

Fuzzy Law-gic

FOSS & the Unauthorized Practice of Law

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Ceci n'est pas un conseil juridique.

This is not legal advice.

I am not your lawyer.

This presentation is intended for general informational purposes only.

(Citations appear at the end, organized by slide)



A Few More Quick Notes

- Focus is on the United States.
- Other jurisdictions also regulate the practice of law, often with a greater emphasis on in-court rather than out-of-court activities.
- Summaries and open questions.

The Tale of the 'World's First Robot Lawyer'

DoNotPay launched in 2015 with a chatbot to help contest parking tickets.

Then moved into other consumer inconveniences, like canceling free trials and subscriptions, negotiating bills, and getting refunds on canceled flights.

Its AI app, dubbed 'The World's First Robot Lawyer,' launched in October 2018, providing expanded services including several legal actions and legal document generation.



A Timeline

4 Jan 2023

DoNotPay announced its AI will fight a speeding ticket in traffic court in Feb 2023.

8 Jan 2023

DoNotPay offered \$1M for anyone to use its AI in a US Supreme Court case.

17 Jan 2023

DoNotPay announced AI extension for summarization of Terms of Service and lease agreements.

22 Jan 2023

DoNotPay confirmed its plans to appear in traffic court 22 Feb 2023.

25 Jan 2023

DoNotPay postponed in-person court case & announced rollback of certain products.



What Happened?

Lawyers and State Bar associations alleged that such actions would constitute the **unauthorized practice of law (UPL)**, threatening to bring charges accompanied by criminal incarceration if found guilty, in addition to other criminal and civil charges.



What Is the Practice of Law?

- Each U.S. state (and some federal agencies) decides for itself.
- Violations may result in civil penalties, criminal penalties, revocation of licensure, etc.
- The rules apply to lawyers and non-lawyers alike.

Common Elements of UPL

- Legal advice
- Given by a person or entity
- That does not hold a law license in the relevant jurisdiction

!=

(does not equal)

- Legal services for compensation
- Given by a person or entity
- That does not hold a law license in the relevant jurisdiction

Public Policy Rationale

“The duty of this Court is **not to protect the Bar** from competition but to **protect the public** from being advised or represented in legal matters by **incompetent or unreliable persons.**”

(**emphasis added** and reformatted for greater readability)



What Are the Options?

Do your own research and represent yourself (called 'pro se').

OR

Hire a licensed lawyer.

OR

A lawyer may be appointed to you (mostly in criminal trials).

Effective Access to Justice

“The access to justice crisis [in the U.S.] cuts across the social spectrum, but its effects are not equally distributed.”

– IAALS & HiIL, *Justice Needs and Satisfaction in the United States of America*
2021 Survey



Factors U.S. Courts *May Consider*

Disclaimers &
efforts to avoid
misrepresentation

Nature of the
activity
(specific or general)

Any fees charged

Consumer
affirmation and
acknowledgement

In-court v.
Out-of-court

Alignment of
financial interests

Actual & potential
harm caused

Alignment with
consumer
protection

Actual & potential
effect on legal
rights

Janson v. LegalZoom (2011)

- Website providing blank legal forms for sale (goods).
- Questionnaires to generate legal documents (services).
- LegalZoom disclaimed that it was not a law firm or providing legal advice.
- No actual harm to the public ever alleged.
- Missouri court found that the sale of the goods fell into a recognized 'scrivener's exception' while the sale of the services constituted UPL.

Janson v. LegalZoom (cont'd)

“...LegalZoom's **branching computer program** is created by a LegalZoom employee using Missouri law.

It is that **human input** that creates the legal document.

A computer sitting at a desk in California **cannot prepare a legal document without a human programming it** to fill in the document **using legal principles derived from Missouri law** that are selected for the customer based on the information provided by the customer.”

(emphasis added and reformatted for greater readability)



Florida Bar v. TIKD (2021)

- Mobile app connected traffic ticket recipients to licensed Florida lawyers for a flat, up-front fee if the consumer's case was accepted.
- TIKD algorithm analyzed tickets for profitability before accepting cases or charging any fees.
- Clear disclaimers & FAQs that it was not a law firm or providing legal advice.
- Consumer established separate lawyer-client relationship.
- Lawyers not employed by TIKD.

Florida Bar v. TIKD (cont'd)

- 2 amicus briefs filed:
 - 1 Pro-FL Bar: Group of private practice Florida lawyers, largely handling traffic tickets.
 - 1 Pro-TIKD: Consumers for a Responsive Legal System and Center for Public Interest Law.
- 4-to-3 decision in Florida Supreme Court that TIKD engaged in UPL:
 - Potentially substantial effect on legal rights and timely assistance of counsel.
 - Potentially substantial effect on quality legal representation.
 - Financial interests may be misaligned with best interest of the consumer.
 - Cannot adequately supervise or control quality of referral lawyer work.

Florida Bar v. TIKD (cont'd)

- No claim of any actual public harm.
- Majority opinion included a footnote:
 - Recognizing the need for affordable access to justice.
 - Acknowledging that technology lowers the barrier for the public's benefit and convenience.
 - Stating that here, the public benefit wasn't sufficient to overlook UPL.
- Minority dissent:
 - TIKD only offering financial hedge and shifted the downside risk off of consumers.
 - Algorithm based on data and statistics, not on legal knowledge or opinion.

In re Peterson (2022)

- Court noticed multiple pro se (self-filed) bankruptcy documents included identical language and references to a legal aid non-profit, Upsolve.
- Court conducted a thorough review of Upsolve's services in light of UPL.
- Upsolve has copious disclaimers and has users acknowledge and confirm they understand and agree Upsolve is not their lawyer or a law firm, and that it does not provide legal advice.

In re Peterson (cont'd)

- Upsolve is a non-profit that offers its services for free.
- Largely relies on state forms, instructions, and publicly available information.
- Upsolve also limits its services to routine, straightforward low-income cases.

In re Peterson (cont'd)

- Upsolve was cooperative and offered to make any changes necessary.
- Court found that the form generation program was engaged in UPL – making legal determinations because it dynamically selected and limited options presented to users based on user inputs.
- Court also found that the wording of certain recommendations, although not required, constituted legal advice.
- Court acknowledged the importance of the services provided and alignment with public policy, and is working with Upsolve to update its services.

Case Comparisons

	<i>LegalZoom Services</i>	<i>TIKD Services</i>	<i>Upsolve Services</i>
Fees	Yes	Yes	No
Actual Harm	No	No	No
Disclaimers	Yes	Yes	Yes
In/Out-of-Court	Mixed - some direct filings	Out-of-Court	Out-of-Court
Decision	UPL, but update services & disclaimers	UPL, discontinue services in FL	UPL, but update algorithm & language

I Left Out One Detail

At least some of Upsolve's software is free and publicly available under open source licenses at <https://github.com/Upsolve>.

(Fair warning, it doesn't look like it's been updated in a while.)



Open Questions for FOSS Projects

'IANAL, but...' ?
(I Am Not A Lawyer)

General versus
specific output?

No fees or
compensation?

License Warranties
& Disclaimers?

The internet is
(mostly)
everywhere

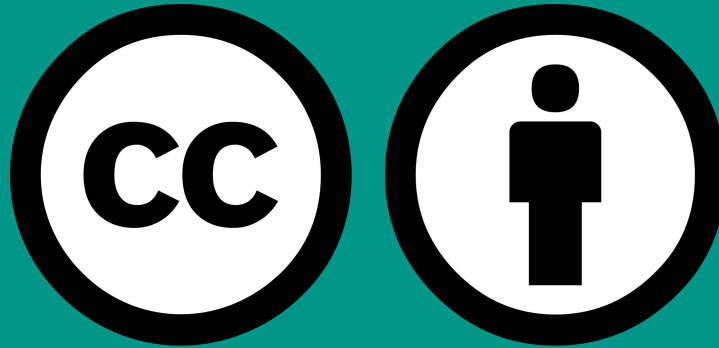
Human input effect
on output?

Potential harm from
reliance or use?

Alignment with
consumer
protection?

Who would be held
liable?

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Citations

All slides

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Slides 13 & 14

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Slides 15–17

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Slides 18–20

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Slide 21

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