I. INTRODUCTION

In 2005, the Legal Services Corporation reported that at least eighty percent of lower-income Americans' legal needs are not being fulfilled. Many authors have assigned the lack of affordable options for legal services to regulations on the practice of law. These authors have explained that regulations on the practice of law increase the price of legal services because such regulations limit the number of individuals authorized to furnish legal services. Given that a significant number of lower-income Americans cannot afford to obtain legal services from an attorney, nonlawyers have marketed various self-help estate-planning instruments as a less expensive alternative to hiring an attorney for estate-planning services. These self-help es-
tate-planning instruments include interactive estate-planning computer software and pre-printed fill-in-the-blank estate-planning documents.\textsuperscript{5} However, one court noted that these self-help estate-planning instruments have injured consumers because such instruments are not tailored specifically to each individual consumer.\textsuperscript{6} For example, in reviewing the terms of a self-help estate-planning instrument executed by Mr. and Mrs. Garwood, the Supreme Court of Wyoming noted that the “Garwoods had the misfortune to fall victim to an itinerate hawker of fill-in-the-blank, one-size-fits-all, trust forms. The materials were ill-suited to the Garwoods’ needs and have served to squander a significant portion of their hard-earned life savings on legal proceedings and attorney’s fees.”\textsuperscript{7} Although many jurisdictions have employed various methods to prevent nonlawyers from engaging in the practice of law, the recent trend of do-it-yourself estate planning has yielded many out-of-court instances of the unauthorized practice of law.\textsuperscript{8}

This Article proceeds in three sections.\textsuperscript{9} First, this Article’s Background explores regulations on the practice law and the unauthorized practice of law.\textsuperscript{10} The Background includes an overview of the American Bar Association’s involvement in the regulation of nonlawyers en-

\textsuperscript{5} See Cynthia L. Fountaine, When is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment, 71 U. CIN. L. Rev. 147, 147 (2002) (discussing that “interactive legal software products can interview the user and produce documents tailored to fit the user’s situation.”); Catherine L. Lancot, Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law, 30 Hofstra L. Rev. 811, 814 (2002) (describing a legal service in which the service provides “blank forms, with instructions, that enables consumers to prepare their own legal documents”).

\textsuperscript{6} See Garwood v. Garwood, 194 P.3d 319, 327 (Wyo. 2008) (stating the “Garwoods had the misfortune to fall victim to an itinerate hawker of 'fill-in-the-blank,' 'one-size-fits-all,' trust forms. The materials were ill-suited to the Garwoods’ needs and have served to squander a significant portion of their hard-earned life savings on legal proceedings and attorney’s fees”).

\textsuperscript{7} Garwood, 194 P.3d at 327.

\textsuperscript{8} See infra notes 20-230 and accompanying text.

\textsuperscript{9} See infra notes 20-379 and accompanying text.

\textsuperscript{10} See infra notes 20-179 and accompanying text.
gaging in the practice of law. Additionally, the Background examines the practice of law, including an overview of various jurisdictions’ methods of regulating the practice of law and regulatory systems from Nebraska, Illinois, and Arizona. The Background concludes by examining issues of unauthorized practice of law created by the modern trend of do-it-yourself estate planning. Next, this Article’s Argument asserts that many of the current approaches to regulating the practice of law do not adequately address issues of unauthorized practice of law surrounding nonlawyer involvement in estate-planning activities. This Argument then elucidates three reasons why jurisdictions should embrace, rather than resist, nonlawyers selling estate-planning instruments by assigning state bar associations the task of establishing and managing a certification system for nonlawyers providing such instruments. First, the Argument opines that states need to assign state bar associations the task of establishing and managing a certification system because the current methods employed to regulate the practice of law do not sufficiently protect consumers from potentially incompetent nonlawyer-provided estate-planning services. Second, the Argument provides that states need to assign state bar associations the task of establishing and managing a certification system because nonlawyer-provided estate-planning services would increase access to the justice system. Third, the Argument opines that states need to assign state bar associations the task of establishing and managing a certification system so that certified nonlawyers are held responsible for their estate-planning services. Finally, this Article concludes that states need to assign state bar associations the task of establishing and managing a certification system to vindicate the purported justifications for regulating the practice of law.

11. See infra notes 20-133 and accompanying text.
12. See infra notes 118-79 and accompanying text.
13. See infra notes 180-230 and accompanying text.
14. See infra notes 231-318 and accompanying text.
15. See infra notes 320-65 and accompanying text.
16. See infra notes 320-36 and accompanying text.
17. See infra notes 337-53 and accompanying text.
18. See infra notes 354-65 and accompanying text.
19. See infra notes 366-79 and accompanying text.
II. BACKGROUND

A. THE PRACTICE OF LAW AND THE UNAUTHORIZED PRACTICE OF LAW IN GENERAL

Generally, the authority to practice law is conferred only to licensed individuals. The licensing system for lawyers is the method by which an applicant becomes entitled to engage in the practice of law. State bar associations establish licensing requirements to ensure that lawyers practicing within the state's jurisdiction have the character and ability required for the proficient and effective practice of law. As part of the licensing system, state bar associations and courts have regulated lawyers through admission requirements and post-admission disciplinary actions.

Lawyer admission requirements have generally included minimum levels of education, requiring degrees from an undergraduate college or university and law school. Additionally, most jurisdictions require that an applicant pass a written examination designed to establish a minimum level of lawyer competence. Furthermore, an applicant's character is subjected to review so as to ensure that the applicant will not use the newly acquired position of power toward unlawful or unethical ends. If the applicant is granted the license to practice law, the lawyer is then subjected to standards of care and rules of professional conduct. Consequently, an incompetent or unethical lawyer is then subjected to disciplinary actions.

However, the law regulating nonlawyer engagement in the practice of law is unsettled in many jurisdictions because nonlawyers are

20. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 849 (1986) [hereinafter WOLFRAM, ETHICS].
21. Id.
22. Id.
23. Id. at 21, 850.
24. Id. at 849.
25. Id. at 198. Furthermore, some jurisdictions require that lawyers complete a certain number of hours of legal education each year. See, e.g., Neb. Ct. R. § 3-401.4 (requiring all active Nebraska attorneys to complete "a minimum of ten (10) hours of accredited or approved CLE in each annual reporting period. Of the ten (10) hours, at least two (2) hours shall be in the area of professional responsibility.").
26. Id. at 856; see, e.g., ABA Model Rules of Prof'l Conduct R. 1.1 (2009) [hereinafter Model Rules] (providing that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").
27. Sande L. Buhai, Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law, 2007 UTAH L. REV. 87, 92-93 (2007); ABA Model Rules of Prof'l Conduct R. 8.5 (2002) ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction").
28. Pamela A. McManus, Have Law License; Will Travel, 15 GEO. J. LEGAL ETHICS 527, 532 (2002).
often not subject to the same standards and rules as lawyers. Nevertheless, courts in several jurisdictions have maintained that such courts hold an inherent authority to regulate both the practice of law and the unauthorized practice of law. However, notwithstanding the broad prohibitions against nonlawyers engaging in the practice of law, nonlawyers have consistently engaged in the practice of law.

In response to concern regarding nonlawyer engagement in the practice of law, the American Bar Association created the Commission on Nonlawyer Practice ("the Commission"). The Commission commenced a national investigation into nonlawyer activity and its effect on the public. In 1995, based on the information obtained during the national investigation, the Commission issued a report that restated the information gathered during the investigation and offered recommendations on how states should address problems arising from nonlawyer involvement in legal-related activities.

In 2003, the American Bar Association's Task Force on the Model Definition of the Practice of Law ("Task Force") provided a framework for defining the practice of law and recommended that every jurisdiction establish a definition for the practice of law. The Task Force stated that each state's judicial branch of government should abolish the traditional case-by-case approach to the practice of law analysis and adopt a formal definition and a regulatory scheme that fosters consumer protection, access to justice, and accountability.

1. Consumer Protection

To protect consumers from the harms attendant to nonlawyer involvement in the practice of law, jurisdictions have restricted those who may engage in the practice of law to individuals possessing the
character and ability required for the proficient practice of law.\textsuperscript{37} Testimony given during the American Bar Association Commission on Nonlawyer Practice's ("the Commission") national investigation into nonlawyer involvement in legal-related situations revealed cases in which legal-related services performed by nonlawyers appeared incompetent or sometimes fraudulent.\textsuperscript{38} In some of these cases, nonlawyers preparing legal documents crossed the line between a mere scrivener and the unauthorized practice of law because the nonlawyer offered legal advice.\textsuperscript{39} Nonlawyers who furnish legal advice may lack the understanding or training to correctly interpret basic legal issues.\textsuperscript{40} Consequently, the Commission determined that some nonlawyers have placed consumers at risk by furnishing erroneous information because such information might cause a consumer to forego legal rights.\textsuperscript{41}

2. Access to the Justice System

Other authors have noted that protecting the public from nonlawyer engagement in the practice of law created problems in accessing the justice system.\textsuperscript{42} Increasing the scope of what constitutes the practice of law limits competition in the legal-related services market because the more activities included within the definition of the practice of law correspondingly increases the activities prohibited by unauthorized practice of law regulations.\textsuperscript{43} This increase in prohibition

\begin{itemize}
\item \textsuperscript{37} Angela M. Vallario, Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad, 59 MD. L. REV. 595, 612 (2000) ("The prohibition against [the unauthorized practice of law] is to protect the public from being preyed upon by those not competent to practice law"); WOLFRAM, ETHICS, supra note 20, at 849.
\item \textsuperscript{38} Nonlawyer Activity, supra note 32, at 126.
\item \textsuperscript{39} Id.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id.
\item \textsuperscript{43} See Letter from FTC and DoJ, to Hawaii's Judiciary Public Affairs Office, Comments on Proposed Definition of the Practice of Law 4 (Jan. 25, 2008), available at http://www.ftc.gov/os/2008/01/V080004letter.pdf [hereinafter Comments] (explaining that the "Justice Department and the FTC are concerned about efforts across the country to prevent non-lawyers from competing with lawyers through the adoption of excessively broad unauthorized practice of law restrictions by state courts and legislatures."); Christopher Curran, The American Experience with Self-Regulation in the Medical and Legal Professions, in Regulation of Professions: A Law and Economics Approach to the Regulation of Attorneys and Physicians in the US, BELGIUM, THE NETHER-
also increases the price of legal-related services because the range of services available to the public is decreased.\footnote{44}

Accordingly, some critics have argued that regulations on the practice of law are responsible for the deficiencies in affordable legal services.\footnote{45} In 2005, the Legal Services Corporation issued a report providing that at least eighty percent of lower-income Americans' legal needs are not being fulfilled.\footnote{46} These critics have contended that restrictions on the practice of law are the primary barrier preventing the expansion of affordable legal services available to the public.\footnote{47}

However, the American Bar Association's Commission on Nonlawyer Practice ("the Commission") stated that an increase in the delivery of legal-related services by nonlawyers also yields a risk of fraudulent and incompetent behavior.\footnote{48} Thus, the Commission suggested that affordable legal assistance and access to the justice system must be balanced against protecting the public from the potentially harmful consequences of nonlawyer involvement in law-related activities.\footnote{49}

\section{Accountability}

The American Bar Association's Task Force on the Model Definition of the Practice of Law ("Task Force") provided that jurisdictions must consider the degree of accountability of those persons permitted to furnish services covered under the definition of the practice of law.\footnote{50} Lawyers are regulated by admission requirements and the rules of professional conduct.\footnote{51} However, many nonlawyers providing

\begin{footnotes}
\footnote{44. Comments, supra note 43, at 4 ("[I]f competition to provide such services is restrained, consumers may be forced to pay higher prices or accept services of lower quality."); Curran, supra note 43, at 77.}
\footnote{45. See, e.g., Wolfram, Ethics, supra note 20, at 835 n.63 (citations omitted) (summarizing one scholar's argument that a "broad definition of [the] practice of law has discouraged development of narrow lay specialties that could accomplish better and cheaper probate administration.").}
\footnote{46. Legal Services Corporation, supra note 42, at 1-2.}
\footnote{47. Derek A. Denckla, Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters, 67 Fordham L. Rev. 2581, 2599 (1999) (arguing that "the lawyer monopoly must be responsible to a large degree for the lack of affordable options that might otherwise be made available in a more diversified market for legal services," and that the restrictions on the practice of law "appear to be the main barrier blocking the development of affordable legal services to the public.").}
\footnote{48. Nonlawyer Activity, supra note 32, at 126.}
\footnote{49. Id.}
\footnote{50. Whitson, supra note 50, at 7-8.}
\footnote{51. Wolfram, Ethics, supra note 20, at 21, 850; Fountaine, supra note 29, at 170.}
\end{footnotes}
legal-related services are not held to such corresponding professional standards.\textsuperscript{52}

Professor Sande L. Buhai of Loyola Law School Los Angeles demonstrated that consumers may encounter difficulties when trying to recover from nonlawyers providing legal services because the courts have not agreed on a standard of care with regard to the practice of law.\textsuperscript{53} Professor Buhai noted that modern cases of nonlawyers rendering legal services involve a consumer claiming that the consumer was harmed as a result of the nonlawyer negligently providing legal services.\textsuperscript{54} Professor Buhai stated that the courts have reacted to this situation in one of three ways.\textsuperscript{55} First, the majority of jurisdictions have held a nonlawyer to the same standard of care as a lawyer when the nonlawyer engages in the practice of law.\textsuperscript{56} Second, some jurisdictions have held that a nonlawyer is liable to an injured consumer under a theory of negligence.\textsuperscript{57} Third, one court did not extend to a nonlawyer the standard of competency of a lawyer.\textsuperscript{58}

Upon review, Professor Buhai first noted that the majority of courts hold that when a nonlawyer engages in the practice of law, the nonlawyer is held to the same standards of competency as a lawyer.\textsuperscript{59} Thus, when a nonlawyer engages in the practice of law, any failure to adhere to a lawyer's standard of competency constitutes actionable negligence.\textsuperscript{60}

Professor Buhai second stated that other courts hold nonlawyers liable in negligence but do not directly address the issue of standard of care.\textsuperscript{61} To illustrate, in Biakanja v. Irving,\textsuperscript{62} the California Supreme Court upheld a civil claim against a nonlawyer for the unauthorized practice of law so as to deter others from engaging in such unauthorized activities.\textsuperscript{63} In Biakanja, Vinka Biakanja ("Biakanja") sued Thomas Irving ("Irving") in the Superior Court of the City and County

\begin{itemize}
\item \textsuperscript{52} Fountaine, \textit{supra} note 29, at 170.
\item \textsuperscript{53} Buhai, \textit{supra} note 27, at 96-97.
\item \textsuperscript{54} \textit{Id.} at 97.
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.}
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} See \textit{id.} at 89 ("[O]ne court held that its state legislature... must have been 'aware of the dangers of non-lawyer practice' and therefore must have contemplated a later standard").
\item \textsuperscript{59} \textit{Id.} at 97.
\item \textsuperscript{60} \textit{Id.} Professor Buhai stated that once the court finds that the negligently rendered service constituted the unauthorized practice of law, the lawyer's standard of care is imposed after the fact, \textit{id.}, and Professor Buhai claimed that "[t]his seems awkward when the provision of such services by non-lawyers has been tacitly permitted ex ante." \textit{Id.}
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{62} 320 P.2d 16 (Cal. 1958).
\item \textsuperscript{63} Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958).
\end{itemize}
of San Francisco. Biakanja, the purported sole devisee of a will drafted by Irving, sued Irving for damages resulting from Irving drafting a will that was ultimately denied probate. The will was not admitted to probate because the will was not attested properly. As a result, the decedent died intestate and Biakanja received only her one-eighth intestate share. Biakanja sought to recover the remaining seven-eighths of the intestate estate. The superior court ruled for Biakanja, holding that Irving consented and attempted to prepare a will that was ultimately determined void because Irving failed to comply with the attestation formalities of a valid will.

On appeal, the issue was whether Irving was obligated to protect Biakanja from injury, even though Irving was not in privity of contract with Biakanja. Rather than specifically address the standard of care issue, the California Supreme Court employed a factors test and determined that the policies designed to prevent the unauthorized practice of law warranted Biakanja recovering despite the lack of privity. In her analysis, Professor Buhai explained that the court concluded that Irving was negligent by merely providing the services. Conversely, Professor Buhai also argued that the court failed to address the issue of standard of care because, following the logic of the decision, a nonlawyer is not negligent by providing authorized legal services.

Professor Buhai third noted that in Bland v. Reed, the California Court of Appeals for the Second District of California declined to hold the nonlawyer-defendant to the same standard of care as an attorney when the defendant caused the plaintiff $50,000.00 in damages after advising the plaintiff about his legal options. In Bland, Dwight Bland ("Bland"), part of the United Steelworkers of America,

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64. Id. at 17.
65. Id.
66. Id. Both John Maroevich, ("Maroevich") the decedent, and Irving, a notary public, signed the will, id., and subsequently, Maroevich obtained signatures from two alleged witnesses, id. However, these "witnesses" did not sign the will in each other's presence, id. Moreover, Maroevich failed to acknowledge his signature in front of the "witnesses." Id.
67. Id.
68. Id.
69. Id. at 18.
70. Id.
71. Id. at 19.
72. Buhai, supra note 27, at 98.
73. Id.
75. Bland v. Reed, 67 Cal. Rptr. 859, 862, 864 (Cal. Ct. App. 1968). Professor Buhai noted that if Reed were held to the standard of care of an attorney, Reed "would likely have been negligent in not informing Bland of the statute of limitations or in letting the statute of limitations run on Bland's claim." Buhai, supra note 27, at 99.
sued James Reed ("Reed") in the Superior Court of Los Angeles County for negligence, claiming that Reed advised Bland to forego filing a negligence claim against Bland's employer despite the fact that Reed purportedly knew or should have known about a forthcoming one-year statute of limitations. An employee of the union told Bland to consult with Reed, a nonlawyer, if Bland were to sustain injuries during the course of his employment. Subsequently, Bland sustained injuries as a result of his employer's alleged negligence. Following the union employee's instructions, Bland consulted with Reed, who advised Bland not to file a claim against Bland's employer. As a result, Bland failed to bring a timely claim. The superior court dismissed Bland's claim.

Bland appealed to the California Court of Appeals for the Second District of California. In affirming the superior court's determination that Reed should not be held to the same standard of care as an attorney, the court reasoned that the California legislature allowed nonlawyers to represent persons before the Industrial Accident Commission because the legislature reasoned that representation by a nonlawyer was better than no representation at all. Thus, the court declined to hold Reed to the same standard of care as an attorney because the court opined that the legislature permitted nonlawyer representation before the Industrial Accident Commission despite the risks of nonlawyer representation.

4. Public Perception of Regulating the Practice of Law

Despite the justifications for regulations on the practice of law, such regulations have created a monopoly over the legal services industry because such regulations permit only licensed attorneys to engage in the practice of law. Critics have argued that regulations on the practice of law are designed so that lawyers maintain a monopoly over the legal system by limiting competition for providing legal ser-

76. Bland, 67 Cal. Rptr. at 861.
77. Id. (stating that the union employee told Bland, "if you are injured in the plant, Reed will take care of your interest.").
78. Id.
79. Id. at 861.
80. Id. at 863.
81. Id. at 861.
82. Id.
83. Buhai, supra note 27, at 99.
84. Id.
vices. As a result, the public has generally perceived regulations on the practice of law as designed solely for the benefit of lawyers.

B. The American Bar Association's Recommendations on the Definition of the Practice of Law

The American Bar Association's Task Force on the Model Definition of the Practice of Law ("Task Force") determined that each jurisdiction's definition for the practice of law should include the fundamental premise that the practice of law is the application of legal doctrine and decisions to the situations or goals of another entity or person.

Next, the Task Force recommended that each jurisdiction employ a balancing test to determine who may furnish the services encompassed by the definition of the practice of law, including the circumstances under which the services may be furnished. The Task Force suggested that each jurisdiction perform a cost-benefit analysis of nonlawyer activity and its effect on the public. Additionally, the Task Force stated that each jurisdiction should consider minimum qualifications, degrees of accountability, and levels of competence for activities and persons covered under the definition of the practice of law.

The American Bar Association's Commission on Nonlawyer Practice ("the Commission") suggested regulatory options that jurisdictions could consider for controlling nonlawyer involvement in legal-related activities. First, each jurisdiction could determine that the status quo has adequately protected against the effects of certain

86. Id.; Wolfram, Ethics, supra note 20, at 828 ("The bar's largely successful campaign against unauthorized practice has left a large field free from nonlawyer competition, thus securing a lawyer monopoly over most of the areas of operation of the legal process, a monopoly that one is tempted to conclude is primarily for the benefit of lawyers.").

87. See Catherine L. Lanctot, Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law, 30 Hofstra L. Rev. 811, 853 (2002) ("The lay public, which already detests lawyers, generally perceives unauthorized practice of law enforcement as yet another way for the legal profession to line its collective pockets at the expense of consumers.").

88. Whitson, supra note 36, at 13.

89. Id.

90. Id. The Task Force stated that jurisdiction should balance concerns for consumer safety and public protection, access to justice, judicial economy, preservation and individual choice, maintenance of professional standards, costs of implementation and regulation of public policy, and efficient operation of the marketplace, id. at 5.

91. Id. at 13. The Task Force suggested that the degree qualification system for the nonlawyer activity included in the exceptions should be proportionate to the sophistication of the nonlawyer services being provided, id. at 6.

types of nonlawyer activity. Alternatively, jurisdictions could adopt a mandatory or voluntary system that provides remedies to consumers for the potentially harmful effects caused by nonlawyers. Second, jurisdictions could actively regulate nonlawyer behavior by placing direct controls over nonlawyer activities.

1. Public Protection Through Regulations and Laws

The American Bar Association’s Commission on Nonlawyer Practice (“the Commission”) stated that certain types of nonlawyer activities may be regulated through current statutes, common-law remedies that normally apply to commercial activities, or regulatory schemes. Consumers can bring suit in the common law tort of negligent infliction of harm or fraud, deceptive or false trade practices, or enforce warranties on service. In addition, public prosecutors can bring civil actions to enjoin deceptive, unfair, or false trade practices and criminal actions for theft and fraud.

However, the Commission noted that these consumer protections schemes lack affirmative safeguards for the public or standards that manage individuals or entities engaging in legal-related activities. Such consumer protection schemes merely create standards for behavior, assign accountability for injury, and provide criminal and civil causes of action. Furthermore, the efficaciousness of such protections is contingent on the capability of enforcement and prosecutorial officials to police nonlawyer activities.

In addition to current laws and regulations, the Commission suggested that jurisdictions could establish a system that provides remedies for consumers injured by nonlawyers engaging in legal-related

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93. Id. at 143.
94. Id. at 144.
95. Id. at 144-45.
96. Id. at 143.
97. Id.
98. Id.
99. Id. at 143-44 (stating that the “effectiveness [of consumer protection schemes] can be diminished if the prosecutorial and enforcement officials charged with their implementation are not able to give violations by nonlawyers much attention.”).
100. Id. at 143.
101. See id. at 143-44. For example, the enforcement of the unauthorized practice of law by nonlawyers have been particularly rare in jurisdictions where the penalty is a misdemeanor because the prosecutor’s time and resources are often best served on more serious violations. See Charles W. Wolfram, Expanding State Jurisdiction to Regulate Out-of-State Lawyers, 30 Hofstra L. Rev. 1015, 1053 (2002) [hereinafter Wolfram, Out-of-State Lawyers] (stating that misdemeanor prosecutions for unauthorized practice of law violations are not are not widely enforced because “prosecutors simply have larger fish to fry and insufficient resources.”); Denckla, supra note 47, at 2589 (stating that criminal prosecutions for the unauthorized practice of law are rare).
services. These remedies could include voluntary or involuntary programs in which nonlawyers carry malpractice insurance or offer mediation and arbitration.

2. Controlling Nonlawyer Behavior by Placing Direct Regulations on Nonlawyer Activities

Alternatively, the American Bar Association’s Commission on Nonlawyer Practice (“the Commission”) recommended three regulatory tools designed to control nonlawyer behavior. First, jurisdictions could employ a registration system for nonlawyers who offer legal-related services. Second, jurisdictions could establish a certification system in which nonlawyers are given permission to use a certain occupational title. Third, jurisdictions could also launch a licensing system in which nonlawyers are granted admittance to engage in specific legal-related activities.

The first and least restrictive regulatory tool is registration. Under a registration system, nonlawyers providing legal-related services would be required to submit their information to a jurisdiction-wide roster. In addition to preventing unregistered persons or entities from participating in a particular activity, a registration system could also impose minimum qualifications for registration.

Second, jurisdictions could create a certification program that identifies a person or entity as qualified to offer particular legal-related services. Generally, certification systems are more expensive and complex than registration systems because certification systems require the development and administration of competency examinations. However, certification does not prohibit noncertified individuals from engaging in a specific activity; certification merely identifies that an individual is qualified to perform particular services.

The third and most restrictive form of regulation is licensure. Under a licensing system, a jurisdiction creates an agency that formally authorizes an individual to engage in a specific activity. Un-
licensed individuals are prohibited from engaging in the regulated activity. Before issuing a license, the agency must first determine that an applicant meets the professional qualities and educational standards necessary to protect the public from an incompetent provider.

C. METHODS BY WHICH VARIOUS STATES HAVE ADDRESSED THE UNAUTHORIZED PRACTICE OF LAW

In 2009, the American Bar Association's Standing Committee on Client Protection ("the Committee on Client Protection") initiated a survey on the unlicensed practice of law. The Committee on Client Protection's survey inquired into state-specific methods of regulating the practice of law. The Committee on Client Protection sent the survey to all fifty states and received responses from all but eleven.

The Committee on Client Protection provided that twenty-nine of the reporting states actively enforced regulations on the unauthorized practice of law. However, some jurisdictions reported that inadequate funding created problems with enforcement. Six states responded that their enforcement was either inactive or non-existent.

Furthermore, the Committee on Client Protection noted the majority of the states that responded to the survey defined both the practice of law and the unauthorized practice of law. The majority of

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116. Id.
117. Id.
119. Id.
120. Id. ("Georgia, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Rhode Island, South Carolina, and Vermont" did not respond).
121. Id.; but see Quintin Johnstone, Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution, 39 Williamette L. Rev. 795, 808-09 (2003) (stating that there are ambiguities in the law of unauthorized law practice in every state).
122. Id. For example, the Survey provided that limited resources hindered Montana's enforcement of its unauthorized practice of law regulations. Id. at 18. Compare id. at 5 (stating that Florida allocated approximately $1,600,000 annually for unauthorized practice of law enforcement), and Survey, supra note 118, at 10 (providing that Ohio allocated approximately $260,000 annually), with Survey, supra note 118, at 8 (stating that Nebraska allocated approximately $75,000 annually), and Survey, supra note 118, at 3 (providing that Arkansas allocated approximately $6,500 annually).
123. Survey, supra note 118, at 1. The Survey listed Missouri, New York, Oklahoma, Washington, and Wisconsin as not actively enforcing regulations on the unauthorized practice of law. Id. at 17, 18, 19, 21, 22. Arkansas and North Dakota reported that their unauthorized practice of law enforcement was non-existent. Id. at 13, 19.
124. Id. at 1.
the states that defined the practice of law did so through case law. The second most popular method was through court rule, followed by statute and advisory opinion. Similarly, the reporting states defined the unauthorized practice of law in statutes, through court rules, or a blend of statute, case law, court rule, and advisory opinion.

Moreover, the Committee on Client Protection stated that nineteen jurisdictions permit nonlawyers to engage in certain legal services. For example, four jurisdictions have authorized nonlawyers to compose legal documents. Additionally, thirteen of the responding jurisdictions empower real estate brokers to be present at real estate closings and prepare documents for property transactions.

The Committee on Client Protection noted that most jurisdictions have authorized two or more authorities to enforce regulations on the unauthorized practice of law. These enforcement entities are primarily financed through lawyer assessments, annual bar association dues, or the jurisdiction's highest court. Furthermore, the Committee on Client Protection determined that thirty-one jurisdictions enforce sanctions against instances of the unauthorized practice of law through civil injunctions, twenty-seven through criminal fines, twenty-three through prison sentences, twenty-three through civil contempt, seventeen through restitution, thirteen through civil fines, one through criminal contempt, and one through misdemeanor jail.

1. Nebraska's Approach to Regulating the Practice of Law

Prior to the Nebraska Supreme Court adopting the rules governing the unauthorized practice of law, the sole enforcement mechanism preventing nonlawyers from engaging in the unauthorized practice of law was a Nebraska statute providing that the unautho-

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125. Id. (providing that seven jurisdictions defined the practice of law through case law). Many states defined the practice of law in more than one source. Id.
126. Id. (providing that six jurisdictions established a definition for the practice of law by court rules, four by statute, and one by one by advisory opinion).
127. Id.
128. Id. at 2.
129. Id.
130. Id.
131. Id. at 1. For example, in Illinois, the State Bar Committee, the Attorney General, and the county prosecutor are all authorized to enforce regulations on the unauthorized practice of law. Id. at 6. Additionally, law firms and private attorneys are authorized to bring a suit for the unauthorized practice of law. Id. (citing Mallen v. MyInjuryClaim.com, 769 N.E.2d 74 (Ill. App. Ct. 2002)).
132. Id. at 1.
133. Id. at 2.
The unauthorized practice of law is a Class III misdemeanor. In addition to the criminal statute, the Nebraska Supreme Court also has inherent authority to charge a nonlawyer with criminal contempt. However, one author noted that these enforcement mechanisms were largely inadequate as applied to the transactional areas of practice.

To remedy this, the Nebraska Supreme Court exercised its inherent authority to regulate and define the practice of law and adopted the rules governing the unauthorized practice of law ("the Rules"). According to the Rules' Statement of Intent, the Rules are designed to protect the public from the harm potentially inflicted by nonlawyers engaging in the unauthorized practice of law. The Rules broadly define the practice of law and provide five subsections that represent a non-comprehensive list of examples. The Rules then state a general prohibition of the practice of law by nonlawyers, which is followed by a statement that the practice of law is defined as:

1. Giving advice or counsel to another entity or person as to the legal rights of that entity or person or the legal rights of others for compensation, direct or indirect, where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given.
2. Selection, drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person.
3. Representation of another entity or person in a court, in a formal administrative adjudicative proceeding or other formal dispute resolution process, or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
by a series of twenty-three exceptions to the general prohibition.141 One of the exceptions permits nonlawyers to sell legal forms, provided that the nonlawyers neither advise nor instruct another person on the choice, use, or legal consequences of the form.142

Additionally, the Rules created both a Commission on Unauthorized Practice of Law ("Nebraska's Commission") and a Counsel on Unauthorized Practice of Law ("CUPL").143 Nebraska's Commission has jurisdiction over all complaints that allege the unauthorized practice of law.144 Generally, once the complaint is filed, the CUPL screens, investigates, and submits a report to Nebraska's Commission.145 Nebraska's Commission then makes an independent judgment about the CUPL's report and may dismiss the complaint, refer the proceeding back to the CUPL for further investigation, or file a civil injunction proceeding in the Nebraska Supreme Court.146 If the

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(D) Negotiation of legal rights or responsibilities on behalf of another entity or person.

(E) Holding oneself out to another as being entitled to practice law as defined herein.

Id.

141. See §§ 3-1003 to 3-1004(A)-(W) (providing that "[n]o nonlawyer shall engage in the practice of law in Nebraska or in any manner represent that such nonlawyer is authorized or qualified to practice of law in Nebraska except as may be authorized by published opinion or court rule;" and that "[w]hether or not they constitute the practice of law, the following [twenty-three exceptions] are not prohibited.").

142. See § 3-1004(G) (excluding "[n]onlawyers selling legal forms in any format, so long as they do not advise or counsel another regarding the selection, use, or legal effect of the forms.").

143. §§ 3-1011, 1013.

144. § 3-1012(A). Nebraska's Commission is comprised of six Nebraska-licensed attorneys and three nonlawyers, who are all appointed by the Nebraska Supreme Court. § 3-1011(A)(1)-(2). The six attorneys on Nebraska's Commission are made up of one attorney per Supreme Court district in Nebraska. § 3-1011(A)(1). The attorney Commission members are nominated by the Executive Council of the Nebraska State Bar Association and appointed by the Supreme Court. § 3-1011(A)(1). The three nonlawyers on Nebraska's Commission are comprised of one nonlawyer per congressional district in Nebraska. § 3-1011(A)(2). The nonlawyer Commission members are appointed by the Supreme Court. § 3-1011(A)(2).

145. § 3-1012(C). The CUPL is an employee of the Nebraska State Bar Association and performs for the Commission all duties required by the rules. § 3-1013(A)-(C). The CUPL is responsible to perform the following duties:

(1) Maintain records of all matters coming within the jurisdiction of the Commission;

(2) Secure facilities for the administration of proceedings under these rules and receive and file all requests for investigation and complaints concerning matters within the jurisdiction of the Commission;

(3) Employ such staff, including investigative and clerical personnel, subject to the approval of the Commission, as may be necessary to carry out the duties of the office; [and]

(4) Perform such other duties as the Commission or the Supreme Court may require.

§ 3-1013(D)(1)-(4).

146. §§ 3-1014(E), (H), 3-1015(A); Hillis, supra note 135, at 10-11.
violator does not comply with the Supreme Court's civil injunction, a contempt proceeding is available.\textsuperscript{147}

2. Illinois's Approach to Regulating the Practice of Law

Illinois has not articulated a definition for the practice of law.\textsuperscript{148} The Illinois Supreme Court has maintained that a mechanistic formulation cannot be used to define the practice of law.\textsuperscript{149} Nevertheless, the court provided requirements for determining whether the nature of an act amounts to the practice of law.\textsuperscript{150} The court determined that one engages in the practice of law when the activity in question demands legal skill and knowledge to competently apply legal doctrine and precedent.\textsuperscript{151} In addition to the Illinois Supreme Court's inherent ability to regulate the practice of law, the Illinois legislature promulgated several acts that govern the unauthorized practice of law.\textsuperscript{152}

For instance, the legislature enacted the Illinois Attorney Act,\textsuperscript{153} which codified the Illinois Supreme Court's inherent ability to regulate the practice of law.\textsuperscript{154} The Illinois Attorney Act grants standing in any circuit court to commence an action against any person that directly or indirectly practices, charges, or receives fees for legal services or represents oneself as an attorney without actually being authorized to engage in the practice of law.\textsuperscript{155} Additionally, the Illinois Attorney Act was amended in 2007 to create a private cause of action for the unauthorized practice of law.\textsuperscript{156} Before the Illinois Attorney Act was amended to create a private cause of action, the only remedies available to an injured party were injunctive relief or contempt of court.\textsuperscript{157}

Further, the Consumer Fraud and Deceptive Business Practices Act\textsuperscript{158} proscribes any nonlawyer, individual or entity, from drafting,

\begin{itemize}
  \item \textsuperscript{147} § 3-1019(A)-(C).
  \item \textsuperscript{148} Survey, supra note 118, at 6 n.2.
  \item \textsuperscript{149} See In re Discipio, 645 N.E.2d 906, 910 (Ill. 1994) (citation omitted).
  \item \textsuperscript{150} Survey, supra note 118, at 6 n.2 (citation omitted).
  \item \textsuperscript{151} Id. (citation omitted).
  \item \textsuperscript{152} Melinda J. Bentley, New Consumer Remedies for UPL, 95 ILL. B.J. 632, 632 (2007).
  \item \textsuperscript{153} 705 ILL. COMP. STAT. 205/1 (2007 & Supp. 2009)).
  \item \textsuperscript{154} Id. at 633 (discussing Attorney Act, 705 ILL. COMP. STAT. 205/1 (2007 & Supp. 2009)).
  \item \textsuperscript{155} § 205/1.
  \item \textsuperscript{156} Attorney Act, 705 ILL. COMP. STAT. 205/1 (2007 & Supp. 2009), amended by P.A. 95-410, 95th Gen. Assem. (2007). The 2007 amendment created the following statutory remedies: "(i) appropriate equitable relief; (ii) a civil penalty not to exceed $5,000, which shall be paid to the Illinois Equal Justice Foundation; and (iii) actual damages." § 205/1.
  \item \textsuperscript{157} Bentley, supra note 152, at 633-34 (discussing Rathke v. Lidisky, 375 N.E.2d 871, 872-73 (Ill. App. Ct. 1978)).
  \item \textsuperscript{158} 815 ILL. COMP. STAT. 505/2BB (2008).
\end{itemize}
assembling, funding, or executing any living trust document. In interpreting the Consumer Fraud and Deceptive Business Practices Act, the Appellate Court of Illinois noted that the act does not prohibit individual nonlawyers from executing their own living trust document.

3. Arizona's Approach to Regulating the Practice of Law

Unlike Nebraska and Illinois, Arizona does not have a statute that prohibits the unauthorized practice of law. However, the Arizona Supreme Court has exercised its inherent power and promulgated rules that regulate the practice of law.

Like many other jurisdictions, the Arizona Supreme Court promulgated Rules of the Supreme Court of Arizona ("Arizona Rules") that broadly defined the practice of law. Subsequent to the broad definition, the Arizona Supreme Court provided a non-comprehensive definition for the unauthorized practice of law, followed by a series of exemptions.

The Arizona Rules also created an Unauthorized Practice of Law Counsel ("Counsel"). The Counsel is responsible for investigating instances of the unauthorized practice of law that are brought to the attention of the Arizona Bar Association. Additionally, the Counsel

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161. Compare Jonathan Rose, Unauthorized Practice of Law in Arizona: A Legal and Political Problem That Won't Go Away, 34 Ariz. St. L.J. 585, 590 (2002) (explaining that Arizona formerly had a statute that prohibited the unauthorized practice of law; however, that statute was repealed in 1985); with Attorney Act, 705 ILL. COMP. STAT. 205/1 (2007 & Supp. 2009) ("No person shall be permitted to practice as an attorney or counselor at law within this State without having previously obtained a license for that purpose from the Supreme Court of this State."); and NEB. REV. STAT. § 7-101 (Reissue 2007) ("[N]o person shall practice as an attorney . . . unless he has been previously admitted to the bar by order of the Supreme Court of this state.").
163. See Ariz. Sup. Ct. R. 31(a)(2)(A) (explaining that the practice of law involves furnishing legal services or advise for or to another person). Cf. Neb. Ct. R. § 3-1001 (providing that "[t]he practice of law,' or 'to practice law,' is the application or legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge, judgment, and skill of a person trained as a lawyer.").
164. See Ariz. Sup. Ct. R. 31(a)(2)(B) (defining the unauthorized practice of law); 31(d)(1)-(27) (listing twenty-seven exemptions to the prohibition on the unauthorized practice of law).
165. See Ariz. Sup. Ct. R. 77(b)(1)-(6) (listing the powers and duties of the Unauthorized Practice of Law Counsel).
166. See Ariz. Sup. Ct. R. 77(b)(1) (stating that the Counsel is responsible for "investigating all information coming to the attention of the state bar which, if true, would be grounds for sanctions for engaging in unauthorized practice of law").
may represent the Arizona Bar Association and prosecute instances of the unauthorized practice of law.\textsuperscript{167}

However, the Arizona Supreme Court has historically struggled with the regulation of nonlawyers who engage in the practice of law because the court’s inherent ability to regulate the practice of law does not necessarily grant the court the power to regulate nonlawyers.\textsuperscript{168} After Arizona’s statute prohibiting the unauthorized practice of law was repealed, it was not clear whether the Arizona Supreme Court had the authority to regulate the practice of law by nonlawyers who do not appear in the courtroom.\textsuperscript{169}

Partly in response to concern over nonlawyer engagement in the out-of-courtroom practice of law, the Arizona Supreme Court established the Board of Legal Document Preparers (“Board”).\textsuperscript{170} The purpose of the Board is to balance the public’s interest in affordable legal services against the harmful consequences that may potentially result from a nonlawyer providing legal services.\textsuperscript{171}

Generally, the Board employs a two-step process to determine whether an applicant is qualified to be a certified legal document preparer.\textsuperscript{172} First, the applicant must pass an examination, which tests the applicant’s knowledge of ethical issues, document preparation, data gathering, client communication, legal terminology, and administrative duties with respect to legal document preparation.\textsuperscript{173} Second, the applicant must possess certain characteristics, such as

\begin{itemize}
  \item \textsuperscript{167} See Ariz. Sup. Ct. R. 77(b)(5) (stating that the Counsel has the authority to “represent the state bar in and prosecute unauthorized practice of law proceedings before the superior court, the court of appeals, and this court, and prosecute contempt proceedings in the appropriate forum”).
  \item \textsuperscript{168} See Rose, supranote 161, at 607, 609 (explaining that Arizona’s problem with the unauthorized practice of law has persisted and that “the Court’s power to define the practice of law does not of itself create power over nonlawyers.”); see also Nonlawyer Activity, supra note 32, at 61 (stating that the Arizona Supreme Court was typically limited its inquiry into the unauthorized practice of law to activities that occur in the court).
  \item \textsuperscript{169} Rose, supranote 161, at 590-91.
  \item \textsuperscript{170} See Ariz. Code of Jud. Admin. \textsection{} 7-208(C)(1) (recognizing that the public needs to be protected from the “possible harm caused by nonlawyers providing legal services” and that section 7-208 is designed to “[p]rotect the public through the certification of legal document preparers to ensure conformance to the highest ethical standards and performance of responsibilities in a professional and competent manner”), available at http://www.supreme.state.az.us/cld/pdf/ACJA%207-208%20FINAL%20for%20Code%20Book.pdf; \textsection{} 7-208 (D)(4)(a) (establishing the Board of Legal Document Preparers).
  \item \textsuperscript{171} \textsection{} 7-208(C).
  \item \textsuperscript{172} See \textsection{} 7-208(E)(2) (“Potential applicants for standard certification shall successfully pass the examination prior to submitting an application for certification.”); \textsection{} 7-208(E)(3) (requiring that an individual possess certain qualifications before the board can grant a certificate).
  \item \textsuperscript{173} \textsection{} 7-208(E)(2)(b)(1).
\end{itemize}
having a certain level of educational experience and moral character.\textsuperscript{174}

If the Board certifies the applicant, then the applicant is authorized to perform the following: (1) supply or prepare legal documents, without the direction of a lawyer, for a member of the public or an entity, when that person or entity is without legal representation; (2) supply general legal information, but such information may not constitute specific recommendations, opinions, or advice to a customer about legal strategies, options, defenses, remedies, or rights; (3) supply general factual information concerning legal options, procedures, or rights available to a person in a legal issue when that person is without legal representation; (4) supply legal documents and forms to a person who is without legal representation; and (5) file and plan for service of legal documents and forms in a legal issue when that person is without legal representation.\textsuperscript{175}

To protect against the potential harmful consequences that may result from a nonlawyer engaging in the practice of law, certified legal document preparers must adhere to a specific code of conduct.\textsuperscript{176} The Arizona Supreme Court included minimum standards of performance for certain categories, including ethics, professionalism, fees and services, skills and practice, and performance in accordance with law.\textsuperscript{177} Additionally, the legal document preparers must satisfy an ongoing continuing education requirement.\textsuperscript{178} If the certified legal document

\textsuperscript{174} § 7-208(E)(3)(b).
\textsuperscript{175} § 7-208(F)(1)(a)-(e).
\textsuperscript{176} See § 7-208(C)(1) (recognizing the public needs to be protected from the "possible harm caused by nonlawyers providing legal services" and that section 7-208 is designed to "[p]rotect the public through the certification of legal document preparers to ensure conformance to the highest ethical standards and performance of responsibilities in a professional and competent manner"); § 7-208(J) ("The purpose of this code of conduct is to establish minimum standards for performance by certified legal document preparers.").
\textsuperscript{177} § 7-208(J)(1)(a)-(d); § 7-208(J)(2)-(5). The ethics category under the code of conduct requires that:

A legal document preparer shall avoid impropriety and the appearance of impropriety in all activities, shall respect and comply with the laws, and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the legal and judicial systems.

A legal document preparer shall be alert to situations that are conflicts of interest or that may give the appearance of a conflict of interest.

A legal document preparer shall promptly make full disclosure to a consumer of any relationships which may give the appearance of or constitutes a conflict of interest.

A legal document preparer shall refrain from knowingly making misleading, deceptive, untrue, or fraudulent representations while assisting a consumer in the preparation of legal documents. A legal document preparer shall not engage in unethical or unprofessional conduct in any professional dealings that are harmful or detrimental to the public.

\textsuperscript{177} § 7-208(J)(1)(a)-(d).
\textsuperscript{178} § 7-208(L).
preparer does not comply with any of the requirements under the code, the certified legal document preparer is subjected to disciplinary sanctions, including, a letter of concern, a period of probation, a further requirement of continuing education, revocation of the certificate, and civil penalties.179

D. THE UNAUTHORIZED PRACTICE OF LAW AS APPLIED TO ESTATE PLANNING

Despite many states' efforts to thwart the unauthorized practice of law, the recent trend of do-it-yourself estate planning has yielded many out-of-court instances of the unauthorized practice of law in the field of estate planning.180 Those individuals providing law-related and legal services outside the courtroom have thrived because of the problems associated with defining the practice of law, the capability of nonlawyers to provide affordable legal and law-related services, and the advancements in technology that have vastly expanded the capability of nonlawyers to sell services to the public.181 Recent trends in estate planning have exposed four situations in which various jurisdictions have struggled to determine whether nonlawyer involvement in estate planning constitutes the unauthorized practice of law.182 The first situation involves nonlawyers creating computer software programs that customize estate-planning documents based on the data provided by a consumer.183 The second situation involves nonlawyers marketing and selling pre-printed fill-in-the-blank estate-

179. § 7-201(6)(a)(k).
180. See Lanctot, supra note 87, at 833 (“Since the issue of lay preparation of legal documents first arose in the Seventies and early Eighties, various jurisdictions have continued to try to regulate the practice,” however, “[t]he legality of scrivener services has come up repeatedly, with cases brought against document preparers in a variety of different contexts, including ‘living trust documents’); Ellen Sugrue Hyman & William Josh Ard, Trust Mills and the Unauthorized Practice of Law: What is your duty?, MICH. B. J., Oct. 2007, at 26, 28, available at http://www.michbar.org/journal/pdf/pdf4article 1227.pdf (“Despite the successes in the State Bar’s effort to stop UPL, difficulties arise in applying a UPL analysis in concrete situations.”).
181. Nonlawyer Activity, supra note 32, at 43.
182. See Lanctot, supra note 87, at 836 (discussing nonlawyers creating computer software that drafts an estate-planning document); Lanctot, supra note 87, at 814-15 (stating that non-legal entities are marketing and selling “fill-in-the-blank” estate-planning documents); Ronald R. Volkmer, New Fiduciary Decisions: When Does Assistance to the Testator Constitute the Unauthorized Practice of Law? 34 EST. PLAN. 44, 44 (2007) (describing a situation in which a nonlawyer assisted another person in drafting estate-planning documents) [hereinafter Volkmer, Unauthorized Practice]; Ronald R. Volkmer, New Fiduciary Decisions: Recent Litigation Over Revocable Trusts Addresses A Variety Of Questions, 36 EST. PLAN. 43, 43-44 (2009) (discussing a situation where a nonlawyer drafted an estate planning document for another person) [hereinafter Volkmer, Recent Litigation].
183. Lanctot, supra note 87, at 836.
The third situation involves nonlawyers drafting estate-planning documents for another person using self-help estate-planning instruments, such as estate-planning computer software and pre-printed fill-in-the-blank estate-planning documents. The last situation involves nonlawyers actually drafting estate-planning documents for another person.

1. Interactive Self-Help Estate-Planning Computer Software That Customize Estate-Planning Documents Based on the User's Data

The first recent trend in estate planning and the unauthorized practice of law has involved nonlawyers programming computer software that creates an estate-planning document based on the information that the user provided. According to case law, nonlawyers creating legal documents for other people amounts to the unauthorized practice of law if the creator of the document provides legal advice. Moreover, the courts have regularly determined that the practice of law includes selecting the legal document, providing recommendations about the appropriate information to include in a document, or collecting information from another person and subsequently determining how the information will be used. However, case law involving computer programs has proven especially arduous because the lack of human interaction has made it difficult to establish the legal advice required to justify a finding of unauthorized practice. Moreover, these document preparation services, such as LegalZoom.com, provide disclaimers in an attempt to demonstrate that the service does not constitute legal advice.

Software, such as some versions of Quicken Family Lawyer, used a decision-tree system to tailor an estate-planning document based on the user's responses to a series of questions. Additionally, the

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185. Volkmer, Unauthorized Practice, supra note 182, at 44.
186. See Volkmer, Recent Litigation, supra note 182, at 43-44 (describing an instance where a nonlawyer drafted an estate-planning document for another person).
187. Lanctot, supra note 87, at 836.
188. Id. at 849.
189. Id.
190. Id. at 850.
191. LegalZoom.com, at http://www.legalzoom.com/ (last visited Mar. 23, 2010) (advertising the following testament from a lawyer: "[a]s an attorney, I have been pleasantly surprised with the ease and efficiency of LegalZoom. I have used it 5 times already.").
192. Justin D. Leonard, Cyberlawyering and the Small Business: Software Makes Hard Law (But Good Sense), 7 J. SMALL & EMERGING BUS. L. 323, 372 (2003). The final product could be transferred to a word processing program for further editing or printed directly from the Quicken Family Lawyer program. Id.
software contained a question and answer feature in which a user could select a specific question within a general topic, and the question would be answered by a preformed response from Harvard Law Professor Arthur Miller.\textsuperscript{193}

In \textit{Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.},\textsuperscript{194} the Unauthorized Practice of Law Committee of the Texas Bar ("UPLC") successfully sued the manufacturer of Quicken Family Lawyer for violating Texas's unauthorized practice of law statute.\textsuperscript{195} As a result, the United States District Court for the Northern District of Texas enjoined the manufacturer of Quicken Family Lawyer from selling its product in Texas.\textsuperscript{196} The court reasoned that the software goes beyond instructing the user on how to complete a fill-in-the-blank will form.\textsuperscript{197} Notwithstanding the UPLC's temporary victory against the manufacturer of Quicken Family Lawyer, the Texas legislature passed an amendment to the unauthorized practice of law statute, which provided an exception for computer software that conspicuously and clearly states that the software is not a substitute for the advice of a lawyer.\textsuperscript{198}

 Critics of these computerized estate-planning programs have argued that such programs potentially expose consumers to significant harm.\textsuperscript{199} For instance, computer programs that customize the document based on the user's responses might impart that user a false sense of security because the user might reasonably believe that the estate-planning document is adequately tailored to the user's situation.\textsuperscript{200} Moreover, one author demonstrated how interactive legal software could be programmed to rely on outdated law, thereby creating a document inconsistent with the current law.\textsuperscript{201}

\textsuperscript{193} Lanctot, \textit{supra} note 87, at 836.
\textsuperscript{196} \textit{Unauthorized Practice of Law Comm.}, 1999 U.S. Dist. LEXIS at *32-33.
\textsuperscript{197} \textit{Id.} at *19.
\textsuperscript{198} Lanctot, \textit{supra} note 87, at 839; \textit{Tex. Code Ann.} § 81.101(c) (2005).
\textsuperscript{199} See, e.g., Leonard, \textit{supra} note 192, at 355 (stating unsuspecting consumers might not realize the dangers created by legal computer software applications).
\textsuperscript{201} See Fountaine, \textit{supra} note 29, at 171-72 (presenting a hypothetical situation where a person uses software from 1999 to create a will in 2002). \textit{See generally} Fountaine, \textit{supra} note 29, at 171-72 (proposing that one solution to the out-of-date software problem could be to require the software producer to include warnings that the user must check for software updates); Leonard, \textit{supra} note 192, at 378 (advocating that cyberlawyering applications can comply with standards of competency if bar associations "mandate clear and conspicuous disclaimers" so as to "ensure that small busi-
2. Non-Legal Entities Selling Fill-in-the-Blank Estate-Planning Documents or Other ‘Self-Help’ Applications

The second trend in estate planning and the unauthorized practice of law has involved non-legal entities marketing and selling pre-printed fill-in-the-blank estate-planning documents. Generally, persons or entities that sell do-it-yourself or fill-in-the-blank kits have been safeguarded by the First Amendment against claims that the distribution of such resources constitutes the unauthorized practice of law. The theory behind awarding sellers such protection is the seller furnished no individualized recommendations in response to specific questions.

However, critics have contended that these fill-in-the-blank estate-planning documents expose the public to harm because these one-size-fits-all documents are not tailored to the needs of each individual consumer. As a result, critics have maintained that these non-legal entities marketing and selling these fill-in-the-blank estate-planning documents are profiting from products that do not necessarily perform their advertised function.

nesses and individuals are reminded of the unique constraints of cyberlawyering 'advice.'

203. Nonlawyer Activity, supra note 32, at 37.
204. Id.
205. See, e.g., Garwood v. Garwood, 194 P.3d 319, 327 (Wyo. 2008) (stating the "Garwoods had the misfortune to fall victim to an itinerate hawker of ‘fill-in-the-blank,’ 'one-size-fits-all,' trust forms. The materials were ill-suited to the Garwoods' needs and have served to squander a significant portion of their hard-earned life savings on legal proceedings and attorney's fees"); David Shulman, South Florida Estate Planning Law: Be Careful of Store Bought “Fill in the Blank” Wills and Software, http://www.so floridaestateplanning.com/2009/03/articles/do-it-yourself-estate-planning/be-careful-of-store-bought-fill-in-the-blank-wills-and-software/ (Mar. 20, 2009, 07:07 EST) (“A fill in the blank form bought in a store or ordered over the internet is not going to be custom tailored to an individual client's needs.”).
206. See Vallario, supra note 37, at 596-99 (showing that non-legal entities in the business of marketing trusts are profiting from the sale of such trusts despite the fact that these trusts have resulted in significant harm to consumers); see also Garwood, 194 P.3d at 321 (stating that a revocable living trust kit yielded a trust that was "of no earthly use to the Garwoods because they simply did not have enough assets to reap any of the estate tax benefits that spring from such a trust."); Shulman, supra note 205 ("Virtually every estate planning attorney has more than one story about a bereaved family finding out after their loved one's death that the do it yourself Will did not accomplish what it was supposed to, or wasn't properly executed and therefore was invalid.")
3. Nonlawyers Utilizing Pre-Printed Fill-in-the-Blank Estate Planning Documents to Prepare Estate Planning Documents for Other Persons

The third issue in estate planning and the unauthorized practice of law is a nonlawyer assisting another person in preparing estate-planning documents.\textsuperscript{207} In these cases, it is difficult to determine the threshold between acting as a mere scrivener and actually furnishing legal advice.\textsuperscript{208}

For example, in \textit{Franklin v. Chavis},\textsuperscript{209} the Supreme Court of South Carolina concluded that an insurance agent engaged in the unauthorized practice of law because the insurance agent's actions surpassed those of a mere scrivener.\textsuperscript{210} In \textit{Chavis}, Ernest Chavis ("Chavis"), a nonlawyer, agreed to help ninety-one year old Annie Weiss ("Weiss") with a simple will.\textsuperscript{211} After Weiss informed Chavis how she wanted to divide the property, Chavis used a Quicken Lawyer Disk to create a generic will, filled in the blanks for Weiss, and brought the document to Weiss at the hospital.\textsuperscript{212} The Supreme Court of South Carolina reasoned that Weiss's lack of involvement in the entire process demonstrated that the agent did more than transcribe verbatim what the decedent requested, and thus, Chavis's actions amounted to the unauthorized practice of law.\textsuperscript{213}

\textsuperscript{207} Volkmer, Unauthorized Practice, supra note 182, at 44.

\textsuperscript{208} Id. at 45; Hyman & Ard, supra note 180, at 28 (noting that state bar associations encounter difficulties when attempting to prove that a nonlawyer-provider of preprinted estate-planning documents furnished advice or tailored the estate-planning document to the consumer's needs). Compare \textit{In re Estate of Marks}, 957 P.2d 235, 241 (Wash. Ct. App. 1998) (determining that a nonlawyer, who was also a named beneficiary under the will, engaged in the unauthorized practice of law where the nonlawyer assisted the testator with the testator's will by picking out the will-kit, acquiring an inventory of testator's assets, discussing the distribution of assets, typing the will, and planning the details surrounding the execution of the will), \textit{with In re Estate of Knowles}, 143 P.3d 864, 871 (Wash. Ct. App. 2006) (stating that a nonlawyer, who was also a named beneficiary under the will, did not engage in the unauthorized practice of law where the nonlawyer assisted the testator with the testator's will by handwriting material provisions of the testator's will on a "fill-in-the-blank" will form).

\textsuperscript{209} 640 S.E.2d 873 (S.C. 2007).

\textsuperscript{210} Franklin v. Chavis, 640 S.E.2d 873, 876 (S.C. 2007).

\textsuperscript{211} Franklin, 640 S.E.2d at 875-76. The decedent asked the insurance agent to assist the decedent with a simple will because the decedent desired that an objective person draft the document. \textit{Id.} at 876.

\textsuperscript{212} \textit{Id.} at 875.

\textsuperscript{213} \textit{Id.} at 876. The court noted that there not only is no evidence that the decedent reviewed the will but also the will was not typed in the decedent's presence. \textit{Id.} Furthermore, the court stated that there was no evidence that the agent contemporaneously recorded the decedent's instructions and then merely transferred the information to the document. \textit{Id.}
4. Nonlawyers Preparing Estate-Planning Documents for Other Persons

Finally, the fourth recent issue in the unauthorized practice of law and estate planning has involved a nonlawyer drafting an estate-planning document for another person.214 The most difficult example has involved a nonlawyer drafting estate-planning documents at the request of another person because it is difficult to deter the nonlawyer when the nonlawyer is not necessarily engaged in the business of drafting estate-planning documents.215

In Landheer v. Landheer,216 the Illinois Court of Appeals determined that a nonlawyer drafting an amendment to a trust for another person constituted the unauthorized practice of law.217 In Landheer, Arlyn Landheer (“Arlyn”) and Mark Landheer (“Mark”) brought an action for declaratory judgment against Warren Landheer (“Warren”), the successor trustee, claiming that the amendment to the trust was not valid.218 In Landheer, Herbert Landheer (“Herbert”) and Mildred Landheer (“Mildred”) created a trust, which provided that a subsequently written instrument signed by one settlor and delivered to the trustee amended the trust.219 After the death of the Mildred, Herbert was diagnosed with cancer.220 Herbert told his son, Warren, to make certain changes to the trust.221 Warren took notes of the changes that Herbert desired and had Warren’s spouse type up the document.222 Next, Herbert read the typed-up document and acknowledged that the document contained all of his desired changes.223 Herbert then signed the document in front of Mark, one of his other sons, and a third party.224

214. See Volkmer, Recent Litigation, supra note 182, at 43-44.

215. See e.g., Franklin v. Chavis, 640 S.E.2d 873, 877 (S.C. 2007) (stating that the nonlawyer accused of engaging in the unauthorized practice of law did not object to the court ordered injunction because the nonlawyer had “no intention of assisting others in any matters related to wills”). But see Unauthorized Practice of Law Comm. of the Supreme Court of Colo. v. Prog, 761 P.2d 1111, 1116 (Colo. 1988) (opining that an injunction is appropriate because “[t]he record suggests that unless restrained, the respondent will continue to engage in the unauthorized practice of law, with the likely consequence that those who rely upon him for legal advice and assistance will suffer injury.”).


218. Landheer, 891 N.E.2d at 976-77.

219. Id.

220. Id. at 977.

221. Id. at 978.

222. Id. at 977.

223. Id. at 987.

224. Id.
In response to Arlyn and Mark's claim, Warren counterclaimed seeking a declaratory judgment that the trust was validly executed. Arlyn and Mark then filed a motion to dismiss Warren's counterclaim alleging that the purported amendment was void because Warren drafted the document in violation of Illinois Consumer Fraud and Deceptive Business Practices Act, which prohibited any nonlawyer, individual or entity, from drafting, assembling, funding, or executing any living trust document. The Circuit Court of the Fourteenth Judicial Circuit, Whiteside County, granted Arlyn and Mark's motion to dismiss.

Warren then appealed to the Illinois Court of Appeals claiming, among other things, that the lower court erred in determining that Warren violated Illinois's Consumer Fraud and Deceptive Business Practices Act because Warren acted as a mere scrivener. The Illinois Court of Appeals determined that the amendment to the trust was void because Warren, a nonlawyer, drafted the document for another person in violation of the Consumer Fraud and Deceptive Business Practices Act.

III. ARGUMENT

A. JURISDICTIONS SHOULD EMBRACE, RATHER THAN RESIST, NONLAWYER INVOLVEMENT IN ESTATE-PLANNING ACTIVITIES BY IMPLEMENTING AND ADMINISTERING A CERTIFICATION SYSTEM FOR NONLAWYERS PRODUCING ESTATE-PLANNING INSTRUMENTS

The current methods that the various jurisdictions have used to monitor and enforce against the unauthorized practice of law have dealt inadequately with situations involving nonlawyers engaging in estate planning. This Article argues that in order to effectuate the avowed justifications for regulating the practice of law, state bar associations should be assigned the task of implementing and administering a certification system for nonlawyers engaging in estate-planning activities. The purpose of this Article is to delineate the problems associated with regulating nonlawyer participation in estate-planning activities because several of the existing unauthorized practice of law regulatory systems do not effectively reduce the potentially harmful consequences of nonlawyer involvement in estate-plan-

225. Id. at 977.
227. Id. at 977-78.
228. Id. at 978.
229. Id.
230. Id. at 979-80.
231. See infra notes 255-319 and accompanying text.
232. See infra notes 320-79 and accompanying text.
Certifying nonlawyer providers of estate-planning instruments that comply with jurisdiction-specific requirements would not only help protect the public from incompetent estate-planning products, but also increase access to the justice system by providing persons of lower income with more affordable estate-planning services that would not otherwise be available.234 Lastly, through an increase in public awareness of the various estate-planning options and risks associated with obtaining estate-planning services or products from a nonlawyer, consumers would be able to make a more informed decision with regard to their available options.235

Jurisdictions have justified restricting the practice of law by professing that the goals of such regulations include protecting consumers from incompetent services, providing access to the justice system, and holding providers of legal services accountable for their actions.236 However, effectuating the goal of protecting consumers from incompetent legal services has created problems with providing greater access to the justice system.237 Because the goal of protecting consumers from incompetent legal services is most often achieved by limiting the authority to provide such services to licensed attorneys, the price for legal services has remained beyond the reach of many lower income individuals.238 Thus, critics of many current regulations on the practice of law have contended that such regulations have exac-

233. See infra notes 255-319 and accompanying text.
234. See infra notes 320-79 and accompanying text.
235. See infra notes 320-79 and accompanying text.
238. See WOLFRAM, ETHICS, supra note 237, at 829 & n.35 (citations omitted) (stating many legal scholars and economists contend that professional self-regulation has an anti-competitive effect); see also Comments, supra note 237, at 4 ("[I]f competition to provide such services is restrained, consumers may be forced to pay higher prices or accept services of lower quality.").
erbated the problems with furnishing affordable legal services to the public. As a result, nonlawyers have marketed and provided legal-related services because these nonlawyers have recognized the public's largely unsatisfied need for affordable legal services.

Although many jurisdictions have promulgated various regulatory systems designed to repress the unauthorized practice of law, the recent trend of do-it-yourself estate planning has created many instances of nonlawyers engaging estate-planning services. These nonlawyers have thrived because of the problems associated with articulating a definition for the practice of law, the capability of nonlawyers to provide affordable legal services, and the innovation of technology that greatly expanded the capacity for nonlawyers to furnish legal services to the public. Consequently, jurisdictions have recently struggled with four situations in which nonlawyers have engaged in estate-planning activities. First, nonlawyers have produced self-help computer software programs that customize estate-planning documents based on the information provided by the individual user. Second, nonlawyers have promoted and sold pre-printed fill-in-the-blank estate-planning documents. Third, nonlawyers have used self-help estate-planning instruments to draft estate-planning documents for other persons. Fourth, nonlawyers have com-

239. See Derek A. Denckla, Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters, 67 FORDHAM L. REV. 2581, 2599 (1999) ("[T]he lawyer monopoly must be responsible to a large degree for the lack of affordable options that might otherwise be made available in a more diversified market for legal services," and that the restrictions on the practice of law "appear to be the main barrier blocking the development of affordable legal services to the public.")

240. See generally Vallario, supra note 237, at 596 (describing a type of company that is "staffed by nonlawyer salespersons who take advantage of a consumer's reluctance to retain attorneys and sell the victim a prepackaged bundle of trusts," which "is pushed on misinformed consumers as a way to 'save' money."); Christopher Curran, The American Experience with Self-Regulation in the Medical and Legal Professions, in REGULATION OF PROFESSIONS: A LAW AND ECONOMICS APPROACH TO THE REGULATION OF ATTORNEYS AND PHYSICIANS IN THE US, BELGIUM, THE NETHERLANDS, GERMANY AND THE UK 47, 57, 77 (Michael Faure et al. eds., 1993) (stating that "[h]igher prices due to occupational licensing will cause consumers to increase the amount of self-provision of services").

241. See supra notes 20-230 and accompanying text.


243. See supra notes 180-230 and accompanying text.

244. See Catherine L. Lantcot, Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law, 30 HOFSTRA L. REV. 811, 839 (2002) (noting that although one battle between a legal self-help computer software program manufacturer and a group of Texas lawyers is over, "the larger war over unauthorized practice of law remains anything but settled.").

245. Id. at 815.

246.See Ronald R. Volkmer, New Fiduciary Decisions: When Does Assistance to the Testator Constitute the Unauthorized Practice of Law?, 34 EST. PLAN. 44, 44 (2007) [hereinafter Volkmer, Unauthorized Practice] (describing a situation in which "[a] lay person assist[ed] the would-be testator by helping that person fill in the blanks of a pre-
posed estate-planning documents for other persons. In summary, current regulations do not adequately address these four situations involving nonlawyers engaging in estate-planning activities.

Jurisdictions can better attain the goals of restricting the practice of law by regulating nonlawyer involvement in estate planning through a certification system. Certification is the process by which an individual obtains an occupational title, which demonstrates that the certified individual satisfied specific requirements. Under a certification system, non-certified individuals are not proscribed from providing the regulated activity so long as non-certified individuals refrain from using the occupational title. The American Bar Association's Commission on Nonlawyer Practice ("the Commission") provided that a certification system could be used to notify the public of the qualifications that a particular jurisdiction determined to be appropriate for nonlawyer involvement without limiting the number of individuals authorized to provide such services. The Commission stated that the qualifications for certification should reflect the requisite skills to reasonably ensure the public that the certified individual is capable of providing competent services.

Jurisdictions should delegate to bar associations the responsibility of implementing and monitoring a certification system for nonlawyers providing estate-planning services because the certification system would better foster the goals of protecting consumers from incompetent legal services, increasing access to the justice system, and holding providers of legal services accountable for their services.

248. See supra notes 180-230 and accompanying text.
249. See infra notes 320-79 and accompanying text.
250. Nonlawyer Activity, supra note 237, at 147.
251. Id. at 146.
252. Id. at 147 ("Certification may be a valuable tool to inform the public of those qualifications or credentials considered to be appropriate for nonlawyer activities while still providing the public with a free choice of providers."); see also Nonlawyer Activity, supra note 237, at 146 ("Non-certified individuals may still offer services if they do not use the occupational title.").
253. Nonlawyer Activity, supra note 237, at 147.
254. See infra notes 320-79 and accompanying text.
B. CURRENT STATE METHODS EMPLOYED TO DETER AND REGULATE THE UNAUTHORIZED PRACTICE OF LAW HAVE INADEQUATELY ADDRESSED ISSUES SURROUNDING THE UNAUTHORIZED PRACTICE OF LAW AND ESTATE PLANNING

The current regulations on the unauthorized practice of law ineptly regulate nonlawyer involvement in estate-planning activities.\(^2\) First, many current regulations have failed to effectively control the market because of the problems with defining the practice of law, and thus, identifying the unauthorized practice of law.\(^2\) Second, many of the current approaches to protect the public against the unauthorized practice of law have relied extensively on regulations that provide inconsequential punishments.\(^2\) Third, many consumers of nonlawyer-provided estate-planning services are not adequately protected because nonlawyers are generally not held to the same standard of care as an attorney providing similar services.\(^2\)

1. Ambiguous Definitions for the Practice of Law Have Created Difficulties in Enforcing Prohibitions on the Unauthorized Practice of Law

Articulating clear definitions for the practice of law in order to demonstrate instances of the unauthorized practice of law is simple in theory but difficult to apply in practice.\(^2\) Despite many jurisdictions’ efforts to regulate and prevent nonlawyers from engaging in the practice of law, nonlawyers have continued to engage in legal-related activities in the field of estate planning.\(^2\) Thus, in many jurisdictions, courts are left with the daunting task of applying a nonlawyer’s out-of-courtroom estate-planning activities to a general definition of the practice of law to determine whether the nonlawyer engaged in the unauthorized practice of law.\(^2\)

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255. See infra notes 259-319 and accompanying text.
256. See infra notes 259-66 and accompanying text.
257. See infra notes 267-87 and accompanying text.
258. See infra notes 288-313 and accompanying text.
259. See Pamela A. McManus, Have Law License; Will Travel, 15 GEO. J. LEGAL ETHICS 527, 540 (2002) (“Given the problem of defining what constitutes the practice of law, it becomes doubly difficult to determine when the unauthorized practice of law occurs.”).
260. See supra notes 118-230 and accompanying text.
261. See Quintin Johnstone, Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution, 39 WILLAMETTE L. REV. 795, 808-09 (2003) (stating there are ambiguities in the law of unauthorized law practice in every state). Compare In re Estate of Marks, 957 P.2d 235, 241 (Wash. Ct. App. 1998) (determining that a nonlawyer, who was also a named beneficiary under the will, engaged in the unauthorized practice of law where the nonlawyer assisted the testator with the testator’s will by picking out the will-kit, acquiring an inventory of testator’s assets, discussing the distribution of assets, typing the will, and planning the details surround-
A definition for the practice of law is designed to prevent nonlawyers from engaging in the practice of law because the definition enunciates the activities that are exclusively limited to those authorized to practice. Therefore, persons not licensed to practice law are not authorized to engage in activities defined as the practice of law. However, many definitions for the practice of law used to prevent nonlawyers from engaging in the practice of law are largely ineffective because of the difficulties in defining the practice of law. Take, for example, a nonlawyer proposing to sell fill-in-the-blank estate-planning documents. In Illinois, the nonlawyer would be forced to consider the nebulous principle that the nonlawyer could sell fill-in-the-blank estate-planning documents so long as the activity does not demand legal skill and knowledge to competently apply legal doctrine and precedent.

2. **Current Regulations Have Provided Inconsequential Punishments for Nonlawyers Engaging in the Practice of Law**

Current punishments designated for nonlawyers that engage in the unauthorized practice of law have not effectively deterred nonlawyer involvement because such punishments are inconsequential. To deter nonlawyers from engaging in the unauthorized practice of law, jurisdictions have primarily relied on criminal prosecutions, civil


263. See Wolfram, Ethics, supra note 237, at 849 (internal citation omitted) ("Tasks that are held to constitute the practice of law may, under the law of unauthorized practice, be undertaken only by a licensed lawyer.").

264. Nonlawyer Activity, supra note 237, at 43.


266. Compare American Bar Association Standing Committee on Client Protection, 2009 Survey of Unlicensed Practice of Law Committees 6 n.2 (May 2009) (citation omitted), available at http://www.abanet.org/cpr/clientpro/09-upl-survey.pdf [hereinafter Survey] (discussing that Illinois has no definition for the practice of law and that an activity constitutes the practice of when "the activity in question required legal knowledge and skill in order to apply legal principles and precedent.")., with Volkmer, Unauthorized Practice, supra note 245, at 45 (arguing that the "line between acting as a 'mere scrivener' and in giving legal advice is clear in theory, but difficult to apply in practice").

267. See infra notes 271-82 and accompanying text.
injunctions, and contempt of court.\textsuperscript{268} However, these punishments have not adequately deterred nonlawyers from engaging in estate-planning activities.\textsuperscript{269} In addition, many jurisdictions lack the resources to enforce such regulations.\textsuperscript{270}

Criminal prosecutions are not an effective unauthorized practice of law enforcement tool because such prosecutions typically impose only minor punishments.\textsuperscript{271} For example, in Nebraska, an individual engaging in the unauthorized practice of law may be found guilty of a Class III misdemeanor.\textsuperscript{272} The maximum penalty for a Class III misdemeanor in Nebraska is three months imprisonment or a $500.00 fine, or both; and, there is no minimum penalty.\textsuperscript{273} Violators of the unauthorized practice of law are assigned the same degree of punishment as persons found guilty of disturbing the peace or first-time offenders of reckless driving.\textsuperscript{274}

Furthermore, civil injunctions and contempt of court alone have inadequately deterred all instances of nonlawyer involvement in estate-planning activities because civil injunctions are most useful where there is a risk of future violation.\textsuperscript{275} Injunctive relief does little
to prevent occurrences of the unauthorized practice of law because the remedy is not designed to deter nonlawyers from initially engaging in the unauthorized practice of law.276

Injunctive relief has successfully protected against future occurrences of some non-legal entities drafting, marketing, and selling estate-planning instruments.277 Presumably, the threat of an injunction has deterred non-legal entities from entering into the market for fill-in-the-blank legal documents because such entities do not want to risk wasting resources on a product that the non-legal entity could be enjoined from selling.278

However, injunctive relief and contempt of court do little to prevent nonlawyers from initially engaging in the unauthorized practice of law in situations where nonlawyers fill in the blanks of a preprinted estate-planning document for other persons because many of these nonlawyers are not likely to be repeat offenders.279 Several of these situations have involved a nonlawyer agreeing to gratuitously undertake certain estate-planning activities at the request of another person.280 Many of these nonlawyers were not in the business of providing estate-planning services.281 As a result, injunctive relief and contempt of court merely proscribe the nonlawyer from further per-

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276. See infra notes 277-82 and accompanying text.
277. See, e.g., Cincinnati Bar Ass'n v. Mid-South Estate Planning, 903 N.E.2d 296, 299 (Ohio 2009) (accepting the Board on the Unauthorized Practice of Law's recommendation to enjoin a non-legal entity from marketing and selling estate planning instruments).
279. Compare Wolfram, Out-of-State Lawyers, supra note 275, at 1053 (inferring that an injunction is most appropriate when there is risk of future engagements of the unauthorized practice of law), and Unauthorized Practice of Law Comm. of the Supreme Court of Colo. v. Prog, 761 P.2d 1111, 1116 (Colo. 1988) (opining that an injunction is appropriate because "[i]t[he] record suggests that unless restrained, the respondent will continue to engage in the unauthorized practice of law, with the likely consequence that those who rely upon him for legal advice and assistance will suffer injury."), with Franklin v. Chavis, 640 S.E.2d 873, 877 (S.C. 2007) (stating that the nonlawyer accused of engaging in the unauthorized practice of law did not object to the court ordered injunction because the nonlawyer had "no intention of assisting others in any matters related to wills").
280. See, e.g., Franklin, 640 S.E.2d at 876. Cf. Volkmer, Unauthorized Practice, supra note 246, at 45 (2007) (arguing that the "courts will be increasingly confronted with unauthorized practice issues as those 'jolly old testators' receive assistance from lay persons in preparing their wills.").
281. See, e.g., Franklin, 640 S.E.2d at 877 (stating that the decedent requested a nonlawyer, decedent's former neighbor, to draft the decedent's will because the decedent desired someone object to draft the will).
forming services in which the nonlawyer does not ordinarily provide.282

Moreover, many claims of unauthorized practice of law have not been prosecuted because those authorized to bring suit do not have the time or resources necessary to prosecute such claims.283 In 2009, the American Bar Association's Standing Committee on Client Protection ("the Committee on Client Protection") published a survey providing that several jurisdictions struggled with unauthorized practice of law enforcement because of insufficient funding.284 For instance, Montana, with an annual budget of $1,500.00 designated for unauthorized practice of law enforcement, reported that its limited budget has hindered enforcement.285 In contrast, Florida stated that it has an annual budget of $1,600,000.00.286 Although lack of deterrence is partly attributed toward the insignificant punishments for unauthorized practice of law violations, many enforcement entities lack the requisite resources to prosecute such violations.287

3. Nonlawyers Are Not Always Held To the Same Standards as Attorneys Providing the Same or Similar Services

Regulations on the practice of law have not effectively addressed issues surrounding nonlawyer involvement in estate-planning activities because nonlawyers are generally not held to the same standard of care as an attorney providing similar services.288 As a result, consumers who purchase legal-related products or services from nonlawyers may encounter difficulties when attempting to recover damages for harms associated with the use of such products or services.289

Jurisdictions have not agreed on whether a nonlawyer is held to the equivalent standard of care as a lawyer.290 Professor Sande L. Buhai of Loyola Law School Los Angeles demonstrated that courts

282. See supra notes 277-81 accompanying text.
283. See Wolfram, Out-of-State Lawyers, supra note 275, at 1053 (stating that misdemeanor prosecutions for UPL violations are not are not widely enforced because "prosecutors simply have larger fish to fry and insufficient resources."); Denckla, supra note 239, at 2592 (stating that criminal prosecutions for the unauthorized practice of law are rare).
284. Survey, supra note 266, at 1.
285. Id. at 8, 18.
286. Id. at 5.
287. See supra notes 259-86 and accompanying text.
288. Vallario, supra note 237, at 620 ("N]onlawyers may not be held to the same standard of care as lawyers.").
289. Id.
290. See Sande L. Buhai, Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law, 2007 UTAH L. REV. 87, 96 (2007) ("The law governing the standard of care applicable to the unlicensed practice of law is apparently not well settled.").
have responded in one of three ways to the modern case of nonlawyers rendering legal services resulting in the consumer being harmed as a result of the nonlawyer negligently providing legal services. 291

The first way in which courts have responded to a nonlawyer providing legal services and subsequently injuring a consumer is by determining that the nonlawyer is held to the same standard of competency as an attorney when the nonlawyer engages in the practice of law. 292 Thus, when a nonlawyer engages in the practice of law, any failure to adhere to the same standard of care of a lawyer providing an identical service constitutes actionable negligence. 293 Therefore, under this approach, if a consumer of a legal service or product provided by a nonlawyer suffers an injury as a result of the use of such service or product, the consumer would probably have a claim against the nonlawyer for negligence. 294

The second way in which courts have responded to a nonlawyer providing legal services and subsequently injuring a consumer is by stating that a nonlawyer may be liable in negligence, but without directly addressing the issue of standard of care. 295 As Professor Buhai discussed, in Biakanja v. Irving, 296 the California Supreme Court reasoned that a nonlawyer failing to properly execute a will should be held liable for civil damages so as to deter others from engaging in the unauthorized practice of law. 297 In Biakanja, Thomas Irving ("Irving"), a notary and nonlawyer, drafted an estate-planning document for the decedent, under which Vinka Biakanja ("Biakanja") was to receive the entire estate. 298 However, the will was not admitted to probate because Irving failed to carry out the formalities required to execute a valid will. 299 As a result, the decedent died intestate, and rather than receiving the entire estate, Biakanja received only her one-eighth intestate share. 300 The California Supreme Court upheld Biakanja's claim against Irving to recover the remaining seven-

291. Id. at 97.
292. Id. (citation omitted).
293. Id.
294. Compare id. (providing that the majority of courts “hold that when an unauthorized law practice is conducted by a layman, he is held, at a minimum, to the standards of competency of a lawyer.”), with Vallario, supra note 237, at 620-21 (stating “[d]amages caused by a nonlawyer’s negligence may not be compensated through common law remedies because “[j]urisdictions are split as to whether a nonlawyer can be held to the same standard of care as that of an attorney.”).
295. Buhai, supra note 290, at 97.
296. 320 P.2d 16 (Cal. 1958).
298. Biakanja, 320 P.2d at 17.
299. Id.
300. Id.
eighths share of the estate. Professor Buhai explained that the court must have determined that Irving had a duty to refrain from engaging in the practice of law, and that Irving was negligent for engaging in the practice of law. Nevertheless, as Professor Buhai noted, the court's decision in Biakanja implies that a nonlawyer is not negligent by providing legal services that the nonlawyer is expressly authorized to perform. Thus, under this approach, it is not entirely clear whether a consumer could recover against a nonlawyer providing legal services because this approach failed to determine whether the nonlawyer was held to a standard of care similar to that of an attorney.

The third way in which courts have responded to a nonlawyer providing legal services and subsequently injuring a consumer is by refraining from holding the nonlawyer to the same standard of care as an attorney. In Bland v. Reed, the California Court of Appeals for the Second District of California declined to hold the nonlawyer-defendant to the same standard of care as an attorney when the defendant caused the plaintiff $50,000.00 in damages after advising the plaintiff about his legal options. In Bland, Dwight Bland ("Bland"), a member of a steelworkers union, was injured as a result of his employer's negligence. An agent of the union suggested that Bland consult with James Reed ("Reed"), a nonlawyer, if Bland sustained injuries in the course of Bland's employment. After Bland sustained injuries during the course of his employment, Bland consulted with Reed, who advised Bland not to file a claim against Bland's employer. As a result, Bland failed to bring a timely claim. In declining to hold Reed to the same standard of care as an attorney, the court reasoned that California legislature had authorized nonlawyers to represent persons before the Industrial Accident Commission and

301. Id.
302. See Buhai, supra note 290, at 98 ("[T]he Biakanja approach appears to find negligence in undertaking to provide the relevant services in the first place.").
303. Id.
304. See supra notes 295-303 and accompanying text.
305. Buhai, supra note 290, at 99.
307. Bland v. Reed, 67 Cal. Rptr. 859, 862-64 (Cal. Ct. App. 1968). Professor Buhai noted that if the defendant were held to the standard of care of an attorney, the defendant "would likely have been negligent in not informing [the plaintiff] of the statute of limitations or in letting the statute of limitations run on [the plaintiff's] claim." Buhai, supra note 290, at 99.
308. Bland, 67 Cal. Rptr. at 861.
309. Id. (stating the union employee told the plaintiff, "[I]f you are injured in the plant, [the defendant] will take care of your interest.").
310. Id. at 863.
311. Id.
already considered the risks of nonlawyer representation. Thus, under this approach, a consumer could not recover from a nonlawyer who negligently provided legal services if the nonlawyer was authorized to perform such a service.

Accordingly, as Creighton University School of Law Professor Ronald R. Volkmer noted, the methods employed to prevent instances of nonlawyers engaging in the unauthorized practice of law have proven very blunt. Many current regulations do not effectively regulate nonlawyers from engaging in the unauthorized practice of estate planning because such regulations are not tailored to apply specifically to estate-planning activities. Furthermore, such regulations have partially failed to deter nonlawyers from participating in the unauthorized practice of law because such regulations carry insignificant punishments. Moreover, under existing regulations on the unauthorized practice of law, consumers are not necessarily afforded remedies for the harms associated with nonlawyer involvement in estate-planning activities. Insomuch as the current regulatory techniques have left much to be desired, state bar associations should embrace, rather than resist, certain nonlawyer involvement with estate-planning activities by implementing and administering a certification system for nonlawyers participating in such activities. By implementing a certification system, state bar associations could monitor and regulate nonlawyers providing estate-planning instruments so as to realize the associations' general goals of protecting consumers of legal services, promoting access to the justice system, and holding persons and entities accountable for their involvement in providing legal-related services.

312. Buhai, supra note 290, at 99.
313. See supra notes 305-12 and accompanying text.
314. See Volkmer, Unauthorized Practice, supra note 246, at 45 (contending that "the enforcement mechanism—'unauthorized practice of law'—is a very blunt instrument.").
315. See supra notes 118-230 and accompanying text.
316. See supra notes 267-87 and accompanying text.
317. See supra notes 288-313 and accompanying text.
318. See infra notes 320-79 and accompanying text.
319. See infra notes 320-79 and accompanying text.
C. **States Need to Assign State Bar Associations the Task Of Establishing and Managing a Certification System for Nonlawyers Producing Estate-Planning Instruments Because the Current Methods Employed To Regulate the Practice of Law Do Not Adequately Protect Consumers from Incompetent Estate-Planning Services**

Jurisdictions should delegate to state bar associations the responsibility of implementing and administering a certification system for nonlawyers producing estate-planning instruments to ensure that consumers are afforded greater protection from incompetent products and services because, contrary to testaments from lawyers posted on websites of legal document preparation services such as LegalZoom.com, nonlawyers are often not held to the same levels of competency as lawyers providing identical services. Because nonlawyers are not always competent in determining whether a specific legal document is suited to achieve the purpose for which the consumer obtained the document, relying on nonlawyers in a completely unregulated market could cause consumers harm.

Just as Arizona’s certification system for legal document preparers regulates the competency of its certificate holders, jurisdictions should establish a certification system requiring that all certified sellers of estate-planning instruments maintain a minimum level of competency. Under Arizona’s certification system, certified legal document preparers are held to similar standards of competency as lawyers. Similar to Arizona’s certification system, the proposed standards of competency that jurisdictions should impose mandates all nonlawyers providing estate-planning documents maintain a de-

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320. See LegalZoom.com, at http://www.legalzoom.com/ (last visited Mar. 23, 2010) (advertising the following testament from a lawyer: “[a]s an attorney, I have been pleasantly surprised with the ease and efficiency of LegalZoom. I have used it 5 times already.”); see infra notes 288-336 and accompanying text.

321. Lanctot, supra note 244, at 821.

322. See infra notes 323-36 and accompany text.

323. Compare Ariz. Code of Jud. Admin. § 7-208(J)(4)(b) (“A legal document preparer shall accept only those assignments for which the legal document preparer's level of competence will result in the preparation of an accurate document.”), and Ariz. Code of Jud. Admin. § 7-208(L)(1)(a) (mandating that legal document preparers complete ongoing continuing education requirements, which are designed to ensure that “legal document preparers maintain competence in the field after certification is obtained.”), with ABA Model Rules of Prof'l Conduct R. 1.1 (2009) [hereinafter Model Rules] (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”), and Neb. Ct. R. § 3-401.4 (requiring all active Nebraska attorneys to "complete a minimum of ten (10) hours of accredited or approved CLE in each annual reporting period. Of the ten (10) hours, at least two (2) hours shall be in the area of professional responsibility.”).
sired level of competency in order to retain certification. Moreover, each jurisdiction could adjust the requisite level of competency for nonlawyer certification relative to the complexity of the services and the potential harm nonlawyers could cause so as to reduce or eliminate the harm to consumers. Additionally, jurisdictions could protect consumers from misrepresentation and avoid consumer confusion by creating disclosure protocols that programmers of interactive self-help legal software and providers of preprinted estate-planning documents must follow. These disclosure protocols must be designed to ensure that users fully understand the qualifications of the provider and the nature and significance of the service being performed.

Nevertheless, opponents of nonlawyers providing legal software have argued that such software provides its users with a false sense of security because the user believes that the document created specifically applies to the user's situation. Furthermore, it is possible that interactive legal software might be programmed to rely on outdated law, thus creating a document inconsistent with the current law. Likewise, providers of preprinted estate-planning documents could potentially provide an outdated form or a form that is not suited to a customer's needs.

324. Compare Nonlawyer Activity, supra note 237, at 147 (“Certification standards should reflect the required skills so the public is reasonably assured the nonlawyer can provide competent services.”), with Ariz. Code of Jud. Admin. § 7-208(L)(1)(a) (mandating that legal document preparers complete ongoing continuing education requirements, which are designed to ensure that “legal document preparers maintain competence in the field after certification is obtained.”).

325. See Nonlawyer Activity, supra note 237, at 147 (explaining that the requirements for nonlawyer certification could be adjusted to reduce or eliminate the harm to consumers by conditioning the certificate on a demonstration of the desired level of competency).

326. See Nonlawyer Activity, supra note 237, at 147 (“Disclosure requirements may be a useful part of a regulatory scheme to avoid consumer confusion and make misrepresentation more difficult.”); Cynthia L. Fountaine, When is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment, 71 U. Cin. L. Rev. 147, 171-72 (arguing that disclosure requirements could prevent consumers harm posed by a hypothetical situation in which a consumer uses software created in 1999 to create a will in 2002).

327. Compare Nonlawyer Activity, supra note 237, at 147-48 (noting that disclosure is a effective and simple way to help consumers in evaluating service provider abilities), with Whitson, supra note 236, at 13 & n.33 (providing that “[a] regulatory approach for nonlawyer activity may be needed if the activity presents a serious risk of harm” and “if consumers cannot protect themselves against that risk because they will find it difficult or impossible to evaluate the nonlawyer service provider’s qualifications”).


329. Fountaine, supra note 326, at 171-72 (presenting a hypothetical situation where a person uses software from 1999 to create a will in 2002).

330. Lanctot, supra note 244, at 584. Cf. Garwood v. Garwood, 194 P.3d 319, 321 (Wyo. 2009) (explaining that the preprinted trust kit created a trust that “was of no
However, while it is possible that some consumers might not realize the potential dangers of self-help estate-planning instruments, the impact of these potentially harmful situations will largely depend on how the instruments are regulated. Jurisdictions must limit any false sense of security by enforcing strict disclosure requirements. Similarly, situations in which consumers use software or preprinted documents that rely on out-of-date laws could be prevented through disclosure requirements. Consequently, disclosure requirements should mandate software publishers to provide notice of software updates and the consequences of using out-of-date software. Similarly, disclosure requirements should require that certified pre-printed document providers place prominently similar warnings on the documents. Thus, many of the competency problems associated with nonlawyers providing estate-planning instruments can be effectively limited through certification.

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331. Compare Leonard, supra note 278, at 355-56 (“[T]he impact caused by cyberlawyering—both good and bad—depends on how it is regulated.”), with Whitson, supra note 236, at 7 (claiming that the “competence of nonlawyers providing services that are included within the definition of the practice of law could be assured, for instance, through experience, education or training standards, certification or licensing, or supervision by a lawyer.”).

332. Compare Fountaine, supra note 326, at 171-72 (proposing that one solution to the out-of-date software problem could be to require the software producer to include warnings that the user must check for software updates), with James, supra note 328, at 18 (arguing that interactive self-help computer software gives users “a false sense of security” because “[t]he user is given the impression that the document is proper for the user based upon his situation.”).

333. Fountaine, supra note 326, at 171-72 (proposing that one solution to the out-of-date software problem could be to require the software producer to include warnings that the user must check for software updates).

334. See id. (arguing that disclosure requirements could prevent consumers harm posed by a hypothetical situation in which a consumer uses software created in 1999 to create a will in 2002).

335. See id. (contending that disclosure requirements could prevent consumers harm posed by a hypothetical situation in which a consumer uses software created in 1999 to create a will in 2002); Leonard, supra note 278, at 378 (arguing that cyberlawyering applications can comply with the standard of competency if bar associations “mandate clear and conspicuous disclaimers” so as to “ensure that small businesses and individuals are reminded of the unique constraints of cyberlawyering ‘advice.’”).

336. See supra notes 320-36 and accompanying text.
D. **States Need to Assign State Bar Associations the Task of Establishing and Managing a Certification System for Nonlawyers Producing Estate-Planning Instruments Because Such Instruments Would Increase Access to the Justice System**

State bar associations should be delegated the task of implementing and overseeing a certification system for nonlawyers providing estate-planning instruments because certifying such providers would furnish persons of lower income with increased access to estate-planning services. Given the problems surrounding low income persons obtaining legal services and the potential for estate-planning instruments to offer competent and affordable services, state bar associations should regulate these providers through a certification system. In 2005, the Legal Services Corporation reported that at least eighty percent of lower-income Americans' legal needs are not being fulfilled. Many skeptics of current regulations on the practice of law have attributed the absence of affordable options for legal services to these restrictions. Regulations on the practice of law that limit who may engage in estate-planning activities increase the price of estate-planning services because only licensed individuals are authorized to provide such services. Consequently, many individuals with access to the justice system.

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337. Compare Nonlawyer Activity, supra note 237, at 146 (explaining that a certification does not prohibit noncertified persons from engaging in the regulated activity), and Curran, supra note 240, at 77 (“[O]ccupational licensing alters the range of services available to consumers.”), with Comments, supra note 237, at 4 (“[I]f competition to provide such services is restrained, consumers may be forced to pay higher prices or accept services of lower quality.”), and Comments, supra note 237, at 4 (explaining that the “Justice Department and the FTC are concerned about efforts across the country to prevent non-lawyers from competing with lawyers through the adoption of excessively broad unauthorized practice of law restrictions by state courts and legislatures.”), and Denckla, supra note 239, at 2599 (arguing that regulations on the practice of law “appear to be the main barrier blocking the development of affordable legal services to the public.”).

338. See infra notes 339-53 and accompanying text.


340. See, e.g., Denckla, supra note 239, at 2599 (arguing that “the lawyer monopoly must be responsible to a large degree for the lack of affordable options that might otherwise be made available in a more diversified market for legal services,” and that the restrictions on the practice of law “appear to be the main barrier blocking the development of affordable legal services to the public.”); WOLFRAM, ETHICS, supra note 237, at 835 n.63 (citations omitted) (summarizing one scholar's argument that a "broad definition of [the] practice of law has discouraged development of narrow lay specialties that could accomplish better and cheaper probate administration.").

341. See WOLFRAM, ETHICS, supra note 237, at 829 & n.35 (citations omitted) (stating that many legal scholars and economists contend that professional self-regulation has an anti-competitive effect); see also Comments, supra note 237, at 4 (footnote omit-
lower incomes have settled on less expensive alternatives to estate planning because they cannot afford to obtain estate-planning services from a licensed attorney. Moreover, the American Bar Association’s Commission on Nonlawyer Practice (“the Commission”) provided that an increase in nonlawyers providing legal services also produces an increased risk of fraudulent and incompetent behavior. Nevertheless, the legal needs of the lower-income population remain substantially unsatisfied.

A nonlawyer certification system for estate planning, unlike a licensing system or an outright prohibition, would offer the public the greatest access to the justice system because a certification system does not limit the number of individuals authorized to engage in the regulated activity. In contrast, a licensing system prohibits non-licensed individuals from participating in the regulated activity. Likewise, complete prohibitions, such as Illinois’s Consumer Fraud and Deceptive Business Practices Act, entirely proscribe unqualified individuals from participating in the regulated activity. Thus, under a certification system, a greater number of nonlawyer individuals would be authorized to perform legal services than under a licensing system and statutory prohibitions. Because a greater amount of individuals authorized to engage in legal services would increase the affordability of legal services, a certification system for nonlawyers would improve access to the justice system.

342. See generally Vallario, supra note 237, at 596-97 (describing a type of company that is “staffed by nonlawyer salespersons who take advantage of a consumer’s reluctance to retain attorneys and sell the victim a prepackaged bundle of trusts,” which are “pushed on misinformed consumers as a way to ‘save’ money.”).

343. Nonlawyer Activity, supra note 237, at 126.

344. Denckla, supra note 239, at 2599.

345. Compare Nonlawyer Activity, supra note 237, at 146 (explaining that a certification does not prohibit noncertified persons or entities from engaging in the regulated activity), and Whitson, supra note 236, at 9 (inferring that access to the justice system would be harmed if nonlawyers were prohibited from engaging in legal-related services), with Nonlawyer Activity, supra note 237, at 147 (providing that only licensed individuals may provide the service for which the licensed is obtained), and Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/2BB (2008) (prohibiting any nonlawyer, individual or entity, from drafting, assembling, funding, or executing any living trust document for another person).

346. Id. at 147.


348. See Consumer Fraud and Deceptive Business Practices Act, 815 ILL. COMP. STAT. 505/2BB (2008) (prohibiting any nonlawyer, individual or entity, from drafting, assembling, funding, or executing any living trust document for another person).

349. See supra notes 337-48 and accompanying text.

350. See supra notes 337-48 and accompanying text.
Accordingly, jurisdictions should delegate state bar associations the responsibility of implementing a certification system for nonlawyers that sell estate-planning instruments because a certification system would best effectuate the bar association's goal of improving public access to the justice system.\textsuperscript{351} Under a certification system, non-certified individuals are not prohibited from engaging in the regulated activity so long as the non-certified individual does not represent that such individual is certified to provide the regulated activity.\textsuperscript{352} Thus, a certification system would improve access to the justice system because such a system does not limit the number of individuals authorized to engage in the regulated activity.\textsuperscript{353}

\textbf{E. STATES NEED TO ASSIGN STATE BAR ASSOCIATIONS THE TASK OF ESTABLISHING AND MANAGING A CERTIFICATION SYSTEM FOR NONLAWYERS PRODUCING ESTATE-PLANNING INSTRUMENTS SO THAT CERTIFIED NONLAWYERS ARE HELD ACCOUNTABLE FOR THEIR ESTATE-PLANNING SERVICES}

Jurisdictions need to delegate state bar associations the duty of creating and administering a certification system for nonlawyers marketing estate-planning instruments because, under existing regulations on the unauthorized practice of law, consumers are not necessarily afforded remedies for the harms associated with nonlawyer involvement in estate-planning activities.\textsuperscript{354} Under a certification system similar to Arizona's system for legal document preparers, jurisdictions could ensure that certified nonlawyers are held accountable for their estate-planning instruments by holding certified nonlawyers to a standard of care comparable to that of an attorney.\textsuperscript{355}

Jurisdictions have not agreed whether to hold nonlawyers to the same standard of care as that of an attorney providing identical services.\textsuperscript{356} Although many courts have determined that a nonlawyer is held to the same standard of competency as a lawyer when the nonlawyer engages in the practice of law, other courts have extended no

\textsuperscript{351} See supra notes 337-48 and accompanying text.
\textsuperscript{352} See supra notes 345-48 and accompanying text.
\textsuperscript{353} See supra notes 345-48 and accompanying text.
\textsuperscript{354} Compare Nonlawyer Activity, supra note 237, at 150 (stating that a certification regulatory scheme could implement rules of professional conduct and procedures for enforcing those rules), with Buhai, supra note 290, at 96 (“The law governing the standard of care applicable to the unlicensed practice of law is apparently not well settled.”), and Vallario, supra note 237, at 620 (explaining that nonlawyers are not always “held to the same standard of care as lawyers.”).
\textsuperscript{355} See infra notes 356-65 and accompanying text.
\textsuperscript{356} Vallario, supra note 237, at 620 (“Nonlawyers may not be held to the same standard of care as lawyers.”).
such duty of care. As a result, the public may encounter difficulties when attempting to recover damages for harms incurred from nonlawyers providing estate-planning services.

Just as Arizona's certification system for legal document preparers holds accountable certified legal document preparers, jurisdictions should establish a certification system holding all certified sellers of estate-planning instruments accountable for their products. Under Arizona's certification system for legal document preparers, certified document preparers must adhere to a code of conduct, including provisions on ethics, professionalism, fees and services, skills and practice, and performance in accordance with law. Additionally, the certified legal document preparers must satisfy an ongoing continuing education requirement. If the certified legal document preparer does not comply with any of the requirements under the code, the document preparer may be subjected to disciplinary sanctions, including a letter of concern, a period of probation, a further requirement of continuing education, revocation of the certificate, and civil penalties. Thus, by utilizing a comparable certification system for nonlawyers marketing estate-planning instruments as Arizona's system for legal document preparers, jurisdictions can ensure that such nonlawyers are held accountable for any injuries consumers might sustain through the use of the nonlawyer's estate-planning instruments.

To provide consumers adequate remedies for the harms associated with nonlawyer involvement in estate-planning activities, jurisdictions should assign bar associations the task of implementing and managing a certification system for nonlawyers that provide self-help estate-planning instruments. By instituting a certification system that matches Arizona's certification system for legal document...
preparers, jurisdictions will ensure that certified nonlawyers are held accountable for their estate-planning services by holding certified nonlawyers to a standard of care comparable to that of an attorney.365

IV. CONCLUSION

To vindicate the avowed justifications for regulating the practice of law, jurisdictions should assign state bar associations the duty of creating and managing a certification system for nonlawyers providing estate-planning services.366 Many current regulations on the practice of law do not adequately address situations surrounding nonlawyer involvement in estate-planning services and the unauthorized practice of law.367 Through a certification system similar to Arizona's system for certified legal document preparers, states can regulate nonlawyers providing estate-planning services and achieve their goals of protecting consumers from incompetent services, providing access to the justice system, and holding providers of legal services accountable for their actions.368

Jurisdictions have justified regulating the practice of law by contending that the objectives of such regulations include insulating the public from incompetent services, minimizing barriers to accessing the justice system, and holding suppliers of legal services responsible for their dealings.369 However, realizing the goal of protecting consumers from incompetent legal services has created problems with providing greater access to the justice system.370 The price for legal services has remained beyond the reach of many lower-income individuals because the goal of protecting consumers from incompetent legal services is primarily realized by restricting the number of individuals authorized to provide legal services to licensed attorneys.371 As a result, regula-

365. See supra notes 354-62 and accompanying text.
366. See supra notes 320-65 and accompanying text.
367. See supra notes 255-319 and accompanying text.
368. See supra notes 320-65 and accompanying text.
tions on the practice of law have been attributed for the lack of affordable legal services.\textsuperscript{372}

Moreover, because jurisdictions have not agreed whether nonlawyers are held to the same standard of care as that of an attorney providing identical services, remedies for injuries resulting from nonlawyer-provided estate-planning services are not always available to consumers.\textsuperscript{373} Although many courts have provided that a nonlawyer engaging in the practice of law is held to the same standard of care as a lawyer, other courts have extended no such duty of care.\textsuperscript{374} As a result, consumers may encounter difficulties when attempting to recover damages for harms incurred from nonlawyers providing estate-planning services.\textsuperscript{375}

By implementing a certification system, state bar associations could monitor and regulate nonlawyers providing estate-planning instruments so as to effectuate the jurisdictions' general goals of protecting consumers of legal services, promoting access to the justice system, and holding individuals accountable for providing legal-related services.\textsuperscript{376} Many of the competency problems associated with nonlawyers providing estate-planning instruments can be effectively limited through certification because such a system can impose minimum levels of competency and strict nonlawyer disclosure requirements for all certified individuals.\textsuperscript{377} Furthermore, a certification system for nonlawyers would improve access to the justice system because such a system does not limit the number of individuals author-

\textsuperscript{372} Derek A. Denckla, \textit{Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters}, 67 \textit{Fordham L. Rev.} 2581, 2599 (1999) (arguing that "the lawyer monopoly must be responsible to a large degree for the lack of affordable options that might otherwise be made available in a more diversified market for legal services," and that the restrictions on the practice of law "appear to be the main barrier blocking the development of affordable legal services to the public.").

\textsuperscript{373} Angela M. Vallario, \textit{Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad}, 59 \textit{Md. L. Rev.} 595, 620 (2000) ("Nonlawyers may not be held to the same standard of care as lawyers.").


\textsuperscript{375} Vallario, \textit{supra} note 373, at 620.

\textsuperscript{376} See \textit{supra} notes 320-65 and accompanying text.

\textsuperscript{377} See \textit{supra} notes 320-36 and accompanying text.
ized to engage in the regulated activity, and thus, making legal services more affordable because a greater number of individuals would be authorized to perform legal services.\textsuperscript{378} Moreover, a certification system would ensure that certified nonlawyers are held accountable for their estate-planning services by holding certified nonlawyers to a standard of care comparable to that of an attorney.\textsuperscript{379}

Admittedly, a certification system cannot entirely prevent or regulate all instances of nonlawyers engaging in estate-planning services because a certification system would not encompass nonlawyers who are not in the business of providing estate-planning services. Short of completely prohibiting nonlawyer involvement in estate-planning services, a solution this author finds too callous, these attenuated instances of nonlawyer involvement cannot be entirely prevented. However, some consequences resulting from situations where such a nonlawyer used self-help estate-planning instruments to draft an estate-planning document for another person can be avoided through the bar associations' active involvement in the certification system. In these situations, strict disclosure requirements would better place consumers in a position to make an informed decision based on the potential risks associated with the use of such products.

\textit{Michael S. Knowles – '11}

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\item \textsuperscript{378} See supra notes 337-53 and accompanying text.
\item \textsuperscript{379} See supra notes 354-65 and accompanying text.
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