

Expert Computer Software and the Unauthorized Practice of Law

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ABSTRACT

Expert systems are a class of intelligent computer programs which incorporate domain-specific facts and the reasoning capabilities of one or more human experts from the problem area. The purpose of an expert system is to use that stored knowledge to solve problems normally requiring human specialists (Firebaugh, 1989). The trend in computer programs developed for the legal market has been to incorporate more and more intelligent features, so that some programs in certain aspects are approaching the level of expert systems. If a computer program truly achieves the legal expertise of an attorney, it could possibly violate the strictures against the unauthorized practice of law. This paper describes the increasing sophistication of software used in legal practice, and addresses certain issues relating to the unauthorized practice of law by computer programs.

INTRODUCTION

Over the past ten years the functional equivalent of an industrial revolution in the application of computer technology to business and professional offices of all kinds has taken place. In 1982 the IBM Magnetic Card typewriter was nearly state of the art for word processing: a user could record a whole page on the envelope-sized piece of plastic. Shortly thereafter, typewriters with word processing capability, such as the Olivetti electronic typewriter equipped with about 16K of external storage, became available. Then came dedicated word processors, and then desk-top general purpose computers with word processing, file management, and spread sheet software. Recently the inclusion of graphical user interfaces has made office systems easier to use, and decision support systems, containing problem-related data and analytical modelling capability, are now available to help managers, executives, and professionals evaluate alternative solutions to problems before making decisions.

Over this same period of time a healthy market has developed selling increasingly sophisticated custom software to lawyers. One has only to look at the advertisements in any current issue of the *ABA Journal* for evidence of a large variety of commercial software packages available to assist attorneys with law office accounting, bankruptcy, debt collection, case management, searches, and so on.

THE EVOLUTION OF LEGAL SOFTWARE: BANKRUPTCY LAW EXAMPLE

A major portion of bankruptcy law practice consists of preparing comprehensive statements and schedules which list all of the assets and debts of the debtors. Information such as the name and address of a creditor, and the amount owed to that creditor by the debtor, might ultimately have to be entered on several different

forms. Naturally, it would be most efficient to use a computer, have the data entered only once and then automatically directed to the correct forms after the computer performs the appropriate mathematical computations.

Matthew-Bender, a major publisher in the legal market, has produced at least three generations of bankruptcy software which illustrate how legal software is evolving from simple forms generation toward expert systems level. The first generation, circa 1987, was fairly unsophisticated. The selection of forms available was quite small, and the entry process was quite primitive. Although the program had forms for petitions filed under Chapter 7¹ and Chapter 11², Chapter 13³ was not serviced. There was no automatic routing of the data to forms. The user had to specify which forms onto which the data was to be recorded. The program performed only limited mathematical operations in totalling the amounts in the schedules, and could only hold the data for one bankruptcy at a time. Despite its limitations, using this program was a lot faster than sitting down at a typewriter to fill out the blank forms.

The second generation, circa 1989, was much more sophisticated. Not only were more forms available, but once data was entered into the program it was automatically routed to the forms. Still, the user had to manually select which forms were to be printed. Chapter 13 was now partially covered. Yet there was no default grouping of forms for printing. That is, the data was directed to the correct forms, but when the forms were to be printed, it was necessary to manually indicate which forms were relevant for the particular bankruptcy. The data input process did utilize limited branching, and the program could hold the data for several debtors at once. All in all, this package was a major advance.

The third generation appeared in 1991. This program used some branching logic in obtaining the data. For example, if an individual as opposed to a couple was filing bankruptcy, the program was finally smart enough that it did not ask superfluous questions about the debtor's spouse. Data was automatically sent to the forms, and the forms were automatically grouped for printing. This program was more adept in the data entry process, particularly in the portion of the program where the assets of the debtor had to be entered. The primary limitation of this version was in the preparation of the Chapter 13 Plans. A form was provided wherein the specifics of

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- 1 Chapter 7 Bankruptcies involve the liquidation of a debtor's estate. The debtor reveals to the court the location and value of all property owned. Technically, certain items of property could be taken and sold under court supervision, and the proceeds applied on a pro rata basis to the debts owed by the debtor, though in about 98% of cases, no property is actually sold. The balance of the unpaid debts would be discharged, meaning that the legal obligations to pay the debts are wiped out.
 - 2 A Chapter 11 bankruptcy generally involves the reorganization of a business, though individual debtors may also file. In general terms, the purpose of a Chapter 11 is to hold the creditors of a debtor at bay while the business is allowed to operate until a plan of reorganization can be filed with the court and accepted by the creditors.
 - 3 Chapter 13 is available only to individuals. This a powerful option, especially for debtors who have fallen in arrears on mortgage payments, and are in danger of losing the property securing the debt, which is typically their residence. The debtor proposes in the Chapter 13 Plan a payment plan between 36 and 60 months in length. This plan can cure the default in a mortgage by completely amortizing the arrearage, with interest over the term of the plan. In addition, up to 70% of a debtor's unsecured debts can be discharged through payments in the plan.

a Chapter 13 plan could be entered, but the program itself did not carry out the computations necessary to formulate the plan. The user had to prepare a template using a spread sheet program that computed the monthly payments for the Chapter 13 Plan. While this was adequate, the user was still required to exit the program, determine the sums of debts owed as computed by the bankruptcy program, enter the data on the spreadsheet, and then return to the bankruptcy program.

Recently Matthew-Bender announced that they have a new, improved release of the program ready to ship. Perhaps this version will contain the ability to compute a Chapter 13 plan entirely within the program and will include a decision support subsystem for determining whether a particular debtor could file under a given Chapter of the bankruptcy code. From this point, the next logical step would be to create future versions which could include expert system reasoning and rules to actually recommend the various bankruptcy options.

Some of these capabilities are already available in at least one commercial program for computing Federal Tax returns (Meca, 1992). In that program the user is asked questions, and from his responses, is presented with follow-up questions as needed. The user has the ability to see what would be the consequences of alternative choices in tax strategies. Clearly the tax program approaches expert level in its sophistication. What may not be apparent is that in the legal arena, if a computer program with legal expertise approaches expert level, it is possible that such a program might actually pass into the realm of the unauthorized practice of law.

LIMITATIONS ON THE PRACTICE OF LAW

In the United States, an individual has a constitutional right to represent himself or herself⁴ in Court. However, there is no corresponding right to represent any other individual or otherwise practice law. Each individual state or jurisdiction strictly controls who may practice law within that state. In most jurisdictions, Statute or Rules adopted by the Courts limit the practice of law to members of the Bar.

Generally speaking, to be admitted to the bar the applicant must graduate from a properly accredited law school, and pass a very rigorous bar exam lasting two or three days. A recent trend has been to require a certain amount of annual continuing legal education for bar membership. Furthermore, a member of the bar is subject to the discipline of the Courts in the event of malfeasance in the representation of clients.

An individual who attempts to practice law without having the requisite bar membership faces potential criminal prosecution⁵. In addition, Courts may issue injunctive relief prohibiting repetition of the offending conduct⁶.

However, note the observation apocryphally attributed to Abraham Lincoln that the person who represents himself in court "has a fool for a client and a lawyer".

By statute, any person practicing law without being duly authorized or licensed is guilty of a misdemeanor", Rules of the Supreme Court of Virginia, Virginia Rules Annotated, Pt. 6, Sect. I.

"The courts of the Commonwealth have the inherent power, apart from statute, to inquire into the conduct of any person to determine whether he is illegally engaged in the practice of law, and to enjoin such conduct". Rules of the Supreme Court of Virginia, Virginia Rules Annotated, Pt. 6, Sect. I.

WHAT IS THE UNAUTHORIZED PRACTICE OF LAW?

In the state of Virginia, one who is a non-lawyer engages in conduct deemed to constitute the unauthorized practice of law occurs whenever:

- 1: One undertakes for compensation . . . to advise another . . . in any matter involving the application of legal principles to the facts or purposes or desires.⁷
- 2: One . . . undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.⁸
- 3: One undertakes with or without compensation, to represent the interest of another before any tribunal.⁹

Theoretically then, a computer program could approach the level of unauthorized practice of law under either or both of the first two bases cited above. A program by itself purporting to directly advise a client of the application of legal principles to a particular set of facts could be viewed as the practice of law. In other words, a computer program is close to practicing law if, after engaging the client in an interactive dialogue to determine the specific facts of the case, it can tell the client, "You are qualified to file a Chapter 13 Bankruptcy, and you should file because of the following reasons ...". A similar conclusion could be reached if the program prepared the schedules and statements to be filed in the particular bankruptcy without review by an attorney.

JUDICIAL ANALYSIS

Determinations of whether the unauthorized practice of law has taken place are made in Courts through the judicial process. A review of reported appellate decisions was unable to find a case directly on point discussing whether a computer program was the unauthorized practice of law. But the day may not be far in the future when such a case will be before the courts. The evolution of computer hardware and software is moving at a very fast pace. As previously noted, some income tax preparation programs already incorporate expert system-like attributes. Furthermore, software is now being sold to the general public enabling ordinary individuals to create and liquidate limited partnerships without the aid of an attorney (Nolo, 1993).

The American Court system frequently uses reasoning through analogy, and relies upon similar cases as precedent for future decisions. Therefore guidance as to what a court might do with the issue of whether a computer program is the unauthorized practice of law may be found in reviewing how the court has treated similar cases. The closest series of cases found dealt with the issue of whether there is the unauthorized practice of law in the sale of books or forms designed to enable non-lawyers to achieve legal results without assistance of an attorney.

7 Rules of the Supreme Court of Virginia, Virginia Rules Annotated, Pt. 6, Sect. I(B)(1).

8 Rules of the Supreme Court of Virginia, Virginia Rules Annotated, Pt. 6, Sect. I(B)(2).

9 Rules of the Supreme Court of Virginia, Virginia Rules Annotated, Pt. 6, Sect. I(B)(3).

It is a rare occasion for an attorney--even a sole practitioner--to sit down and create a document or legal pleading that is completely novel. Instead, the attorney would locate as a model an existing document that comes as close as possible to meeting the current needs, and then modify that model document as necessary to fit the facts at hand. Typical sources of the model document are the prior work product of either the drafting attorney, or his or her associate. From the model, a photocopy can be made, modified and retyped, or more commonly, downloaded from an electronic file and modified using a word processing program. In addition, there are many commercial publishers that produce for the legal market form books containing sample pleadings. Also, certain forms, especially forms for the conveying of real property, sample lease agreements, bills of sale, and so on, are typically available in stationery or business supply stores. Finally, many courts provide samples of the forms required for certain types of matters which may come before it. This is especially true for probate courts and small claims courts.

The Florida Supreme Court in the case of *The Florida Bar v American Legal and Business Forms, Inc.* (Florida, 1973) noted that the printing and sale of legal forms in and of themselves without more purported instructions, has been a practice for many years as a convenience, from a variety of sources. The court found no harm in having printed legal forms and copies of statutes available, provided they do not carry with them instructions on how to fill out such forms or how they are to be used. Such instructions would be viewed as constituting legal advice and the unauthorized practice of law. The matters to be weighed and considered in determining what rights are to be pursued do not generally appear in the pleading filed with the court.

In the case of *Palmer v The Unauthorized Practice Committee of the Texas State Bar* (Palmer, 1974), it was held that the sale of will forms constituted the unauthorized practice of law, on the ground that it was indistinguishable from the preparation of a full legal document for a client because such forms purported to make particular dispositions of property. The court focused on its view that the exercise of judgment in the proper drafting of legal instruments, or even the selecting of the proper form of instrument, necessarily affects important legal rights. Accordingly, the reasonable protection of those rights required that the persons providing such services be licensed members of the legal profession. The Court asserted that a non lawyer may have read defendant's materials, and be misled into believing that all testamentary dispositions may be thus standardized. Such a misconception could lead to unfortunate consequences for anyone who might rely upon the form.

In the case of *The Florida Bar v Stupica* (Florida, 1974), an individual produced a document styled as a "Divorce Kit", designed specifically to be used in a no-fault dissolution of marriage proceedings. The Florida Bar sought injunctive relief barring the advertisement, publication or sale of this "Divorce Kit". The Defendant contended that the "Divorce Kit" was merely a law book or pamphlet publication of legal forms combined with allowable explanatory data and instructions. These arguments were rejected by the Court. The court held: The advice given in the "Divorce Kit" as to the use of the forms is quite comprehensive and specific. It parallels much of what an attorney would customarily advise his clients who seek dissolution of marriage.

Finally, other courts have focused their analyses not on the content of the forms or kits provided, but instead on whether there has been established an individual attorney-client relationship. For example, in the case of *New York County Lawyer's Asso. v Dacey* (New York, 1967), the Court ruled there is no practice of law unless there is a personal relationship established between the client and the person presuming to practice for the purpose of giving and receiving particular legal advice on a particular problem. The mere sale of a book containing forms and advice on how to use the forms was therefore not the practice of law. Similar reasoning was used to allow the marketing of "do-it-yourself" divorce kits in the cases of *New York State v Winder* (New York, 1973) and *Oregon State Bar v Gilchrist* (Oregon, 1975).

THE QUESTION OF ACCOUNTABILITY

The cited basis of the prohibition against the unauthorized practice of law is a concern that the interest of the public be protected.¹⁰ There may indeed be cause for legitimate concern in this area. When it comes to legal matters, a little knowledge is truly a dangerous thing, and serious consequences can indeed flow from inept legal advice or performance. An attorney who is inept or negligent in representing his clients is subject to sanction by the Court and may be disbarred. But who is accountable if a computer program gives erroneous or incomplete advice? Likewise, if an attorney participates in the writing of expert legal software which does give correct advice, what are the ramifications of that attorney not being licensed in the state where the software is actually used?

The ultimate resolution of many legal matters is simple. But the problem is, such matters are often deceptively simple. What is not simple is the process by which the appropriate course of action is selected. What one pays for when one retains an attorney is the benefit of his or her expertise in determining just how simple the problem is. An expert system is based on rules, and it may be difficult to devise rules that would be sufficiently complete to cover all factors, especially if the conclusions were to be directed to laymen.

THE QUESTION OF COST VS BENEFIT

Programs that truly approach the level of being expert systems have so far been difficult and expensive to produce, and the market for these programs has been rather limited. Only a small percentage of the population will consider filing bankruptcy in any given year. Accordingly, the unit cost will be fairly high. The bankruptcy program mentioned above retailed for about \$700.00 in 1991. An

10 "The services of a lawyer are essential and in the public interest whenever the exercise of professional legal judgment is required. The essence of such judgment is the lawyer's educated ability to relate the general body and philosophy of law to a specific legal problem. The public is better served by those who have met rigorous educational requirements, have been certified of honest demeanor and good moral character, and are subject to high ethical standards and strict disciplinary rules in the conduct of their practice....With the increase in the complexity of our society and its laws, the independence and integrity of a strong legal profession, devoted disinterestedly to those requiring legal services, are crucial to a free and democratic society. Allegiance to this principle, rather than the preservation of economic benefits for lawyers, is the basis upon which the Virginia State Bar, as the Administrative agency of the Supreme Court of Virginia, carries forward the responsibility for the discipline of lawyers and the investigation of persons practicing law in the commonwealth without proper authority." Rules of the Supreme Court of Virginia, Virginia Rules Annotated, Pt. 6, Sect. I.

attorney might charge \$350.00 or less for a Chapter 7 Bankruptcy. Therefore, a potential bankrupt debtor will have little incentive to purchase an expert grade bankruptcy computer program for one time use, even if the program does an adequate job. It would be cheaper to hire an attorney.

Compare this potential bankruptcy program with the tax return preparation program mentioned earlier. Everyone files a tax return every year. The program in question cost approximately \$34.00 retail. The development costs for the program can be spread over a relatively large base of potential users. If the cost of developing this program were to be spread over a much smaller base, the individual cost would be much higher, perhaps approaching that of the bankruptcy program.

On the other hand, the limited partnership program also mentioned above retails for about \$129.00, while the cost of hiring an attorney to create a limited partnership might be upwards of \$350.00, and the cost to liquidate one might be \$200.00 or more. In this case it would be more cost effective to buy the program than to hire an attorney, especially if the potential user has a personal computer and is comfortable using it.

CONCLUSIONS

In the not too distant future, more computer programs will be marketed that will be sufficiently advanced such that the programs will be capable of addressing problems now thought to require the professional attentions of an attorney. In short, they will be expert systems. Because of the potential for error or misuse, and because of the lack of direct accountability, such programs could in certain circumstances constitute the unauthorized practice of law.

But the issue of the unauthorized practice of law will be a major factor only to the extent the programs are marketed to the general public as substitutes for the lawyer. If the cost of commercial legal software for the general public continues to fall, it may become widely used by a generation which is computer-literate. Then related cases may very well be brought to the attention of the courts.

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