Blocked-Chain: The Application of the Unauthorized Practice of Law to Smart Contracts

SARAH TEMPLIN*

INTRODUCTION

In the decade since the release of the Bitcoin white paper by Satoshi Nakamoto,[1] computer scientists and crypto-experts are on the cutting edge of using the blockchain for a wide array of uses, including currency and contracts. These uses of the blockchain have been slowly encroaching into regulated areas, including areas that may be ethically left to professional lawyers as practices of law. Regulators are taking notice of smart contracts and the blockchain. U.S. Commodity Futures Trading Commissioner Brian Quintenz expressed his personal opinion that code developers of smart contracts using the blockchain could be under the regulatory purview of the CFTC.[2] The U.S. Securities and Exchange Commission brought an enforcement action against a crypto token trading platform that used a smart contract to execute trades.[3] With regulators taking notice of the use of smart contracts in the marketplace, it seems almost inevitable that the regulators of the legal profession, including the state bar associations and state courts, will take notice of the ethical implications of the use of smart contracts on the legal profession.

This note will explore the application of the unauthorized practice of law doctrine to smart contracts and the implications for the legal profession of this application. In Part I, this note will summarize the mechanics of the technology of smart contracts and the blockchain, which forms the basis for today's smart contracts. In Part II, this note will explore the development and divergence of state doctrines of the unauthorized practice of law. Part II will also detail recent cases in the application of unauthorized practice of law to legal technologies. Finally,

---

* J.D., Georgetown University Law Center (expected May 2020); B.A. & B.S., Auburn University (2017).

1. Dennis Kennedy, *Thinking Smartly About Smart Contracts*, 44 No. 1 L. Prac. 56, 58 (2018). *See generally* Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN (2008), https://bitcoin.org/bitcoin.pdf [https://perma.cc/HF2U-DQ7K].

2. *See* Brian Quintenz, Commissioner, U.S. Commodity Futures Trading Comm'n, Remarks at the 38th Annual GITEX Technology Week Conference (Oct. 16, 2018), https://www.cftc.gov/PressRoom/Speeches Testimony/opaquintenz16 [https://perma.cc/UJ24-DATA].

3. Nikhilesh De, *SEC Charges EtherDelta Founder with Running 'Unregistered Securities Exchange'*, COINDESK (Nov. 8, 2018 15:31 UTC), https://www.coindesk.com/sec-charges-etherdelta-founder-with-running-unregistered-securities-exchange/ [https://perma.cc/C2Y7-DLU8].

Part II will apply current unauthorized practice of law doctrine to smart contracts. In Part III, this note will provide solutions to allow for the advancement of the technology of smart contracts without sacrificing the protection of consumers of smart contracts.

I. THE MECHANICS OF SMART CONTRACTS AND THE BLOCKCHAIN

To adequately understand the potential for smart contracts to constitute the practice of law, the mechanics of (A) the blockchain, which underlies the workings of today's smart contracts, and the concept of (B) the smart contracts themselves will be discussed.

A. THE BLOCKCHAIN

The blockchain was proposed through the introduction of Bitcoin by the pseudonymous Satoshi Nakamoto in 2008.[4] Bitcoin is the world's first decentralized digital currency ("cryptocurrency"), and it is run through a public distributed ledger, the blockchain.[5]

To better understand how blockchain enables the implementation of smart contracts, a brief overview of the technology behind the blockchain and, more broadly, public distributed ledgers is necessary.[6] While there are many forms a distributed ledger can take, the key component is a peer-to-peer network, consisting of connected individual computers, which reach agreement through consensus mechanisms over shared data.[7] A public distributed ledger, or blockchain, consists of "blocks," defined as chronologically organized and aggregated transactions.[8] With each new transaction, the blockchain grows through the addition of a block.[9] The peer-to-peer network, comprised of individual computers, instead of a centralized server, reaches consensus on a new transaction to be added to the blockchain through independent verification, called "mining."[10] Mining, in the context of Bitcoin, involves the use of computer power to solve

4. *See generally* Nakamoto, *supra* note 1.

5. Kennedy, *supra* note 1. For the purposes of this note, the distributed ledger technology of Bitcoin will be illustrative of broader distributed ledger technologies, though different consensus methods and types of blockchain exist and are used.

6. The blockchain is a specific subset of distributed ledgers. Carla L. Reyes, *Cryptolaw for Distributed Ledger Technologies: A Jurisprudential Framework*, 58 JURIMETRICS J. 283, 285 (2018).

7. Peter Van Valkenburgh, *What is "Blockchain" Anyway?*, COIN CENTER (April 25, 2017), https://coincenter.org/entry/what-is-blockchain-anyway [https://perma.cc/6NXV-CKD3].

8. McKinney et al., *Smart Contracts, Blockchain, and the Next Frontier of Transactional Law*, 13 WASH. J. L. TECH. & ARTS 313, 318 (2018).

9. *Id.*

10. Keith Werbach & Nicolas Cornell, *Contracts Ex Machina*, 67 DUKE L.J. 313, 328 (2017) ("Bitcoin nodes repeatedly attempt to solve cryptographic hashing puzzles based on the transactions in a proposed new block on the blockchain . . . . The new block based on that solution is broadcast across the network. Other nodes, after checking for validity, add the new block to the blockchain.").

"complex mathematical problems to validate the block,"[11] which ensures the validity of the transaction. Once the peer-to-peer network reaches consensus, the block is linked to the existing blocks by including the history of the chain, which hinders mutation of earlier blocks, and distributed to the entire peer-to-peer network.[12] Though digital currency was the first use of the blockchain or any distributed ledger technology, blockchain technology has not been limited to the world of cryptocurrency.[13]

B. SMART CONTRACTS

Though competing definitions exist,[14] a smart contract can be simply defined as a digital agreement that self-executes without *ex post* enforcement. The idea of smart contracts, as self-executing electronic instruction, existed long before the creation of the blockchain and Bitcoin.[15] Nick Szabo, a computer scientist and cryptographer, first used the term in 1996 to describe the idea of using computer algorithms and cryptography to create automatically self-executing and self-enforcing contracts that integrated the traditional common law principles of contracts.[16] Szabo analogized a smart contract to a vending machine, an object that people interact within their everyday lives.[17] The vending machine performs a simplified version of a smart contract, as it self-executes the delivery of a product upon the insertion of coins by the user.[18] The vending machine performs the transaction while keeping the cost of breach smaller than the reward, limiting the amount of potential loss in the event of a breach.[19] Szabo used the vending machine analogy to demonstrate that a smart contract could encompass more complex forms of value and property, beyond a bag of chips, into fully automated

---

11. Carla L. Reyes, *Moving Beyond Bitcoin to an Endogenous Theory of Decentralized Ledger Technology Regulation: An Initial Proposal*, 61 VILL. L. REV. 191, 198 (2016).

12. *See* McKinney et al., *supra* note 8.

13. *See generally* Ronald L. Chichester, *Wide Open Spaces: How Blockchain Has Moved Beyond Currency*, 80 TEX. B.J. 288 (2017) (describing instances of blockchain use outside of cryptocurrency, including voting and marriages).

14. *See, e.g.*, McKinney et al., *supra* note 8, at 321 (defining a smart contract as "self-enforcing agreements that exchange promises or consideration between parties based on a transparent set of rules using predefined inputs"); Werbach & Cornell, *supra* note 10, at 319-20 (defining "a smart contract as an agreement in digital form that is self-executing and self enforcing"); Nick Szabo, *Smart Contracts: Building Blocks for Digital Markets* (1996), http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html [https://perma.cc/7D7D-MSSQ] (defining a smart contract as "a set of promises, specified in digital form, including protocols within which the parties perform on these promises"). Most definitions come to a consensus that smart contracts are inherently digital and self-executing agreements.

15. *See* Werbach & Cornell, *supra* note 10, at 323.

16. Szabo, *supra* note 14.

17. *Id.*

18. *Id.*

19. *Id.* (characterizing the prohibitively expensive breach in this example as breaking into the physical vending machine).

contracts, using computer algorithms and cryptography.[20]

E-commerce pre-dated some of these conceptions of the future of contracts by encoding processes of contract formation, acceptance, and performance with electronic data interchange (EDI) formats, which include the familiar processes of entering credit card information for online shopping.[21] The EDI contracts are "a primitive forerunner"[22] to smart contracts. EDI format contracts are not fully automated and still require human interaction, like "a user who clicks the hyperlink to read the terms of service" for a website.[23] The user also still has the opportunity to flexibly enforce the contract through EDI technology by disputing with the online entity through negotiation or litigation, like asking Amazon.com for a refund.[24] Szabo's ideal requires no human interaction for execution or enforcement.[25]

When Szabo first formally proposed the idea of smart contracts, the technology to fully realize and implement the idea of self-executing digital contracts did not exist, and it would not exist until the introduction of the blockchain. The computer code of a smart contract running on blockchain contains terms that specify the necessary obligations that must be fulfilled and the designated performance upon fulfillment of the specified obligations.[26] A basic smart contract consists of "if/then" statements translated into computer code, so if a condition is met pursuant to pre-specified rules, then execution is automatically triggered.[27] The performance can vary to many different activities, including transferring digital assets and deactivating a file.[28]

The blockchain allows for automation of the execution of the contract, with the contract embodied within the code of the blockchain, because it provides the decentralized security that the smart contracts of 1996 inherently lacked.[29] By distributing trust through the peer-to-peer network, unknown parties are willing to enter into self-executing and self-enforcing agreements, through the decentralization of the risk of breach of the contract.[30] The quick, coded execution and enforcement allow for cost reduction that is native to replacing human interference with automation.[31]

---

20. *Id.*
21. Werbach & Cornell, *supra* note 10, at 320-21.
22. Szabo, *supra* note 14.
23. Werbach & Cornell, *supra* note 10, at 321.
24. *Id.* at 349.
25. Werbach & Cornell, *supra* note 10, at 323.
26. Elizabeth Sara Ross, *Nobody Puts Blockchain in a Corner: The Disruptive Role of Blockchain Technology in the Financial Services Industry and Current Regulatory Issues*, 25 CATH. U.J.L. & TECH 353, 365 (2017).
27. McKinney et al., *supra* note 8, at 324.
28. Ross, *supra* note 26, at 365.
29. *See* Werbach & Cornell, *supra* note 10, at 324-25.
30. *See* McKinney et al., *supra* note 8, at 327-28.
31. Werbach & Cornell, *supra* note 10, at 335.

While Bitcoin's platform has limited room for growth beyond transactions of Bitcoin between users, some distributed ledgers, like Ethereum, allow for layering of coded information onto the underlying protocol, [32] leading to innovation beyond the basic technology set up above in distributed ledger technologies. This includes "enabl[ing] developers to create markets, store registries of debts and promises, [and] move funds in accordance with instructions given long in the past (like a will or a futures contract)."[33] With distributed ledgers like Ethereum, at its most basic form, any user can upload their smart contract onto the blockchain, and the contract is automatically executed once another user contributes a specified threshold amount to the contract.[34] Today, most smart contracts using Ethereum are limited to the "Ethereum sandbox," confining them to cryptocurrencies. This confinement is attributable to the fact that oracles, necessary middleware that connects the smart contracts to outside data for the performance of more complex financial transactions, are only in the process of development.[35]

The automatic performance of smart contracts based on blockchain technology inherently leads to the inflexibility of enforcement, as *ex ante* enforcement is unavailable. Because "smart contracts are built on the notion there will not be any modifications after contract finalization,"[36] parties to a smart contract will be faced with the inability to modify terms in the event of changed circumstances or to create flexible performance standards.[37]

Smart contracts, today, mostly consist of simple "If/then" codes, where if a condition is met, then the code will automatically execute the performance specified within the code.[38] Platforms, like Ethereum, may allow for the advancement of smart contracts past this simple stage into more advanced transactions of rights and obligations, with a greater possibility of use beyond self-help.[39] There is

---

32. *See* ETHEREUM, https://www.ethereum.org [https://perma.cc/L4M2-J6KQ] (last visited Mar. 22, 2019) ("Ethereum is a decentralized platform that runs smart contracts."). *See generally* Ethereum Foundation, *White Paper: A Next-Generation Smart Contract and Decentralized Application Platform*, GITHUB, https://github.com/ethereum/wiki/wiki/White-Paper [https://perma.cc/9S6K-SLZZ] (last visited Mar. 22, 2019) (providing an overview of Ethereum and its native cryptocurrency, Ether).

33. ETHEREUM, https://www.ethereum.org [https://perma.cc/L4M2-J6KQ] (last visited Mar. 22, 2019).

34. Jenny Cieplak & Simon Leefatt, *Smart Contracts: A Smart Way to Automate Performance*, 1 GEO. L. TECH. REV. 417, 422 (2017). "On the Ethereum blockchain, a smart contract consists of program code, a storage file, and an account balance." *Id.*

35. Brian P. Eha, *The Race to Connect Smart Contracts to the Real World*, AM. BANKER (Aug. 07, 2017, 2:27 PM), https://www.americanbanker.com/news/the-race-to-connect-smart-contracts-to-the-real-world [https://perma.cc/A7Z9-AFS9]. Multiple reliable data sources will be needed to fully connect smart contracts with outside data to complexify the area of smart contracts. *Id.* (quoting Patrick Murck, Senior Counsel at Cooley LLP, on how a smart contract of a sports bet based solely on data from ESPN could be extremely vulnerable to human error).

36. McKinney et al., *supra* note 8, at 329.

37. *See* Jeremy M. Sklaroff, *Smart Contracts and the Cost of Inflexibility*, 166 U. PA. L. REV. 263, 291-92 (2017).

38. McKinney et al., *supra* note 8, at 324.

39. Because Ethereum is Turing complete, a possibility of movement towards advanced contractual obligations exists using this platform. *See id.* at 334 n.32.

inherent skepticism of the ability of smart contracts to rise above the simple transactions used today,[40] based on the criticisms of the seeming failure of cryptocurrency to produce any real changes to the marketplace so far. However, constraining the conversation of regulation of smart contracts contradicts the history of prior unanticipated evolutions of technology. Smart contracts need not be executing multi-billion-dollar mergers to warrant examination of encroachment into areas of legal expertise through the lens of the regulations put into place by the legal profession. The purpose of regulation, the intersection of consumer protection and advancement in technology, can be found in small consumer-based transactions.

II. THE UNAUTHORIZED PRACTICE OF LAW AND LEGAL TECHNOLOGY

Firstly, the definitions of the practice of law are murky and vague, producing protectionist and monopolistic outcomes for the legal profession. Secondly, recent advances in legal technology, though cornering the low-specialization aspect of the market for legal services, have been targeted for violation of state laws prohibiting the unauthorized practice of law. Lastly, by applying the definition of the practice of law and these recent cases of unauthorized practice of law, the posture of the legal profession towards smart contracts has the potential for hostility.

A. DEFINING UNAUTHORIZED PRACTICE OF LAW

The *Model Rules of Professional Conduct* Rule 5.5 provides the basis for the unauthorized practice of law, that a person, including non-lawyers, shall not practice law without authorization according to the jurisdiction therein.[41] Accordingly, "a person not admitted to practice as a lawyer may not engage in the unauthorized practice of law, and a lawyer may not assist a person to do so."[42] The motivation behind the regulation of the unauthorized practice of law ("UPL") consists of a duality of protecting consumers and protecting the availability of legal resources.[43] A finding of unauthorized practice of law is "dependent on the definition of the practice of law."[44] Defining what activities constitute

40. *See* Stuart D. Levi & Alex B. Lipton, *An Introduction to Smart Contracts and Their Potential and Inherent Limitations*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 26, 2018), https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations/ [https://perma.cc/EB43-6FLW].

41. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5 (2016) [hereinafter MODEL RULES] ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.").

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

43. *See* AM. BAR ASS'N, REPORT OF THE TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, 2 (Aug. 2003), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/taskforce_rpt_803.pdf [https://perma.cc/CXS4-3LBQ] [hereinafter TASK FORCE REPORT]; Cristina L. Underwood, *Balancing Consumer Interests in a Digital Age: A New Approach to Regulating the Unauthorized Practice of Law*, 79 WASH. L. REV. 437, 439 (2004).

44. Brandon M. Meyers, *Addressing the Boundaries of the Legal Profession's Monopoly Through a Model Definition of the Practice of Law*, 40 J. LEGAL PROF. 321, 323 (2016).

the practice of law is a vague and imprecise exercise. Non-lawyers who engage in the practice of law may be subject to sanctions, which include fines, contempt, and conviction.[45]

The American Bar Association last attempted to unify the definition of the practice law through the states in 2002 by composing a Task Force on the Model Definition of the Practice of Law to create a model definition.[46] Critics of the proposed Model Definition included the government, as evidenced by a comment letter from the Federal Trade Commission and the Department of Justice, which advocated against the proposed model definition, as it was overly broad and would likely stymie competition from non-lawyers.[47] Specifically, the Federal Trade Commission and Department of Justice suggested that the definition could lead to states prohibiting "procompetitive conduct."[48] The Task Force abandoned creating a model definition, instead recommending states adopt their own definition.[49] Currently, states follow this recommendation, and some have established their own diverging definitions of the practice of law.[50] Thus, the proposed Model Definition failed to lead to any widespread adoption or any consensus.

Without a Model Definition or strong guidance from the ABA, states have developed different definitions on the practice of law,[51] leading to murky waters for non-lawyers, especially those in competing services like real estate and banking, to tread through. State definitions of the practice of law have even been characterized as embarrassing because of the lack of clarity provided through the definition and the judicial guidance accompanying the definition.[52] The Federal

---

45. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 4 cmt. a (2000).

46. TASK FORCE REPORT, *supra* note 43, at 2. The proposed Model Definition read:

> 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 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.

Definition of the Practice of Law Draft, Task Force on the Model Definition of the Practice of Law, A.B.A. (Aug. 18, 2002), https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition/ [https://perma.cc/Q3VC-JNNT].

47. *See* Federal Trade Commission & Department of Justice, Comment Letter on the Proposed Model Definition of the Practice of Law (Dec. 20, 2002), at 7, https://www.justice.gov/sites/default/files/atr/legacy/2008/03/26/200604.pdf [https://perma.cc/9SMH-Q4ZB].

48. *See id*. at 8.

49. Meyers, *supra* note 44, at 330.

50. *Id*.; *see* MODEL RULES R. 5.5 cmt. 2 ("The definition of the practice of law is established by law and varies from one jurisdiction to another.").

51. *See, e.g*., TEX. GOV'T CODE ANN.§ 81.101 (West 2018) (a broad definition with exclusionary safe harbors); Bd. of Overseers of the Bar v. Mangan, 763 A.2d 1189, 1193 (Me. 2001) (judicial interpretations of the practice of law with no broad definition).

52. David McGowan, *Two Ironies of UPL Laws*, 20 CHAP. L. REV. 225, 225 (2017).

Trade Commission and Department of Justice have issued similar comment letters to various states on proposed definitions with similar concerns of the broad language that will stymie competition in the proposed definitions.[53] The spectrum of definitions for the practice of law ranges from practically non-existent[54] to definitions that expand from a core activity with judicial interpretation[55] to exclusion definitions that create safe harbor activities.[56] Generally, representing another individual in court, preparing documents that alter a person's legal rights, giving advice and rendering services using legal skills or knowledge are considered to be actions that constitute the practice of law and would be violative of unauthorized practice of law if conducted by a non-lawyer.[57] Certain states include the preparation of legal instruments and contracts that secure or alter an individual's legal rights and obligations in their definitions of the practice of law.[58] Overall, the state definitions of the practice of law are vague and diverge between states, which has led to differing adjudication of persons engaging in the unauthorized practice of law throughout the country.

B. RECENT UPL RESPONSES TO LEGAL TECHNOLOGY

Modern enforcement of the unauthorized practice of law is primarily focused on "when a computer encroaches on the lawyers' monopoly and practices law."[59] As technology enters the legal profession, "[m]any of these new tools [of legal technology] help individuals address legal needs in seemingly straightforward areas of law such as family and landlord-tenant law."[60] The unauthorized practice of law cases surrounding the software of Parsons Technology and LegalZoom, which both use technology to remove the lawyer intermediary from simple legal issues for clients, provide a framework for the likelihood of enforcement of the

---

53. *See, e.g.*, Federal Trade Commission & Department of Justice, Comment Letter on the Supreme Court of Hawaii's Proposed Definition of the Practice of Law (Jan. 28, 2008), https://www.justice.gov/atr/comments-proposed-definition-practice-law [https://perma.cc/U5CN-C248] (responding to the Supreme Court of Hawaii's proposed definition of the practice of law).

54. *See Mangan*, 763 A.2d at 1193 ("The Maine Bar Rules do not explicitly state what constitutes the 'practice of law,' nor have we ever defined what constitutes the 'practice of law.'"); State *ex rel*. The Florida Bar v. Sperry, 140 So.2d 587, 591 (Fla. 1962) (refusing to provide a broad definition of the practice of law), *vacated on other grounds by* Sperry v. State of Fla. ex rel. Florida Bar, 373 U.S. 379 (1963).

55. *See* Servidone Const. Corp. v. St. Paul Fire & Marine Ins. Co., 911 F. Supp. 560, 565-66 (N.D.N.Y. 1995); People *ex rel*. Lawyers' Inst. of San Diego v. Merch. Protective Corp., 209 P. 363, 365 (Ca. 1922) (providing a judicially created definition of the practice of law).

56. ARIZ. REV. STAT. ANN. SUP. CT. R. 31 (a broad categorical definition with specific situational exclusions); TEX. GOV'T CODE ANN.§ 81.101 (West 2018) (a broad definition with exclusionary safe harbors).

57. *See, e.g.*, TEX. GOV'T CODE ANN.§ 81.101 (West 2018).

58. *E.g.*, TEX. GOV'T CODE ANN. § 81.101 (West 2018) (including preparing a will, contract, or other instrument"); *Merch. Protective Corp*., 209 P. at 365 (including "the preparation of legal instruments and contracts by which legal rights are secured").

59. Matthew T. Ciulla, *Mapping LegalZoom's Disruptive Innovation*, 11 J. BUS., ENTREPRENEURSHIP & L. 53, 62 (2018).

60. Tanina Rostain, *Robots Versus Lawyers: A User-Centered Approach*, 30 GEO. J.L. ETHICS 559, 570 (2017).

unauthorized practice of law against the coders of smart contracts. First, the claims against Parsons Technology exemplify the reluctance of the legal profession to adopt technology or permit non-lawyers to advance legal technology in the application of the unauthorized practice of law. Second, the claims against LegalZoom similarly further this progression, highlighting the extreme reluctance of the legal profession to allow incursion of technology into traditional legal models.

1. PARSONS TECHNOLOGY

Parsons Technology is a company that sells products, including Quicken Family Lawyer and Quicken WillMaker, which are software products that use decision-tree technology, aimed at providing legal document services to consumers.[61] The Texas Unauthorized Practice of Law Committee challenged the Quicken Family Lawyer product for engaging in the unlawful practice of law under the Texas definition of the practice of law in *Unauthorized Practice of Law Commission v. Parsons Technology, Inc.* (*Parsons I*).[62] The court held that the software was engaging in the unauthorized practice of law.[63] The software interacted with the client in such a way that it effectively gave advice, especially as it recommended documents to the client.[64] The Texas legislature amended the Texas Unauthorized practice of law to exclude selling "computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney."[65] In *Unauthorized Practice of Law Commission v. Parsons Tech., Inc.* (*Parsons II*), the Fifth Circuit Court of Appeals vacated and remanded the Northern District Court of Texas' ruling due to the amendment by the Texas Legislature.[66] The Parsons Technology cases show how a grey area in the definition of the practice of law, in this case with interactive software, can be filled with a clear definition established by the legislature, precluding the need for judicial intervention.

2. LEGALZOOM

LegalZoom, Inc. was created in 2001 as an online legal technology platform to expand access to legal services to consumers and business entities through the drafting of documents without a lawyer.[67] LegalZoom's business model is based

---

61. *See* Steve French, *When Public Policies Collide: Legal "Self-Help" Software and the Unauthorized Practice of Law*, 27 RUTGERS COMPUTER & TECH. L.J. 93, 118 (2001); Underwood, *supra* note 43, at 455.

62. Unauthorized Practice of Law Comm'n v. Parsons Tech., Inc., No. 3:97-CV-2859-H, 1999 WL 47235, at *2 (N.D. Tex., Jan. 22, 1999).

63. *Id.* at *6.

64. *Id.*

65. H.B. 1507, 76th Leg., Reg. Sess. (Tex. 1999).

66. Unauthorized Practice of Law Comm'n v. Parsons Tech., Inc., 179 F.3d 956, 956 (5th Cir. 1999).

67. *About Us*, LEGALZOOM, https://www.legalzoom.com/about-us [https://perma.cc/5F4G-94AY] (last visited Dec. 22, 2018).

on the idea of bringing simple legal solutions, particularly simple legal forms that can be pre-filled, for consumers and business entities.[68] The website of LegalZoom presents options for business formation, wills and trusts, and intellectual property services with the quote that "[they] started a movement to make legal help available to all."[69] Functionally, the consumer uses the services by buying documents to service one of the offered legal needs, inputting their information into a prepared online questionnaire, and receiving the completed legal document.[70] Employees of LegalZoom only review the inputs by the consumer for spelling, consistency, and completeness.[71]

Claims of the violation of states' Unauthorized practice of law against LegalZoom plagued the growth and expansion of the company.[72] The About Us page of the LegalZoom website even contains a section about "How We Fight the Fight," which describes how LegalZoom has fought and succeeded against investigations launched against the company.[73] The question of whether the pre-filing of these legal documents by LegalZoom's technology constitutes the unauthorized practice of law is so ingrained into the identity of the company as a disruptor of the legal industry that it has become a permanent aspect of their marketing. Lawsuits in eight states were brought against LegalZoom for violation of state laws prohibiting the unauthorized practice of law.[74] States took varying approaches to the problem presented by LegalZoom: South Carolina ruled LegalZoom did not engage in unauthorized practice of law,[75] Missouri ruled that LegalZoom did engage in the unauthorized practice of law,[76] and more states declined to rule, including North Carolina.[77] Simply stated, states decided whether LegalZoom was a form provider or a form preparer.

In Missouri, a class action was brought against LegalZoom in the Western District Court of Missouri for the unlawful practice of law under Missouri state law.[78] In *Janson v. LegalZoom.com, Inc.*, the court created a distinction in LegalZoom's conduct between delivering blank legal forms to the consumer and

---

68. *See* Isaac Figueras, *The LegalZoom Identity Crisis: Legal Form Provider or Lawyer in Sheep's Clothing?*, 63 CASE W.L. REV. 1419, 1422–23 (2013).

69. LEGALZOOM, https://www.legalzoom.com/ [https://perma.cc/C4D3-QKJD] (last visited Dec. 22, 2018).

70. *See* Figueras, *supra* note 68, at 1423, 1425.

71. *See* Janson v. LegalZoom.com, Inc., 802 F.Supp.2d 1053, 1056 (W.D. Mo. 2011).

72. Robert Ambrogi, *Latest Legal Victory Has LegalZoom Poised for Growth*, A.B.A. J. (Aug. 2014), http://www.abajournal.com/magazine/article/latest_legal_victory_has_legalzoom_poised_for_growth [https://perma.cc/Y3J7-TY3X].

73. *About Us*, LEGALZOOM, https://www.legalzoom.com/about-us5 (last visited Dec. 22, 2018).

74. Ambrogi, *supra* note 72.

75. Terry Carter, *LegalZoom Business Model OK'd by South Carolina Supreme Court*, A.B.A. J. (Apr. 25, 2014 10:20 PM), http://www.abajournal.com/news/article/LegalZoom_business_model_okd_by_south_carolina_supreme_court/ [https://perma.cc/HHZ7-3KEM].

76. *Janson*, 802 F. Supp. 2d at 1065.

77. LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 1511, 2014 WL 1213242, at *10 (N.C. Super. Ct. Mar. 24, 2014).

78. *Janson*, 802 F. Supp. 2d at 1057.

preparing final forms for the consumer,[79] as the Missouri definition of the practice of law includes the "drawing of papers, pleadings, or documents."[80] The court believed that no significant distinction existed between a lawyer asking clients questions to prepare a document and LegalZoom's services.[81]

One of the earliest efforts by a state bar to enjoin LegalZoom's services in their state on the basis of the unauthorized practice of law is the North Carolina State Bar's effort.[82] The practice of law in North Carolina is defined as "performing any legal services for any other person, firm or corporation . . . ."[83] North Carolina State Bar sent LegalZoom a cease and desist letter, requesting LegalZoom to end preparation of legal documents in North Carolina, as the State Bar argued that LegalZoom provided advice through the generation of completed legal forms using answers to an abstract questionnaire.[84] In *LegalZoom.com, Inc. v. North Carolina State Bar* (*LegalZoom I*), the Superior Court of North Carolina Business Court ruled that North Carolina had the authority to regulate LegalZoom under the unauthorized practice of law after LegalZoom brought a claim for injunctive and declaratory relief.[85] After the State Bar sued to enjoin LegalZoom and LegalZoom filed an antitrust suit in federal court for injunctive relief and monetary damages in *LegalZoom.com, Inc. v. North Carolina State Bar* (*LegalZoom II*), the two parties reached a consent agreement that dismissed all suits and agreed that LegalZoom's practices were not unauthorized practice of law, but LegalZoom would need attorneys to review the prepared forms and include disclosures.[86] The North Carolina State Bar and LegalZoom left defining the practice of law as it pertains to LegalZoom to the North Carolina legislature, which passed legislation that did not include LegalZoom's practices in the unauthorized practice of law.[87]

State bars will begin to show reluctance to pursue new claims against LegalZoom, with the theory that the state bars have chosen to do so because of the specialization of LegalZoom to services that law firms would charge minimal

---

79. *See id*. at 1063.

80. MO. REV. STAT. § 484.010(1) (2018).

81. *Janson*, 802 F. Supp. 2d at 1065.

82. *See* Ciulla, *supra* note 59, at 70; Figueras, *supra* note 68, at 1431. *See generally* Caroline E. Brown, *LegalZoom: Closing the Justice Gap or Unauthorized Practice of Law?*, 17 N.C. J.L. & TECH. ON. 219, 233-39 (May 2016).

83. N.C. GEN. STAT. § 84-2.1 (2018).

84. Letter of Caution to Mr. Charles E. Rampenthal, The North Carolina State Bar Authorized Practice Committee (May 5, 2008), http://www.directlaw.com/LegalZoom%2020080326%20LOC.pdf [https://perma.cc/2JNL-T8G7].

85. LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 1511, 2014 WL 1213242, at *10 (N.C. Super. Ct. Mar. 24, 2014).

86. LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 15111, 2015 WL 6441853, at *1-2 (N.C. Super. Ct. Oct. 22, 2015); *see also* Brown, *supra* note 82, at 238 ("Both parties also agreed to waive the entry of findings of fact and conclusions of law and decided to settle all suits.").

87. LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 15111, 2015 WL 6441853, at *1 (N.C. Super. Ct. Oct. 22, 2015); H.B. 436, 2015-2016 Gen. Assemb., Reg. Sess. (N.C. 2015).

fees to complete.[88] Services, like the incorporation of a small business and the formation of a will that are worth a very small amount, present a niche that the legal profession has begun to view as non-encroaching into the profession's monopoly. This is also evident because the main use of LegalZoom is for *pro se* representation.[89] The niche filled by LegalZoom, while threatening at first to the legal profession, as shown by the concerted efforts by state bars throughout the country, mounts no upheaval to the traditional structure to warrant continued action.

C. APPLICATION OF UNAUTHORIZED PRACTICE OF LAW TO SMART CONTRACTS

A similar battle to the legal fights over technology, like Parsons Technology and LegalZoom, seems to be on the horizon for smart contracts, as they advance into working with more complex transactions, implicating legal rights of individuals and entities.

While no investigations or enforcement proceedings have been brought against coders of smart contracts for violation of the state laws prohibiting the unauthorized practice of law, the trajectory of smart contracts towards encroachment into the legal profession seems ripe for a closer look into whether the coding and execution of smart contracts do indeed constitute the unauthorized practice of law. This is especially true as states like Tennessee[90] and Arizona[91] recently passed legislation recognizing the validity of smart contracts as contracts.[92]

As stated previously, many states include preparation of contracts that secure legal rights or obligations of individuals in their definitions of the practice of law.[93] These definitions of the practice of law pose the greatest threat to the coding and distribution of smart contracts by non-lawyers, as smart contracts are incredibly inflexible and base their ingenuity on the fixing of obligations on parties to enable trust in a peer-to-peer transaction with unknown parties. Almost by definition, for smart contracts to function as common law contracts, legal rights must be secured in the performance of the smart contract.

Even if the state does not include preparation of contracts in their definition of the practice of law, other issues may present themselves. Analyzing through the

88. Ciulla, *supra* note 59, at 71 (explaining that though there are current claims against LegalZoom, state bars will tire in the future of bringing claims against LegalZoom as LegalZoom usually prevails).

89. *Cf.* Figueras, *supra* note 68, at 1423.

90. *See* S.B. 1662, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018) (passed on March 22, 2018).

91. *See* H.B. 2417, 53rd Legislature, 1st Reg. Sess. (Ariz. 2017) (passed March 29, 2017).

92. The potential for chaos is great as states begin to step into the world of smart contracts, which is evident through the emerging differences in legislation already seen in the legislation of Tennessee and Arizona. *See* Mike Orcutt, *States that are Passing Laws to Govern "Smart Contracts" Have No Idea What They are Doing*, MIT TECHNOLOGY REVIEW (Mar. 29, 2018), https://www.technologyreview.com/s/610718/states-that-are-passing-laws-to-govern-smart-contracts-have-no-idea-what-theyre-doing/ [https://perma.cc/6S7Z-REZL].

93. *See supra* Part II.A.

litigation against LegalZoom,[94] smart contracts, as they are now, present the question of whether the simple code is in effect blank forms given to the consumer by the coder or prepared by the coder using legal judgment. Smart contracts, without the input of consideration from the user, function metaphorically as a blank form, anticipating the transfer of value. Until the conditions of the smart contracts are met after the user places currency into the contract, the smart contract secures no legal rights,[95] similar to the LegalZoom forms before input from the consumer.

Though smart contracts do not pose exactly the same problems ethically as LegalZoom or Parsons Technology, smart contracts intrinsically pose the same threat to the monopoly of the legal profession, which may be attempted to be stymied through claims of violation of state laws prohibiting the unauthorized practice of law. No matter if the state's definition of the practice of law includes contracts or the simple smart contracts are prepared using legal judgment, the unauthorized practice of law will likely be construed by potential plaintiffs and state bars to create an issue if smart contracts begin to encroach into traditional legal services. Smart contracts will likely be in violation of state laws prohibiting the unauthorized practice of law, especially in states with stringent protection of the practice of law, as smart contracts function as a contract[96] through its means of securing legal rights through self-execution and self-enforcement.

III. SOLUTIONS AND RECOMMENDATIONS

While smart contracts do not offer the same benefits of increasing access to justice, as most current users are generally more sophisticated than the users of LegalZoom and Parsons Technology software, smart contracts still present the opportunity to move ordinary transactions between sophisticated users, and hopefully eventually unsophisticated users, away from the purview and costs associated with legal intermediaries. First, there should be effort nationally by the ABA and state bar associations, as representatives of the legal profession, to proactively clarify the ethical bounds of smart contracts as they relate to the unauthorized practice of law, without resorting to vague, monopoly-producing definitions. Second, the legal profession should spearhead efforts to develop smart contract technology to ensure consumers are protected from unlawful legal advice and service, while keeping the profession on the cutting edge of the development of technology related to legal services.

---

94. *See supra* Part II.B.2.

95. *Cf.* Werbach & Cornell, *supra* note 10, at 334 (describing how the conditions of the smart contract must be met for the transferring of funds).

96. This outcome is based on the assumption that smart contracts are functionally contracts, as some states have begun to recognize. *See* S.B. 1662, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018); H.B. 2417, 53rd Legislature, 1st Reg. Sess. (Ariz. 2017). *But see* Reggie O'Shields, *Smart Contracts: Legal Agreements for the Blockchain*, 21 N.C. BANKING INST. 177, 178 (Mar. 2017) ("Not everyone thinks they are realistic, and have suggested that smart contracts are neither smart, nor true contracts.").

A. LET US BE CLEAR HERE

For the legal profession and advocates for the advancement of smart contracts, a clear definition of whether, or at what point, smart contracts constitute the unauthorized practice of law when coded or distributed by non-lawyers, is necessary. By abandoning vague definitions in favor of an actual answer on the topic of smart contracts, the costs of litigation, endless speculation, and unnecessary legal opinions can be avoided, especially in states that leave interpretation to the state courts. Clearly defining the limits of the practice of law, either through legislation or through opinions of state bars and state courts, leads to benefits for both sides. This is evident in North Carolina legislation that followed the LegalZoom case,[97] as the clear proclamation from the North Carolina legislature that LegalZoom was not engaged in the practice of law allowed LegalZoom to understand the risks and the North Carolina State Bar to understand its purview. With a growing discussion of smart contracts in the law, the trajectory is foreseeable. A proactive approach in defining the practice of law will push costs forward and onto the profession, which receives much of the benefit of the state laws prohibiting the unauthorized practice of law, and away from consumers and innovators.

Reforms to the definitions of the practice of law have been advocated for decades.[98] Now that the legal profession is faced with embracing or alienating advancements, a renewed vigor from members of the profession and outsiders should pressure the regulators to remove the grey area around coding, using, and distributing smart contracts. Instead of holding smart contracts in limbo with vague definitions of the practice of law, like Parsons Technology found themselves with Texas' definition, preemptively choosing to hold smart contracts outside the purview of state laws prohibiting the unauthorized practice of law will foster growth in the field and advancements in legal services in response. Companies will see the decreased risk associated with smart contracts, and by knowing they will not become another LegalZoom, companies will be more willing to invest in the technology.[99]

Those who advocate for a broader definition of the practice of law that would encompass coding and distribution of smart contracts rely on arguments of consumer protection.[100] The purpose of regulation of the unauthorized practice of

97. H.B. 436, 2015-2016 Gen. Assemb., Reg. Sess. (N.C. 2015). The legislation came after years of litigation between LegalZoom and the North Carolina State Bar. *See* Part II.B.2.

98. *See* Underwood, *supra* note 43, at 459-61 (advocating for a comprehensive test for what constitutes unauthorized practice of law that does not include interactive legal technology as violative).

99. Today, companies and individuals are advised to seek counsel in drafting smart contracts, which is evidence of the increased risk of developing smart contracts. *See* John R. Storino, et al., *Decrypting the Ethical Implications of Blockchain Technology*, LEGALTECH NEWS ONLINE (Nov. 13, 2017), https://jenner.com/system/assets/publications/17556/original/Storino%20Steffen%20Gordon%20LegalTech%20Nov%2013%202017.pdf [https://perma.cc/D2YP-PREU] (noting the need to seek counsel on whether the use of smart contracts constitutes the unauthorized practice of law).

100. *See* Soha F. Turfler, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach to Defining the Practice of Law*, 61 WASH. & LEE L.R. 1903, 1916–17 (2004). Though, there is an

law is based on ideas of consumer protection, as the profession has a valid interest in protecting consumers from non-lawyers giving legal advice.[101] This argument fails to account that smart contracts do not lead the same level of consumer protection as other legal activities, such as real contract drafting or even LegalZoom, or as other blockchain products, such as BitCoin. LegalZoom's reach is primarily because of the simplicity of its online services compared to using a legal intermediary. Bitcoin, which suffered from instances of fraud against consumers and is frequently pointed to as a reason for increased consumer protection regulation,[102] was able to have mass reach to unsophisticated users because of platforms like Coinbase[103] or RobinHood[104] that condensed BitCoin and other cryptocurrency trading into a platform analogous to stock trading. Even with the options trading use of smart contracts, which may have the ability to be more accessible to unsophisticated users, regulation will come from the regulation of options themselves through the CFTC,[105] which precludes any need for state bars and state courts to regulate through the unauthorized practice of law. This is especially true as conflicting state definitions and regulations surrounding the unauthorized practice of law lead to vague and unclear interpretations, leaving consumers vulnerable. Instead of regulation as usual by state courts and state bars, proactively setting forth a definition of the practice of law that defines the limitations regarding smart contracts, preferably allowing wide room for growth, will adequately protect the users of smart contracts, especially as the contracts advance past this simple stage.

B. TAKING ON SMART CONTRACTS

As explained above in Part II, it is unlikely that smart contracts will avoid the efforts of state bar associations to bring them under the umbrella of the monopoly of the legal profession through the unauthorized practice of law. The solution to

---

argument that the public does not want this "protection." *See* Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of Legal and Ethical Parameters*, 67 FORDHAM L.R. 2581, 2595-96 (1999) (noting the pushback from a public referendum in Arizona and criticism for groups like the American Association for Retired Persons).

101. Underwood, *supra* note 43, at 439–40.

102. *See* Fred Imbert, *Fed Chairman Powell Says Cryptocurrencies Present Big Risks to Investors*, CNBC (Jul. 18, 2018), https://www.cnbc.com/2018/07/18/fed-chairman-rips-into-cryptocurrencies-cites-big-risk-to-investors.html [https://perma.cc/BDB3-73U3] (Chairman Powell told Congress, "relatively unsophisticated investors see the asset go up in price, and they think: 'This is great; I'll buy this.' In fact, there is no promise of that.").

103. *See* COINBASE, https://www.coinbase.com/ [https://perma.cc/G34G-UM8Y] (last visited Dec. 22, 2018).

104. *See* ROBINHOOD MARKETS, INC., https://robinhood.com/ [https://perma.cc/G3VK-VFGD] (last visited Dec. 22, 2018). RobinHood incorporates cryptocurrency trading with investing in stocks, options, and exchange-traded funds (ETFs). *Id.*

105. *See* Anthony R.G. Nolan, *Commissioner Brian Quintenz Comments on the Liability of Smart Contract Developers for Uses in Violation of CFTC Regulations*, NATIONAL LAW REVIEW (Oct. 22, 2018), https://www.natlawreview.com/article/commissioner-brian-quintenz-comments-liability-smart-contract-developers-uses [https://perma.cc/T2CG-RQPP].

this path is for the legal profession to adopt the technology of smart contracts quickly and adeptly, while working with non-lawyer smart contract engineers to produce the best and cheapest results for consumers. It is not imperative that lawyers be involved in the coding of all smart contracts; rather, "it's vital that lawyers get involved in advising on how smart contract logic is coded"[106] by being involved in the process with engineers. Instead of alienating advancements in legal technology that provide services at a low cost to consumers, the legal profession should embrace technology, especially smart contracts, to provide cheaper and better legal services for consumers.

Keeping abreast of changes in technology is a key component of the duties of lawyers in providing competent representation under *Model Rule* 1.1.[107] Comment 8 for Rule 1.1 recommends lawyers to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[108] As clients demand smart contracts, it is within the duties of a lawyer to either chose not to offer that service or competently offer it. This shows how a monopolistic approach to the adoption of smart contracts by the legal profession will drive clients away from the profession. The other effect will be that clients will then choose to resort to less consumer protection-oriented offerors if the legal profession will not offer a safe and reliable option, which will have the opposite of the intended effect of monopolizing smart contracts without the aid of non-lawyer experts. Because protecting the public is best achieved "[b]y focusing attention on whether the provider is competent to deliver a service,"[109] embracing smart contracts and the changes they will bring to providing legal services will ensure clients receive the best representation.

There is also increasing evidence of the legal profession beginning to embrace technology, as law schools throughout the country are offering classes on the intersection of law and technology.[110] Coding may even become an integral aspect of the law school curriculum, as evidence of adoption can be found throughout top law schools.[111] The skills necessary for being involved in the development and distribution, maybe even coding, of smart contracts are now being taught to the future of the legal profession. These new lawyers will want to use these skills. The opportunity to provide these services by aiding non-lawyer smart contract engineers will appease the monopolists and the advocates for access to the technology for consumers by non-lawyers.

---

106. Kennedy, *supra* note 1, at 58.

107. MODEL RULES R. 1.1.

108. MODEL RULES R. 1.1 cmt. 8.

109. Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L.R. 49, 89 (2015).

110. *See* Eli Zimmerman, *Why More Law Schools Are Prioritizing Technology Integration*, EDTECH MAGAZINE, https://edtechmagazine.com/higher/article/2018/08/why-more-law-schools-are-prioritizing-technology-integration [https://perma.cc/PEB3-D8B8] (last visited Mar. 22, 2019).

111. *See* Jason Krause, *Does Learning to Code Make You a Better Lawyer?*, A.B.A. J. (Sept. 2016), http://www.abajournal.com/magazine/article/lawyer_learning_code_zvenyach_ohm/ [https://perma.cc/G6E7-YPNM] (noting the introduction of a coding class at Georgetown University Law Center).

CONCLUSION

Overall, "smart contracts create new opportunities for people to interact, while reducing the need for intermediaries and the costs of transactions."[112] In this age with decreasing access to justice, the ability to use the technology of smart contracts to create new and efficient benefits, without resorting to using a lawyer for every transaction, presents the opportunity to change our society. For these reasons, the benefits of smart contracts outweigh the potential costs of having non-lawyers code and distribute smart contracts. Smart contracts should accordingly not be viewed in violation of state laws on the unauthorized practice of law. As the legal profession will work to protect its monopoly against smart contracts once they grow to encroach into the traditional legal services, a clear definition on whether smart contracts do constitute the practice of law and the uptake of innovation in the field of smart contracts by law firms and practitioners will ensure the advancement of technology without inefficient costs or unnecessary prohibitions.

112. Adam J. Kolber, *Not-So-Smart Blockchain Contracts and Artificial Responsibility*, 21 STAN. TECH. L. REV. 198, 227 (2018).