AMERICAN BAR ASSOCIATION
NEW YORK STATE BAR ASSOCIATION
NEW YORK COUNTY LAWYERS ASSOCIATION
STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES
CENTER FOR INNOVATION
INTERNATIONAL LAW SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association adopts the *ABA Best Practice Guidelines for Online Legal Document Providers* dated August 2019; and

4 FURTHER RESOLVED, That the American Bar Association urges online legal document providers to follow the *ABA Best Practice Guidelines for Online Legal Document Providers*. 
ABA BEST PRACTICE GUIDELINES FOR ONLINE LEGAL DOCUMENT PROVIDERS

The Utility of Their Online Legal Documents and Forms

(1) Online legal document providers ("Providers") should provide their customers ("Customers"), with clear, plain language instructions as to how to complete their forms, and the appropriate uses for each form.

(2) Any notifications to be provided pursuant to these Best Practice Guidelines should be understandable to the average person. Such notifications should be prominent, written in plain language, and delivered by the Provider in ways customers are reasonably likely to see, hear or encounter. The term "notify," as used in these Best Practice Guidelines, shall refer to notifications that conform to this Guideline.

(3) The forms that Providers offer to their Customers should be valid in the intended jurisdiction (as represented by the Provider or requested by the Customer). If not, Providers should inform their customers, in plain language, that the form is not substantially valid, or of any possible limitations on enforceability, in the intended jurisdiction and what steps can be taken to make it valid, including if necessary the retention of a lawyer. Providers may limit their warranties to "as is" warranties, using notifications consistent with Best Practices Guideline 2.

(4) Providers should keep their forms up-to-date and promptly account for material changes in the law. Providers should notify Customers or potential Customers as to when their forms were last updated.

(5) If a Provider selects the service agent for a form, the Provider should not disclaim legal responsibility for the proper recording or filing of the document, and should disclose the fees charged by or for the use of such service agent.

Protection of their Customers

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1 The term “online legal documents and forms” or “forms,” refers to documents and forms made available or prepared online, either for sale or free-of-charge from for-profit or not-for-profit enterprises, including lawyers or law firms (through ancillary businesses or otherwise), to members of the public who wish to engage in legal transactions (including, without limitation, real estate sales, purchase-and-sale transactions, corporate or partnership formation or structuring, wills, trusts, deeds, patent and trademark filings and the like) and/or to use or file in litigation (including, without limitation, form pleadings, releases, discovery requests, jury trial demands, and the like) without engaging a lawyer. This includes both static forms and forms created using an online document assembly process. This does not include: (a) forms prepared by lawyers, law firms, or legal services organizations for those with whom they have bona-fide client-lawyer relationships; (b) forms primarily prepared for or marketed to lawyers, either as part of legal treatises or otherwise; or (c) forms prepared by courts, court systems, court-related self-help centers, or government agencies. These Guidelines are not intended to address other online document marketplaces primarily addressed by other professionals, including without limitation tax filings and title searches.
(6) Providers should notify Customers of the terms and conditions of their relationship to the Provider, and Customers should have to actively manifest their assent (such as clicking on an “accept” button) to those terms and conditions.

(7) Providers should notify Customers of all of the ways (if any) they intend to use and share Customers’ information with third parties.

(8) Providers should notify Customers that the information Customers provide is not covered by the attorney-client privilege or work product protection.

(9) Providers should make reasonable efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to Customer information. In the event of a significant data incident or breach the Provider should use reasonable remedial and notification efforts and otherwise comply with applicable data security statutes or other data security protections in a Customer’s jurisdiction.

(10) Providers should notify Customers: (a) how long they intend to keep and maintain Customer information provided to them; (b) how long the Provider will keep and maintain a completed form; and (c) how long the Provider will allow Customers access to their completed form without imposing a new or additional charge.

(11) Providers should not charge their Customers an excessive fee for their services.

Recommendaion of Attorneys to Assist

(12) Providers should notify their Customers that their forms are not a substitute for the services of a lawyer, and that Customers may benefit from the services of a lawyer in any legal transaction.

(13) Providers should not advertise or describe their services in a manner that suggests their forms are a substitute for the advice of a lawyer.

Dispute Resolution

(14) Providers should notify their Customers of their legal name, address and email address to which Customers can direct any complaints or concerns about the Provider’s services.

(15) Providers should provide a forum convenient to the Customer for resolution of any dispute. Providers should offer inexpensive, efficient and effective dispute resolution, either in court, arbitration, or mediation, including without limitation local ADR or court proceedings, online dispute resolution or similar means. Providers should not impose lawyer fee or cost shifting to the Customer in any such proceeding. Providers should not unreasonably delay the resolution of disputes with Customers.
REPORT

I. Introduction

Online legal document providers ("OLPs")\(^1\) have helped millions of people gain access to the legal services they needed and could not otherwise afford. Despite these substantial benefits, there are no established guidelines for OLPs to follow when they deliver their services to the public. The proposed Best Practices Guidelines seek to fill this gap. They encourage OLPs to adopt appropriate consumer protections while recognizing the increasingly valuable role that OLPs play in meeting the public's legal needs and improving access to justice.

The Best Practices Guidelines are the product of careful study that began with a Task Force on Online Legal Providers established by the New York County Lawyers Association in 2016.\(^2\) The Task Force convened a public forum,\(^3\) which found that:

- OLPs are a worldwide multi-billion dollar industry that has created a new market for lower cost law-related services;
- By making accurate and modestly priced legal documents and forms available online, OLPs benefit many people, especially low- and moderate-income individuals, small businesses, and startups; and

\(^1\)The term “online legal documents and forms” or “forms,” refers to documents and forms made available or prepared online, either for sale or free-of-charge from for-profit or not-for-profit enterprises, including lawyers or law firms (through ancillary businesses or otherwise), to members of the public who wish to engage in legal transactions (including, without limitation, real estate sales, purchase-and-sale transactions, corporate or partnership formation or structuring, wills, trusts, deeds, patent and trademark filings and the like) and/or to use or file in litigation (including, without limitation, form pleadings, releases, discovery requests, jury trial demands, and the like) without engaging a lawyer. This includes both static forms and forms created using an online document assembly process. This does not include: (a) forms prepared by lawyers, law firms, or legal services organizations for those with whom they have bona-fide client-lawyer relationships; (b) forms primarily prepared for or marketed to lawyers, either as part of legal treatises or otherwise; or (c) forms prepared by courts, court systems, court-related self-help centers, or government agencies. These Guidelines are not intended to address other online document marketplaces primarily addressed by other professionals, including without limitation tax filings and title searches.

\(^2\) 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 (now Vice President) Vincent T. Chang.

\(^3\) This forum followed a similar forum sponsored by the New York State Bar Association ("NYSBA") in Albany, New York earlier in 2016 that addressed the same topic and was, like the NYCLA forum, attended by industry representatives.
• OLPs should provide consumers with basic and appropriate protections that reflect the importance of the documents and forms that OLPs deliver.

The forum led to a Task Force Report recommending, *inter alia*, a series of Best Practices Guidelines for OLPs. That Report was adopted by the New York State Bar Association (“NYSBA”) House of Delegates in November 2017 and was submitted as a proposed resolution in advance of the 2018 ABA Annual Meeting in Chicago. Though the proposed Resolution 10A and a subsequent resolution were eventually withdrawn, continued meetings and communications between NYSBA representatives and representatives of numerous constituent groups, both within and outside the ABA, ultimately led to the formation of a 30-member Working Group after the February 2019 ABA Midyear Meeting. That Working Group had representatives from fourteen separate ABA Sections, Committees and Centers, as well as several representatives from the NYSBA and other important constituencies, such as the OLP industry and the Legal Services Corporation.4

Over several months of work, the Working Group revised the *Best Practices Guidelines* in ways that more effectively advance the goals of consumer protection, improved access to justice, and support for innovative legal service delivery models. In short, these *Best Practice Guidelines* target specific issues and practices to protect the public while allowing responsible providers to meet a significant need.

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 described “do-it-yourself” law, and the concept of a scrivener service pre-dates the Internet.5 An 1859 book entitled “Everybody’s Lawyer and Counsellor in Business” contains 400 pages of legal forms and information.6 Many court systems and governmental agencies have long made legal forms available to the public.7

4 A complete roster of the Working Group is attached as Exhibit A.


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

7 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).
Today, these services have moved online and help the public address a range of law-related issues, such as those related to trademarks, patents, copyrights, wills, living trusts, and LLC and corporate formation.\(^8\) For example, LegalZoom estimates that it has served four million customers, 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.\(^9\) While LegalZoom is the market leader, it has many competitors and emulators offering a variety of forms and related services, such as RocketLawyer, LawDepot, Legal Templates, FindLaw, FormSwift and Avvo. In all, it is estimated that OLPs currently generate approximately $4.1 billion in annual revenue.\(^{10}\)

Rather than recognizing the market need that OLPs fill, some bar associations have commenced litigation against OLPs, contending that they are engaged in the unauthorized practice of law (UPL).\(^{11}\) These efforts are almost always settled favorably to the OLPs or have resulted in court rulings in favor of OLPs.\(^{12}\) In those instances when


\(^9\) See Statement of Charles Rampenthal, supra note 5.

\(^{10}\) 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)).

\(^{11}\) Moreover, at least one state legislature, Tennessee, is considering a statute that would restrict the ability of OLPs to operate. https://docs.wixstatic.com/ugd/43dae3_0f3b1e269c2148f58c8de1a10abe59d4.pdf?index=true.

\(^{12}\) As one commentator noted in 2015, “Eight state bar associations have filed actions against LegalZoom for the unauthorized practice of law. Of those, one has been sent to binding arbitration (Arkansas) and one, in North Carolina, is still pending [it has since been settled favorably to LegalZoom]. The other six lawsuits have either been settled or dismissed, and LegalZoom is still providing documents to every state.” https://www.lawtechnologytoday.org/2015/06/technology-and-the-unauthorized-practice-of-law/. This is still true – except LegalZoom now provides documents internationally as well. “[Another] example is the Texas Supreme Court’s decision to promulgate online divorce forms despite the opposition of the Texas State Bar. See Anna Whitney, Some Family Lawyers Oppose Creating Divorce Forms, Texas Tribune, January 24, 2012, available at https://www.texastribune.org/2012/01/24/texas-state-bar-asks-supreme-court-stop-forms-task/. The Supreme Court of Texas’s Order approving the Divorce forms lays out some of the controversy on pp. 4-6, see Texas Supreme Court, Order Approving Uniform Forms – Divorce Set One, available at http://www.dallascounty.org/distclerk/media/SupOrder.PDF (last visited August 17, 2016.).”
there have been rulings against OLPS, those rulings are sometimes overruled by legislatures. 13

The Federal Trade Commission (FTC) and Department of Justice (DOJ) also have been hostile to efforts to interpret UPL provisions broadly against OLPS. In a 2016 letter, they jointly recommended that the North Carolina General Assembly revise the definition of the practice of law to avoid undue burdens on “self-help products that may generate legal forms.” 14 The FTC and DOJ stated that these self-help products and other interactive software programs for generating legal documents would promote competition by enabling OLPS “to provide many services that historically were provided exclusively by lawyers.” 15 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. 16

OLPs do, indeed, provide significant benefits to the public, and efforts to prevent OLPS from delivering their services are likely to continue to fail. This report argues for a different approach: the identification of voluntary best practices that would protect consumers without unduly burdening the OLP industry – all in recognition of the important role OLPS can play in promoting access to justice. 17

The ABA has adopted analogous resolutions in the past. In 2003, for example, the House of Delegates adopted a resolution entitled “Best Practice Guidelines for Legal Studies Research Paper No. 351. Available at SSRN: https://ssrn.com/abstract=3183737

13 E.g., Texas Unauthorized Practice of Law Comm. v. Parsons Tech, Inc. 179 F.3d 956 (5th Cir. 1999) (ruling that providing Quicken Family Law forms online was UPL, but legislature subsequently excluded such products from the statutory definition of the “practice of law”).


15 See id.

16 See id.

17 For a similar approach, see Andrew M. Perlman, Towards the Law of Legal Services, 37 CARDOZO L. REV. 49, 88-90, 99-107 (2015).
Information Web Site Providers,” which was intended to cover those who provide legal information online – from law firm websites to bloggers to OLPs. That resolution suggested six practices that such providers should follow: (1) accurately and completely identify the information provider; (2) date the information provided; (3) avoid misleading readers about the jurisdiction to which the information relates; (4) make clear that the legal information provided is not legal advice; (5) link to other sources that might assist the reader in addressing legal problems; and (6) when appropriate, contain relevant legal citations and authorities. See 03M110. This broad-based approach was not focused exclusively on the OLP industry, which was in its infancy at that time.

In 2016, the House of Delegates addressed OLPs more directly in Resolution 114. See 16A114. That resolution, which originated with the Standing Committee on the Delivery of Legal Services, also took a “best practices” approach, urging those who provide online forms – whether bar associations, not-for-profit enterprises or for-profit entities – to “provide clear and conspicuous information on how people can access a lawyer or a lawyer referral service to provide assistance with their legal matters to prevent errors or omissions.”

The proposed Best Practice Guidelines build on this foundation, reiterating some of the suggestions made in the 2003 and 2016 resolutions and adding others that address data sharing, data privacy, and the validity of resulting documents, among other topics. Like Resolution 114, this more comprehensive approach is intended to cover OLPs in both the for-profit and not-for-profit sectors. It even covers law firms that provide legal forms for sale to the public outside of a bona fide lawyer-client relationship. The Resolution exempts courts, court systems, legal services providers and governmental agencies, as these entities have far less of an incentive, and are simply less likely than other OLPs, to provide inaccurate forms, misuse customer data or otherwise cause harm to members of the public.

III. OLPs’ Impact on Access to Legal Services

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.”18 Arthur Norman Field, past president of NYCLA, has noted, “the public has voted that it wants online legal providers and they are here to stay.”19

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

Why have OLPs been this successful? The answer is that OLPs provide cost-savings and convenience for individuals and small businesses of limited means. For instance, people starting small businesses – particularly start-ups and other businesses that require their intellectual property to be protected – cannot afford the hourly rates that many lawyers charge. 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 a lawyer. For this reason, even some lawyers use OLPs to service clients, often at a far lower cost than if the lawyers drafted the documents from scratch.

Perhaps more importantly, the overwhelming majority of low-income individuals and families, and roughly half of those of moderate income, face their legal problems without a lawyer. This “justice gap” is huge and widening. 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.” Low cost internet legal providers, including but not limited to OLPs, can help to provide more affordable legal services to underserved

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.


22 ABA COMM., supra note 10, at 3 (citing Deborah Rhode, Access to Justice 3 (2004)).
populations who cannot afford lawyers. The ABA and other bar associations must recognize this reality and work collaboratively with OLPs to serve the public effectively.

The establishment of Best Practices will not only provide a model for OLPs within the U.S., but in other countries as well. Internationally, various national bar associations have identified the appearance of OLPs in their jurisdictions as well as the need to close their own justice gaps, and the *Best Practices Guidelines* may prove to be useful abroad as OLPs become more common.

IV. Why We Chose the Best Practices Approach

In both written comments and oral discussions, NYSBA and the Working Group encountered two competing objections to the proposed *Best Practices Guidelines*.

First, there were those who expressed concern that OLPs hurt the legal profession, both by discouraging members of the public from using lawyers, as well as by reducing the prices that lawyers can charge for their services. These commenters felt that it was the ABA’s job to protect lawyers against competition from OLPs.

We believe these concerns are misplaced for at least two reasons. First, the ABA is not just a trade association created to protect its members. It is a professional association that must focus on the needs of the public. Indeed, the ABA recently adopted Model Regulatory Objectives for the Provision of Legal Services that make clear that the ABA’s focus on issues such as those presented here should be on protecting the public, not the profession.23 OLPs are developing delivery models that are driving down the cost of legal services and helping to improve access to justice. We believe strongly that the legal profession must turn toward OLPs and work with them and the technology they create to better serve the public at large, rather than take the rejectionist approach that OLPs are criminals violating unauthorized practice statutes. Second, as noted earlier, attacking OLPs has repeatedly failed; in case after case, OLPs have settled favorably or won outright, and have even garnered support from the Justice Department and Federal Trade Commission. To continue these ineffectual attacks benefits no one: not the legal profession, not the OLPs, and certainly not the public we claim to serve.

A second and opposing concern with the proposed *Best Practice Guidelines* is that lawyers have no place regulating their competitors and that the *Best Practices Guidelines* are simply a stalking horse for future regulation. Indeed, these commentators point out

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that the original NYCLA/NYSBA proposal presented primarily a regulatory model. After
listening to those who have expressed these concerns – some of whom are on the
Working Group – we have eschewed the regulatory approach in favor of the Best
Practices Guidelines, and for good reason. Any regulatory approach will inevitably lag
behind changes in technology, rendering any regulation outdated almost as soon as it is
adopted. Moreover, we want to encourage innovation in the OLP industry in order to
improve access to justice, and at this point, regulation seems as likely to stifle innovation
as promote it. In addition, regulation, particularly in Unified Bar states, could raise serious
antitrust concerns. Even where the antitrust laws do not apply, a regulatory model
conveys to the public that the bar is looking to protect its own interests, not those of the
millions of people using OLPs each year.

The ABA has an important role to play in this area for several reasons. First,
lawyers have substantial and longstanding experience with ensuring that legal and law-
related services are delivered in ways that protect the public. Second, lawyers are the
ones who have to solve, or at least address, any problems that result when OLPs create
faulty documents or provide for inadequate dispute resolution mechanisms. Finally, and
perhaps most obviously, the ABA and state and local bars, like NYSBA and NYCLA, have
considerable knowledge and expertise related to the impact that legal documents and
forms have on the public and the legal system. For these reasons, the ABA and other bar
associations are well-positioned to offer voluntary guidance to the OLP industry about
how it can best serve the public.

The Best Practices Guidelines approach offers the most appropriate middle ground
between too much involvement of the bar in the OLP industry and no involvement at all.
It is, in fact, a “win-win-win.” The legal profession wins because it engages with OLPs
and begins to work with them, bringing to bear new technologies to serve the public and
close the justice gap. The OLPs win because they are embraced rather than attacked,
while getting the benefit of the profession’s experience with effectively providing legal
services to the public while protecting the public’s interests. And, perhaps most
importantly, consumers win because these Guidelines, if adopted, protect them while
expanding their ability to obtain legal services. To put it simply: the public gains when all
those providing legal services to the public – lawyers, OLPs and other legal services
providers – work cooperatively rather than antagonistically.

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24 See, e.g., North Carolina Board of Dental Examiners v. FTC, 135 S.Ct. 1101 (2015) (antitrust laws apply
to rules as to non-dentists offering teeth whitening services made by state Dental Board, composed
primarily of dentists, “particularly in light of the risks licensing boards dominated by market participants may
pose to the free market”).
V. Best Practices and Proposed General Provisions Regarding Online Providers of Legal Documents

The proposed Best Practice Guidelines protect the public without stifling the development of new technologies that benefit both the public and the profession.\(^\text{25}\) Broadly speaking, the Best Practice Guidelines cover three general topics:

- Guidelines for disclosure, transparency and enforceability of forms;
- Guidelines for the protection of personal information provided by the consumer; and
- Guidelines relating to arbitration and dispute resolution.

It is important to emphasize that the Guidelines advance the ABA Model Regulatory Objectives for the Delivery of Legal Services.\(^\text{26}\) Although framed as “regulatory” objectives, the clear intent behind their adoption was to offer objectives for the creation of regulatory and other forms of guidance for legal services delivery, including best practices. The Objectives include:

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
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
J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system

\(^{25}\) 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.

\(^{26}\) See supra note 23.
By recognizing the importance of OLPs in the delivery of legal services, the Guidelines taken as a whole advance at least Objectives A, B and C, and for the reasons explained below, specific Guidelines advance one or more Objectives in important respects.


Many of the proposed guidelines track the recommendations of the FTC and DOJ in their letter to the North Carolina legislature and advance Objective D. In particular, the Best Practices Guidelines take a disclosure-oriented approach to many issues by encouraging OLPs to provide clear, conspicuous and comprehensible disclosures regarding key aspects of the relationship between OLPs and their customers. As an example, the proposal adopts, with somewhat different wording, the essential concept contained in the Joint Letter, “that advertisers should ensure that disclosures are clear and conspicuous on all devices and platforms consumers may use.”

b. Provisions Regarding Quality and Enforceability

Consumer protection is particularly important in this area because flaws in many legal forms cannot easily be discerned by most lay customers. For this reason, a fundamental aspect of Guideline 3 of the Best Practice Guidelines is that online forms should be valid in the intended jurisdiction (as represented by the Provider or requested by the Customer). If not, Providers should inform their customers, in plain language, that the form is not substantially valid, or of any possible limitations on validity, in the intended jurisdiction and what steps can be taken to make it valid, including if necessary the retention of a lawyer. At the same time, the Best Practice Guidelines allow OLPs to provide “as is” warranties, which is the standard in the software business. In these ways, the Guidelines advance Objectives A, B, D, and F.

c. Disclosure of and Customer Agreement to Contract Terms

The Best Practice Guidelines also suggest at Guideline 2 that all notifications to customers under the Guidelines “should be prominent, written in plain language, and delivered by the Provider in ways customers are reasonably likely to see, hear or

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27 See Letter from Marina Lao and Robert Potter to Bill Cook, supra note 14 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….“). This tracks proposed Best Practices Guidelines 12 and 13.

28 See id.

29 Perlman, supra note 14, at 94 (noting that legal services are “credence goods” – “services whose quality is difficult to measure or assess”).

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encounter.” Contractual terms also should be provided in this manner, and Customers should be able to actively manifest their assent to those terms. See id., Guideline 6. 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, are one method of actively manifesting assent, but the Best Practice Guidelines are broad enough to encompass other methods of active assent, whether existing or to be developed.30 These provisions advance Objectives A and D.

d. Provisions Regarding Sharing and Protecting Customer Information.

The Best Practices Guidelines reflect a concern that Customer information be protected in various ways that advance Objective G. For example, Providers are advised to notify Customers of whether and to what extent they intend to use Customer information, of how long they intend to keep that information, and of the fact that the information they receive is not covered by the attorney-client privilege or work product protection. See Guidelines 7, 8 and 10. In addition, in the event of a significant data breach or incident, Providers should use reasonable remedial and notification efforts and otherwise comply with data security statutes and other data security protections applicable in a Customer’s jurisdiction. See Guideline 9.

e. Provisions Regarding Arbitration

The proposals contain several provisions related to arbitration and dispute resolution and thus advance Objective I. Many OLPs require the resolution of disputes in arbitration under standard commercial Rules (with their attendant costs) rather than in court and also require that arbitration take place in distant locations inconvenient to the customer.31 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, given what is at stake for users of OLP services, it is appropriate to provide dispute resolution mechanisms that are convenient, inexpensive and efficient, whether in court or via online arbitration. See Guideline 15.

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 The arbitration provision in LawDepot’s Terms of Use, for example, require arbitration in Edmonton, Alberta.
Conclusion

The OLP industry touches the lives of millions of consumers, drives down the cost of some legal services, and helps to address the public's unmet legal needs. At the same time, appropriate guidelines can help to protect consumers when they use OLPs to access important legal documents and forms.

Respectfully Submitted,

Michael Miller
President, New York State Bar Association

Michael J. McNamara
President, New York County Lawyers’ Association

August 2019
1. Summary of Resolution.

The resolution adopts best practices and encourages online legal document providers to follow the ABA *Best Practice Guidelines for Online Legal Document Providers*.

2. Approval by Submitting Entity.

This report was based upon a similar report initially approved by the New York County Lawyers Association on June 13, 2017 and subsequently approved by the New York State Bar Association House of Delegates on November 4, 2017.

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

A similar Resolution was submitted in connection with the August 2018 and January 2019 meetings but each was withdrawn in order for a working group consisting of representatives from various ABA entities and stakeholders to consult and collaborate.

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

Resolution 103, adopted February 10, 2013 (03M110); Resolution 114, adopted August 8, 2016 (16A114).

Neither policy would be affected by adoption of this proposal.
5. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A.

6. Status of Legislation. (If applicable.)

N/A

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

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

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

None.


N/A

10. Referrals.
Since the January 2019 meeting of the ABA House of Delegates, there has been a working group which met via conference call on a weekly basis to address relevant issues. The resolution and report is the product of this collaborative effort. The working group consisted of various ABA entities, bar groups, industry representatives and other stakeholders, including:

ABA ENTITIES:
ABA (Staff Liaison)
ABA Business Law Section
ABA Center for Innovation
ABA Center for Professional Responsibility
ABA Judicial Division
ABA Section of Administrative Law and Regulatory Practice
ABA Section of Dispute Resolution
ABA Section of Intellectual Property Law
ABA Section of International Law
ABA Section of Litigation
ABA Solo, Small Firm and General Practice Division
ABA Standing Committee on the Delivery of Legal Services
American Bar Foundation

OUTSIDE ENTITIES:
Legal Services Corporation
Legal Zoom (industry)
Lexis-Nexis (industry)
National Center for State Courts
New York County Lawyers' Association
New York State Bar Association
Priori Legal (industry)
Responsive Law (Consumer Group)

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

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

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

The resolution adopts best practices and urges online legal forms providers to follow the ABA Best Practices Guidelines for Online Providers to protect consumers and provide a common-sense approach to self-regulation of online legal form providers.

2. Summary of the issue which the Resolution addresses.

Best practices are needed to allow online legal forms providers to meet a significant need and access to justice while protecting consumer privacy and protection of customer data.

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

The report proposes a set of best practices to enable self-regulation of online legal forms providers.

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

There was a previous report and resolution 10-A which was withdrawn from consideration at the August 2018 meeting of the ABA House of Delegates in order to give ABA entities greater time for consideration. The August 2018 resolution called for both regulation of online legal document providers and the adoption of best practices. That resolution was withdrawn for further consideration.

A subsequent resolution 10-A was submitted at the January 2019 meeting of the ABA House of Delegates after consultation with various ABA entities, which had been revised to include only an effort for the adoption of best practices, based upon the foundation of Resolution 103 - “Best Practices for Legal Information Web Site Providers,” adopted by the ABA House of Delegates on February 10, 2003 and Resolution 114 – “Links to Lawyers,” adopted by the ABA House of Delegates on August 8, 2016.

The January 2019 resolution was withdrawn for further consultation and collaboration with a working group which included various ABA entities, bar groups and stakeholders, including:

ABA Business Law Section
ABA Center for Innovation
ABA Center for Professional Responsibility
ABA Judicial Division
The present resolution is a product of those consultations and extensive collaboration. We know of no minority views of the resolution in its current form.