

**REPORT OF NYCLA TASK FORCE ON ON-LINE LEGAL PROVIDERS
REGARDING ON-LINE DOCUMENTS**

Approved by the House of Delegates on November 4, 2017

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REPORT OF NYCLA TASK FORCE ON ON-LINE LEGAL PROVIDERS

REGARDING ON-LINE LEGAL DOCUMENTS

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Appendix I: GENERAL PROVISIONS AND CONSIDERATIONS FOR
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Appendix II: BEST PRACTICES FOR DOCUMENT PROVIDERS

The New York County Lawyers Association (“NYCLA”) has long advocated for access to justice for all New Yorkers and, indeed, for all Americans. This commitment has taken many forms in NYCLA’s 109-year history, with NYCLA pressing for equal treatment for all regardless of economic status, fighting for funding for high-quality criminal defense and civil legal services, supporting legislative reforms eliminating biases against women and minorities, and advocating for judicial independence. Over the years, NYCLA has also partnered with concerned groups to bring about positive change within the legal community.

On-line legal forms provide enhanced access to justice for people of modest means; however the impact on consumer protection of the on-line sales of these forms has received only modest attention. The NYCLA Board of Directors established a Task Force on On-line Legal Providers (the “Task Force”) in early 2016, on the recommendation of then-President Carol A. Sigmond. The Task Force was authorized to study and undertake such steps necessary to consider all relevant issues, including convening a public forum, in order to make appropriate recommendations to NYCLA’s Board of Directors. This report focuses solely on the Task Force’s investigation concerning issues related to on-line legal documents. The Task Force anticipates further investigation of on-line legal referral services and the issues related thereto.

The members of this 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 Chang.

As part of its investigation, the Task Force conducted an all-day public forum at NYCLA on September 30, 2016 which addressed a wide range of topics pertaining to on-line legal documents and On-line Legal Providers (“OLPs”). The public forum was titled: Should On-line Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not?¹ (the “NYCLA Forum”).

The Forum included three panels, each followed by a question and answer session, as well as the President’s Perspective on the issues, presented by then-NYCLA President Carol A. Sigmond. Panelists included: Charles Rampenthal, General Counsel of Legal Zoom, Inc.; Paige E. Zandri, Attorney Network Director at Priori Legal; Peter D. Kennedy, Graves Dougherty Hearon & Moody, counsel to LegalZoom and noted expert on the unauthorized practice of law; Tom Gordon, noted consumer advocate and Executive Director of Responsive Law; NYS Assemblyman Matthew Titone, Assembly District 61; David P. Miranda, immediate past president of the New York State Bar Association (“NYSBA”) and a leading commentator on the issue; Sarah Jo Hamilton, Scalise & Hamilton LLP and Director, NYCLA’s Ethics Institute; Ronald C. Minkoff, Frankfurt Kurnit Klein & Selz and Chair, NYCLA’s Committee on Professionalism and Professional Discipline; and Joseph Bambara, UCNYS and Co-Chair, NYCLA’s Law and Technology Committee. Sarah Jo Hamilton, James B. Kobak, Jr., and Michael Miller served as moderators.

The three panels focused, respectively, on the following questions:

¹ NYCLA Forum: Should On-line Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not? (Sept. 30, 2016).

- A. 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?
- B. Some safeguards are required for consumer use of legal forms: which ones are provided? Which ones are lacking?
- C. 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?

This report outlines: (i) a summary of the Task Force’s conclusions and recommendations, (ii) a brief history of legal form providers, (iii) unauthorized practice of law legislation and case law, (iv) an overview of the on-line legal services market, (v) on-line legal providers and the “justice gap,” (vi) the need for consumer protection in the on-line legal providers market, (vii) background behind the proposed regulatory provisions, (viii) existing regulatory models, and (ix) the Task Force’s regulatory proposals. This report was approved by the NYCLA Board of Directors at its June 13, 2017 meeting.

I. SUMMARY OF TASK FORCE CONCLUSIONS AND RECOMMENDATIONS

The NYCLA Forum considerably informed the Task Force and assisted greatly in reaching the Task Force conclusions and recommendations. Most significantly, the Task Force found that the NYCLA Forum reflected that:

- 1. OLPs are a worldwide multi-billion dollar industry that has created a new market;

2. On-line 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 on-line legal forms available; and
3. Most important, many OLPs do not now provide basic protections for sensitive consumer information or for consumer use of on-line forms.

Considerable research by members of the Task Force, coupled with the discussion at the NYCLA Forum, led the Task Force to conclude 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. Discussed in further detail in Sections III and IV of this report, the process by which consumers select and generate an on-line legal form for use 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.

Regulation is justified based on 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 Task Force believes that the market success of OLPs strongly suggests that the nation's lawyers have not yet met this need effectively through traditional models of practice.

As set forth in greater detail below, the Task Force proposes a set of regulatory standards which provide for consumer protection in such areas as disclosure, consumer privacy, and

warranties. The Task Force’s General Provisions and Considerations for Regulation are attached as Appendix I. In its view, such standards are essential to ensure reasonable protection of the public.

In the area of customer privacy and protection of customer data, we urge regulators and legislators to give strong consideration to legislation similar to that enacted in Massachusetts, which provides protection for legal information provided to OLPs.² The North Carolina legislation (see further discussion below) also provides a useful model for regulation of on-line sales of legal documents.³ In preparing the General Provisions and Considerations, the Task Force has given special attention to these two statutory models.

The Task Force believes that traditional regulatory and legislative approaches are appropriate and desirable to protect and effectively ensure the public is adequately informed of risks attendant on using forms generated by OLPs, particularly in sensitive situations. While the Task Force prefers that the legislature or other appropriate regulators enact the regulatory standards, it believes that the adoption of industry-wide voluntary standards is a useful interim measure. To that end, the Task Force also offers in Appendix II a statement of *Best Practices for Document Providers*, which it calls on OLPs to voluntarily adopt immediately.

II. THE HISTORY OF LEGAL FORMS: A SHORT OVERVIEW

The legal form industry did not start on-line—at least as far back as the 1700s, books were written on “do-it-yourself” law and the concept of a scrivener service pre-dates the

² See discussion of Massachusetts legislation *infra* pp. 35–36.

³ See N.C. GEN. STAT. § 84-2.2 (2016).

internet.⁴ Similarly, Peter Kennedy noted that wills and form books date back to at least the 1850s.⁵ An 1859 book entitled “Everybody’s Lawyer and Counsellor in Business” contains 400 pages of legal forms and information.⁶ In the 1950s and 1960s, bar associations sought to take action against such self-help books, including NYCLA’s unsuccessful challenge in *Matter of New York County Lawyers Association v. Dacey*, 21 N.Y. 2d 694 (1967),⁷ a case involving a Do-It-Yourself Probate book.

As at least one court noted, the fact that OLP legal forms now reside on the internet is not what creates legal problems for LegalZoom and other OLPs; rather, such problems, if they exist, flow from the way OLP personnel advertise, draft, manipulate or help consumers create those documents.⁸ Indeed, as a South Carolina court pointed out,⁹ many court systems and governmental agencies make legal forms available to the public.¹⁰ Based upon its investigation and the discussion at the NYCLA Forum, the Task Force believes that often much more is being sold than mere blank forms and access to software.

⁴ 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); *See also* the DIY legal forms that publishers, like Nolo Press, have provided since the 1970s, <http://www.nolo.com/about/about.html> (last visited July 20, 2017).

⁵ Peter Kennedy, Graves Dougherty Hearon & Moody, Counsel to LegalZoom, Statement at NYCLA Forum: Should Online Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not? (Sept. 30, 2016).

⁶ FRANK CROSBY, EVERYBODY’S LAWYER AND COUNSELLOR IN BUSINESS (1859).

⁷ *Matter of New York County Lawyers Association v. Dacey*, 21 N.Y. 2d 694, 234 N.E. 2d 459, 287 N.Y.S.2d 422 (1967).

⁸ *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1064 (W.D. Mo. 2011) (“LegalZoom’s legal document preparation service goes beyond self-help because of the role played by its human employees, not because of the internet medium.”).

⁹ *Medlock v. LegalZoom.Com, Inc.*, No. 2012-208067, 2013 S.C. LEXIS 362, *21 (S.C. Oct. 18, 2013).

¹⁰ 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 (<http://www.courts.ca.gov/forms.htm>).

Today, on-line 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.¹¹ The business of LegalZoom, the largest OLP, generally involves the following steps:

First, the client fills out a series of questions pertaining to a particular legal issue. A customer support team is available for assistance as the customer completes the questionnaire. Second, LegalZoom's "document assistants" review the answers for "consistency and completeness." The company has trademarked this step in the process the "LegalZoom Peace of Mind Review," which includes a series of automated checks as well as personal review by the document scriveners. Third, LegalZoom uses the questionnaire to create the necessary legal documents, which it prints and delivers to customers with simple wrap-up instructions.¹²

III. UNAUTHORIZED PRACTICE OF LAW LITIGATION

Participants at NYCLA's Forum discussed litigation that bar associations have pursued against OLPs. Bar associations have historically commenced litigation against OLPs, contending that those 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. However, such litigation has tended to seek an outright ban on alternatives to the use of lawyers rather than more nuanced means of protecting consumers, which this report addresses.

Over approximately the last decade, LegalZoom was accused of engaging in UPL in several states, including California,¹³ Arkansas,¹⁴ North Carolina,¹⁵ Ohio¹⁶ and Missouri.¹⁷ The

¹¹ 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_issues_paper.pdf (citing WILL MCKITTERICK, IBISWORLD INDUSTRY REPORT OD5638: ONLINE LEGAL SERVICES IN THE U.S., 4 (2014)).

¹² 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, 557 (2015), http://harvardlpr.com/wp-content/uploads/2015/07/9.2_9_Moxley.pdf.

¹³ *Webster v. Legalzoom*, 2014 Cal. App. Unpub. LEXIS 6972 (Cal. App. 2d Dist. Oct. 1, 2014), available at http://www.lidalitigation.com/docs/LZM_StampedAppeal_Opinion.pdf.

North Carolina case, *LegalZoom, Inc. v. North Carolina State Bar*, was settled on terms favorable to LegalZoom during litigation.¹⁸ The Missouri case, *Janson v. LegalZoom, Inc.*, was settled after an adverse ruling that LegalZoom was engaged in UPL for selling to customers a document preparation system through which “[t]he customer merely provides information and ‘LegalZoom takes over.’”¹⁹ In *Janson*, the U.S. District Court judge stated that “there is a clear risk of the public being served in legal matters by ‘incompetent or unreliable persons.’”²⁰

Notably, however, in *Medlock v. LegalZoom, Inc.*, the South Carolina Supreme Court approved LegalZoom’s business practices and ruled that most of the forms that LegalZoom provides were like ones already offered by various state and local agencies.²¹ In Texas, the state legislature passed a law specifying that the sale of computer legal software did not constitute the practice of law.²² Most settlements have, in effect, given the OLP a license to continue to provide legal forms to the public. However, it is important to note that these consent decrees and laws concerning OLPs and the sale of on-line legal documents have hinged on arguments

¹⁴ *LegalZoom.com, Inc. v. McIlwain*, No. 12-cv-1043, 2013 Ark. 370 (Ark. Oct. 3, 2013), *cert. denied.*, 134 S. Ct. 1563 (2014).

¹⁵ *LegalZoom.com, Inc. v. N.C. State Bar*, 2015 NCBC 96, 2015 WL 6441853 (N.C. Super. Ct. Oct. 22, 2015) (discussed more extensively at pages 23–25, *infra*).

¹⁶ *Lowry v. LegalZoom.Com, Inc.*, No. 4:11-cv-02259, 2012 WL 2953109 (N.D. Ohio 2012).

¹⁷ *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).

¹⁸ *LegalZoom.com, Inc. v. N.C. State Bar*, 2015 NCBC 96, 2015 WL 6441853 (N.C. Super. Ct. Oct. 22, 2015) (discussed more extensively at pages 23–25, *infra*).

¹⁹ *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).

²⁰ *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1064 (W.D. Mo. Aug. 2, 2011).

²¹ *Medlock v. LegalZoom.com, Inc.*, No. 2012-208067, 2014 S.C. LEXIS 358 (S.C. Mar. 11, 2014) (adopting the findings set forth in *Medlock v. LegalZoom.Com, Inc.*, No. 2012-208067, 2013 S.C. LEXIS 362, *10 (S.C. Oct. 18, 2013)).

²² TEX. GOV’T CODE ANN. § 81.101.

revolving around UPL. It has generally been ruled that the provision of such services does not violate unauthorized practice laws in and of itself.²³ However, when there was a determination that UPL was not involved, it turned on the narrow issue of selling software and forms, not on broader issues such as the confidential information given and lawyer algorithms utilized.

It is also important to note that the FTC and 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 unauthorized practice of law to avoid undue burdens on “self-help products that may generate legal forms.”²⁴ 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.”²⁵ 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.²⁶

²³ *Medlock v. LegalZoom.com, Inc.*, No. 2012-208067, 2014 S.C. LEXIS 358. As the South Carolina Supreme Court found, “a majority of courts have held that the publication and sale of form books and software are protected by the First Amendment and do not constitute the unauthorized practice of law.” *Medlock v. LegalZoom.Com, Inc.*, No. 2012-208067, 2013 S.C. LEXIS 362, *16 (S.C. Oct. 18, 2013) (citing *New York County Lawyers Assoc. v. Dacey*, 21 N.Y.2d 694, 234 N.E.2d 459 (N.Y. 1967); *Oregon State Bar v. GilChrist* 538 P.2d 913 (Or. 1975); *State Bar of Michigan v. Cramer*, 249 N.W.2d 1 (Mich. 1976); *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978); *People v. Landlords Professional Servs.*, 264 Cal. Rptr. 548, 553 (Cal. App. 1989); *Oregon Ethics Opinion*, 1994-137, 1994 WL 455098 (Or. State Bar Assoc. Bd. of Gov. 1994); *In re Thompson*, 574 S.W.2d 365, 367-69 (Mo. 1978); *State Ex. Rel. Schneider v. Hill*, 573 P.2d 1078, 1078-79 (Kan. 1978); *People Ex. Rel. Att’y General v. Bennett*, 74 P.2d 671, 672 (Colo. 1937)).

²⁴ *See* Letter from Marina Lao, Dir., Office of Policy Planning, Fed. Trade Comm’n and Robert Potter, 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-bill-436/160610commentncbill.pdf.

²⁵ *See id.*

²⁶ *See id.*

Nevertheless, attacks directed at these other aspects of the OLP business are difficult to measure.²⁷ As Ronald Minkoff noted at the NYCLA Forum, the American Bar Association (“ABA”) and other bodies have spent years attempting to define the practice of law and have not succeeded in doing so.²⁸ As one law review article put it:

Despite the extensive history of unauthorized practice committees and their enforcement mechanisms, the unauthorized practice of law lacks a precise definition, and is ambiguous as to whom it applies. As a result, it is difficult for courts and legislatures to determine what activity by non-lawyers constitutes the unauthorized practice of law.²⁹

The on-line 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 but without loyalty or confidentiality, and

²⁷ Some commentators have suggested that “online self help publishers such as LegalZoom face UPL prosecution because they use an automated decision tree to complete forms, rather than handing a printed decision tree to a customer. Such UPL prosecutions have a chilling effect on innovators throughout the legal industry. . . .” See Tom Gordon, *Comments on Issues Paper Concerning Unregulated Legal Service Providers*, AMERICANBAR.ORG, 5 (Apr. 28, 2016), https://www.americanbar.org/content/dam/aba/images/office_president/responsive_law.pdf; See also *Frankfort Digital Servs. v. Kistler (In re Reynoso)*, 477 F.3d 1117, 1126 (9th Cir. 2007) (finding that the website, owned by a non-lawyer, that “offer[ed] legal advice and projected an aura of expertise concerning bankruptcy petitions,” constituted unauthorized practice of law); *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956, 956 (5th Cir. 1999) (vacating an order to enjoin a company from selling legal software because the Texas Legislature had enacted a statute specifying that the sale of computer software did not constitute the practice of law).

²⁸ Ronald Minkoff, *Frankfurt Kurnit Klein & Selz and Chair of NYCLA’s Committee on Professionalism and Professional Discipline, Statement at NYCLA Forum: Should Online Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not?* (Sept. 30, 2016). “The work of the ABA Task Force on the Model Definition of the Practice of Law makes this clear: the Task Force could not draft an acceptable model definition of the practice of law and suggested that the states should develop their own definitions.” See ABA COMM., *supra*, note 11, at 5 (citing ABA TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT (2003), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/taskforce_rpt_803.authcheckdam.pdf; TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AMERICAN BAR ASSOCIATION REPORT *ET AL.*, REPORT TO THE HOUSE OF DELEGATES (2003), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/recomm.authcheckdam.pdf).

²⁹ Mathew Rotenberg, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 MINN. L. REV. 709, 717 (2012), http://www.minnesotalawreview.org/wp-content/uploads/2012/12/Rotenbergs_MLR.pdf (“[T]he definitions and tests employed by courts to delineate unauthorized practice by nonlawyers have been vague or conclusory, while jurisdictions have differed significantly in describing what constitutes unauthorized practice in particular areas.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 cmt. c (2000)); see also Moxley, *supra* note 12.

(b) a lawyer using similar algorithms to assist in a consumer-based practice. The difference is primarily human interaction, loyalty and confidentiality.

IV. THE ON-LINE LEGAL SERVICES MARKET

As noted above, on-line 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 on-line in different and evolving formats,”³⁰ and as NYCLA Past President Arthur Norman Field put it, “the public has voted that it wants on-line legal providers and they are here to stay.”³¹

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 somewhere in the United States.³² In a draft S-1 that LegalZoom prepared in connection with its proposed initial public offering, it claimed that:

In 2011, nine out of ten of our surveyed customers said they would recommend LegalZoom to their friends and family, our customers placed approximately 490,000 orders and more than 20 percent of new California limited liability companies were formed using our online legal platform. We believe the volume of transactions processed

³⁰ Barton, Benjamin H., *Some Early Thoughts on Liability Standards for Online Legal Providers of Legal Services*, 44 HOFSTRA L. REV. 541, 546 (2015).

³¹ Arthur Norman Field, Former NYCLA President, Statement at NYCLA Forum: Should Online Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not? (Sept. 30, 2016). Similarly, Stanford Law Professor Deborah L. Rhode, Director of Stanford Law School’s Center on the Legal Profession, stated: “With respect to LegalZoom, the train has left the station. They’ve got a couple million satisfied customers and it’s going to be really hard for anyone to shut them down.” Stephen Fairley, *Why LegalZoom Doesn’t Have to Mean Legal Doom for Solos and Small Firms*, NAT’L LAW REVIEW (Aug. 1, 2014), <http://www.natlawreview.com/article/why-legalzoom-doesn-t-have-to-mean-legal-doom-solos-and-small-firms>. 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>.

³² See Statement of Charles Rampenthal, *supra* note 4.

through our online legal platform creates a scale advantage that deepens our knowledge and enables us to improve the quality and depth of the services we provide to our customers.³³

And while LegalZoom is the market leader, it has many competitors and emulators offering a variety of forms and related services. Another large OLP, RocketLawyer, contends that “well over half—the vast majority of people who’ve used RocketLawyer for legal advice—have never consulted with an attorney before in their life, and that includes small business people. So, we are really the on-ramp now for first-time purchasers of legal advice.”³⁴

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.

To be clear, OLPs need not be considered adverse to the legal profession. Many attorneys work with OLPs, which provide them in turn with clients and revenue that they would

³³ LegalZoom, Inc., Registration Statement (Form S-1) (May 10, 2012), *available at* <https://www.sec.gov/Archives/edgar/data/1286139/000104746912005763/a2209299zs-1.htm>. A Form S-1 is an SEC filing used by companies planning on going public to register their securities with the U.S. Securities and Exchange Commission (SEC).

³⁴ 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/>.

not otherwise obtain.³⁵ As a result, it is lawyers who themselves have participated in the new market created by OLPs.

V. 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.³⁶ This “justice gap” is huge and is not closing.³⁷ 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. In New York State alone, “[s]ome 1.8 million litigants in civil matters do not have representation when addressing the ‘core essentials of life – housing, family matters, access to health care and education and subsistence income.’”³⁸ In New York, over 90% of people involved in housing, family, and consumer problems have no legal representation.³⁹ According to some estimates, “about four-fifths of the civil legal needs of the poor and two to three-fifths of the needs of middle income individuals remain unmet.”⁴⁰

³⁵ 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/>.

³⁶ 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 L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531 (2013).

³⁷ 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/wp-content/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>.

³⁸ ABA COMM., *supra* note 11, at 2 (quoting TASK FORCE TO EXPAND ACCESS TO JUSTICE TO CIVIL LEGAL SERVICES IN NEW YORK REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 2, 3 (Nov. 2014), <http://nycourts.gov/accesstojusticecommission/PDF/CLS%20TaskForce%20Report%202014.pdf>); See also Alan Houseman, *The Justice Gap: Legal Assistance Today and Tomorrow*, CTR. FOR AM. PROGRESS, 3 (Jun. 22, 2011), <https://www.americanprogress.org/issues/courts/reports/2011/06/22/9824/the-justice-gap/>.

³⁹ See Tom Gordon, *Comments on Issues Paper on the Future of Legal Services*, AMERICANBAR.ORG, 1 (Dec. 10, 2014), https://www.americanbar.org/content/dam/aba/images/office_president/responsive_law.pdf. “In New

It has been thought by some that one potential method of closing the “justice gap” is the use of on-line, legal service platforms that provide legal assistance at a significantly discounted rate over traditional private attorney or firm prices.⁴¹ On-line 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.⁴² Some commentators contend that “LegalZoom can bridge the justice gap by breaking down barriers to access for low and middle-income individuals and by encouraging innovation and competition in the market for legal services at the benefit of non-lawyer consumers of legal services.”⁴³ According to a recent article, LegalZoom charged as little as \$69 for wills, \$149 for business formation, and \$169 for trademark registration.⁴⁴ A reasonable regulatory regime could help ensure that OLPs play a role in addressing the justice gap, while protecting their consumers.

VI. 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 Federal Trade Commission (“FTC”), the Department of Justice (“DOJ”) and

York, 2.3 million pro se litigants try to find their way through the civil justice system each year.” Wallace B. Jefferson, Chief Justice of the Supreme Court of Texas, Liberty and Justice for Some: How the Legal System Falls Short in Protecting Basic Rights, 19th Annual Justice William J. Brennan Lecture on State Courts and Social Justice, Address at N.Y.U. School of Law, 1960 (Dec. 2013), <http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-88-6-Jefferson.pdf>.

⁴⁰ ABA COMM., *supra* note 11, at 3 (citing Deborah Rhode, *Access to Justice*, 3 (2004)).

⁴¹ 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/>.

⁴² *Id.* While pro bono and legal aid assistance is an enormously laudable contribution to the solution, there remains a “huge gap today between the legal needs of low-income people and the capacity of the civil legal assistance system to meet those needs,” as well as “severe inequality in funding among states.” Alan Houseman, *The Justice Gap: Legal Assistance Today and Tomorrow*, CTR. FOR AM. PROGRESS, 3 (Jun. 22, 2011), <https://www.americanprogress.org/issues/courts/reports/2011/06/22/9824/the-justice-gap/>.

⁴³ Moxley, *Zooming Past the Monopoly*, *supra* note 12, at 566–67.

⁴⁴ *Id.* at 566.

attorneys general.⁴⁵ The organized bar and consumer protection agencies also provide a degree of oversight.

At the NYCLA Forum, LegalZoom's Charles Rampenthal emphatically argued that proponents of further regulation have largely failed to identify any specific problems arising from LegalZoom's business.⁴⁶ However, it is difficult to obtain information regarding such problems given the fact that most claims in this area are either settled, arbitrated or abandoned. Moreover, harm or lack of efficacy may never be perceived by the user or, in the case of a will or trust, may not be known until after the death of its maker, perhaps decades after its execution. Unlike the purchaser of a toaster or even a car—both of which are subject to specific standards and regulations—the purchaser often cannot immediately judge the adequacy of the product or service purchased or recognize a product deficiency, until the product is actually tested (e.g. a

⁴⁵ See Tom Gordon, *Comments on Issues Paper Concerning Unregulated Legal Service Providers*, AMERICANBAR.ORG, 5 (Apr. 28, 2016), https://www.americanbar.org/content/dam/aba/images/office_president/responsive_law_unregulated.pdf. Gordon argued that existing laws provide a good deal of protection for consumers. He also contended that the ABA Futures Commission failed to recognize the impact of such laws and that it issued a working paper which did not mention generally applicable laws except in a footnote on page 8. Gordon suggested that existing laws were sufficient to regulate on-line legal providers. *Id.* at 3.

⁴⁶ See Statement of Charles Rampenthal, *supra* note 4; See also R. Brescia, *What We Know and Need to Know about Disruptive Innovation*, *supra* note 37 (“Although some providers of commoditized legal services have faced legal challenges based on consumer protection law—such as We the People (WTP), an early entrant into the commoditized legal services market—to date, companies like LegalZoom have not faced such litigation. Indeed, an analysis by Consumer Reports noted that several such groups seemed to provide credible services.”). See also *Legal DIY Websites Are No Match for a Pro*, CONSUMER REP. MAG. (Sept. 2012), <http://www.consumerreports.org/cro/magazine/2012/09/legal-diy-websites-are-no-match-for-a-pro/index.htm>; *LegalZoom Reviews by Experts & Customers [Updated 2016]*, BLOGTREPENEUR, <http://www.blogtrepreneur.com/legalzoom-reviews/> (“While not all of the LegalZoom reviews have been flattering, we have yet to come across one that accused LegalZoom of any form of malpractice. The company has been around since 2001 and is a fairly noteworthy and respected business.”); *Lionshare Holdings LLC, Compare Legal Forms, LegalZoom Review 2016*, COMPARELEGALFORMS.COM, <http://comparelegalforms.com/legalzoom-review/> (“LegalZoom has 58 complaints filed against it with the Better Business Bureau. At first we thought this was too many complaints. However, after further review, it appears that the number of complaints has a direct relationship to the total number of customers and LegalZoom is not proportionately different than their competitors.”).

will following death or when a competitor challenges the sufficiency of one's intellectual property rights).⁴⁷

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. Services.⁴⁸ The Task Force does not propose a case for intrusive regulation of OLPs. Rather, we believe that 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). One such area for possible regulation is the need for quality control.

At the NYCLA Forum, LegalZoom General Counsel Charles Rampenthal stated that LegalZoom has strict quality control standards and that it monitors calls, provides rigorous training to its employees, and utilizes lawyers and other outside monitors to evaluate the calls. He said that the company treats UPL violations the same way that it would treat sexual harassment and that the company would fire offenders, if appropriate, and would require re-training for relatively minor infractions. Rampenthal said that LegalZoom's culture is vigilant with respect to UPL allegations because of the company's past legal issues.⁴⁹

Rampenthal also said that, at LegalZoom, all forms are drafted by a team of "legal architects" who create templates, instructions, forms, and software. He said that LegalZoom stays abreast of changes in the law the same way a law firm would and will notify prior purchasers if the change in law retroactively applies. As an example, Rampenthal stated that LegalZoom reformatted a Health Insurance Portability and Accountability Act of 1996

⁴⁷ See Barton, *supra* note 30, at 544.

⁴⁸ See *supra* Section III.

⁴⁹ See Statement of Charles Rampenthal, *supra* note 4.

(“HIPAA”) form and informed its prior customers about the new form and advised them to consider consulting an attorney.⁵⁰ However, not all OLPs maintain the same standards that LegalZoom, one of the largest and best funded of the providers, claims it maintains.⁵¹

VII. BEST PRACTICES AND PROPOSED GENERAL PROVISIONS AND CONSIDERATIONS FOR REGULATION OF ON-LINE PROVIDERS OF LEGAL DOCUMENTS

The Task Force believes that 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, the Task Force proposes General Provisions and Considerations for Regulation of On-line Providers of Legal Documents, attached as Appendix I, which the Task Force believes strikes a reasonable balance and avoids regulations that would unduly impair OLPs’ businesses.⁵² The Task Force additionally proposes that OLPs voluntarily adopt the *Best Practices for Document Providers*, attached as Appendix II, to incorporate regulatory

⁵⁰ *Id.*

⁵¹ Some other OLPs have encountered significant legal problems. See Samson Habte, *Third Ethics Panel Dings Avvo Flat-Fee Referral Service*, BLOOMBERG BNA (Oct. 15, 2016), <https://www.bna.com/third-ethics-panel-n57982078096/>.

⁵² For example, the regulatory regime in Florida was so burdensome that, at least at one point, some 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/?durl=/DIVCOM/JN/jnnews01.nsf/cb53c80c8fabd49d85256b5900678f6c/2DFCD2FA693B5AE085257DC4004854D5!opendocument> (“When I spoke with the ABA about their partnership with RocketLawyer, I said, ‘Hey, you didn’t include Florida...Why don’t you try your program on RocketLawyer out in Florida?’” he said, “And the answer was very quick and very direct: ‘Florida’s restrictions are far too strict for us to even consider a pilot program; the advertising rules, the unlicensed practice of law rules, we can’t even recommend to the ABA to try a program in Florida.’”).

recommendations. If properly employed, these would help provide consumer protection in the legal form industry in such areas as disclosure, consumer privacy, and warranties.⁵³

The Task Force's 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 which LegalZoom contends are favorable to consumers but are likely to require the consumer to bear costs and arbitrate in a distant place;⁵⁴ however, these clauses often force consumers to waive their rights to a trial by jury and preclude class actions.⁵⁵ Use of any on-line 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.

At the same time, in a show of good faith, the Task Force urges that self-regulation be initially employed by OLPs, pending regulation or legislation. The Task Force does not view a voluntary standard as 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

⁵³ At the NYCLA Forum, LegalZoom's General Counsel stated that LegalZoom already adheres to the great majority of these provisions. Rampenthal described many of those provisions as "best practices." See Statement of Charles Rampenthal, *supra* note 4.

⁵⁴ Catey Hill, *Don't buy legal documents online without reading this story*, MKT. WATCH (Nov. 27, 2015, 9:29 AM), <http://www.marketwatch.com/story/dont-buy-legal-documents-online-without-reading-this-story-2015->. See, e.g., Avvo.com Terms of Use, AVVO.COM (last revised Apr. 19, 2017), <https://www.avvo.com/support/terms> (indicating that arbitration will be held in Kings County, Washington); Revision Legal Terms of Use Agreement, REVISION LEGAL (last revised Dec. 18, 2013), <https://revisionlegal.com/terms-use> (indicating that arbitration will be held in Traverse City, Michigan); LawDepot Terms and Conditions, LAWDEPOT (last revised July 14, 2017), <https://www.lawdepot.com/terms.php> (indicating that arbitration will be held in Alberta, Canada).

⁵⁵ See, e.g., *Terms of Use*, LEGALZOOM <https://www.legalzoom.com/legal/general-terms/terms-of-use> (last visited July 20, 2017).

protect the public in the manner characterized by the Task Force’s *Best Practices for Document Providers*, attached as Appendix II.

However, NYCLA’s Task Force recognizes that regulation or legislative action may be difficult to achieve quickly and thus, encouraging self-regulatory efforts by individual OLPs such as adoption of best practices, may end up as the principal means of guarding consumer interests.

VIII. EXISTING REGULATORY MODELS

In issuing its General Provisions and Considerations for Regulation of On-line Providers of Legal Documents, the Task Force is not writing on a blank slate. At the NYCLA Forum, former NYSBA President David P. Miranda discussed some of the types of regulations that he believed would be necessary, including the imposition of disclaimers, warnings, and notifications that the user of legal forms should seek attorney assistance for difficult problems.⁵⁶ The Task Force has also reviewed the following regulations and guidelines that have thus far been adopted, including:

1. The ABA Model Regulatory Objectives;⁵⁷
2. The North Carolina settlement;⁵⁸
3. The Washington Attorney General Settlement;⁵⁹ and

⁵⁶ Miranda described online legal forms as a “gateway drug” to unauthorized practice of law. He said that online legal forms could lead to other things which should be regulated. However, he expressed uncertainty as to which entities could engage in such regulation. He suggested that bar associations, courts, and attorneys could not handle such regulation and that the legislature might need to intervene. See David P. Miranda, Past President of NYSBA, Statement at NYCLA Forum: Should Online Providers of Legal Forms be Regulated? If So, By Whom? If Not, Why Not? (Sept. 30, 2016).

⁵⁷ 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.

⁵⁸ See N.C. GEN. STAT. § 84-2.2 (2016).

4. The Missouri Settlement.⁶⁰

In the Task Force's view, the above regulatory regimes are imperfect at best and have often been adopted in settlement of ongoing litigation, a scenario which does not lend itself to optimal policymaking. Unlike the standards outlined above, the Task Force's proposed General Provisions and Considerations for Regulation of On-line Providers of Legal Documents cover most of the major areas of consumer concern, yet strive to adopt balanced regulations which avoid any undue burden on the business of OLPs.

1. ABA Model Regulatory Objectives

The ABA Model Regulatory Objectives (the "ABA Objectives") were adopted by the ABA in February 2016 in an effort to urge each state's courts in assessing state regulatory framework and regulation concerning non-traditional legal service providers.⁶¹ LegalZoom has indicated its willingness to abide by these objectives. Those model regulations are:

- A. Protection of the public;
- B. Advancement of the administration of justice and the rule of law;
- C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems;

⁵⁹ Settlement between the State of Washington and LegalZoom.com, Inc., (Sep. 15, 2010), http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2010/LegalZoomAOD.pdf.

⁶⁰ 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).

⁶¹ See *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.

- D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections;
- E. Delivery of affordable and accessible legal services;
- F. Efficient, competent, and ethical delivery of legal services;
- G. Protection of privileged and confidential information;
- H. Independence of professional judgment;
- I. Accessible civil remedies for negligence and breach of other duties owed, and disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs; and
- J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system.⁶²

These ABA Objectives are intended as guidelines for regulation of legal services providers; they are not intended to serve as regulations themselves.⁶³ Nevertheless, the General Provisions and Considerations for Regulation of On-line Providers of Legal Documents adopt some of the ABA’s principles.⁶⁴ Like the ABA Objectives, the Task Force’s standards also seek

⁶² See Minkoff, *supra* note 28.

⁶³ See *id.*

⁶⁴ For example, the Task Force’s statement contains several provisions relating to the protection of private and confidential information. See *infra* Appendix I, at 9, 10 (“protection of information from unauthorized use or access by third person”).

to promote accessible civil remedies.⁶⁵ Moreover, as is the case with the ABA Objectives, many of the provisions aim at transparency.⁶⁶

Despite these similarities, the Task Force believes that its proposed General Provisions and Considerations for Regulation of On-line Providers of Legal Documents are considerably more specific and would protect consumer welfare to a much greater extent than the ABA Objectives.

2. *The North Carolina Settlement*

Between 2008 and 2015, the North Carolina State Bar (the “NC State Bar”) engaged in litigation with LegalZoom. The NC State Bar contended that LegalZoom’s business constituted the unauthorized practice of law. In turn, LegalZoom filed a lawsuit against the NC State Bar in federal court in North Carolina in June 2015, seeking \$10.5 million in antitrust damages.⁶⁷ LegalZoom’s suit relied on a U.S. Supreme Court antitrust ruling in 2015 against the state’s self-regulating body for dentists, which had unsuccessfully proposed regulations on teeth whitening by non-dentists.⁶⁸

LegalZoom and the NC State Bar settled their litigation, agreeing to provisions that read in full as follows:

The practice of law, including the giving of legal advice, as defined by G.S. 84-2.1 does not include the operation of a Web site by a provider that offers consumers access to

⁶⁵ See *infra* Appendix I, at 14–16 (submission to jurisdiction in the courts of the state in which the client is located).

⁶⁶ See *infra* Appendix I, at 5, 7, 13, 14.

⁶⁷ See *LegalZoom.com, Inc. v. North Carolina State Bar*, 2015 NCBC 96, 2015 WL 6441853 (N.C. Super. Ct. Oct. 22, 2015); Terry Carter, *LegalZoom resolves \$10.5M antitrust suit against North Carolina State Bar*, ABA JOURNAL (Oct. 23, 2015), http://www.abajournal.com/news/article/legalzoom_resolves_10.5m_antitrust_suit_against_north_carolina_state_bar.

⁶⁸ *Id.*

interactive software that generates a legal document based on the consumer's answers to questions presented by the software, provided that all of the following are satisfied:

- 1) The consumer is provided a means to see the blank template or the final, completed document before finalizing a purchase of that document.
- 2) An attorney licensed to practice law in the State of North Carolina has reviewed each blank template offered to North Carolina consumers, including every potential part thereof that may appear in the completed document. The name and address of each reviewing attorney must be kept on file by the provider and provided to the consumer upon written request.
- 3) The provider must communicate to the consumer that the forms or templates are not a substitute for the advice or services of an attorney.
- 4) The provider discloses its legal name and physical location and address to the consumer.
- 5) The provider does not disclaim any warranties or liability and does not limit the recovery of damages or other remedies by the consumer.
- 6) The provider does not require the consumer to agree to jurisdiction or venue in any state other than North Carolina for the resolution of disputes between the provider and the consumer.
- 7) The provider must have a consumer satisfaction process. All consumer concerns involving the unauthorized practice of law made to the provider shall be referred to the North Carolina State Bar. The consumer satisfaction process must be conspicuously displayed on the provider's Web site.⁶⁹

At the NYCLA Forum, LegalZoom's representative, Charles Rampenthal, criticized the North Carolina regulation. He said that the regulations that had been adopted by North Carolina were not an appropriate model for other states. Rampenthal contended that at least some of the North Carolina regulations were overly intrusive, including the provision forbidding OLPs from disclaiming warranties. He urged other states not to follow North Carolina's example and said that other states should adopt a process that is not protectionist.⁷⁰

⁶⁹ See N.C. GEN. STAT. § 84-2.2 (2016); see also Richard Granat, *North Carolina Restricts the Distribution of Legal Self-Help Software to Consumers*, E-LAWYERING BLOG (July 12, 2016), <http://www.elawyerredux.com/2016/07/articles/access-to-justice/north-carolina-restricts-distribution-legal-self-help-software-consumers/>; see also *LegalZoom.com, Inc. v. North Carolina State Bar*, 2015 NCBC 96, 2015 WL 6441853 (N.C. Super. Ct. Oct. 22, 2015)

⁷⁰ See Statement of Charles Rampenthal, *supra* note 4.

The Task Force has included some aspects of the North Carolina model in its General Provisions and Considerations For Regulation of On-line Providers of Legal Documents, including the requirements that: an attorney licensed in the relevant state review each form, the provider communicate that the forms are not a substitute for a lawyer, the provider disclose its legal name and physical location, the provider not disclaim any warranties, and the provider does not require the consumer to agree to jurisdiction in any other state. In short, the Task Force has incorporated considerable portions of the North Carolina settlement but has augmented the settlement provisions with many other recommendations.

The Task Force has also included a warranty provision analogous to the North Carolina provision.⁷¹ That provision proved to be a particular flashpoint at the NYCLA Forum and will be discussed separately below in Section IX.

3. *The Washington Attorney General Settlement*

The Washington Attorney General and LegalZoom entered into a settlement that barred the company from comparing its document costs favorably to attorney fees unless it discloses that its service is not a substitute for a law firm. In an “assurance of discontinuance,” LegalZoom also promised to refrain from:

- Offering estate-planning forms that do not conform to Washington law.
- Engaging in the unauthorized practice of law by providing individualized legal advice about a self-help form.
- Selling consumer information to third parties, unless the consumers are given a chance to opt in.

⁷¹ See *infra* Appendix I, at 2.

Like the Washington standards, the NYCLA Task Force’s General Provisions and Considerations for Regulation of On-line Providers of Legal Documents include a requirement that the OLP acknowledge that its services are not a substitute for an attorney and that its forms conform to state law.⁷²

4. *The Missouri Settlement*⁷³

The Missouri settlement includes the following elements, among others:

- LegalZoom will pay up to \$6 million in settlement.
- LegalZoom will provide a Missouri-specific sample of certain documents that the customer selects on the LegalZoom website, subject to review by a Missouri-licensed attorney.
- LegalZoom will remove certain references from its website and from its advertising, including references that compare the cost of LegalZoom’s self-help products without clear disclosure that LegalZoom is not a law firm or substitute for an attorney or law firm.
- LegalZoom will advertise that its “Peace of Mind Review” is not available in Missouri unless it is performed by a Missouri-licensed attorney.
- LegalZoom will provide an offer to consult with a Missouri-licensed attorney through certain of its programs.⁷⁴

⁷² Deborah Cassens Weiss, *Wash. AG’s Settlement with LegalZoom Bars Fee Comparisons Absent Disclosure*, ABA JOURNAL (Sept. 21, 2010, 12:06 PM), http://www.abajournal.com/news/article/wash_ag_settlement_with_legalzoom_bars_fee_comparisons_absent_disclosure.

⁷³ 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).

⁷⁴ *Id.* at 12-18.

IX. NYCLA TASK FORCE PROPOSAL

The NYCLA Task Force’s General Provisions and Considerations for Regulation of On-line Providers of Legal Documents and Best Practices for Document Providers are set out in full in Appendices I and II. Broadly speaking, the Task Force’s provisions contain three general categories:

- 1) Standards for disclosure and transparency (Appendix I & II, Nos. 1, 5, 7, 13, 14);
- 2) Standards for the protection of personal information provided by the consumer (Appendix I & II, Nos. 6, 8, 9, 10, 11-12); and
- 3) Provisions relating to arbitration and dispute resolution (Appendix Nos. 16-19).

Several of the more important provisions recommended in this report deserve special mention because they are not included in some of the settlements and because representatives from the OLPs have expressed opposition to these provisions.

a. Disclosure Provisions

As an initial matter, many of the provisions in the Task Force’s proposal 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.⁷⁵ Like the settlements in Washington and North Carolina, and also in accord with the FTC/DOJ proposal, the NYCLA Task Force’s proposal calls for OLPs to acknowledge that the services they provide are not a substitute for the services of a lawyer.⁷⁶ The proposal also adopts

⁷⁵ See *infra* Appendix I, at 1, 7, 13, 14.

⁷⁶ See Letter from Marina Lao and Robert Potter to Bill Cook, *supra* note 24 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 . . .”).

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.”⁷⁷

b. Requirement of Clickwrap Agreements

The Task Force’s 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.⁷⁸ “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.”⁷⁹ “‘Browsewrap’ agreements are treated differently under the law than ‘clickwrap’ agreements.”⁸⁰ 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.’”⁸¹ This is rarely the case for individual consumers. In fact, courts have stated that “the cases in which courts have enforced ‘browsewrap’ agreements have involved users who are businesses rather than... consumers.”⁸²

⁷⁷ *See id.*

⁷⁸ *See infra* Appendix I, at 5. “‘Clickwrap’ agreements are distinguished from and ‘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.” *See 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).

⁷⁹ *See 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* 6 (D.Mass. July 11, 2016)); *See also Specht v. Netscape Communications Corp.*, 306 F.3d at 22 n. 4; *Savetsky v. Pre–Paid Legal Servs., Inc.*, 14–cv–03514, 2015 WL 604767, at *3 (N.D.Cal. Feb. 12, 2015); *Berkson v. Gogo LLC*, 97 F.Supp.3d 359, 397 (E.D.N.Y.2015).

⁸⁰ *See Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 129 n.18 (2d Cir. 2012).

⁸¹ *Id.* (quoting *Cvent, Inc. v. Eventbrite, Inc.*, 739 F.Supp.2d 927, 937 (E.D.Va.2010)).

⁸² *See Meyer v. Kalanick*, No. 15 CIV. 9796, 2016 WL 4073012, at *5 (S.D.N.Y. July 29, 2016) (quotation omitted). *See also Berkson*, 97 F.Supp.3d at 396 (“Following the ruling in *Specht*, courts generally have enforced browsewrap terms only against knowledgeable accessors, such as corporations, not against

In litigation involving the Terms of Service and “clickwrap” agreements of Uber, a technology company that uses phone applications to connect consumers with car transportation services, extensive discussions have arisen on the nature of “clickwrap” agreements with conflicting decisions, some of which have invalidated Uber’s arbitration agreements.⁸³ The *Meyer* court opined that “[w]hen contractual terms as significant as the relinquishment of one’s right to a jury trial or even of the right to sue in court are accessible only via a small and distant hyperlink titled ‘Terms of Service & Privacy Policy,’ with text about agreement thereto presented even more obscurely, there is a genuine risk that a fundamental principle of contract formation will be left in the dust: the requirement for ‘a manifestation of mutual assent.’”⁸⁴

However, other courts have held that consumer contracts presented by Uber and other internet-based companies constituted valid consent to arbitration or other waivers of rights. In these cases, the courts found that (unlike in *Meyer*), the agreements in question required an affirmative assent to the clause in question.⁸⁵

individuals.”); *See* Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 472 (2006) (“the courts have been willing to enforce terms of use against corporations, but have not been willing to do so against individuals).

⁸³ *See Meyer v. Kalanick*, No. 15 CIV. 9796, 2016 WL 4073012, at *5 (S.D.N.Y. July 29, 2016).

⁸⁴ *Id.* (quoting *Schnabel*, 697 F.3d at 119).

⁸⁵ *See Cullinane v. Uber Techs., Inc.*, No. 14-cv-14750, 2016 WL 3751652* 6 (D.Mass. July 11, 2016); *Defillipis v. Dell Fin. Servs.*, 14-cv-115, 2016 WL 394003, at *3 (M.D. Pa. Jan. 29, 2016) (“an applicant had to affirmatively click a box agreeing: ‘I have read and agree to the Privacy Policy and Terms & Conditions, which contain important account information.’”); *Bassett v. Elec. Arts, Inc.*, 93 F. Supp. 3d 95, 99 (E.D.N.Y. 2015) (“Plaintiff would have been presented with four buttons, two of which are the links to the terms of service and privacy policy, one which reads ‘I Do Not Accept,’ and one which reads ‘I Have Read And Accept Both Documents.’ If the registrant does not click the button reading ‘I ... Accept . . . the registration process stops and the online features cannot be activated.”); *Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 150 (E.D.N.Y. 2015) (Dkt. 53-3) (the statement “By placing your order, you agree to Amazon.com’s privacy notice and conditions of use” appears directly under “Review your order” and higher on the page than the button to click to “Place your order,” so that “[t]o place his orders, Plaintiff had to navigate past this screen by clicking a square icon below and to the right of this disclaimer, which states: ‘Place your order.’”).

Uber has filed an appeal in *Meyer* and, thus, the Second Circuit will likely decide the issue of the validity of at least some of Uber’s arbitration clauses.⁸⁶ Regardless of the outcome of the litigation, the Task Force believes that OLP agreements should incorporate a protective form of “clickwrap” agreement, requiring that a customer affirmatively click “I agree” to assent to arbitration and the waiver of the right to access to court.

c. Provisions Regarding Warranties

At the NYCLA Forum, LegalZoom’s representative, Charles Rampenthal, opposed efforts to require LegalZoom to include warranties. However, Rampenthal acknowledged that North Carolina’s settlement imposes such a requirement and that LegalZoom adheres to it.⁸⁷ In the Task Force’s view, 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.⁸⁸ For this reason, NYCLA’s Task Force regards warranty protection as a fundamental aspect of its General Provisions and Considerations for Regulation of On-line

⁸⁶ Mark Hamblett, *51 Law Professors Join Fight Against Arbitration in Uber Price-Fixing Case*, N.Y. LAW JOURNAL (Dec. 7, 2016), <http://www.newyorklawjournal.com/id=1202774152389/51-Law-Professors-Join-Fight-Against-Arbitration-in-Uber-PriceFixing-Case>.

⁸⁷ See Statement of Charles Rampenthal, *supra* note 4.

⁸⁸ 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) (citing, inter alia, CAL. CIV. CODE § 1793 (Deering 2015) (providing that if a seller makes express warranties in a sale of goods, the seller is unable to disclaim the implied warranty of merchantability); CONN. GEN. STAT. § 42a-2-316(5) (2015) (rendering disclaimers of the implied warranty of merchantability in the sale of new goods ineffective); KAN. STAT. ANN. § 50-639(a)(1) (2015) (“[N]o supplier shall ... [e]xclude, modify, or otherwise attempt to limit the implied warrant[y] of merchantability”); MASS. GEN. LAWS ch. 106, § 2-316A (2015) (prohibiting disclaimers of the implied warranty of merchantability when there has been injury to a person); VT. STAT. ANN. tit. 9A, § 2-316(5) (2015) (prohibiting disclaimers in the sale of new or unused consumer goods)).

Providers of Legal Documents and Best Practices.⁸⁹ The Task Force notes that consumers in New York and across the nation deserve warranty protection and not just North Carolinians.

d. Provisions Regarding Arbitration

The Task Force’s proposals contain several provisions relating to arbitration and dispute resolution.⁹⁰ 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.⁹¹ In addition, most of these forms prohibit class action law suits. All of these restrictions reduce the likelihood that aggrieved customers would pursue their legal remedies. The Task Force notes that restrictions on litigation are not uncommon in other form contracts.⁹² However, in this situation, the Task Force believes 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.⁹³

Additionally, the Task Force’s proposal would forbid provisions in OLP contracts which bar class action litigation. As one consumer advocacy group has put it, “class action waivers

⁸⁹ See *infra* Appendices I and II at 2.

⁹⁰ See *infra* Appendix I, 15–18; see *infra* Appendix II, 16-19.

⁹¹ See Hill, *supra* note 55.

⁹² In fact, in applying the Federal Arbitration Act, the Supreme Court has often upheld restrictions on class action waivers contained in arbitration agreements. See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 2015 WL 8546242 (2015); See *Am. Exp. Co. v. Italian Colors Rest.* 133 S. Ct. 2304 (2013) (class action waivers are enforceable and do not deny a plaintiff any substantive right simply because individual claims of nominal value would more effectively proceed on a class basis). However, even if class action waivers are permissible, the NYCLA Task Force does not believe that they are desirable. In the NYCLA Task Force’s view, OLP contracts should be drawn so they do not deny access to the courts for class action cases that would not be viable if litigated on an individual basis. This view is consistent with holdings of the high courts in Massachusetts, New Mexico, North Carolina, California, Washington, Illinois, New Jersey, Alabama, and West Virginia have found class action bans unconscionable. See *Feeney v. Dell*, 908 N.E.2d 753 (Mass. 2009); *Gentry v. Superior Court of Los Angeles County*, 165 P.3d 556 (Cal. 2007); *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250 (Ill. 2006); *Muhammad v. Co. Bank of Rehoboth Beach, Del.*, 912 A.2d 88 (N.J. 2006).

⁹³ In some cases, a customer might rationally decide to choose arbitration over litigation. In some cases, arbitration could be faster, less burdensome, and/or less expensive. If that were the case, a customer could, of course, waive its right to go to court under the NYCLA General Provisions and Considerations for Regulation of On-line Providers of Legal Documents and Best Practices.

prevent consumers who have been harmed on a systematic basis from joining together to seek remedies from the offending company—which is often the only method of obtaining redress.”⁹⁴ For similar reasons, the Consumer Finance Protection Bureau has proposed a rule that would prohibit class action waivers in consumer finance contracts. Moreover, the Financial Industry Regulatory Authority (FINRA), which is an industry self-regulatory organization for broker dealers, allows forced arbitration clauses in brokerage contracts but does not allow those agreements to contain class action waivers.⁹⁵

e. Customer Privacy

The Task Force’s proposed General Provisions and Considerations for Regulation of On-line Providers of Legal Documents and its proposed Best Practices also focus on the protection of consumer information. Based upon its research and the sentiments expressed at the NYCLA Forum, the Task Force believes that sensible consumer privacy regulations in this area are important. The Task Force’s General Provisions and Considerations for Regulation of On-line Providers of Legal Documents contain one possible interim framework.⁹⁶ Laws such as the Massachusetts Consumer Privacy Law or HIPAA provide other longer-term regulatory solutions.⁹⁷

⁹⁴ 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://consumerfed.org/wp-content/uploads/2016/08/8-22-16-CFPB-Class-Action-Waiver-Rule_Letter.pdf.

⁹⁵ See FINRA Rule 12204(d), which forbids enforcing an arbitration agreement against a member of a class action, shows that this was a deliberate policy decision made to ensure that “investor access to the courts should be preserved for class actions.” Complaint at 14, *Department of Enforcement v. Schwab*, No. 2011029760201 (Apr. 24, 2014), <https://www.finra.org/sites/default/files/NACDecision/p496824.pdf> (citing October 1992 Approval Order, 1992 SEC LEXIS 2767, at *9–10).

⁹⁶ See *infra* Appendix I, at 6–12; See *infra* Appendix II, at 7–13.

⁹⁷ See Massachusetts Regulation 201 CMR 17.00.

It should be noted that, at the outset, many OLPs' activities (such as the mere sale of forms) do not involve confidential consumer information.⁹⁸ In addition, as Peter Kennedy pointed out at the NYCLA Forum, information should be treated differently depending upon the level of sensitivity. He suggested that "innocuous" information such as names and addresses need less protection as compared to other personal information, such as DNA data.⁹⁹

The Task Force agrees that consumer protection safeguards are necessary for sensitive consumer information and that OLPs must assure such protection in order to ensure the viability of their business models. Indeed, in its draft S-1, LegalZoom itself acknowledged that: "Our online legal platform involves the receipt, use, storage, processing and transmission of information from and about our customers, some of which may be personal or confidential." In its draft S-1, LegalZoom explained that "sophistication of intrusion techniques" could be used to compromise consumer privacy.¹⁰⁰

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

⁹⁸ Kennedy said that the business of LegalZoom and other internet based providers often does not even involve confidential information because their business often does not involve any discussion between the clients and the provider. In addition, the provider does not necessarily collect or maintain client information. *See* Statement of Peter Kennedy, *supra* note 5.

⁹⁹ *Id.*

¹⁰⁰ *See supra* note 33.

inconsequential. Although the Task Force recognizes that First Amendment consideration may apply to the content of forms themselves, the First Amendment does not require specific practices involved in the on-line sale of forms be free from any regulation.¹⁰¹ Some regulation of this industry is important. Meeting an unmet need is not a valid argument for ignoring consumer risk.

The Task Force is concerned that many features of the online relationship could lend themselves to abuse in a manner similar to that encountered in other online industries. For example, while different companies have promulgated different terms and differ in the range and quality of their offerings, the relationship is typically governed by a lengthy online form contract which, depending on the provider, is not always consumer-friendly. Not many non-lawyers would readily understand the terms or consequences of these agreements, including non-English speakers. Some of the more popular services have forms which, if printed out, run to many densely typed, single spaced pages.¹⁰² Typically, these forms contain no warranties; in fact, quite the reverse: they disclaim consumer warranties, and strictly limit damages, while imposing indemnities that run from the user to the provider rather than vice versa. This stands in stark contrast to legal services, where disclaimer of warranties and malpractice liability is strictly prohibited.

The forms almost always include an arbitration clause; some of these have some features favorable to the consumer, as LegalZoom contends its clause does, but many require the

¹⁰¹ See *Matter of New York County v. Dacey*, 24 N.Y. 2d 694 (1967).

¹⁰² For example, the Revision Legal form is four pages, the Law Depot form is seven pages, the Avvo form is eight pages and the LegalZoom form is thirteen pages. See Avvo.com Terms of Use, AVVO.COM (last revised Apr. 19, 2017), <https://www.avvo.com/support/terms>; Revision Legal Terms of Use Agreement, REVISION LEGAL (last revised Dec. 18, 2013), <https://revisionlegal.com/terms-use>; LawDepot Terms and Conditions, LAWDEPOT (last revised July 14, 2017), <https://www.lawdepot.com/terms.php>.

consumer to bear costs and arbitrate in a distant place.¹⁰³ Additionally, the arbitration clause is also almost certain to preclude any form of class actions.

Use of the service often involves disclosure of some personal data and potential disclosure of sensitive information about a user's transactions and circumstances. Whether a particular OLP chooses to use this information for internal marketing purposes or even chooses to sell it, often nothing in the contract precludes them from doing so. Given that OLPs are not lawyers or law firms, the attorney-client privilege does not apply – another fact often not adequately conveyed to consumers.

In other regards, Massachusetts Consumer Privacy Law may be the most appropriate regulatory model. In 2007, the Massachusetts Legislature passed a comprehensive set of laws addressing data breaches.¹⁰⁴ The Massachusetts Regulation contains an extensive list of technical, physical and administrative security protocols aimed at protecting personal information that affected companies must implement into their security architecture, and describe in a comprehensive written information security program.¹⁰⁵ The law applies to companies such as OLPs that collect and retain personal information of their customers. “Personal information” under the law includes names plus any of the following social security numbers, driver's license numbers or financial account numbers, including credit or debit card numbers.¹⁰⁶ Commentators have described the Massachusetts law as “[t]he best example of a preventative-type of law.”¹⁰⁷ It has also been called “the most comprehensive data protection and privacy law in the United

¹⁰³ See note 55.

¹⁰⁴ Massachusetts Regulation 201 CMR 17.00.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Ieuan Jolly, *Data protection in the United States: overview*, THOMSON REUTERS PRACTICAL LAW (Jul. 1, 2016), <http://us.practicallaw.com/6-502-0467#a762707>.

States.”¹⁰⁸ It should be noted that at the NYCLA Forum, Rampenthal stated that LegalZoom follows Massachusetts law in all 50 states, does not share customer information without permission, and that, if LegalZoom wanted to market or disclose information, it would need to disclose that intention to its customers.¹⁰⁹

Regulators should consider not only the Massachusetts statute, but also privacy laws from other sectors such as HIPAA and Gramm Leach Bliley.¹¹⁰ While NYCLA’s Task Force urges that governmental regulators carefully study the possibility of adapting such regulations to the OLP context, the Task Force also urges that regulators consider the cost of regulations and arrive at a balanced outcome.

With respect to the sale of consumer information, it is the Task Force’s belief that such sale should be prohibited without informed consent. The Task Force believes that sensible regulations can be developed in this area. Charles Rampenthal said, at NYCLA’s Forum, that the sale of customer information is not likely be a major problem because he does not believe there is massive profit to be made from information sharing.¹¹¹ However, it should be noted that Legal Zoom’s standard form provisions state that customer information can be re-sold. As several panelists pointed out, apart from “special” laws targeted at internet companies, those

¹⁰⁸ Kevin D. Lyles & Mauricio F. Paez, *Massachusetts Law Raises the Bar for Data Security*, JONES DAY (Feb. 2010), http://www.jonesday.com/massachusetts_law_raises/.

¹⁰⁹ See Statement of Charles Rampenthal, *supra* note 4.

¹¹⁰ *Safeguarding Customers’ Personal Information: A Requirement for Financial Institutions*, FTC (accessed Dec. 30, 2016), <https://web.archive.org/web/20170220213348/https://www.ftc.gov/system/files/documents/plain-language/alt115-safeguarding-customers-personal-information-requirement-financial-institutions.pdf>. It has been suggested that Gramm Leach Bliley may require some overhaul even in those areas where it currently operates. See *CFPB Proposes New Rules on Gramm-Leach-Bliley Act Annual Privacy Notices*, BALLARD SPAHR LLP (May, 15, 2014), <http://www.ballardspahr.com/alertspublications/legalalerts/2014-05-16-cfpb-proposes-new-rules-on-gramm-leach-bliley-act.aspx>.

¹¹¹ See Statement of Charles Rampenthal, *supra* note 4.

companies are subject to laws of general applicability.¹¹² Regulators and legislators should examine the prospect of enforcing current privacy laws in lieu of, or perhaps in addition to, the development of special laws targeted at OLPs.¹¹³ Notably, even if regulators take no steps to enforce existing laws, some courts might import existing laws even from other areas of law. For example, in fashioning private law remedies, courts have used the standards established by HIPAA even when that statute is not directly applicable.¹¹⁴

The General Provisions and Considerations for Regulation of On-line Providers of Legal Documents and the statement of Best Practices for Document Providers proposed by this Task Force provide a common-sense approach to regulation or self-regulation of OLPs. The Task Force believes that, 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.

¹¹² For example, existing laws dealing with fiduciary duty might cover customer information held by OLPs. As Peter Kennedy stated at the NYCLA Forum, if a provider stores and maintains control over information, the provider may have a fiduciary duty to keep that information private and disclosure could give the client a cause of action. *See* Statement of Peter Kennedy, *supra* note 5. Another speaker at the NYCLA Forum pointed to fear of malpractice suit (contract and tort) as potential enforcement mechanisms. It was also contended that contract and tort may defeat waivers of warranty.

¹¹³ At the NYCLA Forum, Peter Kennedy said that existing rules relating to confidentiality are not effectively enforced. He said proceedings regarding such information are secret proceedings, at least in Texas. He said that he had, in the past, argued that such proceedings should be public. *See* Statement of Peter Kennedy, *supra* note 5.

¹¹⁴ Stephanie D. Willis, *Provider Beware: HIPAA and State Privacy Laws May Inform Negligence Suits*, MINTZ LEVIN: HEALTH LAW & POLICY MATTERS (Dec. 9, 2014), <https://www.healthlawpolicymatters.com/2014/12/09/provider-beware-hipaa-and-state-privacy-laws-may-inform-negligence-suits/>.

The Task Force submits that 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. NYCLA's Task Force will continue exploring the issues related to OLPs and will next investigate the thorny and complex issues regarding legal referrals, fee-splitting and non-lawyer ownership of law firms.

APPENDIX I

GENERAL PROVISIONS AND CONSIDERATIONS FOR REGULATION OF ON-LINE 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 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) 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 State of New York for the resolution of any dispute with New York customers, and should not be permitted to require arbitration of any disputes.
- (17) OLPs should be not be permitted to preclude their customers from joining in class actions, or require shifting of legal fees to customers.
- (18) Any notifications 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' web-sites, 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 submit to the jurisdiction of the courts of the State of New York for the resolution of any dispute with New York customers, 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 web-site, the required words, statements or notifications shall appear on their home page.