

This report with recommendation was received after the May 8 filing deadline and has not been reviewed by the Committee on Rules and Calendar.

ANNOTATED VERSION WITH RESPONSIVE LAW COMMENTS IN RED

AMERICAN BAR ASSOCIATION

NEW YORK STATE BAR ASSOCIATION

NEW YORK COUNTY LAWYERS ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges states to adopt General
2 Provisions for Regulation of Online Providers of Legal Documents to establish
3 reasonable standards of product reliability and efficacy, provide consumers with
4 information and recourse against abuse, ensure consumers are made aware of the risks
5 of proceeding without attorneys, inform consumers where affordable attorneys can be
6 found, and protect confidential information; and
7
8 FURTHER RESOLVED, That until such time as the General Provisions are adopted,
9 online providers of legal documents are encouraged to adopt the Statement of Best
10 Practices to provide a common-sense approach to self-regulation of online providers of
11 legal documents.

REPORT

I. Introduction¹

Online legal forms provide enhanced access to justice for people of modest means; however, the impact on consumer protection of the online sales of these forms has received only modest attention. In 2016, the New York County Lawyers Association established a Task Force on On-Line Legal Providers². The Task Force sought to study and undertake such steps necessary to consider all relevant issues, including convening a public forum entitled “Should Online Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not?” The forum included presenters from all perspectives, including stakeholders, and examined the following topics:

What does the online legal document sale industry do? Who uses it? How new is it? How big is it? Are legal documents like other consumer goods? Are there legal documents that should not be sold without advice from a lawyer?

Some safeguards are required for consumer use of legal forms: which ones are provided? Which ones are lacking?

If additional safeguards are required, should they be self-imposed or required by legislative action? Should the addition of safeguards provide a basis to regulate industry activity?

The forum reflected that:

Online legal forms providers (OLPs) are a worldwide multi-billion-dollar industry that has created a new market;

¹ This report is a summary of the full report prepared by the Task Force on On-line Legal Providers of the New York County Lawyers Association with the help of NYCLA staff and associates at the law firm of Seward & Kissel LLP. It was approved and adopted by the New York State Bar Association House of Delegates on November 4, 2017. The report can be accessed in its entirety at <http://www.nycla.org/pdf/NYCLA%20Task%20Force%20Report%20-%20Online%20Legal%20Providers%20of%20Forms%20%282017%29.pdf>.

² The members of the Task Force included NYCLA Past Presidents Arthur Norman Field, James B. Kobak, Jr., and Michael Miller; NYCLA Ethics Institute Director Sarah Jo Hamilton; NYCLA Committee on Professionalism and Professional Discipline Chair Ronald C. Minkoff; NYCLA Law and Technology Committee Co-Chair Joseph J. Bambara; and then-NYCLA Treasurer Vincent T. Chang.

If you have feedback on Responsive Law’s comments, please contact Tom Gordon at tom@responsivelaw.org.

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Comment: There is no reliable data that supports the assertion that the online legal document provider portion of the online legal services market is a multi-billion-dollar market. This assertion exaggerates the problem.

Online legal documents can genuinely benefit many people, especially low- and moderate-income persons, small businesses, and startups, as the public interest is served by having accurate and modestly priced online legal forms available; and

Most important, many OLPs do not now provide basic protections for sensitive consumer information or form consumer use of online forms.

Comment: Where is the data that supports this assertion?

Based upon research, review and discussion, this report concludes that there is a need for some form of regulation in order to (i) establish minimum standards of product reliability and efficacy, (ii) provide consumers with information and recourse against abuse, (iii) ensure consumers are made aware of the risks of proceeding without attorneys, (iv) inform consumers how affordable attorneys can be found, and (v) protect consumers' confidential information. The process by which consumers select and generate an online legal form can simulate the process of legal advice; the computer is programmed to make certain judgments, and the information gathered is highly personal in many cases. The potential for harm, as with medical information, can be very high if there is a mistake or disclosure. This report focuses solely on the Task Force's investigation concerning issues related to online legal documents.

Comment: This is a heavy-handed regulatory scheme that will stifle innovation and will crush an emerging self-help legal software industry that includes not only online automated legal documents, but also automated legal advice, automated legal information instant messaging services, to name only a few.

Technically, there is no definition of what constitutes an Online Legal Document Provider in this Report or the proposed regulation. This report and the proposed regulations conflates legal document providers whereby a non-lawyer reviews the generated document for accuracy with a pure digital software application which generates a document based upon data provided by the customer and where there is no human intervention.

We disagree with the Report's conclusion that only the form itself is protected speech under the First Amendment of the U.S. Constitution.

We maintain that the second category constitutes a category that we call “self-help legal software” and is a publication that deserves First Amendment protection.

Self-help legal software sold directly to consumers for their use is akin to a publication and arguably is protected speech under the First Amendment. The arguments for protecting self-help legal software from prior restraint are summarized in a pair of articles by Marc Lauritsen that appear here: [Liberty, Justice, and Legal Automata, 88 Chi-Kent L. Rev. 917 \(2013\)](#) and [Are We Free to Code the Law? - August 2013 Communications of the Association for Computing Machinery.](#)

Lauritsen argues that legal software applications, including automated legal documents, dynamic legal information tools, and expert system web advisors, are computer code and therefore “text” and entitled to First Amendment free speech protections. The “speech” contained in legal documents is not “commercial speech”, it is “speech”, like a song, a video game, a book, an interactive book, or a static legal form, and deserves First Amendment protection from regulation.

There is a difference between a “software publisher” which publishes and distributes legal self-help software applications and a website that offers legal document preparation services which involve a person reviewing the document or legal form for errors and omissions.

It is arguable that software programs are immune from state bar and legislative regulation on constitutional grounds and require no exemption from the definition of the practice of law to be sold or distributed in the stream of commerce.

Regulation is justified based upon the particular risks of handling personal information and not on a record of consumer abuse. Such regulation must target specific issues and practices to protect the public while allowing responsible providers to serve a significant need. The market success of OLPs strongly suggests that the nation’s lawyers have not yet met this need effectively through traditional models of practice.

This report proposes a set of regulatory standards which provide for consumer protection in such areas as disclosure, consumer privacy, and warranties. Such standards are essential to ensure reasonable protection to the public. In the area of customer privacy and protection of consumer data, regulators and legislators should give strong consideration to legislation similar to that enacted in Massachusetts and North Carolina to provide protection for legal information provided to OLPs.

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Comment: The North Carolina statutory scheme has not been challenged in Federal Court on First Amendment grounds, or other challenges such as anti-trust grounds, and the failure of the North Carolina Bar to comply with the requirements of the *Dental Examiners* decision.

While traditional regulatory and legislative approaches are appropriate and desirable, the adoption of industry-wide voluntary standards is a useful interim measure. To that end, this report offers a statement of *Best Practices for Document Providers*, which it calls on OLPs to voluntarily adopt immediately.

Even before NYCLA's report was adopted by the New York State Bar Association on November 4, 2017, it received support and approval from numerous New York county bar associations, including the Brooklyn Bar Association, The Suffolk County Bar Association, the Bar Association of Erie County, the Queens County Bar Association, the Monroe County Bar Association and The New York City Bar Association.

II. A History of Legal Forms and Unauthorized Practice Concerns

The legal form industry did not start online; at least as far back as the 1700s, books were written on "do-it-yourself" law and the concept of a scrivener service predates the internet.³ An 1859 book entitled "Everybody's Lawyer and Counsellor in Business" contains 400 pages of legal forms and information.⁴ Many court systems and governmental agencies make legal forms available to the public.⁵

Comment: In the paragraph below again note the failure to distinguish between service companies and pure self-help software publishers. Regrettably, the failure to make this distinction is sloppy legal analysis.

As at least one court has noted, the fact that OLP legal forms now reside on the internet is not what creates problems for OLPs; rather, such problems, if they exist, flow from the ways OLP personnel advertise, draft, manipulate or help consumers create

³ Charles Rampenthal, General Counsel of Legal Zoom, Inc., Statement at NYCLA Forum: Should Online Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not? (Sept. 30, 2016).

⁴ FRANK CROSBY, EVERYBODY'S LAWYER AND COUNSELLOR IN BUSINESS (1859).

⁵ Such forms appear on, for example, the website of the New York office of Court Administration (<https://www.nycourts.gov/forms/>) and the website of California's court system (<https://www.courts.ca.gov/forms.htm>).

these documents.⁶ Often much more is being sold than mere blank forms and access to software. Today, online legal forms generate approximately \$4.1 billion in annual revenue, providing, among other things, forms in a host of areas including trademarks, patents, copyrights, wills, living trusts, as well as LLC and corporate formation.⁷

Comment: The estimate of a \$4.1 billion market value is from an unsubstantiated source and includes the value of servicers delivered by virtual law firms, other legal service companies, as well as online legal document providers. This is actually a “false fact” that is put forth to exaggerate that nature and scope of the “problem” and to motivate lawyers to protect their incomes and franchise.

Bar associations have historically commenced litigation against OLPs, contending that these companies were engaging in the unauthorized practice of law (UPL). Much of it has been either settled favorably to the OLPs or been outright unsuccessful. It is also important to note that the Federal Trade Commission (FTC) and Department of Justice (DOJ) have long been hostile to a broad interpretation of UPL legislation. In a 2016 letter, they jointly recommended that the North Carolina General Assembly revise the definition of UPL to avoid undue burdens on “self-help products that may generate legal forms.”⁸ They stated that these self-help products and other interactive software programs for generating legal documents would promote competition by enabling non-lawyers “to provide many services that historically were provided exclusively by lawyers.”⁹ They also contended that:

Interactive websites that generate legal documents in response to consumer input may be more cost-effective for some consumers, may exert downward price pressure on licensed lawyer services, and may promote the more efficient and convenient provision of legal services. Such products may also help increase

⁶ *Janson v. LegalZoom, Inc.*, 802 F. Supp. 2d 1053, 1064 (W.D. Mo. 2011) (“LegalZoom’s legal document preparation service goes beyond self-help because of the rule played by its human employees, not because of the internet medium.”).

⁷ Issues Paper Concerning Unregulated LSP Entities, ABA COMM. ON THE FUTURE OF LEGAL SERVICES 5 (Mar. 31, 2016), https://www.americanbar.org/content/dam/aba/images/office_president/final_unregulated_lsp_entities_iss_ues_paper.pdf (citing WILL MCKITTERICK, IBISWORLD INDUSTRY REPORT OD5638: ONLINE LEGAL SERVICES IN THE U.S. 4 (2014)).

⁸ See letter from Marina Lao, Dir., Office of Policy Planning, Fed. Trade Comm’n and Robert Porter, Chief, Legal Policy Section, Antitrust Div., U.S. Dep’t of Justice to Bill Cook, N.C. State Senator, Dist. 1 (June 10, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-federal-trade-commission-staff-antitrust-division-addressing-north-carolina-house-bill436/160610commentncbill.pdf.

⁹ See *id.*

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access to legal services by providing consumers additional options for addressing their legal situations.¹⁰

Comment: The DOJ/FTC also stressed in the same letter to the North Carolina Bar:

“The Division and FTC staff believe that ‘the practice of law’ should mean activities for which specialized legal knowledge and training is demonstrably necessary to protect consumers and an attorney-client relationship is present. Overbroad scope-of-practice and unauthorized-practice-of-law policies can restrict competition between licensed attorneys and non-attorney providers of legal services, increasing the prices consumers must pay for legal services, and reducing consumers’ choices.”

The Agencies also stressed:

“Such interactive software products may raise legitimate consumer protection issues. The Agencies recommend that any consumer protections, such as requiring disclosures, be narrowly tailored to avoid unnecessarily inhibiting competition and new ways of delivering legal services that may benefit consumers.”

The online legal document industry is still in the early stages of development. The more appropriate UPL analysis may be a comparison between (a) a product based on client information and seller algorithms prepared by lawyers without loyalty or confidentiality, and (b) a lawyer using similar algorithms to assist in a consumer-based practice. The difference is primarily human interaction, loyalty and confidentiality.

This report acknowledges that under appropriate circumstances, OLPs can have significant benefit on the public interest, and unlike approaches seeking an outright ban on alternatives to the use of lawyers, explores a more nuanced means of protecting consumers.

III. The Online Legal Services Market

As noted above, online legal documents generate billions of dollars annually and the OLP business is growing in size every year. Indeed, “as computers grow more powerful and ubiquitous, legal work will continue to drift online in different and evolving formats.”¹¹ As Arthur Norman Field, past president of the New York County Lawyers

¹⁰ See *id.*

¹¹ Barton, Benjamin H., *Some Early Thoughts on Liability Standards for Online Legal Providers of Legal Services*, 44 HOFSTRA L. REV. 541, 546 (2015).

Association, put it, “the public has voted that it wants online legal providers and they are here to stay.”¹²

LegalZoom estimates that it has served four million customers, and that its forms may have created one million corporations and that someone uses its forms to write a will every three minutes in the United States.¹³ And while Legal Zoom is the market leader, it has many competitors and emulators offering a variety of forms and related services, including RocketLawyer and Avvo.

Comment: The focus on commercial providers is misplaced, as there are many legal service agencies, courts and non-profit organizations that could be considered online document providers that would have to comply with the proposed Best Practice requirements.

Why have OLPs been this successful? The answer is that OLPs provide cost-savings and convenience for individuals and small businesses of limited means. Those starting small businesses—particularly internet start-ups and others whose businesses require the protection of intellectual property—simply cannot afford the hourly rates many lawyers charge for their services. Though some lawyers provide substantial rate reductions and other favorable financial arrangements for start-ups, those arrangements (such as deferring costs) still create financial pressure on start-up companies. These businesspeople view the economic equation as simple: they would rather rely on an inexpensive legal form (in order to obtain *some* degree of protection) than pay money (and risk financial stability) to hire an attorney.

OLPs need not be considered adverse to the legal profession. It has been noted that many attorneys work with OLPs, which provide them in turn with clients and revenue that they would not otherwise obtain.¹⁴ This has notably generated some controversy,

¹² Arthur Norman Field, Statement at NYCLA Forum: Should Online Providers of Legal Forms be Regulated? If So, by Whom? If Not, Why Not? (Sept. 30, 2016). Similarly, as Chief Judge Barbara Madsen of the Supreme Court of Washington has stated that “[i]nnovation will continue with or without us, so we need to get in the driver’s seat [...] [w]e need to get on that bandwagon to change the profession before it runs us over. And I believe that, given the statistics I’ve heard, maybe we’ve already been run over.” Lorelei Laird, Avvo Founder Tells Lawyers to ‘Get Rid of UPL’ if They Want Innovation and Access to Justice, ABA JOURNAL (Aug. 3, 2015), http://www.abajournal.com/news/article/avvo_founder_tells_lawyers_to_get_rid_of_upl_if_they_want_innovation_and_to.

¹³ See Statement of Charles Rampenthal, *supra* note 4.

¹⁴ Nicholas Gaffney, *How Branded Legal Networks Help Smaller Firms Land Big Work*, ABA LAW PRACTICE TODAY (Apr. 14, 2016), <http://www.lawpracticetoday.org/article/how-branded-legal-networks-help-smaller-firms-land-big-work/>.

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as many argue that the referrals amount to the unlawful practice of law. However, this is outside the scope of this report.

IV. OLPs and the “Justice Gap”

It has been posited that the overwhelming majority of low-income individuals and families, and roughly half of those of moderate income, face their legal problems without a lawyer.¹⁵ This “justice gap” is huge and is not closing.¹⁶ According to some estimates, “about four-fifths of the civil legal needs of the poor and two to three-fifths of middle income individuals remain unmet.”¹⁷ Low cost internet legal providers can present the promise of affordable legal services for underserved populations of low and middle income consumers who cannot afford lawyers.

It has been thought by some that one potential method of closing the “justice gap” is the use of online legal service platforms that provide legal assistance at a significantly discounted rate over traditional private attorney or firm prices.¹⁸ Online legal services could, at least in theory, meet the needs of the large sectors of the population which are not eligible for legal assistance and yet do not have the resources to retain attorneys.¹⁹ According to a recent article, LegalZoom charged as little as \$69 for wills, \$149 for business formation, and \$169 for trademark registration.²⁰ A reasonable regulatory regime could help ensure that OLPs play a role in addressing the justice gap, while protecting consumers.

¹⁵ Raymond H. Brescia, *What We Know and Need to Know about Disruptive Innovation*, 67 S.C.L. REV. 203, 206 (2016),

http://www.americanbar.org/content/dam/aba/images/office_president/brescia_whitepaper.pdf. See also Deborah H. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 431, 531 (2013).

¹⁶ Discussion of the “justice gap” is not new. See eg. Houseman, Alan, *The Justice Gap: Civil Legal Assistance*

Today and Tomorrow, CENTER FOR AMERICAN PROGRESS (June 2011), <https://www.americanprogress.org/wpcontent/uploads/issues/2011/06/pdf/justice.pdf>; see also Documenting the Justice Gap In America The Current Unmet Civil Legal Needs of Low-Income American, LEGAL SERVICES CORPORATION (Sept. 2009),

<https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGainAmerica2009.authcheckdam.pdf>.

¹⁷ ABA COMM., *supra* note 8, at 3 (citing Deborah Rhode, *Access to Justice* 3 (2004)).

¹⁸ Michael Zuckerman, *Is There Such a Thing as an Affordable Lawyer?* THE ATLANTIC (May 30, 2014), <http://www.theatlantic.com/business/archive/2014/05/is-there-such-a-thing-as-an-affordable-lawyer/371746/>.

¹⁹ *Id.*

²⁰ Lauren Moxley, *Zooming Past the Monopoly: A Consumer Rights Approach to Reforming the Lawyer’s Monopoly and Improving Access to Justice*, 9 HARV. L. & POL’Y REV. 553, 566-67 (2015), http://harvardlpr.com/wp-content/uploads/2015/07/9.2_9_Moxley.pdf.

V. The Need for Consumer Protection Regulation

In considering the appropriate extent of regulation of OLPs, it is important to note that it is overly simplistic to contend that they are currently “unregulated”—ostensibly, they are regulated by the FTC, the DOJ and attorneys general.²¹ The organized bar and non-governmental consumer protection groups and agencies also provide a degree of oversight. The FTC/DOJ position on OLPs recognizes online forms as a substitute for legal services in some situations without addressing the extent of appropriate consumer safeguards. This report does not propose a case for intrusive regulation of OLPs. Rather, regulators, legislators and bar associations need to consider important protections for the consumer (and at a minimum promote the adoption of voluntary best practices standards).

VI. Existing Regulatory Models

In developing this Report’s regulatory and best practice proposals, several existing models were reviewed and served as guideposts, including: (i) the ABA Model Regulatory Objectives,²² (ii) the North Carolina settlement,²³ (iii) the Washington Attorney General Settlement²⁴ and (iv) the Missouri settlement.²⁵

Comment: These settlements were based on actions against LegalZoom. LegalZoom is not in the same category as a legal software publisher, LegalZoom provides an accuracy review of documents generated by a person, and it is this accuracy review that has triggered UPL complaints. LegalZoom is not purely a legal software publisher of digital forms. Again, this report conflates the two categories of providers.

Furthermore, conditions to which two parties agree as the basis of a settlement may not apply equally well to other business models, nor are they necessarily good public policy,

²¹ See Tom Gordon, *Comments on Issues Paper Concerning Unregulated Legal Service Providers*, AMERICANBAR.ORG 5 (Apr. 28, 2016).

²² Resolution: ABA Model Regulatory Objectives for the Provision of Legal Services, AMERICAN BAR ASSOCIATION (Feb. 8, 2016), http://www.abajournal.com/files/2016_hod_midyear_105.authcheckdam.pdf.

²³ See N.C. GEN. STAT. § 84-2.2 (2016).

²⁴ Settlement between the State of Washington and LegalZoom.com, Inc., (Sep. 15, 2010), http://agportals3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2010/LegalZoom_AOD.pdf.

²⁵ See Joint Motion for Preliminary Approval of Class Action Settlement Agreement, *Janson v. LegalZoom.com, Inc.*, No. 2:10-cv-04018-NKL (W.D. Mo. Sept. 28, 2011); *Janson v. LegalZoom.com, Inc.*, 2012 U.S. Dist. LEXIS 60019 (W.D. Mo. Apr. 30, 2012) (approving the settlement agreement).

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particularly when one of the parties is the bar association, which has an interest in reducing competition which is at odds with its interest in increasing access to justice.

VII. Best Practices and Proposed General Provisions and Considerations for Regulation of Online Providers of Legal Documents

The organized Bar should take leadership to encourage reasonable regulation to protect the public, while working with all OLPs to find ways to satisfy their concerns. In that spirit, this report proposes General Provisions and Considerations for Regulation of Online Providers of Legal Documents (Appendix I), which strikes a reasonable balance and avoids regulations that would unduly impair OLPs' businesses.²⁶ In addition, the organized Bar should encourage OLPs to immediately voluntarily adopt the Best Practices for Document Providers (Appendix II), to incorporate regulatory recommendations. If properly employed, these would help provide consumer protection in the legal form industry in such areas as disclosure, consumer privacy, and warranties.²⁷

These recommendations are intended to counter the one-sided nature of OLP form contracts. Typically, such contracts contain no warranties and, indeed, often disclaim warranties. These contracts also generally contain arbitration clauses that may require the consumer to bear costs and arbitrate in a distant place, or force consumers to waive their rights to a trial by jury and preclude class actions. Use of any online service involves disclosure of personal data and potential disclosure of sensitive information about a user's transactions and circumstances. OLPs may make use of this data for marketing purposes, or may try to sell it outright. Typically, nothing in the contract precludes them from doing so.

Comment: The assertion that nothing in the "contract precludes them from" use of personal data for marketing data is another "false fact." A review of the terms and conditions statement of many online document providers reveals that there is a clear assertion that all personal data is encrypted and a representation that personal data is never sold to a third party.

²⁶ For example, the regulatory regime in Florida was so burdensome that, at least at one point, OLPs avoided that state. See G. Blankenship, Technology rapidly transforms the legal services marketplace: Panel plans "aggressive" recommendations to help lawyers enter this market "before it's too late", The Fla. Bar News (Jan. 15, 2015), <https://www.floridabar.org/news/tfb-news/?DIVCOM/JN/jnnews01.nsf/cb53c80c8fabd49d85256b5900678f6c/2DFCD2FA693B5AE085257DC4004854D5!opendocument>.

²⁷ LegalZoom's General Counsel stated that LegalZoom already adheres to the great majority of these provisions. Rampenthal described many of these provisions as "best practices." See Statement of Charles Rampenthal, *supra* note 4.

This report urges OLPs to utilize self-regulation pending regulation or legislation. A voluntary standard is not a substitute for effective governmental regulation. It is unlikely that the industry is cohesive enough to adopt an industry-wide self-regulatory scheme and, even if it did, it is highly unlikely that such regulation would provide adequate and sufficient safeguards to effectively protect the public. However, regulation or legislative action may be difficult to achieve quickly; accordingly, encouraging self-regulatory efforts by individual OLPs, such as adoption of best practices, may end up as the principal means of guarding consumer interests.

Broadly speaking, the General Provisions and Considerations for Regulation of Online Providers of Legal Documents and Best Practices for Document Providers contain three general categories:

- Standards for disclosure and transparency;
- Standards for the protection of personal information provided by the consumer; and
- Provisions relating to arbitration and dispute resolution.

Several of the more important provisions recommended deserve special mention.

a. Disclosure Provisions

As an initial matter many of the proposals' provisions track the recommendations of the FTC and DOJ in their letter to the North Carolina legislature. Thus, the proposal contains a number of disclosure-related provisions, consistent with the FTC/DOJ letter.²⁸ The proposal also adopts the proposed regulation of the Joint Letter, "that advertisers should ensure that disclosures are clear and conspicuous on all devices and platforms consumers may use."²⁹

b. Requirement of Clickwrap Agreements

The proposal also requires the use of so-called "clickwrap" agreements in which website users are required to click on an "I agree" box after being presented with a list

²⁸ See Letter from Marina Lao and Robert Potter to Bill Cook, *supra* note 9 at 10 ("a commercial software product for generating legal forms should not falsely represent, either expressly or impliedly, that it is a substitute for the specialized legal skills of a licensed attorney....")

²⁹ See *id.*

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of terms and conditions of use.³⁰ “Clickwrap” agreements are more readily enforceable, since they “permit courts to infer that the user was at least on inquiry notice of the terms of the agreement, and has outwardly manifested consent by clicking a box.”³¹ “Browsewrap” agreements are treated differently under the law than “clickwrap” agreements.³² Courts will generally enforce browsewrap agreements only if they have ascertained that a user “had actual or constructive knowledge of the site’s terms and conditions, and ... manifested assent to them.”³³ In fact, courts have stated that “the cases in which courts have enforced ‘browsewrap’ agreements have involved users who are businesses rather than ... consumers.”³⁴

c. Provisions Regarding Warranties

Warranty protection is essential in this area because (unlike, e.g., the internet purchase of a consumer product) flaws in many legal forms cannot easily be discerned by most lay customers.³⁵ For this reason, warranty protection is a fundamental aspect of the General Provisions and Considerations for Regulation of Online Providers of Legal Documents and Best Practices.

See Comment in Proposed Regulation Below. We know of no software publisher that licenses its software without an “as is” warranty.”

d. Provisions Regarding Arbitration

The proposals contain several provisions related to arbitration and dispute resolution. Once again, many OLP form contracts require resolution in arbitration rather than in court, and require that arbitration take place in distant locations inconvenient to the customer. In addition, most of these forms prohibit class action lawsuits. All of these

³⁰ “‘Clickwrap’ agreements are distinguished from ‘browsewrap’ agreements, where a website’s terms and conditions of use are generally posted on the website via a hyperlink at the bottom of the screen.” *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014). “The defining feature of browsewrap agreements is that the user can continue to use the website or its services without visiting the page hosting the browsewrap agreement or even knowing that such a webpage exists.” *Be In, Inc. v. Google Inc.*, No. 12-cv-03373, 2013 WL 5568706, at *6 (N.D. Cal. Oct. 9, 2013).

³¹ *Meyer v. Kalanick*, No. 15 CIV. 9796, 2016 WL 4073012, at *5 (S.D.N.Y. July 29, 2016) (quoting *Cullinane v. Uber Techs, Inc.*, No. 14-cv-14750, 2016 WL 3751652 at *6 (D. Mass. July 11, 2016)).

³² *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 129 n. 18 (2d Cir. 2012).

³³ *Id.* (quoting *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp.2d 927, 937 (E.D. Va. 2010)).

³⁴ *Meyer v. Kalanick*, No. 15 CIV. 9796, 2016 WL 4073012, at *5 (S.D.N.Y. July 29, 2016).

³⁵ Even with respect to other, typical consumer products, “[a]pproximately one-third of states, in their enacted versions of section [UCC Section] 2-314, prevent merchants from disclaiming the implied warranty of merchantability under certain circumstances. Some of these statutes also preclude any attempt to limit remedies available for a breach of warranty.” Ethan R. White, *Big Brother and Buyers*, 51 WAKE FOREST L. REV. 917, 934 (Fall 2016).

restrictions reduce the likelihood that aggrieved customers would pursue their legal remedies. Restrictions on litigation are not uncommon in other form contracts; however, in this situation, it is appropriate to permit the customer to have the option of preserving his or her day in a court in his or her home state.

Additionally, the proposal would forbid provisions in OLP contracts which bar class action litigation. As one consumer advocacy group has put it, “class action waivers prevent consumers who have been harmed on a systemic basis from joining together to seek remedies from the offending company—which is often the only method of obtaining redress.”³⁶

e. *Customer Privacy*

The proposed General Provisions and Considerations for Regulation of Online Providers of Legal Documents and the proposed Best Practices also focus on the protection of consumer information and contain one possible interim framework. Laws such as the Massachusetts Privacy Law³⁷ or HIPAA provide other longer-term regulatory solutions.

It should be noted that, at the outset, many OLPs’ activities (such as the mere sale of forms) do not involve confidential information. In addition, information should be treated differently depending on the level of sensitivity. However, consumer protection safeguards are necessary for sensitive information and OLPs must assure such protection in order to ensure the viability of their business models.

Conclusion

The online document form industry touches the lives of millions of consumers and small businesses and continues to grow rapidly. Online legal forms are widely used, and their presence—and eventually their effect on future transactions—already is, and increasingly will be, significant.

This is not a passing phenomenon and the impact of online forms and related activities—be they adequate substitutes for lawyers’ services or not—cannot be dismissed as inconsequential. Although First Amendment consideration may apply to the content

³⁶ Letter from Michael Best, Senior Policy Advocate, Consumer Federation of America, Tom Feltner, Director of Financial Services, Consumer Federation of America and Rachel Weintraub, Legislative Director and General Counsel, Consumer Federation of America to Monica Jackson, Executive Secretary, Consumer Financial Protection Bureau (Aug. 22, 2016), http://www.consumerfed.org/wp-content/uploads/2016/088-22-16-CFPB-Class-Action-Waiver-Rule_Letter.pdf.

³⁷ See Massachusetts Regulation 201 CMR 17.00.

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of forms themselves, the First Amendment does not require specific practices involved in the online sale of forms be free from any regulation.³⁸ Some regulation of this industry is important. Meeting an unmet need is not a valid argument for ignoring consumer risk.

Comment: It is arguable that the First Amendment applies not only to the content of the forms themselves as asserted in this report but to all of the computer code. A digital software application consists of computer code and text and both the computer code and the text can be copyrighted and is a “publication” that is protected from prior restraint.

The General Provisions and Considerations for Regulation of Online Providers of Legal Documents and the statement of Best Practices for Document Providers provide a common-sense approach to regulation or self-regulation of OLPs. If enacted or adopted, they would:

- establish reasonable standards of product reliability and efficacy;
- provide consumers with information and recourse against abuse;
- ensure consumers are made aware of the risks of proceeding without attorneys;
- inform consumers where affordable attorneys can be found; and
- protect confidential information.

Such regulations would protect the public while allowing responsible providers to serve a demonstrated need that traditional models of practice have not been able to meet.

Respectfully Submitted,

Michael Miller
President, New York State Bar Association

Michael J. McNamara
President, New York County Lawyers Association

August 2018

³⁸ See *Matter of New York County Lawyers Association v. Dacey*, 24 N.Y.2d 694 (1967).

Annotated Version

**APPENDIX I
GENERAL PROVISIONS AND CONSIDERATIONS FOR REGULATION OF ONLINE
PROVIDERS OF LEGAL DOCUMENTS**

The Usefulness and Propriety of Forms

Comment: There is no definition of what is an “Online Document Provider?” Does it include legal software publishers like Nolo or legal document preparation companies like Legal Zoom?

- (1) An OLP should be required to provide clear, plain language instructions as to how to complete forms and the appropriate uses for each form.
- (2) There should be a warranty either (a) that the form of documents provided to customers will be enforceable in the relevant State, or (b) that the OLP will inform its customers, in plain language, that the document is not enforceable in the relevant State and what steps can be taken to make it enforceable, including if necessary the retention of an attorney. OLPs should not be permitted to limit this warranty, or recovery under this warranty, in any way

Comment: No software publisher would license its software without an “as is” warranty. Without an “as is” warranty, an internet liability insurance company would not insure the publisher. This requirement effectively would kill the emerging self-help legal software industry, which includes not only automated legal documents but forms of automated legal advice.

As an alternative we recommend that the American Bar Association pass a resolution that is similar to the rule defining the “practice of law” in Texas which state:

“In this chapter, the ‘practice of law’ does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney. This subsection does not authorize the use of the products or similar media in violation of Chapter 83 and does not affect the applicability or enforceability of that chapter.”

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- (3) Documents should be kept up-to-date and account for important changes in the law.

Comment: To our knowledge all publishers that publish legal forms insert the following disclaimers or something similar:

“This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher and author are not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.”

—From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and Committee of Publishers

DISCLAIMER

“Because of possible unanticipated changes in governing statutes and case law relating to the application of any information contained in this book, the author, publisher, and any and all persons or entities involved in any way in the preparation, publication, sale, or distribution of this book disclaim all responsibility for the legal effects or consequences of any document prepared or action taken in reliance upon information contained in this book. No representations, either express or implied, are made or given regarding the legal consequences of the use of any information contained in this book. Purchasers and persons intending to use this book for the preparation of any legal documents are advised to check specifically on the current applicable laws in any jurisdiction in which they intend the documents to be effective.”

DISCLAIMER AND TERMS OF USE

“This legal product, whether book, CD, kit, individual legal form, or legal information, is provided ‘as-is’ and these materials are used at your own risk. This legal product is not intended as a substitute for legal advice and should not be used nor relied upon without consulting with an attorney first. Purchasers and persons intending to use this legal product for the preparation of any legal document are advised to check specifically on the current applicable laws and/or the existence of any state-specific requirements in any jurisdiction in which they intend the documents to be effective. Although the publisher and authors of this legal product try to keep this product accurate and up-to-date, the accuracy of this legal product cannot be guaranteed. Because of differing interpretations of law in different jurisdictions and possible changes in governing statutes and case law relating to the application of any information contained in this legal product, the author, publisher, and any and all persons or entities involved in any way in the preparation, publication, sale, or distribution of this legal product disclaim all responsibility

for the legal effects or consequences of any document prepared or action taken in reliance upon information or documents contained in this legal product. No representations or warranties, either express or implied, are made or given regarding suitability, merchantability, fitness for a particular purpose, or completeness for your particular purpose, nor regarding the legal consequences of a particular use of any information contained in this legal product. Any person or entity that uses this legal product in any manner hereby agrees to fully indemnify and hold harmless _____, its respective affiliates and subsidiaries, and the author(s), from any responsibility or liability for any direct or indirect, incidental, special, or exemplary damages (including, but not limited to, procurement of substitute goods or services; loss of use, data, or profits; or business interruption) however used, and on any theory of liability whatsoever, whether in contract, strict liability or tort (including negligence or otherwise) arising in any way out of any use of these materials. Use of this product constitutes full understanding and acceptance of all of these terms and conditions.”

- (4) If the OLP selects the service agent for a document, the OLP will be legally responsible for the proper recording or filing of the document.

Comment: What does this mean? If a service agent is selected it is a purchased service between the customer and the provider and the provider is obligated to fulfill its contractual obligation or refund the customer’s payment. If the OLP subcontracts the filing of a document it is legally required to meet its obligation to its customer. Why is this necessary?

Protection of Customers

- (5) OLPs should be required to sue only clickwrap agreements with their customers and require the customers’ consent and express opt-in to any changes made to the customer agreement after the initial registration.

Comment: To our knowledge online legal software publishers already use clickwrap agreements.

- (6) OLPs should be required to inform their customers of all of the ways (if any) they intend to use and share customers’ personal and legal information with the OLPs’ business associates and ask for consent and express opt-in authorization before initiating the relationship.

Comment: To our knowledge online legal software publishers provide these choices to their customers.

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- (7) OLPs should be required to inform customers, in plain language, that the personal information customers provide is not covered by the attorney-client privilege or work product protection.
- (8) OLPs should be required to regulate the collection and use of customers' personal and legal information and use "best of breed" data security practices to maintain the privacy and security of the information provided.

Comment: What does this really mean? To our knowledge online legal software publishers encrypt all data in transit and at rest. In fact, it is solo and small law firms that often fail to use "best of breed" security practices as the frequent breaches of law firm data demonstrate.

- (9) OLPs should be required to protect customers' information from unauthorized use or access by third persons and OLPs should be required to inform customers of any breach of their systems.
- (10) OLPs should be required to make all efforts to remedy and cure any harm a breach of customers' personal and legal information may cause.
- (11) OLPs should not be permitted to sell, transfer or otherwise distribute customers' personal information to third persons without express opt-in authorization.

Comment: Every online legal document provider that we know of already represents that they do not sell customer's personal information to third parties without authorization. There is no data that supports the requirement of this best practice, but we would have no objection to it.

- (12) OLPs should be required to retain customer information and any completed forms for a period of three years, and make the form available for the customers' use during that period free of charge.

Recommendation of Attorneys to Assist

- (13) OLPs should be required to inform their customers, in plain language, of the importance of retaining an attorney to assist them with any legal transaction.

Comment: This best practice is already covered in a resolution passed by the American Bar Association in 2016.

- (14) OLPs should not be permitted to advertise their services in a manner that suggests that their services are a substitute for the advice of a lawyer.

Comment: To the contrary every online legal document provider that we know of represents that the use of their legal forms is not a substitute for the advice of an attorney.

Dispute Resolution

- (15) OLPs should be required to disclose their legal names, addresses, and email addresses to which their customers can direct any complaints or concerns about their services.
- (16) OLPs should be required to submit to the jurisdiction of the courts of the customer's state for the resolution of any dispute with the customer, and should not be permitted to require arbitration of any disputes.

Comment: This is an arbitrary requirement that is not consistent with current commercial practices between publishers and their customers.

- (17) OLPs should not be permitted to preclude their customers from joining in class actions, or require shifting of legal fees to customers.
- (18) Any notification to be provided should be required to be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of OLPs' websites, the required words, statements or notifications shall appear on their home pages.

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APPENDIX II BEST PRACTICES FOR DOCUMENT PROVIDERS

The Usefulness and Propriety of Their Forms

- (1) Document provider services (“Providers”) shall provide customers with clear, plain language instructions as to how to complete their forms, and the appropriate uses for each form.

Comment: This is a First Amendment prior restraint for legal software publishers as it stipulates what a legal software publisher must do. As a best practice, it makes sense, but requiring a publisher to produce its product in a certain way is a slippery slope.

- (2) Providers will warrant either (a) that the form of documents they provide to their customers will be enforceable in the relevant State, or (b) that Providers will inform their customers, in plain language, that the document is not enforceable in the relevant State and what steps can be taken to make it enforceable, including if necessary the retention of an attorney. Providers will not limit this warranty, or recovery under this warranty, in any way.

Comment: A variance from an “As Is” warranty will be the death knell of the emerging self-help legal software industry. Instead of varying the terms of the warranty, most online legal document providers that we know of provide a 100% refund with no questions asked if the form is not enforceable in a relevant state. Liability should be limited to the purchase price of the form.

- (3) Providers will keep their documents up-to-date and account for Important changes in the law.

Comment: What does this mean? It is not practical for a legal software publisher to either warrant or represent that the legal forms provided are always up to date and all legal software publishers disclaim this representation. If a customer wants the guarantee that the legal forms provided are totally up to date and enforceable they should consult an attorney where the standard of care is higher. This “best practice” is a standard of care that is equivalent to purchasing a service from an attorney.

- (4) If a Provider selects the service agent for a document, the Provider shall be legally responsible for the proper recording or filing of the document.

Comment: See comment above as it is not clear what this requirement actually means.

Protection of their Customers

- (5) Providers will use only clickwrap agreements with their customers and require the customers' consent and express opt-in to any changes made to the customer agreement after the initial registration.

- (6) Providers will charge their customers a reasonable fee for their services.

Comment: What does a reasonable fee mean? Do lawyers charge reasonable fees for their services? Is there any transparency with respect to lawyer's fees? Self-help legal software publishers provide products, not services. Again, this demonstrates a failure to understand the nature the industry and the different types of suppliers.

- (7) Providers will inform customers of all of the ways (if any) they intend to use and share customers' personal and legal information with their business associates and ask for customers' consent and express opt-in authorization before the Providers begin a customer relationship.

- (8) Providers will inform customers, in plain language, that the personal information customers provide is not covered by the attorney-client privilege or work product protection.

- (9) Providers will regulate the collection and use of customers' personal and legal information and will use "best of breed" data security practices to maintain the privacy and security of the information customers provide.

- (10) Providers will protect customer information from unauthorized use or access by third persons and will inform customers of any data breach that might affect them.

- (11) Providers will make all efforts to remedy and cure any harm a breach of customers' personal and legal information may cause.

- (12) Providers will not sell, transfer or otherwise distribute a customer's personal information to third persons without the customer's express opt-in authorization.

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- (13) Providers will retain customer information and any completed forms for a period of three years, and make the form available for the customers' use during that period free of charge.

Recommendation of Attorneys to Assist

- (14) Providers will inform their customers, in plain language, of the importance of retaining an attorney to assist them should their customers have questions regarding any legal transaction, including without limitation transactions involving the customers' money, property, intellectual property, estate, trusts, matrimonial status or custody rights, and where an affordable attorney can be found.
- (15) Providers will not advertise their services in a manner that suggests their documents are a substitute for the advice of a lawyer.

Dispute Resolution

- (16) Providers will disclose their legal name, address and email address to which their customers can direct any complaints or concerns about their services.
- (17) Providers will be required to submit to the jurisdiction of the courts of the customer's state for the resolution of any dispute with the customer, and will not require arbitration of any disputes.
- (18) Providers will not preclude their customers from joining in class actions, or require shifting of legal fees to the customer.
- (19) Any notifications to be provided pursuant to this Statement of Best Practices will be clearly legible and capable of being read by the average person, if written, and intelligible if spoken aloud. In the case of their website, the required words, statements or notifications shall appear on their home page.

GENERAL INFORMATION FORM

Submitting Entity: New York State Bar Association
New York County Lawyers Association

Submitted By: Michael Miller, President, New York State Bar Association
Michael J. McNamara, President, New York County
Lawyers Association

1. Summary of Resolution.

The resolution urges states to adopt General Provisions for Regulation of Online Providers of Legal Documents and, until such time as General Provisions are adopted, online providers of legal documents are encouraged to adopt Statements of Best Practices.

2. Approval by Submitting Entity.

This report was approved by the New York State Bar Association House of Delegates on November 4, 2017.

3. Has this or a similar Resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

N/A

Neither policy would be affected by adoption of this proposal.

5. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A.

6. Status of Legislation. (If applicable.)

N/A

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7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates:

It is anticipated that the report would be disseminated widely and promoted to states and online legal documents providers.

8. Cost to the Association. (Both indirect and direct costs.)

None.

9. Disclosure of Interest.

N/A

10. Referrals.

Business Law Section
National Association of Bar Executives
National Conference of Bar Presidents
Law Practice Division

11. Contact Name and Address Information. (Prior to the meeting.)

Michael Miller, Esq.
President, New York State Bar Association
666 Fifth Avenue, Suite 1717
New York, NY 10103
mmiller@nysba.org
(212) 545-7000

12. Contact Name and Address Information. (Who will present the report to the House.)

Michael Miller, Esq.
President, New York State Bar Association
666 Fifth Avenue, Suite 1717
New York, NY 10103
mmiller@nysba.org
(212) 545-7000

EXECUTIVE SUMMARY

1. Summary of the Resolution.

The resolution urges states to adopt General Provisions for Regulation of Online Providers of Legal Documents to establish reasonable standards of product reliability and efficacy, provide consumers with information and recourse against abuse, ensure consumers are made aware of the risks of proceeding without attorneys, inform consumers where affordable attorneys can be found, and protect confidential information; and until such time as the General Provisions are adopted, urges online legal forms providers to adopt a Statement of Best Practices to provide a common-sense approach to self-regulation of online providers of legal documents

2. Summary of the issue which the Resolution addresses.

Minimum standards are needed to allow online legal forms providers to meet a significant need while protecting consumer privacy and protection of customer data.

3. Explanation of how the proposed policy position will address the issue.

The report proposed a set of regulatory standards to provide consumer protection. Pending the adoption of such standards, the report proposes best practices to enable self-regulation of online legal forms providers.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

Comment: This is another “false fact” as there has been no opportunity for interested entities to comment on this proposal.

No minority or opposing views have been identified.