been acquainted with Cohen in her youth argued that Cohen had libeled her by using her name in a skit and making unflattering statements about her.¹⁷ Nonetheless, choosing to settle even a frivolous claim can be cheaper than paying to defend against a meritless claim.¹⁸ In this case,

10. *Id.* at 138-40 (noting, however, the exception of document review in discovery, where offshored legal services have led to a reduction in the amount of document review work that is carried out within the United States).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 125-26.

15. Leigh Holmwood, *Ali G: US Judge Throws Out Woman's \$800,000 Libel Claim*, THE GUARDIAN (Apr. 22, 2009), <http://www.theguardian.com/media/2009/apr/22/ali-g-libel-win>; see also *Doe v. Channel Four TV Corp.*, 2010 Cal. App. Unpub. LEXIS 2468, at *4-6 (2d Dist. Div. 2 Apr. 6, 2010) (noting that HBO had settled for \$40,000 in 2004 and settled for \$50,000 in 2006).

16. Robertson, *supra* note 9, at 125-26.

17. When the case was later litigated, a California court found the skit to be as ridiculous as it was offensive (and therefore not likely to be believed by a reasonable viewer). *Doe v. Channel Four TV Corp.*, 2010 Cal. App. Unpub. LEXIS 2468, at *3-4. The court concluded that "the statements could not reasonably be understood as statements of fact." *Id.* at *7.

18. Ari Dobner, Comment, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1576 (1996) ("Frivolous claims often yield nuisance settlements, which represent nothing more than the nuisance value of the suit — the expense, harassment, and embarrassment that the defendant may endure in defending the suit. These nuisance settlements provide enough of an incentive for plaintiffs to pursue them and, therefore, for investors to invest in them.").

however, settling the case twice was enough: when the U.K. distributor was sued in California over the same skit, it handled the suit differently, outsourcing its defense to SDD Global, an Indian firm associated with Smith Dehn LLP, the defendant's U.S. counsel.¹⁹ SDD Global drafted a motion for summary judgment, which was filed by an associated U.S. attorney, granted by a Los Angeles judge, and ultimately affirmed on appeal — with the appellate briefing also being drafted by the Indian firm.²⁰ So at least in this case, the legal services purchased offshore did not replace domestic legal services; instead, outsourcing allowed a case that would likely have been handled outside the court system to be brought within the formal adjudicatory system.²¹ Success with outsourcing the case also served as proof of concept — once the Indian firm had proved its value in the defamation case, Cohen's production company hired it to do additional legal work, including researching local defamation and obscenity rulings of the various jurisdictions in which the comedian planned to film scenes for a subsequent movie.²²

From a regulatory point of view, the decision of a large production company like Cohen's to send legal work to India does not create any significant issues of public protection. But what happens when less sophisticated parties begin to offshore legal work? As mentioned above, they are beginning to do so.²³ Although such practices are not as widely publicized — these cases rarely involve celebrity clients, large corporate interests, or million-dollar discovery budgets — they are growing in practice, as otherwise self-represented litigants seek legal help on the Internet from international as well as domestic providers.²⁴ And, in the same way, they are increasing the demand for legal services rather than displacing traditional representation.²⁵

B. *The Needs of Middle-Class Litigants*

The forces driving middle-class litigants to look for legal help online are strong. At the current time, we are seeing a large population

19. Company News and Press Releases, *SDD Global [SmithDehn INDIA] Helps Win Unanimous California Appellate Victory in "Ali G" Libel Case*, SMITHDEHN INDIA, <http://www.smithdehnindia.com/news.html> (last visited Aug. 10, 2013).

20. *Id.*; Doe v. Channel Four TV Corp., 2010 Cal. App. Unpub. LEXIS 2468, at *6-9.

21. Robertson, *supra* note 9, at 127.

22. *Id.*

23. *See supra* note 47.

24. Robertson, *supra* note 8, at 79-80 (noting that many pro se claims fail, but the availability of online assistance will cause pro se success to grow).

25. *Id.* at 89 (noting that offshoring can make legal services affordable to a broader range of litigants).

of individuals who need, but cannot afford, legal services.²⁶ Although much of the access-to-justice literature has focused on individuals living in poverty, there is a growing recognition that even the middle class has significant unmet legal needs.²⁷ The American Bar Association has estimated that although “half of the low and moderate income households in America are facing one or more situations that could be addressed by the system of civil justice,” few people can afford legal services.²⁸ In many areas of the country, a prospective client cannot find an attorney willing to accept less than \$150 an hour — a rate that is simply unaffordable even for most middle-class individuals.²⁹ As a result, many disputes go unresolved; the majority of legal issues are either handled informally outside the justice system or ignored entirely.³⁰

When individuals have no choice but to go to court — as is often the case in family law cases when parties need a judicial resolution in order to divorce or seek child support — individuals are increasingly attempting to represent themselves without an attorney.³¹ Now, in New Hampshire, eighty-five percent of family law cases involve at least one self-represented party.³² That number has grown very rapidly: In Maricopa County, Arizona, which has a divorce self-representation rate

26. *Id.* at 78; Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the Corporate Practice of Law* 3 (USC Gould Sch. of Law Econ. and Org. Research Paper Series No. C12-16, Legal Studies Research Paper Series No. 12-26, 2012), available at <http://ssrn.com/abstract=2183978> (“Conventional legal services are simply beyond the means of most Americans”).

27. Debra Cassens Weiss, *Middle-Class Dilemma: Can't Afford Lawyers, Can't Qualify for Legal Aid*, ABA J. (July 22, 2010), <http://www.abajournal.com/news/article/middle-class-dilemma-cant-afford-lawyers-cant-qualify-for-legal-aid>; Benjamin P. Cooper, *Access to Justice Without Lawyers*, 47 AKRON L.REV. 205-07 (2014).

28. David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 GEO. J. LEGAL ETHICS 959, 964 (1998) (citing ABA Consortium on Legal Services and the Public, *Agenda For Access: The American People and Civil Justice* 4, 38.40 (1996); ABA Consortium on Legal Services and the Public, *Legal Needs and Civil Justice: A Survey of Americans* (1994)).

29. Robertson, *supra* note 8, at 79 (noting that most parties without representation, but not necessarily indigent, cannot afford an attorney that runs \$150 or more); Weiss, *supra* note 27; Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 112 (2002).

30. Robertson, *supra* note 8, at 78.

31. See Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 440-41 (2009); Nina Ingwer VanWormer, Comment, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 988-91 (2007).

32. See sources cited *supra* note 31; State of New Hampshire Judicial Branch, *Challenge to Justice: A Report on Self-Represented Litigants in New Hampshire Courts* 2 (2004), available at <http://www.courts.state.nh.us/supreme/docs/prosereport.pdf>.

close to that of New Hampshire, the number of parties proceeding pro se “virtually quadrupled” in a decade.³³

Parties proceeding pro se are less likely to be successful in litigation than parties represented by counsel,³⁴ even though many courts allow greater leeway for pro se litigants who have difficulty complying with traditional litigation procedures.³⁵ Given the high cost of obtaining legal representation, however, full-service legal representation is simply not available to many litigants — even those who may be solidly middle class.

Thus, it is not surprising that self-represented litigants will turn to the Internet to seek legal assistance. It is not necessarily the poorest litigants who are increasingly turning to online legal support, but it is instead often the middle class — those who cannot afford traditional legal representation but are nonetheless very comfortable doing business online.³⁶ These individuals are used to shopping online for goods and services, and they use online review sites such as Angie’s List to evaluate potential service providers.

C. *Virtual Law Practice and Other Electronic Resources*

When litigants do turn to the Internet, they find no shortage of lawyers and legal service providers willing to assist them. First, electronic services, such as LawPivot and LegalZoom, offer support but perhaps not representation.³⁷ These companies are growing rapidly,

33. Landsman, *supra* note 31, at 441.

34. Richard W. Painter, *Pro Se Litigation in Times of Financial Hardship — A Legal Crisis and Its Solutions*, 45 FAM. L.Q. 45, 46 (2011) (“Sixty-two percent of judges said that outcomes were worse for the unrepresented parties.”); *see also* Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 835-36, 843 (1997) (finding that “most [pro se] cases, 56%, were unable to survive a preliminary motion to dismiss,” and another 7% were abandoned by the pro se plaintiff; also finding that cases involving pro se defendants were more likely to settle than cases involving pro se plaintiffs, perhaps reflecting “inferior bargaining power”); Kristin Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services* (Apr. 15, 2013), available at <http://ssrn.com/abstract=2251421>.

35. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (stating that courts should hold pro se pleadings “to less stringent standards than formal pleadings drafted by lawyers”); Landsman, *supra* note 31, at 450 (“Some courts have carried this principle beyond the pleading stage and have relaxed requirements relating to service of process, motions to dismiss, summary judgment, compliance with discovery rules, and introduction of evidence.”).

36. Robertson, *supra* note 8, at 79-80.

37. *See* Isaac Figueras, Comment, *The LegalZoom Identity Crisis: Legal Form Provider or Lawyer in Sheep’s Clothing?*, 63 CASE W. RES. L. REV. 1419, 1419 (“At best, LegalZoom is an online provider of legal documents such as a company’s articles of incorporation. At worst,

though they are also facing charges regarding the unauthorized practice of law. LegalZoom reportedly put \$5 million in reserve to cover litigation in California and Missouri.³⁸ Second, domestic attorneys practice in virtual law firms online. Such attorneys may offer full-service representation for local litigants, but more often they seek to provide limited representation to clients on a national basis.³⁹ Sometimes, these virtual law offices are staffed by former “Big Law” attorneys who have left the firm and gone into business for themselves — the lower cost overhead can allow them to cut their billing rate in half while maintaining similar earnings.⁴⁰

Finally, there are lawyers licensed in foreign jurisdictions, particularly in India. Some Indian outsourcing companies that specialize in serving a larger corporate clientele may also be willing to provide litigation support to self-represented U.S. litigants. SunLexis, for example, is a division of a large Indian company that primarily provides legal support and discovery management to large corporations, but has also branched out into providing legal drafting and advice to self-represented litigants.⁴¹ Other websites serve as intermediaries between clients and potential legal service providers, offering a meeting ground and the financial backing of a larger company. One of the largest of these is Elance.com, which provides a central clearinghouse for freelancers and clients.⁴² Launched in 1998, it is not limited to legal services — instead, more than half of its business comes from computer programmers, and legal services are only a small fraction of the total freelance job postings.⁴³ But it is a small fraction of a very large total: Elance participants have earned more than \$200,000,000 dollars since its

LegalZoom is an online legal service provider that regularly engages in the unauthorized practice of law. . . . [O]ne thing is clear: LegalZoom has the potential to transform traditional notions of legal services by providing an online forum where unrepresented persons obtain answers to legal questions and issues.”).

38. John Wallbillich, *LegalZoom: When the Law Goes Public*, WIREDGC (May 23, 2012), <http://www.wiredgc.com/2012/05/23/legalzoom-when-the-law-goes-public/>.

39. Peter R. Bornstein, *Ghostwriting and the Invisible Lawyer*, 39 LITIG. 36 (2012-2013) (“Limited representation is a growing alternative. It means what it sounds like: The lawyer provides, by mutual agreement with the client, a stripped-down product with fewer options and alternatives and no bells or whistles.”).

40. John Wallbillich, *Legal Tech: The Rise of the Virtual Lawyers*, WIREDGC (Feb. 25, 2011), <http://www.wiredgc.com/2011/02/25/legal-tech-the-rise-of-the-virtual-lawyers/>.

41. See SUNLEXIS, <http://www.sunlexis.com/> (last visited Aug. 10, 2013) (“SunLexis’ broad range of paralegal and e-discovery services help law firms, in-house counsels, private attorneys and pro se litigants have informed control over their data and save on time and money”).

42. See ELANCE, <https://www.elance.com/> (last visited Oct. 10, 2013).

43. See *Jobs*, ELANCE, <https://www.elance.com/freelance-jobs> (last visited Oct. 10, 2013).

inception.⁴⁴ More than 4,000 legal service providers offer their services over Elance. The majority of those providers are located in the United States, but 739 providers are located in India.⁴⁵ Of those, 254 advertised an hourly billing rate of less than \$20 an hour, and 110 advertised a rate of \$10 or less per hour.⁴⁶ Not all of the service providers are licensed attorneys — instead, this group includes paralegals and other types of legal support. Nevertheless, even limiting the search to licensed attorneys brings up freelancers willing to work for as little as \$22 an hour.⁴⁷

III. THE REGULATORY CHALLENGE

These trends create a tremendous challenge for bar regulatory officials who seek to protect the public from lawyer incompetence and misconduct. Regulating attorney misconduct within a single state is difficult enough; regulating within the greater United States is more difficult, though reciprocal discipline practices between states helps to some degree. Regulating across national boundaries is nearly impossible. Some scholars have supported the creation of a “global umbrella organization for legal regulators.”⁴⁸ Such an organization would certainly assist in coordinating between the jurisdictions, but it does not solve the underlying difficulty in finding and reaching the providers of online services. But forming such an organization would likely involve protracted negotiation over a period of years — if efforts to standardize lawyer admission and regulation in the United States are any guide, an effective international organization likely remains years or decades away.⁴⁹

In the meantime, what should bar regulators do when faced with

44. See *Global Online Employment Report – Q1 2013*, ELANCE, <https://www.elance.com/q/online-employment-report> (last visited Aug. 19, 2013).

45. *Id.*

46. *Id.*

47. *Search Results*, ELANCE, <https://www.elance.com/r/contractors/cat-legal/cry-IN/grp-1197/rte-gt1-lt40> (last visited Aug. 10, 2013) (listing results for a search limited to “All Freelancers,” “Legal,” “India,” “Licensed Attorneys,” and “Rate: \$1-\$40”).

48. Laurel S. Terry, *Preserving the Rule of Law in the 21st Century: The Importance of Infrastructure and the Need to Create a Global Lawyer Regulatory Umbrella Organization*, 2012 MICH. ST. L. REV. 735, 736 (2012).

49. While such an organization will take time to grow, there is significant interest in establishing such an organization; a recent conference on lawyer regulation included “[m]ore than 100 professionals from 30 countries in Africa, Asia, Australia, Canada, Europe, the United Kingdom, and the United States[.]” Laurel S. Terry, *Creating an International Network of Lawyer Regulators: The 2012 International Conference of Legal Regulators*, 82 THE BAR EXAMINER 2, at 21 (June 2013).

clients who allege that they were harmed, defrauded, or otherwise taken advantage of online? And perhaps more importantly, what can regulators do to avoid such harm from occurring in the first place?

There are no easy answers to these questions, but the same technologies that give rise to the problem may also provide ideas for creative solutions. Cyberlawyering comes with risks, but it also comes with new forms of consumer protection and new opportunities for bar regulators to protect the public from fraudulent or incompetent lawyers. Perhaps the most important thing bar counsel can do is to observe and to work with some of the online Internet intermediaries⁵⁰ in a collaborative effort to identify and remove bad actors. Taking advantage of this collaborative opportunity likely requires leaving protectionism aside, and focusing exclusively on public protection. This is a significant challenge, as historically state bars have not been willing or able to set protectionist goals aside.⁵¹

By and large, pro se litigants are not finding and hiring virtual attorneys directly — instead, they are working through intermediaries like Elance⁵² or ODesk.⁵³ Such intermediaries are a hallmark of online business in general, and they obtain an advantage by offering a trusted space on the Internet.⁵⁴ Many consumers will not buy products from the website of a company they have never heard of. But they will buy products from Amazon. And Amazon can leverage this trust by selling the products of third-party vendors and offering the protection of their own business reputation and refund policies.⁵⁵ Likewise, consumers are more likely to trust legal services intermediaries — and here, it is helpful

50. Jacqueline D. Lipton, *Law of the Intermediated Information Exchange*, 64 FLA. L. REV. 1337, 1342-44 (2012) (arguing that the role of intermediaries is the distinguishing feature of internet activity).

51. See, e.g., 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, 255 (2011) (“In the past, one weapon that the organized bar has used to protect itself during economic hard times is the principle of unauthorized practice of law — guarding its market for legal services against the barbarians at the gate”); Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 6-8 (2012) (arguing in favor of loosening corporate practice restrictions); John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1316 (2003) (“[P]rivate self-regulation of attorneys through bar associations means the continued government of the guild, by the guild, and for the guild”).

52. ELANCE, <http://www.elance.com> (last visited Aug. 10, 2013).

53. ODESK, <https://www.odesk.com> (last visited Aug. 10, 2013).

54. See Lipton, *supra* note 50 (analyzing the importance of intermediaries in online transactions).

55. *Amazon vs eBay – 7 Reasons Why One Will Make You More Money Than the Other*, 7 PILLARS OF SELLING ONLINE, <https://7pillarsofsellingonline.com/amazon-vs-ebay-7-reasons-why-one-will-make-you-more-money-than-the-other/>.

that the intermediaries have introduced feedback mechanisms that are already familiar to online shoppers: reviews from prior clients, both satisfied and unsatisfied, and a “star” rating: five stars from a fully satisfied client, or one star from an unsatisfied client. Furthermore, the intermediaries protect clients by keeping the money in escrow until the services have been performed to the client’s satisfaction — and if the parties cannot agree, they may offer dispute resolution services as well. For example, Elance has a three-step dispute resolution process that includes the possibility of arbitration by a neutral third party at reasonable rates that are paid in part by Elance.⁵⁶

As a result, there is room for collaboration: both legal regulators and the online intermediaries that facilitate lawyer-client connections would benefit from identifying and excluding harmful or fraudulent actors. It is true that an individual client may not be able to evaluate the quality of the legal services they have been provided; after all, the very theory of lawyer regulation is founded on the notion that clients cannot themselves evaluate the quality of the professional they hire, and so the market cannot ensure a base level of quality — regulation must do that.⁵⁷ But in the aggregate, some of the online services call that assumption into question. By crowdsourcing and publicizing a wealth of information about legal service providers’ job history and client satisfaction, these sites offer prospective clients a much more effective way to evaluate potential attorneys.⁵⁸ Thus, for example, the online evaluations of one service provider located in India show that some clients were satisfied. One client, for example, accepted a \$100 bid from a provider to write a post-divorce enforcement motion, and found that the provider “came through with professionalism, attention to detail and on time.”⁵⁹ Another, however, hired the same provider to review a contract and

56. ELANCE DISPUTE RESOLUTION PROCESS, <http://help.elance.com/entries/20999643-Dispute-Resolution-Process> (last visited Sept, 20, 2013) (“For jobs valued under \$1000.00 the cost to file is \$399.00 to be reviewed by a single arbitrator. For jobs valued \$1000.00 and over the cost to file is \$750.00 to be reviewed by a panel of arbitrators. Elance will pay 1/3 of the cost for the parties to move to arbitration, with 1/3 of the cost paid by the client and 1/3 paid by the freelancer.”).

57. See, e.g., ABA Commission on Professionalism, ‘. . . In the Spirit of Public Service’: A Blueprint for the Rekindling of Lawyer Professionalism (1986) (report to the Board of Governors and House of Delegates), reprinted in 112 F.R.D. 243, 261-62 (1987).

58. See, e.g., *The Elance Work System – Overview*, ELANCE, <http://help.elance.com/entries/34623-The-Elance-Work-System-Overview> (“Ratings and feedback are shared by clients after the job has been completed. These ratings are made public and are kept as part of the permanent work-history of the freelancer.”).

59. *Motion for Enforcement*, Post to ELANCE (Feb. 1, 2012), <https://www.elance.com/j/motion-enforcement/28422525/>.

determine whether payment was owed; this client was dissatisfied that the provider billed for ten hours, asserting that the work should not have taken more than two hours.⁶⁰ Overbilling in the elite, high-cost law firms is well-documented,⁶¹ but this complaint was notable given the legal service provider's hourly rate of \$7.67 an hour.⁶² These types of reviews provide valuable information to people in need of legal services; in traditional representation, clients likely have far less information about how satisfied a lawyer's former clients are. And even if the clients cannot determine the intellectual quality of those services (for example, did the lawyer spot all the correct issues in the contract review?), the client can fairly judge whether the lawyer was responsive, timely, and able to explain and defend the amount of time charged.

These online consumer protections, while valuable, are not enough by themselves to protect the public; there is certainly still a role for bar regulators. Those regulators will be most effective, however, if they collaborate with online intermediaries to help identify and evaluate lawyer misconduct.⁶³ Online intermediaries may well assist in identifying incompetent or fraudulent service providers; after all, excluding legal service providers who act in ways that are harmful to clients benefits the intermediary as well as the public. Perhaps a new sanction could be adopted by disciplinary committees. Rather than limiting disciplinary options to reprimanding, suspending, or disbaring an attorney, the committee could add an additional sanction and recommend that an attorney be removed from the roster of an online service provider.⁶⁴ Such an additional sanction would not displace

60. *Contract attorney B2B*, Post to ELANCE (Apr. 18, 2011), <https://www.elance.com/j/contract-attorney-b2b/23893076/>.

61. David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1594-95 & n.53 (1998) ("There is evidence that associates often exaggerate the amount of time they spend on a given matter."); Lisa G. Lerman, *Gross Profits? Questions about Lawyer Billing Practices*, 22 HOFSTRA L. REV. 645 (1994) (noting several examples of fee manipulation).

62. John & Johnco, Comment to *Contract attorney B2B*, ELANCE (Apr. 19, 2011, 01:14 ET), <https://www.elance.com/j/contract-attorney-b2b/23893076/> (announcing the winning bid to the *contract attorney B2B* post).

63. See Irina D. Manta, *A Horse is Not Always a Horse, of Course*, 65 FLA. L. REV. FORUM 1 (2013) (response to Jacqueline Lipton, *Law of the Intermediated Information Exchange*, 64 FLA. L. REV. 1337 (2012)), available at <http://www.floridalawreview.com/wp-content/uploads/A-HORSE-IS-NOT-ALWAYS-A-HORSE-OF-COURSE.pdf> (noting that "a focus on intermediaries provides not only a neutral architectural view of the virtual world but also makes certain substantive choices in how to construct the law more likely to take place than others").

64. See, e.g., Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 19 (1998) ("Although the traditional approach to lawyer discipline follows a quasi-criminal model, in recent years a consumer

traditional sanctions, but would provide another safeguard for client protection and would assist with the jurisdictional challenge — an attorney who wanted to continue to benefit from the intermediary's market base would be asked to submit to a dispute-resolution process with regulatory officials.

If such efforts are to be successful, they will require significant collaboration between online service providers and bar regulatory officials. This relationship, however, has not always been a good one. Many jurisdictions have only reluctantly allowed attorneys to provide limited representation to pro se litigants,⁶⁵ and states have objected even more forcefully to electronic legal assistance, charging companies like LegalZoom under laws prohibiting the unauthorized practice of law.⁶⁶ These efforts, though aimed at protecting the public, also contain an element of protectionism — and the line between protecting the public and protecting lawyers' economic livelihoods is not an easy one to draw.⁶⁷

Nevertheless, the future success of lawyer regulation will require efforts to distinguish between economic protectionism and public protection.⁶⁸ Banning electronic service providers from competing in the legal marketplace may just push consumers to seek the same services from offshore providers outside the jurisdictional reach of the state bars.⁶⁹ Collaboration with service providers — including companies

protection approach to lawyer misconduct has emerged”).

65. Bornstein, *supra* note 39, at 36 (“The battle is over in the state courts. A majority of the jurisdictions and the ABA Model Rules now explicitly authorize both ghostwriting and unbundling. The only holdouts now are many of the federal district and appellate courts”).

66. *See supra* notes 37-40.

67. William H. Brown, Comment, *Legal Software and the Unauthorized Practice of Law: Protection or Protectionism*, 36 CAL. W. L. REV. 157, 165-67 (1999).

68. *See, e.g.*, James E. Moliterno, *Ethics 20/20 Successfully Achieved Its Mission: It “Protected, Preserved, and Maintained,”* 47 AKRON L. REV. 149, 175 (2014) (“The legal profession has no choice about whether change will come or not. The legal profession's choice is whether or not to be engaged in the process of change or to have change imposed by forces of competition, government, technology, culture, and economics.”); Ted Schneyer, “Professionalism” As Pathology: *The ABA's Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities*, 40 FORDHAM URB. L.J. 75, 137 (2012) (providing a historical explanation of how the ABA's emphasis on “professional” has created a resistance to innovation); Laurel S. Terry, Steve Mark, & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685, 2742 (2012) (recommending the transparent adoption of regulatory objectives); Stephen Gillers, *A Profession If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Legal Marketplace, and What We Should Do About It*, 63 HASTINGS L.J. 953, 998-99 (2012) (“The traditional model of lawyer regulation cannot expect to police this new world”).

69. Robertson, *supra* note 8, at 91 (“[W]hen overseas providers offer such legal services directly to unrepresented individuals, the state may not be able to exercise regulatory authority over them”).

like LegalZoom and intermediaries like Elance — is more likely to bear long-term dividends for client protection. Making such collaboration effective requires that regulatory officials focus on reducing conduct that is harmful to the public rather than merely trying to define and eliminate the unauthorized practice of law.⁷⁰

IV. CONCLUSION

Technology and globalization are changing the practice of law and creating new challenges for lawyer regulation. Middle-class litigants who struggle to afford legal services — but are comfortable using online resources — are increasingly seeking and finding legal support online. State and national boundaries dissolve in the online marketplace, making it easy for attorneys to provide services to litigants in other jurisdictions. Differences in national economies make it cost effective for both clients and lawyers to engage in transnational practice, so that attorneys in India and other jurisdictions can offer legal support and advice to American litigants for as little as \$22 an hour, and paraprofessionals for less than \$10 an hour — significantly less than the \$150-an-hour billing floor found in many U.S. jurisdictions.⁷¹ The growing globalization of online legal services suggests that bar regulators who truly want to protect the public will have to become more open to onshore computer-assisted legal services. Protectionism still inhibits such openness, however, as evidenced by the number of states that are still contesting the propriety of the legal services offered by such services as LegalZoom.⁷² In the current environment, that discussion has largely become moot — litigants are already working with attorneys around the globe to obtain just these services, and will continue to do so. In the twenty-first century, the real question is whether those services will be available from onshore attorneys and legal service companies as well as offshore ones. A regulatory system focused on client protection cannot resist innovation, but must instead engage in creative regulation to match the ways in which the public is seeking and finding legal counsel.

70. See Lanctot, *supra* note 51, at 255.

71. See *supra* notes 29 and 47.

72. Lanctot, *supra* note 51, at 258; Figueras, *supra* note 37, at 1430.