GRAY ADVICE

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Debates over economic protectionism or the technology flavor-of-the-month obscure a simple, urgent truth: people are going online to find help that they cannot get from legal and health professionals. They are being let down, by products with festering trust and quality issues, by regulators slow to apply consumer protection standards to harmful offerings, and by professionals loath to acknowledge changes to how help is delivered.

The status quo cannot continue. Waves of capital and code are empowering ever more organizations to build digital products that blur the line between self-help and professional advice. For good or ill, "gray advice" is changing how ordinary people get help with legal issues and healthcare issues, and even how they perceive professionals.

This Article begins the work of articulating what makes a high-quality digital advice product, and how regulators and professionals can engage with the reality of how people seek and find help today.

INTRODUCTION

Americans need help and don't get it. Critical services, from health and psychiatric care to legal assistance, are increasingly becoming luxury goods: unavailable and unaffordable for many Americans. Traditional regulated advice-giving professions are unable or unwilling to meet overwhelming demand for their services.

Most Americans do not receive any help for the legal issues they encounter every day.[1] In the rare cases where people recognize a problem

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[1] LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 42-48 (Apr. 2022), https://justicegap.lsc.gov/the-report/.

as "legal" and seek out the help of a lawyer,[2] they often receive inadequate or no assistance.[3] Even when Americans interact with courts, they increasingly do so without a lawyer present.[4] Lower-income Americans bear the brunt of this deficit: they receive no help for the vast majority of their legal needs.[5]

The supply of healthcare services and professionals continues to deteriorate: the COVID-19 pandemic accelerated a growing shortage of doctors, nurses, and specialists across the country.[6] In rural areas, the availability of care is eroding rapidly, as health systems close facilities and cut core services, from maternity wards to dialysis clinics.[7] Nearly half the country lives in "mental health professional shortage areas".[8] Nationwide,

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[2] Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 16 STAN. J. OF C.R. & C.L. 283, 296 (2020) ("Consumers are unlikely to consider justiciable problems to be legal in nature."). *See also* LEGAL SERVS. CORP., *supra* note 1, at 44 (showing that people rarely contact a lawyer for problems that might be considered legal).

[3] LEGAL SERVS. CORP., *supra* note 1, at 46 (even when they talk to a lawyer, "…low-income Americans did not receive all of the help they needed for 66% of their substantial problems.").

[4] *See* Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEORGETOWN L. J. 509, 511 (2022) (citing Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, NAT'L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (2015) ("Today, most state civil trial courts are lawyerless…where more than three-quarters of cases involve at least one unrepresented party.")).

[5] LEGAL SERVS. CORP., *supra* note 1, at 48 ("Low-income Americans did not receive any legal help or enough legal help for 92% of the problems that substantially impacted them in the past year.").

[6] *See* Bianca K. Frogner & Janette S. Dill, *Tracking Turnover Among Health Care Workers During the COVID-19 Pandemic*, 3 JAMA HEALTH FORUM e220371, e220371 (2022). *See also* ASS'N OF AMER. MED. CS., THE COMPLEXITIES OF PHYSICIAN SUPPLY AND DEMAND: PROJECTIONS FROM 2019 TO 2034 (2021), viii-x (forecasting a shortage of between 37,800 and 124,000 physicians by 2034).

[7] *See, e.g.,* Emily Baumgaertner, *A Rural Hospital's Excruciating Choice: $3.2 Million a Year or Inpatient Care?*, N.Y. TIMES, Dec. 10, 2022, at A1; Roni Caryn Rabin, *Rural Hospitals Are Shuttering Their Maternity Units*, N.Y. TIMES, Feb. 27, 2023, at A1.

[8] Stacy Weiner, *A growing psychiatrist shortage and an enormous demand for mental health services*, AAMC NEWS, Aug. 9, 2022, https://www.aamc.org/news-insights/growing-psychiatrist-shortage-enormous-demand-mental-health-services (citing Anand Satiani, Julie Nidermier, Bhagwan Satiani & Dale P. Svendsen, *Projected Workforce of Psychiatrists in the United States: A Population Analysis*, 69 PSYCHIATRIC SERVS. 710-713 (2018)). *See also*, *generally*, THE U.S. CONF. OF MAYORS, THE MENTAL HEALTH CRISIS IN AMERICA'S CITIES AND THEIR RESPONSES TO IT: A 117-CITY SURVEY (June 2023).

a shortage of primary care physicians, the first line of advice and help, continues to grow.[9] Remaining doctors are burned out and overworked and provide worse care. [10] When healthcare can be found, it is often unaffordable, causing Americans to avoid care because of cost.[11] Medical debt is the single largest source of consumer debt in collections,[12] and small-dollar debt collections cases of all types are a growing plurality of all civil cases filed in American courts.[13] Even for people who do have access to care, there is a growing acknowledgement that the work of managing one's health largely happens outside of a healthcare setting.[14]

In the absence of other options, Americans are turning online for help. A new wave of organizations and individuals offer professional-style expertise—limited-scope, personalized digital assistance—without professional status.

I call this phenomenon "gray advice": interactive advice software that presents as self-help, but that offers personalized assistance related to someone's well-being or livelihood, and that serves as a limited-scope stand-in for professional help. Gray advice services help people resolve

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[9] ASS'N OF AMER. MED. CS., *supra* note 6, at viii.

[10] *See* Justin Altschuler, David Margolius, Thomas Bodenheimer & Kevin Grumbach, *Estimating a reasonable patient panel size for primary care physicians with team-based task delegation*, 10 ANNALS OF FAM. MED. 396, 396 (Sept.-Oct. 2012) ("Patients receive only 55% of recommended chronic and preventive services" due to doctors having too many patients under their care at once). *See also* Frogner & Dill, *supra* note 6.

[11] Omolola E. Adepoju, Michael A. Preston & Gilbert Gonzales., 105 AMER. J. PUB. HEALTH S665, S666 (2015) ("Health services research consistently demonstrates that cost is a significant barrier to health care utilization, particularly for preventive services. Although cost is a particularly overwhelming barrier for low-income populations, even individuals from wealthier families underuse preventive services when out-of-pocket spending is required.") [internal citations omitted]. *See also* Lucie Kalousova & Sarah A. Burgard, *Debt and Foregone Medical Care*, 54 J HEALTH SOC BEHAV 204, 215-217 (2013) (showing that people with debt may be more likely to forgo medical care).

[12] Raymond Kluender, Neale Mahoney, Francis Wong & Wesley Yin, *Medical Debt in the US, 2009-2020*, 326 JAMA 250, 250 (July 20, 2021).

[13] PEW CHARITABLE TRUSTS, HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 8-11 (May 6, 2020).

[14] *See* Michael S. Goldstein, *The Persistence and Resurgence of Medical Pluralism*, 29 J. OF HEALTH POL., POL'Y, & L. 925, 930 (2004) (describing research that shows Americans treat most illness episodes without a physician; that Americans over the age of sixty-five with access to Medicare are more likely to self-medicate than younger adults; and that many people who do seek care from a doctor do not follow instructions they receive).

legal issues and manage health conditions, but operate apart from traditional professionals and the regulations that govern them.

Americans have solved problems without professionals long before the internet age. Self-help resources and non-professional assistance have deep historical roots: DIY legal and medical books date back to pre-revolutionary times.[15] Today, self-help software is marketed as a way for ordinary people to take control over their rights, livelihoods, health, and future by solving problems on their own.[16]

Regulations governing the professions have traditionally drawn a line between self-help resources and human assistance. Self-help is mostly tolerated and lightly regulated, while person-to-person assistance outside of professional monopolies—whether from communities, paraprofessionals, or even professionals from other states—is fiercely resisted.[17]

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[15] *Id*. at 932 (citing PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 32-37 (1982) (describing medical handbooks for laypeople)). *See also* William M. Brown, *Legal Software and the Unauthorized Practice of Law: Protection or Protectionism*, 36 CAL. W. L. REV. 157, 157 (1999) (describing self-help legal materials for laypeople before 1900).

[16] *See also, e.g.,* Nancy Vuckovic & Mark Nichter, *Changing patterns of pharmaceutical practice in the United States*, SOC. SCI. MED. 1285, 1296 (1997) ("A self-help ethic implies that individuals, rather than the state, are responsible for maintaining health."); Goldstein, *supra* note 14, at 934 ("For a growing number of people the norm of the passive patient who assumes that the doctor always knows what is best for him or her has been supplanted by the image of a health care consumer who is responsible for getting as much good information as possible and then acting on it.").

[17] In medicine, *see, e.g.*, Peter Conrad & Joseph W. Schneider, *Professionalization, Monopoly, and the Structure of Medical Practice*, *in* THE SOCIOLOGY OF HEALTH AND ILLNESS: CRITICAL PERSPECTIVES, 194 (Peter Conrad ed., 8th ed. 2009); Harry Ritter, *How cross-state licensure reform can ease America's mental health crisis*, STAT (Mar. 8, 2023), https://www.statnews.com/2023/03/08/cross-state-licensure-reform-telehealth-ease-mental-health-crisis/; Bret Mettler, *Sunsetting medical license reciprocity would return medicine to the dark ages*, STAT (Mar. 7, 2022). https://www.statnews.com/ 2022/03/07/sunsetting-medical-license-reciprocity-return-medicine-dark-ages/. In law, *see, e.g.*, Gillian Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets*, 60 STAN. L. REV. 102, 122 n.94 (2008); Sandefur, *supra* note 2, at 309-311; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions,* 34 STAN. L. REV. 1, 7 (1981) (most unauthorized practice enforcement is focused on lay practitioners).

Gray advice blurs this line. Modern digital services are more capable, more personalized, and more communicative than the self-help CD-ROMs of old. An online tool may prompt a user for information that would be confidential if communicated to a lawyer or doctor, and that could be harmful if disclosed to a third party; even the act of visiting a provider's website can communicate a sensitive issue or need for help.[18] Large language models are but one recent example of how data, processing power, and clever design can yield software that feels personalized to a user's situation.

The result: a growing middle space between static self-help materials and live person-to-person assistance. Today, dozens of organizations, apps, and websites are delivering interactive advice-like services in the guise of self-help, targeted at people who cannot find or afford help from professionals.[19] This is gray advice.

This is not an Article about "robot lawyers" or "robot doctors". The November 2022 launch of OpenAI's ChatGPT has rapidly mainstreamed a frantic discussion on artificial intelligence, full of hype and histrionics about what large language models are and are not capable of doing, what they may or may not be capable of doing in the future, and how they may or may not supplant, complement, or destroy the professions.

For professionals, this is precisely the wrong discussion. Instead of trading sweeping categorizations about a technology's suitability for delivering services, professionals should be asking what digital advice services owe users, and how to ensure users receive trustworthy, high-quality help.[20] Speculating on the future economics of the AI-augmented professional risks ignoring the very real regulatory gaps that affect digital products and services that exist today, and the people who have no other option but to turn to them.

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[18] *See* Alfred Ng & Maddy Varner, *Nonprofit Websites Are Riddled With Ad Trackers*, THE MARKUP (Oct. 21, 2021), https://themarkup.org/blacklight/2021/10/21/nonprofit-websites-are-riddled-with-ad-trackers.

[19] *See* Section 1C, *infra*, and accompanying notes.

[20] For the sake of clarity, throughout this Article, I use the term "users" to refer to people who use gray advice or software products, and "clients" to refer to people who receive help from professionals. These are the common terms of art. For one critique on the use of "users" to describe people who interact with software, *see* Taylor Majewski, *It's time to retire the term user*, MIT TECHNOLOGY REVIEW (Apr. 19, 2024), https://www.technologyreview.com/2024/04/19/1090872/ai-users-people-terms/.

Regardless of one's optimism or pessimism about technology's potential, gray advice deserves attention. People are seeking help online via interactive self-help tools. They are succeeding or failing, and their lives are better or worse for it. And their experiences, good or bad, are sure to affect their confidence in the professions and the institutions they represent.

This Article takes up the question. I attempt to build a theory of gray advice, explore what gray advice providers owe their users, and examine how gray advice exposes gaps in how regulators and professionals think about digitally-mediated advice. While this Article maintains a narrow focus on the traditional professions, I nod to a larger movement of digital intermediaries who are reshaping how Americans plan for their financial future,[21] access government services,[22] and more.[23]

Part I articulates a more complete definition of gray advice. In Part II, I explore the trust and quality issues that gray advice tools must overcome to fill the need for critical services. Part III sidesteps unproductive debates on professional licensing to examine how regulators and professions can ensure that gray advice services are trustworthy and high-quality. I conclude with a provocation on self-help.

I. DEFINING GRAY ADVICE

Gray advice is interactive advice software that presents as self-help. Services invite users to rely on them to resolve a legal problem or manage a health condition. They offer seemingly personalized experiences

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[21] *See, e.g.*, Cleo, https://meetcleo.com; PayItOff, https://payitoff.io. *See also* Simone Degeling & Jessica Hudson, *Financial Robots as Instruments of Fiduciary Loyalty*, 40 SYDNEY L. REV. 63, 63 (2018) (discussing fiduciary duties of financial robo-advisors).

[22] *See, e.g.*, NAVA P.B.C., *Nava and Benefits Data Trust partner to explore how Ai can support public benefits navigators* NAVA (Feb 20, 2024), https://www.navapbc.com/news/nava-ai-public-benefits; BenefitKitchen, https://benefitkitchen.com; Bryce Covert, *How Many People Does It Take For The Government to Send a Text?*, BLOOMBERG (June 20, 2023), https://www.bloomberg.com /news/features /2023-06-20/how-code-for-america-tried-to-improve-snap-benefit-renewal-rates?embedded-checkout=true.

[23] As described more fully *infra*, gray advice covers user-facing services, rather than tools that help professionals make decisions or communicate with people. This definition does not encompass the totality of ways people may get information about health or legal issues: search engines, websites, social media, community and social connections, and more—nor does it fully cover movements to allow community-based help or limited licensure of paraprofessionals, absent some digital assistance.

or recommendations. And they have a limited scope: they may do less than a regular professional, or leave users with some remainder task to execute.

A. Gray advice invites users to rely on it.

Gray advice invites reliance. When a person seeks out help for a legal or health concern, they decide to engage with a product or service based on its invitation: messaging about what it offers. Invitations are specific to the issue a person faces, and is a normative claim that a person should use a service to help resolve their problem.[24]

An invitation is the primary way users judge a service's suitability.[25] And it may be the only way. Advice, professional or gray, is a credence good: a user may not be able to evaluate its quality, sometimes even after the fact.[26] In consumer protection law, this dynamic can justify more active regulation to protect consumers and create an efficient market.[27] Even though consumer products lack the fiduciary duties of professionals, they are still presumed to be fit for purpose.[28]

A person seeks help because they need it. An invitation is a claim that a service can fill that need.

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[24] *See* Arthur Laby, *Advisors as Fiduciaries*, 72 FLA. L. REV. 953, 1002 (2020) (citing Edward S. Hinchman, *Advising as Inviting to Trust,* 35 CANADIAN J. PHIL. 355, 356 (2005) (advice is "an invitation to the client to repose trust in the advisor")). Here, an invitation distinguishes gray advice from a generic information tool or a general-purpose chatbot that is not held out as a legal or health assistant.

[25] *Id.* at 1002-1004 (an advisor invites the client to trust the advisor's perspective above the client's own, and the advisor benefits from a "disparity of information and expertise."). *See also* John Heritage and Sue Sefi, *Dilemmas of advice: aspects of the delivery and reception of advice in interactions between health visitors and first-time mothers*, *in* TALK AT WORK: INTERACTION IN INSTITUTIONAL SETTINGS 367-368 (Paul Drew and John Heritage eds., 1992) ("Any request for advice constitutes an admission of uncertainty about an appropriate course of action. Such a request may, further, imply or display that its producer lacks knowledge or competence concerning the issue at hand or is unable to cope with a problem without external assistance. By the same token, it constitutes the recipient of the request as the knowledgeable, competent, and authoritative party in the exchange.").

[26] *Id. See also infra* Section II(A)(ii).

[27] *See* Michael Lynch, Ross M. Miller, Charles R. Plott & Russell Porter, *Product Quality, Consumer Information, and "Lemons" in Experimental Markets*, *in* EMPIRICAL APPROACHES TO CONSUMER PROTECTION ECONOMICS, FEDERAL TRADE COMMISSION 254, 297-299 (1984).

[28] James C. Miller, F.T.C. POLICY STATEMENT ON DECEPTION, F.T.C. (Oct. 14, 1983), appended to *Cliffdale Associates Inc*., 103 F.T.C. 110, 174 (1984).

B. Gray advice is personalized, or appears to be personalized.

Gray advice is personalized, or appears to be personalized. Interactivity can help seemingly informational services feel distinctly advice-like to the user. More capable technology may only enhance the effect.

Advice is a communication or interaction that is specific to a recipient's problem. [29] Advice is intended to influence a recipient's behavior—a recipient is meant to follow advice and do something with it. [30] A recipient is more likely to trust and follow advice if it seems personalized to them. [31] Even if it goes unfollowed, personalized advice can frame and influence a recipient's subsequent actions. For example, a person might receive advice that recommends treatment A and disparages treatment B. Even though they might decide not to follow the recommendation to pursue treatment A, they may also decline to seek out information about treatment B at all. [32]

The process of interacting with a software product can yield personalized advice, even with relatively crude technology. [33] A personalized gray advice service might prompt a user for information, ask follow-up questions, and provide a specific recommendation or answer that depends in part on information the user provided. A simple service might use a question-and-answer interface, while a more sophisticated service might scan and analyze documents, provide live feedback to users as they navigate a problem, mimic a chat interface, or mediate human advice.

Interactive software can also create the impression of personalization. A service might prompt a user for information, ask follow-up questions, and ignore most of the information in favor of a pre-

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[29] Erina L. MacGeorge & Lyn M. Van Swol, *Advice Across Disciplines and Contexts*, *in* THE OXFORD HANDBOOK OF ADVICE (Erina L. MacGeorge & Lyn M. Van Swol eds., 2018) (hereinafter "OHA").

[30] Laby, *supra* note 24, at 1002.

[31] Pamela Briggs, Bryan Burford, Antonella De Angeli & Paula Lynch, *Trust in Online Advice*, 20 SOC. SCI. COMPUTER REV. 321, 328-29 (2002).

[32] This suggests that the binary of whether a person adheres to or ignores algorithmic advice is too simple. Instead, users may integrate advice into their own sense of a problem, and pick and choose which recommendations to follow, ignore, or modify.

[33] *See, e.g.*, John M. Carroll & Jean McKendree, *Interface Design Issues for Advice-Giving Expert Systems*, 30 COMMUNICATIONS OF THE ACM 15, 15 (Jan. 1987).

packaged recommendation.[34] An LLM-powered chatbot might provide spurious information in the style of a persuasive, personalized recommendation.[35] Ample literature documents a user's susceptibility to manipulative design practices.[36] A user may not be able to tell the difference between seemingly personalized advice and actually personalized advice.[37]

Advice is specific to a person's situation or need. The more personalized an interaction feels, the more influence it is likely to have on a user.

C. Gray advice is a limited-scope substitute for professionals.

Gray advice provides a limited substitute for a professional service. When compared to an engagement with a professional, gray advice services might help with fewer tasks, offer advice on a narrower range of subjects, or leave more decision-making to the user. Technical, regulatory, economic, or practical constraints may factor into a particular service's limitations.

Nonetheless, even a limited scope offers ample room for assisting users.[38] Here, and throughout this Article, I focus on two illustrative modes of help: resolving a discrete legal issue and managing a health condition.

In law, gray advice services claim to help people resolve discrete legal issues without lawyers.[39] Simple self-help products for categorizing

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[34] Psychologist Bertram Forer documented the tendency of people to see themselves in generic personality evaluations or descriptions of abnormal psychology. Bertram R. Forer, *The Fallacy of Personal Validation: A Classroom Demonstration of Gullibility*, 44 THE J. OF ABNORMAL AND SOC. PSYCHOL. 118, 118 (1949).

[35] Sayash Kapoor, Peter Henderson & Arvind Narayanan, *Promises and pitfalls of artificial intelligence for legal applications*, 2 J. CROSS-DISCIPLINARY RESEARCH IN COMPUTATIONAL L. 7, 7 (2024) (citing Zheng Zhao, Shay B. Cohen & Bonnie Webber, *Reducing Quantity Hallucinations in Abstractive Summarization, in* FINDINGS OF THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS: EMNLP 2020, 2237 (2020)).

[36] *See generally* BRINGING DARK PATTERNS TO LIGHT, F.T.C. (Sept. 2022).

[37] *See* Forer, *supra* note 34; *see* Heritage & Sefi, *supra* note 25.

[38] Sandefur, *supra* note 2, at 299.

[39] Rebecca Sandefur, LEGAL TECH FOR NON-LAWYERS: REPORT OF THE SURVEY OF US LEGAL TECHNOLOGIES, AMER. BAR. FDN., at 5-8 (2019) (a 2018 survey identified "322 technologies designed for use by non-lawyers in US jurisdictions". 167 of them "facilitate user action", i.e., "helping users complete a task related to taking action on a legal problem without assistance from an attorney". Examples of "user action" include "diagnosing legal problems, compiling evidence, creating documents, providing online dispute resolution, or crowdfunding legal actions.").

legal issues or automating the filing of simple court forms have existed for decades.[40] But services are increasingly emboldened to deliver more involved assistance: for self-represented litigants in small claims court,[41] for people who are pursuing simple divorces,[42] obtaining a new immigration status,[43] securing government benefits,[44] writing a will,[45] expunging a criminal record,[46] and more.[47]

In healthcare, a growing number of products offer help with managing health conditions,[48] with variable levels of doctor or pharmacist involvement.[49] A rash of chatbots and chat interfaces offer first-line assistance with mental health and addiction issues, or provide help with a mix of software and unlicensed professionals.[50] Health coaching and

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[40] Brown, *supra* note 15.

[41] *See, e.g.*, Courtroom5, https://courtroom5.com; JusticeDirect, https://justicedirect.com/; Painworth, https://www.painworth.com.

[42] *See, e.g.*, HelloDivorce, https://hellodivorce.com; SplitSmart, https://splitsmart.com.

[43] *See, e.g.*, Boundless, https://boundless.com; Chameli Belk-Gupta, *Immigrants Like Us Helps Prepare Immigration Paperwork Online For Free*, HOUSTONIA MAGAZINE (July 15, 2020), https://www.houstoniamag.com/news-and-city-life/2020/07/immigrants-like-us-nonprofit-free-immigration-paperwork-legal-help); *Dream.Org and Fifty One Ai Partner To Launch AI Tools That Scale Justice*, DREAM.ORG (May 20, 2024), https://dream.org/news-articles/dream-org-and-fifty-one-ai-partnership/.

[44] *See, e.g.*, BenefitKitchen, https://app.benefitkitchen.com.

[45] *See, e.g.*, Trust & Will, https://trustandwill.com.

[46] *See, e.g.*, EasyExpunctions, https://www.easyexpunctions.com.

[47] *See, e.g.*, MyPocketLawyer, https://mypocketlawyer.ai/en/about-us; SoloSuit, https://solosuit.com.

[48] For a description of self-management tasks and modes in health, *see generally* Kate R. Lorig & Halsted R. Holman, *Self-Management Education: History, Definition, Outcomes, and Mechanisms*, 26 ANN. BEHAV. MED. 1, 1 (2003).

[49] *See, e.g.*, Josip Car, Woan Shin Tan, Zhilian Huang, Peter Sloot & Bryony Dean Franklin, *eHealth in the future of medications management: personalization, monitoring, and adherence*, 15 BMC MED. 73, 73 (2017); Ian A. Scott, Paul Scuffham, Deepali Gupda, Tanya M. Harch, John Borchi & Brent Richards, *Going digital: a narrative overview of the effects, quality and utility of mobile apps in chronic disease self-management*, 44 AUSTL. HEALTH REV. 62-83 (2018); Sanaz Abasi, Azita Yazdani, Shamim Kiani & Zahra Mahmoudzadeh-Sagheb, *Effectiveness of mobile health-based self-management application for posttransplant cares: A systematic review*, 4 HEALTH SCI. REPORTS 434, 434 (2021).

[50] *See, e.g.*, Barclay Bram, *My Therapist, the Robot*, N.Y. TIMES (Sep. 27, 2022), https://   www.nytimes.com/2022/09/27/opinion/chatbot-therapy-mental-

journaling apps are poised to deliver more personalized health advice and recommendations.[51] Apps and websites providing pregnancy advice are legion,[52] while a shadow network for self-managed abortion assistance grows.[53] And beyond condition management, there is a long history of apps and digital services that offer assisted self-diagnosis.[54]

　　　As technology advances, it is easy to imagine these services becoming more ambitious in their claims, if not necessarily more capable.[55] A future healthcare service might invite users to upload their

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health.html; Aditya Nrusima Vaidyam, Hannah Wisniewski, John David Halamka, Matcheri S. Kashavan & John Blake Torous, *Chatbots and Conversational Agents in Mental Health: A Review of the Psychiatric Landscape*, 64 CAN. J. PSYCHIATRY 456-64 (July 2019); *NEDA Suspends AI Chatbot for Giving Harmful Eating Disorder Advice*, PSYCHIATRIST.COM (June 5, 2023), https://www.psychiatrist.com/news/neda-suspends-ai-chatbot-for-giving-harmful-eating-disorder-advice/.

[51] *See, e.g.*, Kylie Robison, *OpenAI and Arianna Huffington are working together on an 'AI health coach'*, THE VERGE (July 9, 2024), https://www.theverge.com/2024/7/9/24194450/openai-sam-altman-arianna-huffington-thrive-ai-health; Julie Jargon, *Can Tracking Your Moods Make You Happier?*, WALL ST. J. (July 15, 2023), https://www.wsj.com/articles/can-tracking-your-moods-make-you-happier-2ac9f9a8.

[52] *See generally* Gareth M. Thomas & Deborah Lupton, *Threats and Thrills: Pregnancy Apps, Risks, and Consumption*, 17 HEALTH, RISK, & SOC. 495, 504 (2015) ("[While pregnancy] apps arouse feelings of anxiety, self-responsibility, and blame, but they may also offer a solution for women, who are entirely accountable for maternal and [fetal] health, as part of their sales pitch (i.e., this will keep you / your baby safe).)" (internal citations omitted). *See also, e.g.*, Nicola Mackintosh, Shona Agarwal, Kirsty Adcock, Natalie Armstrong, Anette Briley, Molly Patterson, Jane Sandall & Qian Sarah Gong, *Online resources and apps to aid self-diagnosis and help-seeking in the perinatal period: A descriptive survey of women's experiences*, 90 MIDWIFERY 102803 (Nov. 2020).

[53] *See* Cynthia Conti-Cook, *Surveilling the Digital Abortion Diary*, 50 BALTIMORE L. REV. 22-24 (2020).

[54] *See, e.g.,* Deborah Lupton & Annemarie Jutel, *'It's like having a physician in your pocket!' A critical analysis of self-diagnosis smartphone apps*, 133 SOC. SCI. & MED 128-35 (2015); Michael L. Millenson, Jessica L. Baldwin, Lorri Zipperer & Hardeep Singh, *Beyond Dr. Google: the evidence on consumer-facing digital tools for diagnosis*, 5 DIAGNOSIS 95-105 (2018); Yue You, Chun-Hua Tsai, Yao Li, Fenglong Ma, Christopher Heron & Xinning Gui, *Beyond Self-diagnosis: How a Chatbot-based Symptom Checker Should Respond*, ACM TRANSACTIONS ON COMPUTER-HUMAN INTERACTION (Mar. 2023).

[55] As but one example of ambitious claims from AI proponents, *see, e.g.*, Aaron Mok, *AI Could Mean Free Doctors and Lawyers in 10 Years,* BUSINESS INSIDER (Dec. 3, 2023), https://www.businessinsider.com/ai-could-mean-free-doctors-lawyers-openai-vinod-khosla-prediction-2023-12.

electronic health records and ask questions about their health conditions, as a virtual "second opinion". A legal service could provide self-represented litigants with a probabilistic estimate of winning a case, and assess how certain facts might be helpful or harmful to their chances.

Future services may also transcend professional boundaries—substantial research demonstrates the interconnectedness of a person's health, legal, economic, and social issues.[56] A hypothetical future service might offer to help people make elective care decisions by factoring in economic cost, quality of service at a healthcare provider, and the likelihood of winning a pre-approval fight with an insurer. A service that helps people defend small claims debt cases might also offer long-term financial advice or debt management services.

But regardless of ambition, gray advice services to date maintain a limited scope compared to their professional counterparts. Users are often left with some remainder task, to accomplish what technology cannot or will not, from checking medication contraindications to serving court forms.

<p style="text-align:center">*   *   *</p>

As select self-help services begin to resemble personalized advice, people will begin treating them as such. Users will rely on gray advice services for help: they will provide sensitive information and follow personalized recommendations. Their interactions with gray advice services will color their impressions of institutions and professionals. Perhaps most importantly, they will expect to actually be helped, and not be harmed or exploited by a service provider.

II. GRAY ADVICE SERVICES MUST OVERCOME TRUST AND QUALITY OBSTACLES TO HELP USERS.

Interacting with a computer is not the same as interacting with a person. But scholarship about how technology will change legal or

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[56] *See e.g., generally*, Paula Braverman & Laura Gottlieb, *The Social Determinants of Health: It's Time To Consider the Causes of the Causes*, 129 PUBLIC HEALTH REPORTS Suppl. 2 19-31 (Jan.-Feb. 2014) ("A large and compelling body of evidence has accumulated…that reveals a powerful role for social factors—apart from medical care—in shaping health across a wide range of health indicators, settings, and populations."); Mary Stratton & Travis Anderson, SOCIAL, ECONOMIC AND HEALTH PROBLEMS ASSOCIATED WITH THE LACK OF ACCESS TO THE COURT*S*, DEPT. OF J. CANADA, 6-26 (Mar. 2006); Pascoe Pleasence & Nigel J. Balmer, *Mental health and the Experience of Social Problems Involving Rights: Findings from the United Kingdom and New Zealand*, 16 PSYCHIATRY, PSYCHOL., & L. 123 (2009).

medical services risks conflating a general-purpose technology with a diverse set of products that a given technology may enable: from the simple to the cutting-edge, from high-quality to hackwork, from honest to deceptive.

A product is laden with the choices of its creator: about what it will and will not do, about what users will and will not need from it, and about how it is visually designed, messaged, and described to users.[57]

This section explores what makes a good product: one that users can (and do) trust, and one that actually helps users achieve better outcomes. Focusing on products does not ignore the risks and characteristics inherent to a given technology, but it appropriately centers the role of people and organizations in designing and delivering help. While gray advice products have the potential to be helpful, an uncertain regulatory environment tempts unscrupulous actors, and design challenges may stand between good advice and good outcomes.

A. Trust

People are more likely to rely on products that they trust. But a product's actual and perceived trustworthiness may only be loosely correlated to the substantive quality of the service on offer. A service that offers help may contradict that offer in the fine print.[58] A helpful service might suffer because an ordinary user cannot distinguish it from junk.[59] And regardless of helpfulness, users may be wary of disclosing data that leaves them vulnerable to opportunistic behavior.[60]

1. Disclaimers empower deception.

Nearly every website, app, and digital good or service includes a disclaimer of some kind that absolves the operator of a vast array of sins, from a server crash to accidentally delivering malware.[61] The dense boilerplate of a terms of service page often includes a disclaimer of

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[57] For a version of this argument with AI, see Arvind Narayanan & Sayash Kapoor, *AI Safety is not a model property*, AI SNAKE OIL (Mar. 12, 2024), https://www.aisnakeoil.com/p/ai-safety-is-not-a-model-property (arguing that safety is not an inherent property of an AI model, but rather a product of the context that the model is deployed in: "trying to make an AI model that can't be misused is like trying to make a computer that can't be used for bad things").

[58] *See infra* Section II(A)(i).

[59] *See infra* Section II(A)(ii).

[60] *See infra* Section II(A)(iii).

[61] David A. Hoffman, *Defeating the Empire of Forms, 109* VA L. REV. *1367, 1368-71 (2023)*.

merchantability: a service is offered "as is", is not claimed to be suitable for any purpose, and a user relies on it at their peril.[62]

While such a disclaimer might be less notable on a social media platform or a game, it looks unusual in a service that is explicitly offering to help a user with a problem. And yet, gray advice services are replete with disclaimers.[63] Services may not only disclaim the responsibilities of professionals, they may disclaim the quality of their offerings in the first place.[64] Consumers are unlikely to be able to identify which disclaimers are enforceable and which are not.[65] The combination presents services as slot machines: perhaps they will produce a result that you can use, perhaps they will not. For people who cannot afford or find professional help, their only option may be to take a gamble.

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[62] *See id.* at 1407 (describing the growth of unenforceable clauses in consumer form contracts, and arguing that even unenforceable clauses "affect consumer behavior").

[63] *See*, *e.g.*, Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, 87 GEO. WASH. L. REV. 1, 16 (2019) (describing DoNotPay's disclaimers); Lupton & Jutel, *supra* note 54, at 133 (describing disclaimers of symptom checking apps). As a small sampling of disclaimers at the time of this writing, *see, e.g.*, *Terms of Use,* UPSOLVE, https://upsolve.org/terms-of-use/ ("Upsolve makes no warranty that: (a) the site, applications, or the materials will meet your requirements; (b) the site, applications, or the materials will be available on an uninterrupted, timely, secure or error-free basis; (c) the results that may be obtained from the use of the site, applications, or any materials offered through the site or applications, will be accurate or reliable; or (d) the quality of any products, services, information or other material purchased or obtained by you through the site, applications, or in reliance on the materials will meet your expectations.") (converted from all caps); *Agreement between user and Courtroom5*, COURTROOM5, https://courtroom5.com/terms/ ("However, neither Courtroom5 nor any content provider nor any author promise, warranty, or guarantee that the information, materials or content provided are free of errors or omissions. Your use of the Courtroom5 Website is your acknowledgment that neither Courtroom5 nor any content provider nor any author promise, warranty, or guarantee that no errors or omissions exist…The legal information on the Courtroom5 Website is not guaranteed to be correct, complete or up-to-date. Because the law changes rapidly, Courtroom5 cannot guarantee that all the information on the Courtroom5 Website is completely current."); *Terms and Conditions*, BOUNDLESS, https://www.boundless.com/terms/ ("We make no promises about the website or services we provide, and do not guarantee that our services are right for you. You are responsible for determining whether or not you should use our website or services. While we strive to provide accurate information, we can't guarantee that our information will always be up to date or error-free. If you do use our website or services, you do so at your own risk.").

[64] *Id.*

[65] Hoffman, *supra* note 61, at 1407.

There are few analogs in professional relationships. A professional disclaimer might focus on informing clients of the uncertainty of *outcomes* beyond a professional's control: a jury might vote one way or another, a patient might respond differently to a treatment, a stock might go up or down. Disclaimers in a professional context do not suggest that the *professional* may be unsuited to delivering the promised service, nor are professionals generally permitted to disclaim their duty of care to their client.

In law, disclaimers are the first line of defense against threats of unauthorized practice of law (UPL) prosecutions: an attempt to notify the client that a service is not a substitute for a lawyer.[66] But as discussed *supra*, gray advice services in law often disclaim more than just professional status: they may disavow the very usefulness of the product they offer.[67]

In healthcare, apps and services use disclaimers as burial grounds for user rights, from privacy to consumer protection. Minor changes in business practices can allow healthcare apps and services to collect sensitive data, offer advice, and even intermediate health services with minimal regulatory oversight.[68] For example, health data exists in two separate regulatory worlds, depending on "the entity processing the information".[69] Online providers can provide health services and avoid HIPAA protections by declining to bill health insurance electronically, or by serving as a referral hub to licensed providers.[70] And as in law,

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[66] Kelli Raker, FROM FOUNDED TO FUNDED: CHALLENGES AND VISIONS FOR JUSTICE TECH, DUKE CTR. ON L. & TECH (2023).

[67] *See supra* note 63.

[68] *See also* Tasha Glenn & Scott Monteith, *Privacy in the Digital World: Medical and Health Data Outside of HIPAA Protections*, 16 CURRENT PSYCHIATRY REPORTS 494, 3 (2014) ("Even data from a prescribed medical device may fall outside of the scope of HIPAA if it is sent directly to the device manufacturer, who in turn provides a summary report to the physician.").

[69] Nicolas P. Terry, *Regulatory Disruption and Arbitrage in Health-Care Data Protection*, 17 YALE J. HEALTH POL'Y, L. & ETHICS 143, 173 (2017). *See also* Thomas Germain, *Mental Health Apps Aren't All As Private As You May Think*, CONSUMER REPORTS (Mar. 2, 2021), https://www.consumerreports.org/health/health-privacy/mental-health-apps-and-user-privacy-a7415198244/.

[70] HIPAA applies to health care providers "who transmit any health information in electronic form" in connection with a covered transaction. 45 CFR 160.102(a)(3). Covered transactions are primarily related to insurance claims and interactions between a healthcare provider and insurer. 45 CFR 160.103.

healthcare apps are almost always delivered "as is".[71] The message is clear: when it comes to assisted self-help, consumers are on their own.

The problem of disclaimers and form contracts is not unique to gray advice; they are ubiquitous online.[72] But here, they incentivize untrustworthy services while failing to communicate meaningful information to users. Blanket disclaimers empower deceptive services and corrode user trust.[73] Users who skip a disclaimer (i.e., most of them) may rightfully feel deceived if they are led astray or encounter an unexpected limitation. Users who read a disclaimer may feel even more confused about whether to engage with the service at all, even if it might be truly helpful.

For gray advice products, disclaimers are dangerous for another reason: users struggle to evaluate the quality of the service they are receiving.

2. Users cannot evaluate the quality of gray advice.

Professional advice is a credence good: a consumer may be unable to evaluate its quality, even after receiving it.[74] A client may not notice an error by professional, or could perceive a suboptimal outcome positively—a lawyer's assistance prompted a landlord to make a needed repair, but the client was unaware that they could have also received a temporary rent concession.[75] Or, a client may perceive a "best case" outcome as a negative one—an extended jail term (that could have been longer), an amputation (that otherwise may have killed them), a financial

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[71] Lupton & Jutel, *supra* note 54, at 133.

[72] Hoffman, *supra* note 61, at 1407.

[73] *Id.*

[74] Winand Emons, *Credence goods and fraudulent experts,* 28 RAND J. ECON. 107, 107-08 (1997) (citing Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J. L. & ECON. 67 (1973)). Outside of professional services, a health supplement is a classic example of a credence good: a consumer does not (and likely cannot) know if a supplement that claims to have 1000 units of Vitamin D has 1000, 2000, 500, or none at all.

[75] *See* Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 453 (2016) (On people's poor understanding of their legal issues: "People often believe they understand their situations, the possible courses of action, and the likely outcomes. Sometimes they are correct, and sometimes they are disastrously wrong. Lay people can be poor judges of whether they have enacted their rights, because they may well have no idea what their rights are and what remedies are actually available to them. Consequently, they may believe that they have handled a situation well, when in fact more or different legal expertise could have completely changed the game.").

loss (that could have been worse).[76] This core vulnerability—that clients rely on a professional whose advice and assistance they cannot validate—helps justify the fiduciary duties that protect clients.[77]

Gray advice is a digital credence good. Just as with traditional professional advice, most users will lack the knowledge to validate advice they receive online—often, that lack of knowledge is why they are seeking help in the first place.[78] And engaging with an advice service may not help a user learn about their underlying issue or condition.[79]

The interface design of an advice service can exacerbate this problem. A user may receive little to no explanation of why a service arrived at a recommendation, and may not be able to ask for clarifications. A service's logic and reasoning might simply be unavailable to the user, along with any insight about the choices or assumptions the service's designers have made.[80] While black-box machine learning is a growing concern elsewhere in law and health, here a service's opacity is just as likely to be the product of a design choice as a technical limitation.[81]

Whether due to knowledge deficits or confounding design choices, users will struggle to identify junk services for what they are. And while the risk of bad advice is ever-present, the converse is also true: inscrutable services are difficult to trust. If a user does not understand or trust why a recommendation applies to their situation, they may ignore high-quality advice, or seek out other sources that validate their own

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[76] Of course, not every service is inscrutable, and not every client is blind. A client is still capable of spotting obvious errors and deceptions (an operation on the wrong limb, a lawyer missing a deadline, an account balance turning to zero). And clients with lived experience—with a chronic condition or the justice system, for example—may have the knowledge to identify more subtle errors.

[77] Laby, *supra* note 24, at 996-1013.

[78] Heritage & Sefi, *supra* note 25.

[79] *See, e.g.*, Ida Chak, Karen Croxon, Francesco D'Acunto, Jonathan Reuter, Alberto G. Rossi & Jonathan M. Shaw, *Improving Household Debt Management With Robo-Advice* 21-22 (Nat'l Bureau of Econ. Research, Working Paper No. 30616, 2022) (finding no evidence that users learn from robo-advice on debt management)

[80] Keith Porcaro, *Making Public Services Explorable*, MEDIUM (2016), https://keithporcaro.medium.com/making-public-services-explorable-e9feb1d0acb6.

[81] *Id.*

intuition.[82] Or, they may pick and choose which recommendations to follow and which to ignore, leading to unexpected behavior.

When users struggle to distinguish good advice from bad, the market for services is not driven by quality.[83] Junk services may thrive, and mere accuracy may not be enough to win user trust.

3. Users of gray advice are vulnerable to data-driven exploitation.

Confidentiality is essential to trust. Without it, clients may not seek help or may not be fully candid with professionals.[84]

In professional relationships, confidentiality protections start when a client seeks help.[85] The disclosure that a person is seeking help for a legal issue or medical condition can have adverse consequences—it may inhibit their ability to get housing, credit, or employment, or expose them to predatory services or threats from third parties.[86] The threat of disclosure may ultimately deter people from engaging with help.[87]

Thanks to pervasive online tracking, the mere act of visiting a website can effectively disclose confidential information.[88] When a

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[82] *See* Lyn M. Van Swol, Jihyun Esther Paik & Andrew Prahl, *Advice Recipients: The Psychology of Advice Utilization,* OHA 33 (May 8, 2018) (Trust in automated advisors is "fragile", and they are "judged more harshly for suboptimal outcomes"). *See also* Julie R. Agnew, Hazel Bateman, Christine Eckert, Fedor Ishakov, Jordan Louviere & Susan Thorpe, *First Impressions Matter: An Experimental Investigation of Online Financial Advice*, 64 MGMT. SCI. 288, 288 (2018) (showing "how clients' decisions on which advisor to follow, and whether to continue to trust an advisor, can be manipulating by a simple and easily replicated catering strategy. Advisors who make good first impressions by confirming clients' views are more often followed in subsequent decisions.").

[83] *See* Michael Lynch, Ross M. Miller, Charles R. Plott & Russell Porter, *Product Quality, Consumer Information, and "Lemons" in Experimental Markets*, *in* EMPIRICAL APPROACHES TO CONSUMER PROTECTION ECONOMICS, FEDERAL TRADE COMMISSION 254, 297-99 (1984).

[84] *See* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 1 (1998); AMA PRINCIPLES OF MED. ETHICS, Opinion 3.2.1.

[85] Richard A. Painter, *Fiduciary Principles in Legal Representation, in* OXFORD HANDBOOK OF FIDUCIARY LAW 264, 267-71 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

[86] *See* Jon Keegan & Joel Eastwood, *From "Heavy Purchasers" of Pregnancy Tests to the Depression-Prone: We Found 650,000 Ways Advertisers Label You*, THE MARKUP (June 8, 2023), https://themarkup.org/privacy/2023/06/08/from-heavy-purchasers-of-pregnancy-tests-to-the-depression-prone-we-found-650000-ways-advertisers-label-you.

[87] Fischel, *supra* note 84.

[88] Ng & Varner, *supra* note 18.

service uses third-party trackers from large ad networks, they communicate that a particular visitor is likely seeking that service.[89] Trackers can be configured to track and communicate specific user interactions, such as clicking a "book appointment" button.[90] Ad networks may be able to match that knowledge to a visitor's personal information, and use it to target that person with digital and physical ads.[91] A person looking for help with a sensitive legal or health issue may perceive this as a breach of trust.

As discussed *infra*, professionals have also struggled to translate confidentiality duties into best practices that protect clients from internet surveillance.[92] But gray advice services have no duty of loyalty to users, and far fewer regulatory constraints against tracking user behavior and transmitting it to third-party ad networks.[93]

Tracking aside, digital advice services rely on collected user data to deliver personalized help. Without a duty of loyalty or other confidentiality protections, the door is open for opportunistic behavior and potential conflicts or dualities of interests. A tenant dispute resolution app could offer a background check service to landlords that weeds out "problem tenants". A mental health counseling service could train sentiment analysis models on user conversations.[94] An app for managing diabetes could offer targeted advertising to pharmaceutical companies and device makers based on someone's health condition. A service that helps people defend against small claims debt cases may offer payment plans for

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[89] *Id.*

[90] *See* Matthew S. McCoy, Ari B. Friedman & Allison K. Hoffman, *The Scope and Legal Implications of Tracking Technologies on Hospital Websites*, 330 JAMA 217-18 (June 29, 2023).

[91] Ng & Varner, *supra* note 18; Keegan & Eastwood, *supra* note 86.

[92] *See generally* Anne Klinefelter, *When to Research is to Reveal: The Growing Threat to Attorney and Client Confidentiality From Online Tracking*, 16 VA. J. L. & TECH. 1 (2011); Jessica Nix, *Health-Care Companies Are Sending Your Data to Big Tech,* BLOOMBERG (July 11, 2024), https://www.bloomberg.com/news/articles/2024-07-11/do-health-care-companies-share-my-data-analysis-finds-they-do?srnd=homepage-americas.

[93] *See, e.g.*, Joanne Kim, *Data Brokers and the Sale of American' Mental Health Data*, DUKE SANFORD CYBER POLICY PROGRAM (Feb. 2023), https://techpolicy.sanford.duke.edu/wp-content/uploads/sites/4/2023/02/Kim-2023-Data-Brokers-and-the-Sale-of-Americans-Mental-Health-Data.pdf.

[94] *See, e.g.*, Keith Porcaro, *The Real Harm of Crisis Text Line's Data Sharing*, WIRED (Feb. 1, 2022), https://www.wired.com/story/consumer-protections-data-services-care/#:~:text=And%20that's%20the%20true%20harm,from%20using%20any%20similar%20service.

debt that could otherwise have been discharged. A chatbot may include sponsored answers that are difficult to distinguish from organic ones.

Even well-intentioned services may put users at risk, thanks to a lack of legal protections from hostile requests for user data. A former partner might seek data from a divorce counseling app; law enforcement might target immigration assistance or women's health services.[95]

People who seek help online do so because they are unable to find or afford help from traditional professionals. [96] Absent durable confidentiality protections, users may be vulnerable to harm even as they search for help.

<div align="center">*   *   *</div>

An inability to access professional help does not change the depth of someone's need, or their vulnerability to exploitative behavior. The more gray advice services resemble traditional online products, the more they advance the perception that trustworthy help is simply unavailable for most people, whether online or off.

B. Quality

Good advice is more than a correct answer. Advice is meant to get a recipient to take some appropriate action *and* to advance them towards a good outcome.

Just as a professional advisor does more than correctly answer licensing exam questions, high-quality advice products must do more than provide a correct answer: they must help a user achieve a desired result. To do so well requires navigating foundational challenges of human-computer interaction. A service might fail to account for complex or unusual cases. [97] A service might mislead users or induce misunderstandings.[98] And a limited-scope service might strand users with a task they are unable to complete.[99]

1. A service might fail to account for edge cases.

A common case for gray advice services (or paraprofessionals[100]) is that they can help people with simple, common issues.

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[95] *See, e.g.*, *generally*, Conti-Cook, *supra* note 53.
[96] *See* Bo Feng, Xun Zhu & Yining Zhou Malloch, *Advice Communication in Cyberspace*, OHA 363-64, 366-67 (May 8, 2018).
[97] *See infra* Section II(B)(i).
[98] *See infra* Section II(B)(ii).
[99] *See infra* Section II(B)(iii).
[100] *See* Sandefur, *supra* note 2, at 305-06.

Professionals fiercely resist the notion that their expertise can be distilled into rote work.[101] In the most romantic telling, a professional is uncovering a client story, identifying hidden complexities, and crafting a bespoke solution especially for that client.[102]

By contrast, even the most sophisticated automated tools present as brittle—they are only as good as the situations they explicitly account for in advance.[103] When a user arrives with an unexpected twist, they crack and shatter.

But even brittle instruments have their uses. Not every legal or health need requires intensive professional attention—even if it used to in the past. Management of type 1 diabetes has increasingly been patient-led, thanks to continuous advances in insulin delivery systems, the development of at-home blood glucose monitoring, and intensive patient education efforts.[104] The rise of no-fault divorce laws in the 1970s made it far easier for couples to get divorced without the need for a lawyer to prove a narrow justification.[105] With the right support, people can manage some legal and health issues largely on their own.

The trick is to know when a self-managed issue needs professional intervention. Even well-intentioned services can harm users when they fail to account for an edge case: a complex or uncommon service need.[106] A

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[101] *See* Pasquale, *supra* note 63, at 27-28, 55 (2019); David Cook, Jeffrey E. Thompson, Elizabeth B. Habermann, Sue L. Visscher, Joseph A. Dearani, Veronique L. Roger & Bijan J. Borah, *From 'Solution Shop' Model to 'Focused Factory' in Hospital Surgery: Increasing Care Value and Predictability,* 33 HEALTH AFFAIRS 746, 747 (2014).

[102] Cook et al., *supra* note 101.

[103] David Autor, *Polanyi's Paradox and the Shape of Employment Growth* 31 (Nat'l Bureau of Econ. Research, Working Paper No. 20485, 2014) (describing automated systems as "brittle").

[104] *See generally*, Norbert Hermanns, Dominic Ehrmann, Katharina Finke-Groene & Bernhard Kulzer, *Trends in Diabetes Self-management Education: Where Are We Coming from and Where Are We Going? A Narrative Review*, 37 DIABET. MED. 436 (2020).

[105] Kimberly Wehle, *The Coming Attack on an Essential Element of Women's Freedom*, THE ATLANTIC (Sept. 26, 2023), https://www.theatlantic.com/ideas/archive/2023/09/no-fault-divorce-laws-republicans-repeal/675371/.

[106] *See* Rebecca Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 52 (2010); Elizabeth Sillence & Pam Briggs, *Please advice: using the Internet for health and financial advice*, 23 COMPUT. IN HUM. BEHAV. 727, 728-29 (2007) (citing Conrad S. Ciccotello &

mental health app may not detect when a user is at greater risk of self-harm.[107] A medication tracker may miss a contraindication or harmful drug interaction.[108] A tool for securing food stamp benefits may not ask about expenses that could increase a user's benefit.[109]

A service does not need to offer help for every edge case, if those edge cases are indeed rare. But it does need to notify, deter, and redirect people who it cannot help.

2. A service might induce user errors.

Advice succeeds not when a client receives the correct answer, but when a client takes the correct *action* as a result of the answer.

Russell E. Wood, *An Investigation of the Consistency of Financial Advice Offered by Web-Based Sources*, 10 FIN. SERV. REV. 5 (2001) (Web-based financial advice struggles with more complex client inputs)); Caleb Melby, Polly Mosendz & Noah Buhayar, *The Miseducation of America's Nurse Practitioners*, BLOOMBERG BUSINESSWEEK (July 24, 2024), https://www.bloomberg.com/news/features/2024-07-24/is-the-nurse-practitioner-job-boom-putting-us-health-care-at-risk?srnd=homepage-americas (noting that nurse practitioner graduates feel "minimally prepared" to care for "patients with complex problems").

[107] *See, e.g.*, Amelia Fiske, Peter Henningsen & Alena Buyx, *Your Robot Therapist Will See You Now: Ethical Implications of Embodied Artificial Intelligence in Psychiatry*, 21 J. MED. INTERNET RES. e13216 (2019) ("It is unclear when, and how, assistive robots that patients have in their homes, or freely available virtual agents and chatbots, would effectively connect at-risk individuals with appropriate services, including hospitalization and other protections. This scenario is particularly relevant in the aforementioned situation of using AI mental health applications to extend access to rural, hard to reach, or uninsured populations. In these cases, some provision of service is arguably better than nothing. However, what should be done if, for example, a therapy bot detects through speech patterns that an individual is at higher risk for self-harm, yet appropriate referral services are not available in the area?"); Dana Remus & Frank Levy, *Can Robots Be Lawyers? Computers, Robots, and the Practice of Law, 3* GEO. J. L. ETHICS 501, 551 (2016).

[108] *See, e.g.*, Caleb Melby & Polly Mosendz, *Telehealth Giant Drew People With Addiction. Deaths, Overdoses Followed*, BLOOMBERG (Nov. 10, 2022), https://www.bloomberg.com/news/features/2022-11-10/addicts-signed-up-for-telehealth-giant-that-prescribed-drugs-online-deaths-ove?embedded-checkout=true.

[109] *See, e.g.*, Ty Jones, SNAP'S EXCESS MEDICAL EXPENSE DEDUCTION, CTR. ON BUDGET AND POL'Y PRIORITIES 10-11 (Aug. 20, 2014) (arguing that the SNAP medical expense deduction is underutilized in part because "some state SNAP applications do not appear to seek sufficient information from applicants to ensure that eligible households receive the full deduction").

Who is responsible for bridging the distance between a correct answer and a correct action? It is tempting, even intuitive, to say the advice recipient.[110] And indeed, users might blame themselves when interacting with a service yields a bad outcome.

But that intuition runs counter to decades of human-computer interaction scholarship,[111] and wilts in the face of even the most basic power analysis of advice-seekers and the services they are invited to rely on.

In the design of safety-critical systems, it is not enough to provide accurate information. Designers are responsible for ensuring users perform the correct actions at the correct time.[112] Take, for instance, an automated system designed to detect sepsis in hospital patients.[113] Of course, the system needs to accurately identify when a patient is becoming septic—a failed identification could literally be a matter of life or death. But a successful warning must not only be accurate, it must come in time for someone to take preventative action: an alert after a doctor or nurse has already noticed a problem is too late. If the alert is ambiguous or unclear, it might result in the wrong action. If the system is too sensitive and offers too many alerts, it might inadvertently train doctors and nurses to ignore it.

If they do ignore the alerts, we would not call this a user error. Instead, the system is poorly designed to support the user. So too in other

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[110] Don Norman & Pieter Jan Stappers, *DesignX: Complex Sociotechnical Systems*, 1 SHE JI: THE J. OF DESIGN, ECON. AND INNOVATION 83, 86 (2015).

[111] *Id.*

[112] *Id.* at 87. *See also* MICA R. ENDSLEY AND DEBRA G. JONES, DESIGNING FOR SITUATION AWARENESS, 13-19 (2d ed. 2004) (describing how situation awareness problems can cause the user to "make the correct decision for their picture of the situation, but that picture is in error"); Emily Wall, John Stasko & Alex Endert, *Toward a Design Space for Mitigating Cognitive Bias in Vis*, 2019 IEEE VISUALIZATION CONFERENCE 1 (Oct. 2019) (describing approaches "to design systems that can help people make better decisions by compensating for the ways in which people are likely to make cognitive errors."); Jens Rasmussen & Kim J. Vicente, *Coping with human errors through system design: implications for ecological interface design*, 31 INTL. J. MAN-MACHINE STUDIES 517, 517-19 (1989) (describing forms of human error); Donald A. Norman, *Design Rules Based on Analyses of Human Errors*, 28 COMMUNICATIONS OF THE ACM 254, 257 (Apr. 1983).

[113] The example in this paragraph is adapted from Casey Ross, *Epic overhauls popular sepsis algorithm criticized for faulty alarms*, STAT NEWS (Oct. 3, 2022), https://www.statnews.com/2022/10/03/epic-sepsis-algorithm-revamp-training/.

complex, safety-critical systems, from airplanes[114] to nuclear plants.[115] Design can improve or degrade a user's ability to respond to a critical situation.[116] And system designers have a responsibility to minimize the likelihood and effects of user mistakes.[117]

Professional advice, too, is more than just providing the correct answer to the question a client brings[118]—lawyers and doctors have a responsibility to identify and communicate issues that emerge in the course of an engagement, and to help clients recognize and correct mistakes and misunderstandings.[119] Competent advice is designed to empower clients to make an appropriate, informed choice.

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[114] Mica R. Endsley, *Situation Awareness and Human Error: Designing to Support Human Performance*, PROCEEDINGS OF THE HIGH CONSEQUENCE SYSTEMS SURETY CONFERENCE (1999).

[115] *See* Axel Roesler, *Lessons from Three Mile Island: The Design of Interactions in a High-Stakes Environment,* 43 VISIBLE LANGUAGE 170, 185-93 (2009).

[116] ENDSLEY & JONES, *supra* note 112, at 13-19.

[117] Norman & Stappers, *supra* note 110. Another parallel might be drawn from vehicle safety regulation, which shifted from a focus on "driver error" to making the vehicle safer in the event of an accident. Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG 257, 257-58, n.4 (1987) ("since human beings err, since drivers err, since drivers make mistakes, and they are always going to make mistakes…automobiles should be built in such a way as to minimize the damage done.").

[118] *See generally* Michael McGinnis, *Advice in the Lawyer-Client Relationship*, OHA 280-82 (May 8, 2018); Jonathan D'Angelo & Anne-Lise D'Angelo, *Advice from Healthcare Professionals*, OHA 197-98, 201-03 (May 8, 2018). *See also* Laby, *supra* note 24, at 993 ("But in many instances, an advisor will enumerate several possible courses of action and explain the advantages and disadvantages of each. Advice may influence a client's deliberative process, but the client is free to make her own decision.").

[119] MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 5 (AM. BAR ASS'N 1980); AMA COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AMA CODE OF MEDICAL ETHICS' OPINIONS ON PATIENT SAFETY, Opinion § 8.12 (2011). Lawyers and doctors also have a responsibility to disclose their own mistakes. *See* Thomas L. Hafemiester & Selina Spinos, *Lean On Me: A Physician's Fiduciary Duty to Disclose an Emergent Medical Risk to the Patient*, 86 WASH. UNIV. L. REV. 1167, 1171-78 (Physicians have an ethical duty to disclose medical errors, a requirement supported by several state laws); AMA COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AMA CODE OF MEDICAL ETHICS' OPINIONS ON PATIENT SAFETY, Opinion § 8.121 (2011); Catherine Gage O'Grady, *A Behavioral Approach to Lawyer Mistake and Apology* 51 NEW ENGLAND L. REV 7, 27-28 (2017), citing Benjamin P. Cooper, *The Lawyer's Duty to Inform His Client of His Own Malpractice,* 61 BAYLOR L. REV 174, 184-86 (2009) (describing how rules of professional conduct apply to lawyers recognizing and acknowledging mistakes).

Unlike the users of the complex systems described above, clients who seek professional or gray advice may not be knowledgeable about the issue they are seeking help for.[120] This shifts the burden further towards an advice provider, who is responsible for a broad spectrum of user variability and misinterpretations. A poorly-designed system might cause the user to misunderstand their situation and make incorrect or harmful decisions as a result.

Consider, for example, a chatbot powered by a large language model and supporting resources. The chatbot might initially be validated with a set of model questions: when presented with a question like "How do I ask my landlord to make a needed repair?", the designer verifies that the chatbot delivers the correct output. But in the real world, users may present questions in wildly different ways. A user might use slang or different writing styles. They might write a long narrative filled with emotion and irrelevant details. They might use specific names or misuse jargon. They might ask the wrong question. All of these framings and phrasings may result in different answers from a large language model. They may result in wrong answers.[121] If they do, this is the system's fault, not the user's.

As of this writing, overcoming this fickleness is a core challenge with using large language models.[122] But in an advice context, asking users to become "prompt engineers" and find just the right phrasing that yields the correct answer is tremendously unhelpful. At best, users might end up with multiple contradictory answers that they are unable to parse. At worst, users might take the wrong action and blame themselves for a service's mistake.

Advice leads to action. Users seek advice because they are unsure of what action to take next, and they may not be able to evaluate the recommendations they receive.[123] As increasingly sophisticated, complex advice is delivered under the banner of self-help, users may incorrectly blame themselves for mistakes that an advice provider should be responsible for. Gray advice services must own the power they exert over users and take responsibility for ensuring that users are not led astray by jargon, ambiguity, or misinterpretation.

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[120] Heritage & Sefi, *supra* note 25.

[121] Kapoor, Henderson & Narayan, *supra* note 35, at 6.

[122] *See also* Samuel R. Bowman, *Eight Things To Know About Large Language Models*, ARXIV 5 (2023) ("[large language] models can misinterpret ambiguous prompts or incentives in unreasonable ways, including in situations that appear unambiguous to humans, leading them to behave unexpectedly.").

[123] *See* Section II(A)(ii), *supra*, and accompanying notes.

3. A service might set users up to fail.

Limited-scope assistance often leaves a residual task for a person to do on their own. But a person may not be able to perform it.

An all-too-common pattern in automation is to ask humans to do what technology cannot.[124] But people are not always well-suited for a stopgap role, and the result is that the combination of humans and technology can sometimes be less than the sum of its parts.[125] Beyond the professions, the rise of self-help services for interacting with government has potentially made it too difficult for some ordinary citizens to manage.[126]

So too with gray advice. A user might be asked to perform a task that the service cannot or will not: to verify a medication's contraindications,[127] to serve process on a counterparty,[128] to proofread a generated document for errors, to interpret eligibility rules for a government program,[129] to self-assess symptoms,[130] and so on. Without additional support, a user may fail and get a worse outcome as a result.

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[124] Norman & Stappers, *supra* note 110, at 87 ("There is a tendency to design complex sociotechnical systems around technological requirements, with the technology doing whatever it is capable of, leaving people to do the rest. The real problem is not that people err; it is that they err because the system design asks them to do tasks they are ill suited for.").

[125] *Id.* at 87; *See, e.g.*, Andrew Selbst, *Negligence and AI's Human Users,* 100 B.U. L. REV. 1315, 1346-47 (2020) (describing how humans struggle to take over for partially self-driving cars).

[126] *See* Christian Østergaard Madsen, Ida Lindgren & Ulf Melin, *The accidental caseworker – How digital self-service influences citizens' administrative burden*, 39 GOV. INFO. QUARTERLY 101653 at 6-8 (2022) (describing learning burden on citizens who had to complete administrative tasks that would normally be handled by a caseworker); ANNE-GREEN KEIZER, WILL TIEMEIJER & MARK BOJENS, WHY KNOWING WHAT TO DO IS NOT ENOUGH: A REALISTIC PERSPECTIVE ON SELF-RELIANCE 7-9 (2019); Carolyn Y. Barnes, *"It takes a while to get used to": The costs of redeeming public benefits*, 31 J. OF PUB. ADMIN. RESEARCH AND THEORY 295, 303-07 (2021). *See also*, *generally* Judith H. Hibbard, Paul Slovic & Jacquelyn J. Jewett, *Informing Consumer Decisions in Health Care: Implications from Decision-Making Research,* 75 MILBANK QUARTERLY 395 (1997) (describing cognitive challenges for consumers selecting health plans, and cognitive and credibility challenges for intermediaries who stand to help).

[127] *See, e.g.*, Melby & Mosendz, *supra* note 108.

[128] *See, e.g.*, Sandefur, *supra* note 2, at 300, citing BRIDGEPORT CONSULTING, MICHIGAN LEGAL HELP EVALUATION REPORT 23 (2015).

[129] *See, e.g.*, Madsen, Lindgren & Melin, *supra* note 126; Porcaro, *supra* note 80.

[130] *See, e.g.*, Forer, *supra* note 34.

When help is scarce, the risks of limited-scope assistance can be ethically acceptable: partial help may be better than no help at all. But making that determination requires a more holistic look at the outcomes people achieve when they use a service. Not every service can be delivered *a la carte*, especially if doing so sets users up to fail.

<div style="text-align:center">*   *   *</div>

The gulf between the right answer and a good outcome can be vast—this is why people seek advice from professionals. Even an accurate product is a failure if it merely strands the user in a different place from where they started.

III. REGULATORS AND PROFESSIONALS CAN ENSURE THE RESPONSIBLE ADOPTION OF DIGITALLY MEDIATED ADVICE.

Digital services that toe the line between self-help and advice are likely here to stay. But they need not continue to exist as they are. More focused regulatory attention can minimize opportunistic behavior and more closely align user protections with traditional professional relationships. Professions still have time to adapt to the reality of gray advice, and to imagine what responsible digital services could and should look like.

They have an interest in doing so. Individual interactions with professionals, unofficial services, or even information websites can influence how ordinary perceive—and trust—professionals, professional services, and the institutions they represent.[131] For regulators, gray advice is an opportunity to protect vulnerable consumers from potentially predatory online services. For professionals, gray advice is an invitation

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[131] *See*, *e.g.*, Michele Peterson-Badali, Stephanie Care & Julia Broeking, *Young People's Perceptions and Experiences of the Lawyer–Client Relationship*, 49 CANADIAN J. OF CRIMINOLOGY AND CRIM. JUST. 375, 377 (2007); Carly Parnitzke Smith, *First, do no harm: institutional betrayal in health care organizations,* 10 J. MULTIDISCIPLINARY HEALTHCARE 133, 135 (2017) ("Trust in an individual physician and trust in a larger health care institution may be interrelated; patients may generalize their trust in a physician to doctors in general or the health care system in which the physician is located, or patients may base their trust in a physician on their trust in the health care system or their attitudes about doctors in general (more likely in new treatment relationships).") (internal citations omitted); Virginia Heffernan, *A Prescription for Fear*, N.Y TIMES MAGAZINE (Feb. 4, 2011) ("Health sites are hugely influential in how Americans think about their health and may even play a part in public debates over health care, as they aggressively shape how would-be patients consume medical information and envision treatment.").

to reimagine the systems that stand between clients and the outcomes they strive for.

A. Regulators can help close trust gaps that gray advice introduces.

State and federal regulators can do more to protect vulnerable users who rely on gray advice products for help and care. Gaps between a product's promises and disclaimers can be the basis for deception claims. Research and auditing can identify harms that users may miss. And confidentiality protections can be updated to protect users against modern threats and opportunism.

1. Regulators can incentivize forthright disclosures about gray advice products.

People who seek help online expect the services they engage with to work. When invitations promise help and disclaimers disavow it, the result is a lottery: maybe a service will work, maybe it will not.

Consumers and providers share an interest in clear communications about what a service does and does not offer. But consumers should not have to decipher deceptive and aggressive disclaimers in order to get the help they need. And providers should be responsible for the help they do provide.

Federal and state consumer protection regulations can help. Regulators can use deception cases to pursue products that do not work as claimed. New rulemaking can align terms of service with consumer expectations. And nutrition labels suggest a more accessible alternative to dense legalese.

a. Gray advice products that do not work as claimed are deceptive.

A gray advice product invites people to use it for a specific purpose. When users fall short, it may be evidence of a deceptive practice.

Consumer deception cases require representation, omission, or practice that is material and likely to mislead a consumer, and where the consumer's interpretation or reaction is reasonable under the circumstances. [132] Importantly here, actual intent to deceive is not a necessary element, only that "an act or practice is likely to mislead."[133] A practice can be deceptive when there are material differences between how a product actually works and how a consumer reasonably expects it to work.[134]

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[132] Miller, *supra* note 28.

[133] *Id.*

[134] *Id.*

Deception determinations account for the relative sophistication of a consumer. [135] Particular audiences may be more susceptible to deceptive claims: for instance, the terminally ill may be more susceptible to claims of miracle cures.[136]

Here, people who seek legal or health assistance online are especially susceptible to claims of help: they need expertise and may lack good alternatives. Offering help and not providing it is plainly misleading, disclaimer or no. Beyond classic, time-honored practices—bait and switch, sham services, and so on—quality problems that are more particular to gray advice can also give rise to deception claims.

Consider a hypothetical app that offers to help users pursue small claims cases against companies after data breaches. The app might generate court forms, use templates to help users write claims, and walk users through filing a small claims court case in their jurisdiction. The app might collect a small fee for this service.

What deceptive practices might arise from this app? Of course, it might simply not work: generating forms riddled with errors, or for the wrong jurisdiction. But it also might push users into buying an expensive, unnecessary credit monitoring service and seek reimbursement from the offending company. Or, it may fail to alert users of alternative ways of seeking redress for their claim, such as joining a class action. So far, these practices cover well-trod ground in consumer deception cases.

But our hypothetical app can lead users astray in other ways. It might fail to account for someone who actually experienced identity theft as a result of a breach, and who was materially harmed as a result. Without a warning or a redirect, the user might file a suboptimal claim and lose an opportunity to be made whole. After filing, our app might not adequately inform users of their obligation to serve process or actually appear for the court hearing, and the consequences of default if they do not.

These, too, are deceptive practices. Users of our app likely have little knowledge of small claims cases or the legal system. Not only are users susceptible to claims of help, but they are vulnerable to being misled by a service that is not up to par.

Deception does not require an intent to mislead. [137] Here, deception actions against low-quality advice services can help establish a floor for competent advice services. While few advice products may ultimately attract the notice of the F.T.C., even a small number of

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[135] *Id.*

[136] *Id.*

[137] *Id.*

deception cases can have a gravitational effect on how companies behave.[138] Elsewhere, state consumer protection agencies and attorney general offices can help police services that are too small to attract federal attention, or against nonprofits that are not subject to F.T.C. oversight.

> *b. Even without professional re-regulation, a duty of loyalty can align consumer protections with consumer expectations and limit opportunistic behavior.*

The presence of disclaimers in gray advice services is emblematic of a larger problem: when consumers seek health and legal advice online, they expect to encounter helpful products that protect their privacy.

Even without resolving professional re-regulation battles, consumer protection rules can help close the gap between consumer expectations and the actual protection they receive when seeking help online.

Already, the F.T.C. has cited user expectations as the basis for rules governing apps that collect sensitive health information: even for health apps are not subject to HIPAA rules, consumers expect a certain level of protection because of the sensitive nature of health information.[139] Washington's My Health, My Data Act was likewise intended to "close the gap" between user expectations and how apps deal with personal health data.[140]

This justification could be wielded to impose a duty of loyalty on services that stand in for professional offerings, and explicitly prohibit gray advice services from being provided as-is. Consumers expect services that work and that are safe to rely on. Currently, gray advice users are vulnerable to opportunistic behavior that may not be covered under negligence or product liability theories: where a service provider

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[138] *See also*, *e.g.*, Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUMBIA L. REV 583, 606-27 (Apr. 2014) (arguing that the F.T.C. has created a de facto privacy common law).

[139] *Statement on breaches by health apps and other connected devices*, F.T.C. (Sept. 15, 2021). *See also FTC Proposes Amendments to Strengthen and Modernize the Health Breach Notification Rule,* F.T.C. (May 18, 2023).

[140] Amy Olivero & Ankokhy Desai, *Washington's My Health, My Data Act*, IAPP RESEARCH (Apr. 18, 2023).

improperly benefits, but a plaintiff may not have significant monetary damages.[141] A duty of loyalty can help stem this behavior.[142]

Professional services are not provided as is. Providers should be responsible for the services they offer, and should not be permitted to absolve themselves for harm they might cause vulnerable users. Here, better rulemaking could provide both substantive protection for users and signaling value for people seeking help.[143]

> *c. Nutrition labels can provide a better alternative for communicating a service's offerings and limitations.*

A service may have a genuine need to communicate its limitations and suitability, and for a user to understand and accept them. But ordinary people are unlikely to read or understand dense form contracts about what a service does and does not offer.[144] Even if they do, they may struggle to distinguish the responsibilities and capabilities of professionals versus those of gray advice services. [145]

As an alternative to form contracts, regulators could experiment with field-specific nutrition labels that outline a service and a user's respective responsibilities. Nutrition labels have become a popular explanatory analogy, from machine learning datasets [146] to privacy

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[141] For example, data-driven group harms may be hard to particularize to a single individual. Neil Richards & Woodrow Hartzog, *A Duty of Loyalty for Privacy Law*, 99 WASH. UNIV. L. REV. 961, 978-86 (2021).

[142] Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 BOSTON UNIV. L. REV. 1289, 1296-97 (2011); Laby, *supra* note 24, at n26. *See also* Lauren Henry Scholz, *Fiduciary Boilerplate: Locating Fiduciary Relationships in Information Age Consumer Transaction,* 46 J. CORP. L. 144, 190-92 (2020).

[143] *Id*.

[144] Hoffman, *supra* note 61.

[145] *See* Rebecca L. Sandefur, Thomas M. Clarke & James Teufel, *Seconds to impact?: Regulator Reform, New Kinds of Legal Services, and Increased Access to Justice.* 84 L. and CONTEMPORARY PROBLEMS 69, 76 n.37 (2021). *See also* Sandefur, *supra* note 2, at 291-92 ("In an analysis of live chat streams from two different legal aid websites, one in a rural state and one in a state where a majority of the population resides in a single large metropolitan area, researchers found that visitors sought legal advice…about two-fifths of the time….But prohibitions on the delivery of legal advice outside of lawyer-client relationships prevented operators from answering with legal advice.").

[146] *See, e.g.*, Sarah Holland, Ahmed Hosney, Sarah Newman, Joshua Joseph & Kasia Chmielinski, *The Dataset Nutrition Label*, *in* DATA PROTECTION AND PRIVACY, VOL. 12 (Dara Hallinan, Paul De Hert, Ronald Leenes & Serge Gutwirth eds., 2020).

policies[147] to broadband offerings.[148] While it is unclear whether nutrition labels durably change consumer behavior, emerging advice tools may still benefit from common language to describe and compare alternative services.

2. Auditing and testing regimes can validate services and combat junk.

Professional services are credence goods.[149] If clients are unable to evaluate the quality of a service, they may also struggle to identify when they have been harmed because of a professional's actions (or inactions).[150] As a result, an enforcement regime based largely on client reporting or private action will catch only a fraction of actual harm done to clients, or may not identify misbehavior until long after it occurs.[151]

Client-driven reporting of problems is a poor signal of service quality and of client trust in professionals. Of course, clients should have a venue for reporting harm and pursuing redress. But client reporting should not be the sole or even the primary determinant of whether alternative forms of help, from paraprofessionals to software, are actually working. An imbalanced picture is inevitable.

But with digital advice, regulators can rely on a simple fact: software can be tested, repeatedly and cheaply. Regulators could devise test suites that attempt to measure a product's baseline accuracy, or stress-test a product's ability to flag emergent issues or address edge cases.[152] Auditing regimes could help regulators and designers uncover connections between a product's design and the outcomes users actually receive.[153]

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[147] *See, e.g.*, Patrick Gage Kelly, Joanna Breese, Lorrie Faith Cranor & Robert W. Reeder, *A "Nutrition Label" for Privacy*, PROCEEDINGS OF THE 5TH SYMPOSIUM ON USABLE PRIVACY AND SECURITY 1 (2009).

[148] *See, e.g.*, Christopher Choy, Ellie Young, Megan Li, Lorrie Faith Cranor & Jon M. Peha, *Consumer-Driven Design and Evaluation of Broadband Labels*, 48 TELECOMMUNICATIONS POL. 102717, 102717 (2024).

[149] *See supra* Section II(A)(ii).

[150] *Id. See also* Sandefur, *supra* note 2.

[151] *See*, *e.g.*, Arthur F. Greenbaum, *The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap*, 73 OHIO ST. L.J. 437, 440-41 (2012), citing DEBORAH L. RHODE & GEOFFREY C. HAZARD JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 264 (2d ed. 2007).

[152] A popular approach in healthcare has been to use synthetic data to test interventions prior to deployment. *See* Mario Giuffre & Dennis L. Shung, *Harnessing the power of synthetic data in healthcare*, 6 NPJ DIGITAL MEDICINE 186, 186 (2023).

[153] *See, e.g.*, Inioluwa Deborah Raji et al., *Closing the AI Accountability Gap*, *in* PROCEEDINGS OF THE 2020 CONFERENCE ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 33 (2020).

The result is still an imperfect signal—test suites and synthetic data may miss crucial information or cases, and audits may fail to drive change. But in conjunction with client reporting, active monitoring of digital advice services can better validate the quality of advice that people receive online.

3. Confidentiality protections must protect users against predatory inferences.

It is easier than ever to infer someone's legal, health, or economic status without their consent, and to monetize those inferences via discriminatory pricing or predatory ads.[154] Small wonder Americans are more fatalist about their privacy than ever.[155]

Professions have the opportunity to do better, to provide an enclave of safety in a privacy free-for-all. They are not meeting the moment. Healthcare websites are loaded with trackers that communicate protected health information to third parties,[156] and healthcare providers routinely sell deidentified data.[157] Legal ethics bodies have been largely silent on lawyers' obligations to protect clients from third-party inferences about their legal problems.

Regulations governing the professions must modernize confidentiality responsibilities to meet modern threats to client welfare and trust. Consumers deserve to be shielded from predatory services when they seek help for legal or medical issues.

Protecting users against third-party inferences serves both ends. As a baseline matter, gray advice providers and professionals should not be permitted to help third parties infer a user's legal or health status unless it is in support of the service they are providing.[158]

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[154] *See supra* notes 86-95 and accompanying text.

[155] Brook Auxier, Lee Rainie, Monica Anderson, Andrew Perrin, Madhu Kumar & Erica Turner, *Americans and Privacy: Concerned, Confused, and Feeling Lack of Control Over Their Personal Information*, PEW RESEARCH CENTER (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information.

[156] McCoy, Friedman & Hoffman, *supra* note 90.

[157] Kenneth D. Mandl & Eric D. Perakslis, *HIPAA and the Leak of "Deidentified" EHR Data*, 384 N ENGL J MED 2171, 2171 (2021).

[158] The professions may differ in how they define exceptions to this rule. For example, HIPAA permits healthcare providers to use identifiable patient data to improve their own services. As discussed *supra*, a duty of loyalty may be the most appropriate guide for providers, rather than enumerating every permitted and prohibited use.

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Consumer protection agencies can help fill regulatory gaps left by slow-moving professions, and protect consumers from predatory services. But professions must eventually rise to meet the moment.

B. Professionals must adapt to the reality of how help is delivered.

Professions lack the power to erase gray advice entirely. The unmet demand is too fierce; the roots of self-help are too deep. But the professions, too, are likely to endure. And they can help ensure that digital advice products are deployed responsibly and appropriately. Rather than focusing on economic threats, professions can imagine gray advice as part of the broader infrastructure of care.

Better bridges between gray advice and professional counterparts can ensure that complex or urgent cases get appropriate help. Field-specific design ethics for digital advice can trickle down from professionals to consumer products. And a more critical eye on the gap between service provisions and true outcomes can reveal blind spots for professionals and technologists alike.

1. Professionals can build bridges between gray and professional advice.

Not every issue needs bespoke care from a professional. In some instances, people may be able to get by with help from paraprofessionals, software, or other specialized support. [159] New research, advancing technology, changing laws, or evolving institutions may make it easier for people to mostly help themselves, or to get help outside of the professions.

For people who need intensive, complex care, professional relationships remain critical. But users may not self-identify as needing special care, and professionals have struggled to build bridges with alternative sources of help. Research from Kelli Raker and Jeff Ward found that "justice tech" entrepreneurs may limit their service offerings or refrain from making referrals to lawyers in order to avoid the threat of sanctions for unauthorized practice of law.[160] Despite acknowledgements that community health workers and peer support are critical to improving health outcomes, both remain poorly integrated with mainstream healthcare systems.[161] Without a clean referral relationship, people with

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[159] Sandefur, *supra* note 106; Jacqueline Martinez, Marguerite Ro, Normandy William Villa, Wayne Powell & James R. Knickman, *Transforming the delivery of care in the post-health reform era: what role will community health workers play?*, 101 AMER. J. PUB HEALTH e1-5 (2011).

[160] Raker, *supra* note 66.

[161] Martinez, Ro, Villa, Powell & Knickman, *supra* note 159.

the most need may fall through the cracks, or be vulnerable to predatory services.

Professionals can do more to build referral relationships with alternate providers of help, even as debates rage about professional re-regulation. Alternative providers of help could be subject to a duty to refer: a requirement that complex, urgent, or unsuitable cases be handed off to a professional. That duty could include a safe harbor that shields providers from unauthorized practice liability for cases they refer.

A future ecosystem of help might smoothly integrate software, paraprofessionals, and professionals. [162] But we are far from that ecosystem today, as murky regulatory waters impede regulated professionals from connecting with alternative providers of help. Referral relationships can help build bridges between the two, and ensure that no person seeking help is left stranded.

2. Professionals can develop field-specific design ethics for digital advice.

Even as gray advice services proliferate, professionals are experimenting with limited-scope assistance and technology-assisted self-service. [163] Software and data-driven models increasingly play a role in supporting professional decision-making. [164]

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[162] *See* Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 J. PROF. LAW. 79, 82 (2012); Goldstein, *supra* note 14, at 925-45 ("Those who advocate and participate in the various rights movements do not wish to do away with what American society has to offer. They want complete access to it."). *See also* Sandefur, *supra* note 2, at 313, n.177 ("A just and accessible legal system would include a range of kinds of providers, both traditional lawyers and others. It would also include means for connecting people with services that they need and want and that are appropriate and proportionate to their situations").

[163] *See, e.g.*, James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza, *Using Technology to Enhance Access to Justice*, 26 HARVARD J. L. TECH. 243, 249-51 (2012).

[164] *See, e.g.*, Daniel N. Kluttz & Deidre K. Mulligan, *Automated Decision Support Technologies and the Legal Profession*, 34 BERKLEY TECH L. J. 853, 853; Richard Re & Alicia Solow-Niederman, *Developing Artificially Intelligent Justice*, 22 STANFORD TECH L. REV. 242, 242 (2019); Rebecca Crootof, *"Cyborg Justice" and the Rise of Technological-Legal Lock-in*, 119 COLUMBIA L. REV. FORUM 223-51 (2019); Anna Ostropolets, Linying Zhang & George Hripcsak, *A scoping review of clinical decision support tools that generate new knowledge to support decision making in real time*, 27 J. AMER. MED. INFORMATICS. ASS'N 1968-76

One might imagine a future where professionals offer advice software to help clients navigate simple cases, with the professional backstopping complex or special needs.

Yet the professions have had little to say about how their professional duties translate to the ethics of digital advice-giving, and how those ethics can be translated into the design of products.[165] After all, professional advice is about more than providing a correct answer:[166] advice products must account for the unexpected behavior that might emerge from people using a tool on their own.[167]

The consequence of this silence is a lost opportunity to set standards for what responsible digital advice should look like, and to learn what works and what does not. Without it, gray advice services more closely resemble consumer tech products: opaquely designed, thick with disclaimers, and with users as unwitting test subjects.

There is still time to imagine what a competent advice service looks like, and what distinguishes those services from run-of-the-mill consumer products. Advice software products influence low-knowledge users on high-consequence issues, with limited or no supervision by a human professional. An adverse experience with advice software can affect a person's confidence in legal or health institutions, and their ability to provide reliable help.[168]

How might we transpose a professional's duty of care onto software? One frame might ask products to compensate for weaknesses of

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(Dec. 2020); Eta S. Bener & Tonya J. La Lande, *Overview of Clinical Decision Support Systems* IN CLINICAL DECISION SUPPORT SYSTEMS (Eta S. Berner ed., 2016).

[165] *See* Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law*, 70 HASTINGS L.J. 173, 196-98 (2018) (describing the inadequacy of "simple" competence and commentary around technology in legal practice); Cynthia L. Fountaine, *When is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment*, 71 U. CIN. LAW REVIEW 147, 171 (2002) (arguing that a lawyer's duty of competence should be imposed on software publishers). *See also* Fiske, Henningsen & Buyx, *supra* note 107 ("so far, how an AI duty of care or a code of practice on reporting harm should be operationalized is entirely unclear.").

[166] *See supra* note 118.

[167] Carroll and McKendree, *supra* note 33, at 15 ("True advice-giving systems will have to know about more than merely their own dialogue conventions. They will have to know about advice-giving, about the tasks they are to be used for, and about the ways that users can vary.").

[168] *See* Smith, *supra* note 131, at 135.

human-computer interaction: a duty of error correction. Advice software would be presumptively responsible when users reasonably fail to receive advice suitable to their situation, fail to accurately implement advice, or fail to accomplish assigned tasks.

This is not a duty of perfection; quite the opposite. Rather, it assumes that ordinary people are likely to make mistakes of all kinds when using advice software, and when navigating an issue on their own.[169] Effective advice software will anticipate, notice, and correct those errors before those consequences are realized.[170]

As in a deception inquiry, our sense of reasonableness is context-specific. Users might arrive with different levels of capability and understanding; they may need to explore or backtrack, or may need more or less explanation. Someone who has managed a chronic health condition for a long time may have a thorough understanding of jargon and terms of art related to their condition. Someone who has just been diagnosed may not. So too with notice and warning labels. It may be sufficient to provide a simple warning to lawyers to check a large language model's outputs for mistakes. It is almost certainly not to ask a client to make that same check.

Finally, our duty of error correction might require some fiduciary qualities. As some commentators have argued and some states have recognized, a client may not need to prove direct harm in order to prove a violation of a fiduciary duty.[171] Here, a multitude of other factors may weigh heavier on a client's ultimate outcome—a case was misfiled, but it was a poor one; a person's chronic condition worsened after wrong advice, but it would have anyway even with the correct advice. But errors can harm trust in professionals and software alike—everyone is worse off when errors go unidentified. A fiduciary duty allows for a simpler theory of redress, and avoids the moral hazard of permitting users to be led astray if their situation is already dire.

A more positive frame might be that advice software should affirmatively teach users, and empower them to help themselves. Already, the experience of navigating a problem leaves an impression: a person's interactions, feelings, and results contribute to a mental model about how to navigate their problem or a similar problem in the future.[172] This happens regardless of whether an advice tool teaches the user or not.[173] Without tools that are designed to teach, a person may entrench a

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[169] Rasmussen and Vicente, *supra* note 112, at 516.
[170] *Id.*; Carroll and McKendree, *supra* note 33, at 15.
[171] *See supra* notes 141-142 and accompanying text.
[172] Porcaro, *supra* note 80.
[173] *Id.*

misunderstanding of their issue or condition, even as they receive good advice about what to do next. While it is unreasonable to expect, say, a person facing eviction to become an expert in landlord-tenant law overnight, surely there is benefit in taking a small step towards sense-making and away from bewilderment and confusion.

A design ethic led by professions can influence how advice software is built, regardless of who builds software. Without one, gray advice will continue to resemble consumer software: opaquely designed, rife with conflicts of interest, and of dubious quality.

Better design will not make software universally suited for all advice-giving roles, but it is possible to design digital services that better reflect the fiduciary relationships that inspire them.

3. Professionals can investigate the true impact of their services.

What stands between a person and the help they need? The emerging legal issue that must be resolved; the health condition that must be understood or managed.

Often, people simply need help from lawyers and doctors. But sometimes, people need more: other expertise, community support, fairer policies, better infrastructure.[174] A professional may be necessary but not sufficient.

And sometimes people need less—less bespoke or less expert care. When someone truly does, a profession's economics should not cloud the small triumph of a person needing just a bit less help to solve a legal problem or manage their own health.

More research is needed at the margins to identify the role professional help plays in getting clients the outcomes they need. This is not merely an academic concern: poor outcomes corrode trust in the professions and the institutions they support.

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[174] *See, e.g.*, Shobita Parthasarathy, *Innovative Thinking Could Make New Sickle Cell Treatments More Accessible,* SCIENTIFIC AMERICAN (2024) (arguing that some people who suffer from sickle cell disease lack the care infrastructure needed to fully benefit from gene therapy)*;* David K. Hooper et al., *A Medication Adherence Promotion System to Reduce Late Kidney Allograft Rejection: A Quality Improvement Study,* 79 AMER. J. KIDNEY DISEASES 335, 339 (2022) (describing how additional support from psychologists, social workers, and health support staff can improve outcomes for adolescent kidney transplant recipients). *See also* Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the Deregulation of the Lawyer's Monopoly*, 89 FORDHAM L. REV. 1315, 1317 (2021) (describing how judges in domestic violence courts are "quietly experimenting" with paraprofessionals to alleviate the pro se problem).

So too with gray advice, or any other digital self-help tool. Advancing technology will continue to embolden new offerors of help. There may be a large gap between the output a product yields and the actual outcome a client ends up with.[175] Shedding light on that gap with research is the only way to uncover what works and what does not, and what help a person actually needs.

The quality of limited-scope assistance remains understudied: how effective a given service is at accomplishing a limited task, how effective it is at furthering a user's broader goal, and how replicable a service's effectiveness is across cultural, jurisdictional, and clinical contexts.[176]

Perhaps this is a fight against prevailing winds: a service provider has little incentive to discover that their service is not actually helpful. And the depth of unmet demand invites shallow analysis of whether services actually meet it.

But the alternative is uncritical scholarship about the use of technology in legal and health services that depends on unverified marketing claims. Without a critical eye on outcomes and why they happen, professionals and service providers may miss the impact of subtle product choices or local policies on the results people get. Policymakers may lose opportunities to learn about alternative solutions to deliver help. And professionals who have to allocate scarce resources in the face of overwhelming demand may be left fumbling in the dark.

CONCLUSION

The problems of living predate the professionals that lay claim over them. People will continue to search for and deliver help for human problems, no matter how fortified the professional monopoly. This has always been true; the rise of software has just made the phenomenon more obvious. Self-help tools promise users agency and empowerment—the ability to overcome a troublesome legal obstacle, or to keep a health condition from dominating one's life. One risk is that the opposite happens: that people are led astray, exploited, or just left with a different problem to sort out on their own.

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[175] *See, e.g.*, J. David Greiner, Dalie Jimenez & Lois Lupica, *Self-Help Reimagined*, 92 INDIANA L. REV. 1119, 1125 (2017) ("cognitive, emotional, and behavioral challenges" prevent people from successfully deploying legal self-help material).

[176] *See* Sandefur, Clarke & Teufel, *supra* note 145 (describing difficulties of measuring impact of new service delivery methods on legal services market).

Systemic risks linger, too. Like the professionals they claim to replace or complement, gray advice providers are building an economic interest in solving a problem, in treating a condition. Once established, they may fight to keep it, and resist systemic improvements that may truly minimize the need for third-party assistance, or eliminate the problem entirely. TurboTax's owner has, for years, fought everything from Free File programs to proposals to simplify the tax code. [177] Perhaps future organizations might resist proposals for civil Gideon, or small claims court reform, or expansion of health insurance to better cover telemedicine.

Americans need help and gray advice may help them get it. Regulators and professionals ignore this reality at their peril—in their zeal to preserve professional monopolies, they may lose influence in how ordinary people perceive the law, their health, their finances, and the government. This does not mean the end of the professions or the rise of the robots. But protecting consumers and earning their trust requires us to acknowledge the full gradient of how people seek and find help, and to build ethical standards to match.

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[177] *See* Justin Elliott & Paul Kiel, *Inside TurboTax's 20-Year Fight to Stop Americans From Filing Their Taxes For Free*, PROPUBLICA (Oct. 17, 2019), https://www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free.