

# LAW & TECHNOLOGY CLE

## THE ETHICS OF LEGAL TECH

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May 29, 2019



### What is Legal Tech?

- LegalTech affects all segments of the legal industry and legal profession and covers a wide range of products and services.



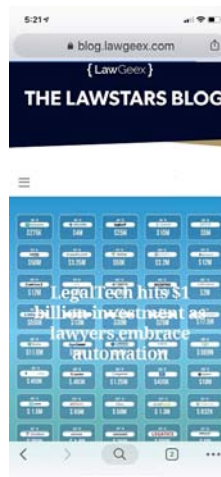
— Dennis Kennedy



# LegalTech Ecosystem



## Legal Tech Hits \$1 Billion



## Introduction to this Session

- With such a broad range, what was I thinking?  
The ethics of LegalTech in 50 minutes.
- Obviously, requires some focus and limits.
- Panel at the conclusion of the CLE will address a variety of other issues after you've seen and heard more.
- I will limit my talk to two basic points.



## The Duty of Technology Competence

### Rule 4-1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

In response to ABA 2020 recommendations, Missouri and Kansas, along with more than 30 other states, added a new section to the Comments to Rule 1.1 ([6] in MO, [8] in KS) which provides:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology . . . (emphasis added).*



## The Duty of Technology Competence

According to Anthony E. Davis and Steven M. Puiszis, [\*An Update on Lawyers' Duty of Technological Competence: Part 1\*](#), New York Law Journal (3/1/19):

There are six realms of technological competence reasonably necessary for today's lawyers:

- data security;
- the technology used to run a law firm and practice law;
- social media competence;
- technology used by clients to build products or offer services that lawyers have to defend;
- electronic discovery; and
- technology used to present information in court.

While these are all part of the duty, there is likely more as well.



## The Duty of Technology Competence

In [\*No Rules, Just Be Right? The ABA's New Technology Ethics Opinion\*](#), Peter Norman looks to ABA Formal Op. 17-477R and finds two guiding principles for how lawyers can meet their ethical responsibilities in an "ever-changing technological world."

### Principle #1: Technology Risk is Always a Matter of Context

The ABA developed an approach that is "context-dependent and technology-agnostic. One size does not fit all. . . . Instead of a bright-line rule, . . . lawyers are expected to engage in an individualized decision-making process . . . ."

### Principle #2: The Individual Lawyer Cannot Outsource Her Professional Judgment

While some lawyers might argue that the ABA has expanded the lawyer's role "beyond its appropriate boundaries," the "grim answer is that lawyers might have no choice, as the realities of their responsibilities force them into the role of digital custodians and gatekeepers."



## The Duty of Technology Competence

Norman suggests that this duty involves two key elements:

- The first is a deep understanding of technology - adequate to identify potential problems and evaluate
- The second deals with issue spotting – understanding how a situation can give rise to technology risks.
- solutions.

And, while he acknowledges that this duty appears daunting, he concludes that there is some good news.

- There are similarities between legal work and software or systems engineering in that both require thinking through complex and risky processes methodically and sequentially.
- The second competency cuts even closer to the core of lawyers' traditional strengths in that traditionally, clients rely on lawyers to spot the risks in fluid and ambiguous situations.



## An Ethical Challenge: LegalTech and Access to Justice



### Comment to Rule 4-6.1: Voluntary Pro Bono Publico Service

[2] The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules, and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

[3] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally . . . Every lawyer should support all proper efforts to meet this need for legal services.



### LegalTech and Access to Justice

- Is LegalTech a threat or an opportunity to small-law lawyers who represent people and small business?
- It largely depends on who you ask and from what perspective they answer that question.
- While there is no doubt that technology can provide greater efficiencies, it is also true that competition from alternative legal service providers, with investment capital behind them, poses a significant threat to traditional lawyers.
- On the other hand, technology presents great opportunities to provide service to the estimated 80% of people and small businesses who need, but can't afford, traditional legal services.
- Perhaps what we need are effective business models, but who will provide them, and will they really serve the needs of those in need of the services?



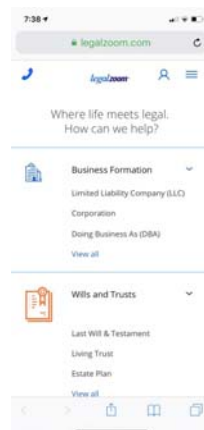
## LegalTech and Access to Justice

- Should the legal profession embrace LegalZoom, Rocket Lawyer, AVVO, and similar entities or fear them?
- Do these companies meet the needs of the un- and underserved?
- Do they violate the ethical rules of the Profession?
- Or are they merely competitive threats?



## LegalTech and Access to Justice

### Legal Zoom



## LegalTech and Access to Justice

### § 484.020: Unauthorized Practice of Law

1. No person shall engage in the practice of law or do law business, as defined in [section 484.010](#), or both, unless he shall have been duly licensed therefor and while his license therefor is in full force and effect, nor shall any association, partnership, limited liability company or corporation, except a professional corporation organized pursuant to the provisions of chapter 356, a limited liability company organized and registered pursuant to the provisions of chapter 347, or<sup>1</sup> a limited liability partnership organized or registered pursuant to the provisions of chapter 358, engage in the practice of the law or do law business as defined in [section 484.010](#), or both.
2. Any person, association, partnership, limited liability company or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof . . .



## LegalTech and Access to Justice

### § 484.010: Practice of the law and law business defined

1. The “**practice of the law**” is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.
2. The “**law business**” is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.





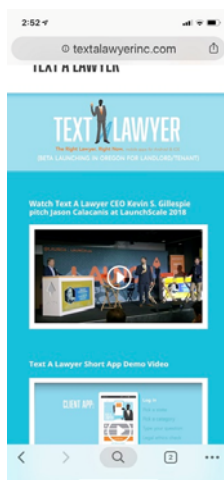
## LegalTech and Access to Justice

Todd JANSON Plaintiffs,  
v.  
LEGALZOOM.COM, INC., Defendant.

802 F.Supp.2d 1053  
United States District Court,  
W.D. Missouri,  
Aug. 2, 2011



## [Text A Lawyer](#)



## LegalTech and Access to Justice

Posted on Louisiana Legal Ethics:

Considering these unfavorable ethics opinions, Louisiana lawyers should avoid participating in Text A Lawyer (and Avvo Advisor). Louisiana Rule 5.4(a) provides that a “lawyer or lawfirm shall not share legal fees with a nonlawyer,” except under unusual circumstances. Similarly, Louisiana Rule 7.2(c)(13) provides that a “lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may pay the reasonable cost of advertising or written or recorded communication permitted by these Rules, and may pay the usual charges of a lawyer referral service . . . .” Both rules are squarely implicated by Text A Lawyer’s business model.

1. See Utah Ethics Advisory Opinion Committee, Op. No. 17-05 (Sep. 27, 2017); South Carolina Ethics Op. 16-06 (2016); Pennsylvania Ethics Op. 2016-200 (2016); Ohio Ethics Op. 2016-3 (2016); New York State Ethics Op. 1132 (2017); New Jersey Ethics Op. 732, (2017).



## LegalTech and Access to Justice

### **RULE 4-5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;
- (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;
- (3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 4-1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
- (4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
- (5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.



## LegalTech and Access to Justice

### **RULE 4-5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER**

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit if:

- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
- (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.



## Can You Really Get Good Legal Help For \$69/Month?



## LegalTech and Access to Justice

Carolyn Elefant: Killing Solo Softly: How Ethics Regulations Threaten Solo and Small Law Firms, <https://www.2civility.org/the-future-is-now-2-019/carolyn-elefant/>

Today, many solo and small firm lawyers struggle financially in the face of competition from do-it-yourself websites and attorney-matching platforms. But it's hardly a fair fight. Onerous ethics rules that are no longer necessary to safeguard clients in a digital age place solo and small firm lawyers at a disadvantage when competing against nonlawyer sites. In fact, these ethics rules threaten the very survival of solo and small law firms. The solution? Instead of resorting to protectionist tactics, the legal profession must break the surly bonds of ethics regulation that constrain solo and small firm lawyers.

