

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;
- 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.

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.

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 on-line legal documents.

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.

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

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).

Business” contains 400 pages of legal forms and information.⁴ Many court systems and governmental agencies make legal forms available to the public.⁵

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 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

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

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>).

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.*

¹⁰ See *id.*

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 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.

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

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

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 [...]we 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.

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, 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

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/>.

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.*

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.

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 on-line 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

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

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.

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).

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.

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

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.

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 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.

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.*

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).

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 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.

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.

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 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.

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,

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August 2018

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

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

The Usefulness and Propriety of Forms

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

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.
- (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.
- (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.
- (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.
- (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.
- (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.

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.
- (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.

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

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.
- (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.
- (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.