

Oklahoma Law Review

Volume 72 | Number 1

*Symposium: Lawyering in the Age
of Artificial Intelligence*

2019

Online Legal Document Providers and the Public Interest: Using a Certification Approach to Balance Access to Justice and Public Protection

Susan Saab Fortney

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>

 Part of the [Legal Ethics and Professional Responsibility Commons](#), [Legal Profession Commons](#),
and the [Science and Technology Law Commons](#)

Recommended Citation

Susan Saab Fortney, *Online Legal Document Providers and the Public Interest: Using a Certification Approach to Balance Access to Justice and Public Protection*, 72 OKLA. L. REV. 91 (2019),
<https://digitalcommons.law.ou.edu/olr/vol72/iss1/5>

This Introduction is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

ONLINE LEGAL DOCUMENT PROVIDERS AND THE PUBLIC INTEREST: USING A CERTIFICATION APPROACH TO BALANCE ACCESS TO JUSTICE AND PUBLIC PROTECTION

SUSAN SAAB FORTNEY*

Abstract

The Internet and electronic communications have revolutionized how consumers obtain legal information and assistance. The availability of legal forms and services has developed at lightning speed and countless consumers are using these forms, rather than consulting attorneys. At the same time, many regulators of the legal profession appear to be frozen in time. Some take the position that the provision of interactive forms amounts to the unauthorized practice of law and others question arrangements that appear to involve the sharing of legal fees with non-lawyers. Even for those interested in regulating the provision of online services, one complication to doing so relates to the fact that the forms and services are provided around the world, rather than being limited to particular jurisdictions. This article examines the regulatory challenges and the manner in which a private governance approach using third-party certification can be used to improve access to legal services while advancing consumer protection.

“Arrest that software!”¹ This title of a 1999 *Forbes* article captured its author’s critique of the federal court’s decision in one of the first cases involving artificial intelligence and interactive legal forms.² In that case, the Supreme Court of Texas Unauthorized Practice of Law Committee (UPL Committee) sought to enjoin Parsons Technology from selling and

* Professor and Director of the Program for the Advancement of Legal Ethics at Texas A&M University School of Law. The author thanks Professor Melissa D. Mortazavi and the members of the *Oklahoma Law Review* for their assistance and organizing the symposium on artificial intelligence and lawyering. She also appreciates the insights shared by symposium participants, Benjamin H. Barton, Milan Markovic, Ronald Minkoff, Andrew M. Perlman, and Lucian T. Pera.

1. Daniel Fisher, *Arrest that Software!*, FORBES (Mar. 8, 1999), <https://www.forbes.com/forbes/1999/0308/6305094a.html#2abee714887e>.

2. *Id.* (noting that the customization of legal documents based on questions answered by customers was a “dash of artificial intelligence” to push the software “across the line into the illegal practice of law”).

distributing a software product that posed questions to users and purported to select appropriate forms based on the users' answers.³ The UPL Committee "alleged the [software] act[ed] as a 'high tech lawyer by interacting with its "client" while preparing legal instruments, giving legal advice, and suggesting legal instruments that should be employed by the user.'"⁴ United States District Judge Barefoot Sanders agreed with the UPL Committee, referring to the software as a "cyber-lawyer" whose product went beyond instructing someone on how to fill in a blank form, and instead "ventured into the unauthorized practice of law."⁵

The court decision in *Parsons Technology* did not chill the development of self-help interactive tools for legal instruments. With widespread use of the Internet, legal technology innovators have transformed the legal landscape by creating websites that enable users to create their own legal documents without consulting attorneys.⁶ Futurist Richard Susskind suggests this type of automated document assembly is among the most disruptive technologies within the legal industry.⁷ Legal startups fulfill the classical venture capital checklist by offering a "disruptive model in a huge, decentralized business" and they often target

3. *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. 3:97-Civ.A. 3:97 CV-2859H, 1999 WL 47235, at *1 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999) (mem). Following the decision in the district court, the Texas Legislature amended the definition of the practice of law to state "that the 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney." 179 F.3d at 956 (quoting H.B. 1507, 76th Leg., Reg. Sess. (Tex. 1999)).

4. *Parsons Tech.*, 1999 WL 47235, at *4.

5. *Id.* at *4, *6.

6. The following describes the interactive feature of automated documentation as follows:

Automated documentation works by requiring the consumer to fill out a questionnaire about his or her legal situation. Based upon the answers the consumer has provided, the program automatically generates a document that purports to address the consumer's legal issues. The program stores standardized text to insert into the document if the consumer chooses a particular answer.

Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALBANY L. REV. 553, 572 (2014) (internal footnotes removed).

7. See RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES 98, 101-02 (2008) (using the term "disruptive technologies" to refer to those technologies that do not simply support or sustain the way a business or sector operates, but instead "fundamentally challenge or overhaul such a business or sector").

“the high-volume, low cost business of providing basic consumer and business documents.”⁸

Computerization of legal services aimed at America’s low- and middle-income consumers has revolutionized the delivery of legal services over the last twenty years.⁹ Technological innovation, supported by venture capital funding, fueled an explosion of new providers of inexpensive legal forms.¹⁰ Online legal document providers have demonstrated that there is a market hungry for legal materials. Millions of consumers, many of whom may have never consulted a lawyer, have obtained legal forms from online providers.¹¹

Online providers point to the number of customers they serve, asserting that online document services help bridge the justice gap by providing access to persons who cannot afford to hire lawyers, but do not qualify for legal aid.¹² This argument does not persuade those regulators and

8. BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE, MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW 117 (2017) (quoting Daniel Fisher, *Silicon Valley Sees Gold in Internet Legal Services*, FORBES, Oct. 5, 2011, <https://www.forbes.com/sites/danielfisher/2011/10/05/silicon-valley-sees-gold-in-internet-legal-services/#2d20976843ef>).

9. Benjamin H. Barton & Deborah L. Rhode, *Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators*, 70 HASTINGS L.J. 955, 960-61 (2019) [hereinafter Barton & Rhode, *Access to Justice*]. For a thoughtful discussion of the potential and limitations of artificial intelligence and lawyering, see Milan Markovic, *Rise of the Robot Lawyers*, 61 ARIZ. L. REV. 325, 328-35 (2019).

10. “In 2012, legal technology startups took in an estimated \$66 million in venture capital. . . . [By] 2013, that amount was \$458 million.” Benjamin H. Barton, *Some Early Thoughts on Liability Standards for Online Providers of Legal Services*, 44 HOFSTRA L. REV. 541, 545-46 (2015) [hereinafter Barton, *Early Thoughts on Liability Standards*] (citing Joshua Kubicki, *2013 Was a Big Year for Legal Startups; 2014 Could Be Bigger*, TECH CO. (Feb. 14, 2014, 12:07 PM), <http://tech.co/2013-big-year-legal-startups-2014-bigger-2014-02>).

11. Legal Zoom, one of the larger online providers, notes on a timeline on its website that it reached 3.6 million customers in 2015. *About Us*, LEGALZOOM, <https://www.legalzoom.com/about-us> (last visited May 25, 2019). LegalZoom’s website also notes that it has assisted over four million people with personal and business needs, while over two million have obtained help in starting and running business. LEGALZOOM, <https://www.legalzoom.com/> (last visited May 14, 2019).

12. In a keynote session at the 2017 ABA Techshow, the chief executive officers of three online providers “underscored their commitment to bridging the gap in access to justice while reiterating their common, customer-oriented philosophy.” Victor Li, *Avvo, LegalZoom and Rocket Lawyer CEOs Say Their Products Help Bridge Access-to-Justice Gap*, ABA J. (Mar. 17, 2017, 6:08 PM CDT), http://www.abajournal.com/news/article/techshow_keynote_panelists_reflect_on_regulations_and_consumer_service.

practicing lawyers who maintain that automated documentation amounts to the unauthorized practice of law (UPL).¹³

Interestingly, the camps on each side of the debate articulate the same arguments made in the 1990s when Parsons Technology launched its interactive self-help software. Each side points to the public interest in defending their particular positions. In making their access to justice arguments, the supporters of online document services assert that the organized bar resists change in a desperate effort to protect lawyers' turf and pocketbooks.¹⁴ Lawyers and regulators deny that their opposition is driven by protectionism. They maintain that public protection requires limiting the practice of law to trained lawyers who embrace the core values of the legal profession, including competency and confidentiality.¹⁵

Although the arguments made in 1999 and 2019 are largely the same, the popularity and strength of the online providers makes it highly unlikely that bar regulators will successfully reverse the tide of consumers using the Internet to obtain automated legal forms. As stated by Chas Rampenthal, general counsel of LegalZoom, "I don't see how you can stop this tidal wave. There is a groundswell of consumers demanding what they deserve. They deserve to have a legal representative they can afford."¹⁶ In addition to consumer pressure, the U.S. Department of Justice and the U.S. Federal Trade Commission have taken positions supporting innovative delivery of services that promote competition and

13. Unlike the sale of blank forms, automated legal documentation presents what Professor Benjamin M. Barton calls a "hybrid UPL case" in that "[a] human does not offer advice along with the forms or fill the form out for someone else, but the websites are packed with instructions and suggestions that look a lot like advice." Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 *FORDHAM L. REV.* 3067, 3081 (2014) [hereinafter Barton, *The Lawyer's Monopoly*].

14. E.g., Robert Ambrogi, *Why Is This Man Smiling? Latest Legal Victory Has LegalZoom Poised for Growth*, ABA J., Aug. 2014, at 33 ("Richard Granat, co-chair of the ABA eLawyering Task Force and president and CEO of Direct Law Inc., contend[s]" that [arguments against online providers of self-help documents] are nothing more than "an effort to protect lawyers' incomes."); see also Barton & Rhode, *Access to Justice*, *supra* note 9, at 958 (arguing that bar regulators should be looking for ways to "harness" the potential of technological innovations "to help underserved constituencies that need it most"). "Snuffing out innovation before it even launches seems more calculated to protect the profession than the public." *Id.* at 988.

15. See, e.g., Mitchell R. Heppenheimer, *A Changing Landscape: What We Face*, RES GESTAE, Oct. 2016, at 5, https://issuu.com/res_gestae/docs/rg_oct_2016.

16. Susan Beck, *Divided ABA Adopts Resolution on Nonlawyer Legal Services*, AM. LAW., Feb. 8, 2016, at 4 (Lexis).

expand consumer access to legal services, while addressing consumer protection issues.¹⁷

Various attempts to use UPL laws to attack online providers have ended in settlement or concluded favorably for the online providers.¹⁸ Rather than pushing enforcement actions or taking a laissez-faire stance, some bar groups have taken a “big tent” approach in recognizing that regulatory initiatives may accommodate nonlawyer providers while advancing public protection.¹⁹

The ABA used this tack in 2016 in adopting regulatory objectives as a framework for regulating nontraditional legal providers.²⁰ The following year, the New York County Lawyer Association (NYCLA) “issued a groundbreaking report calling for regulation of on-line document providers and encouraging those providers to adopt a set of voluntary best practices designed to protect consumers.”²¹

The NYCLA best practices formed the basis for the proposed ABA Best Practice Guidelines for Online Document Providers dated January 2019.²² In January 2019, the NYCLA and New York State Bar Association (NYSBA) submitted ABA Resolution 10A, asking the ABA

17. See Organisation for Econ. Co-operation & Dev., *United States Submission to the Directorate for Financial and Enterprise Affairs Competition Committee: Disruptive Innovations in Legal Services*, DAF/COMP/WP2/WD(2016)4 (June 13, 2016), <https://www.justice.gov/atr/file/874326/download>.

18. See *infra* notes 29-64; see also Ambroggi, *supra* note 14 (commenting on LegalZoom’s track record in fending off UPL lawsuits).

19. In urging that “the binary thinking that has characterized regulatory responses to date,” be avoided, Dean Andrew M. Perlman suggests “consumer-facing services are often useful to the public and should be authorized to operate . . . [with] some modest regulation.” Andrew M. Perlman, *Towards the Law of Legal Services*, 37 *CARDOZO L. REV.* 49, 100-01 (2015). Dean Perlman proposes we move away from a “lawyer-centric approach,” and develop a broader “law of legal services” to address the unique opportunities and challenges presented by innovations in the delivery of legal services. *Id.* at 57-58, 87-102.

20. The ABA resolution related to regulatory objectives takes the “modest step of acknowledging that some states may want to let nonlawyers provide legal services.” Beck, *supra* note 16, at 4.

21. Press Release, N.Y. Cty. Lawyers Ass’n, NYCLA Issues Report Regarding On-Line Legal Providers (Aug. 7, 2017), <http://www.nycla.org/pdf/NYCLA%20Online%20Providers%20Press%20Release.pdf> [hereinafter NYCLA Press Release].

22. A previous report and resolution 10-A was also withdrawn from consideration at the August 2018 meeting of the ABA House of Delegates. That resolution called for both regulation of online legal document providers and the adoption of best practices. Am. Bar Ass’n & N.Y. State Bar Ass’n, Report to the House of Delegates: Resolution 10A, at 17 (June 2019) [hereinafter ABA 10A Resolution and Report] <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/10a-annual-2019.pdf>.

to adopt the proposed ABA Best Practices Guidelines.²³ After preliminary discussions at the January 2019 midyear meeting, the proposal was withdrawn with the understanding that a group would be appointed to continue to work on the proposal for submission and a vote at the ABA annual meeting in August 2019.²⁴ A thirty-member ABA Working Group on On-line Document Providers labored over several months to revise the best practices to “target specific issues and practices to protect the public while allowing responsible providers to meet a significant need.”²⁵ Revised Resolution 10A and the related report call for the adoption of ABA Best Practices Guidelines for Online Legal Document Providers and urge online providers to follow the guidelines.²⁶ Taking a similar approach, this Essay proposes to engage online providers in developing a private governance regime that advances both access to justice and consumer protection.

To provide background on why private governance may be more effective than government regulation or litigation, Part I reviews litigation brought against online providers of automated documentation services. Although there are dozens of online providers of legal documents, this Essay focuses on issues related to automated legal document providers.²⁷ Part II examines bar association efforts to address issues related to providers of automated legal documents, focusing on best practices recommendations. Building on the best practices approach, Part III discusses the use and advantages of private certification over government regulation. Part IV focuses on how a private certification regime could both benefit online document providers and advance public protection. The conclusion calls for the development of standards and a certification

23. Am. Bar Ass’n & N.Y. State Bar Ass’n, Report to the House of Delegates: Resolution 10A (Jan. 2019) (on file with author) [hereinafter ABA Midyear Resolution 10A]. The resolution also urged “for-profit, not-for-profit, governmental and court-based online providers to follow the *ABA Best Practices Guidelines* . . . and encourages other bar associations to urge online providers to follow them.” *Id.*

24. Sydney Feldman, *New York State Bar Withdraws Proposal for ABA Best Practices for Online Legal Document Providers*, LEGAL ETHICS IN MOTION (Feb. 20, 2019), <http://www.legalethicsinmotion.com/2019/02/new-york-state-bar-withdraws-proposal-for-aba-best-practices-for-online-legal-document-providers/>. I served as a member of the ABA Working Group on Online Document Providers.

25. ABA 10A Resolution and Report, *supra* note 22, at 2.

26. *Id.*

27. See Perlman, *supra* note 19, at 101-05 (discussing regulatory and consumer protection issues related to automated legal documentation).

program that may influence consumers to use providers who voluntarily adopt consumer protection safeguards.²⁸

I. Litigation Involving Automated Document Providers

Given that segments of the organized bar staunchly oppose automated document providers, it is somewhat surprising that more UPL complaints have not been brought against the providers.²⁹ One explanation may be that regulatory bodies do not have the will or resources to successfully prosecute complaints.³⁰ Another explanation is that some regulators may not believe that UPL laws clearly prohibit automated documentation generated with the type of assistance provided by online providers. Other regulators recognize that automated document providers serve millions of consumers who otherwise may not obtain legal documentation.

Regulators may also be concerned that enforcement actions will be treated as anti-competitive under *North Carolina Board of Dental Examiners vs. the Federal Trade Commission (NCBDE)*.³¹ In *NCBDE*, the U.S. Supreme Court limited the antitrust immunity for a nonsovereign actor “controlled by market participants.”³² According to the Court, a state licensing board composed of persons who are the market participants may claim antitrust immunity only if the challenged restraint is “clearly

28. For an insightful examination of the problems associated with centralized government rule-making and the value of developing a legal infrastructure that includes private regulators that are prepared to deal with challenges and opportunities in our complex global economy, see GILLIAN K. HADFIELD, *RULES FOR A FLAT WORLD* 246-59 (2017).

29. In discussing why online providers have not faced more UPL action, Professor Benjamin M. Barton compares lawyers to a little “frog in a pot of slowly heating water,” suggesting that lawyers “did not notice the threat that computerized legal services presented until it was too late.” Barton, *The Lawyer’s Monopoly*, *supra* note 13, at 3082.

30. The results of cases brought against LegalZoom.com, Inc., one of the largest online providers of automated legal documentation, reveal that the provider is a formidable opponent with resources to contest and settle litigation. *See id.* at 3085 (“LegalZoom and other computerized providers of legal services have grown prevalent and profitable enough to present a strong challenge to any UPL enforcement effort.”).

31. *See* N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101 (2015).

32. *Id.* at 1110 (describing the requirements for immunity under *Parker v. Brown*, 317 U.S. 341 (1943) (citing *FTC v. Putney Health Sys., Inc.* 568 U.S. 216, 226 (2013))). For an analysis of how NCBDE “curtails the regulatory autonomy historically enjoyed by state bar associations,” see Lauren Moxley, Note, *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, 555, 559-62 (2015).

articulated and affirmatively expressed” as state policy and the state actively supervises the policy.³³

Finally, there is a public relations angle when regulators take action against an online provider—especially one with visibility and a large market share. Referring to LegalZoom as a “famous company with a large advertising budget,” Professor Benjamin H. Barton suggests that “[a]ny effort to put it out of business in a particular state would bring significant negative attention to the state’s lawyer regulators.”³⁴ Those who champion improving access to legal services could help lead the charge against regulatory initiatives that impede the ability of consumers to access online legal documents.

The results of several legal actions may also discourage regulators from pursuing actions against online providers. Although regulators prevailed in a few cases, many were resolved favorably to the provider or settled.³⁵ The following section reviews results in select cases involving online document providers, starting with actions brought by regulators, followed by actions brought by private parties.

Parsons Technology, discussed in the introduction, illustrates how providers of automated legal documents have ultimately prevailed when their business practices were challenged on the basis of UPL. Although the federal district court concluded Parsons Technology’s interactive forms and related practices amounted to UPL, Parsons Technology responded by successfully lobbying the Texas legislature to change the statutory definition of the practice of law.³⁶ The statute now states:

33. Moxley, *supra* note 32, at 560 (quoting Putney Health Sys., 568 U.S. at 226).

34. Barton, *The Lawyer’s Monopoly*, *supra* note 13, at 3082-83. In suggesting that more UPL regulation would require a great deal of political will and capital from state supreme courts, Professor Barton cautions: “Truly aggressive moves would be likely to draw federal antitrust and congressional attention. If push came to shove, state supreme courts and lawyer regulators would face a potentially existential crisis: attempting to maintain their inherent authority to regulate lawyers against an angry populace and an engaged federal government.” *Id.* at 3089.

35. Many of the cases that were resolved favorably or settled were against LegalZoom. The regulator prevailed in some reported cases against smaller providers. *E.g.* *In re Low Cost Paralegal Servs.*, 19 A.3d 1229, 1230 (R.I. 2011) (adopting findings of the UPL Committee that the respondents engaged in UPL in Rhode Island by conducting business through a website).

36. For a discussion of the “legislative bailout” obtained through the efforts of the technology industry, see Julee C. Fischer, Note, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 *IND. L. REV.* 121, 132 (2000).

The “practice of law” does not include the design, creation, publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously stated that the products are not a substitute for the advice of an attorney.³⁷

Because the practice of law is regulated on a state-by-state basis, the Texas legislative bailout did not prevent other states from challenging the business practices of online providers of automated legal forms.

North Carolina regulatory authorities were among the first to investigate whether LegalZoom was engaged in UPL. Beginning in 2003, the North Carolina “State Bar’s Authorized Practice Committee (APC) opened an inquiry into whether LegalZoom’s online legal document preparation service constituted [UPL].”³⁸ In 2011, LegalZoom sued the North Carolina State Bar, asserting that the state bar exceeded its statutory authority by refusing to register LegalZoom’s legal service plans.³⁹ While the case was pending in the North Carolina state court, the U.S. Supreme Court decided the antitrust case *North Carolina State Board of Dental Examiners*.⁴⁰ Armed with this opinion, LegalZoom filed a \$10.5 million antitrust complaint in federal court, alleging that the North Carolina State Bar’s actions were anti-competitive and amounted to monopolizing the legal industry.⁴¹ Subsequently, the North Carolina State Bar and LegalZoom reached an agreement and entered into a Consent Judgment.⁴² Under the Consent Judgment, the parties agreed that North Carolina’s

37. TEX. GOV. CODE ANN. § 81.101 (West 2017).

38. LegalZoom.com., Inc. v. N.C. State Bar, No. 11 CVS 1511, 2014 WL 1213242, at *2 (N.C. Super. Ct. Mar. 24, 2014) (tracing background and the procedural history of the case). Although that inquiry was dismissed because of insufficient evidence to support the UPL complaint, in 2007 the APC opened another inquiry and issued a cease and desist letter, which stated that the APC concluded that there was probable cause to believe that LegalZoom’s conduct constituted UPL. *Id.* LegalZoom responded to the allegations and the APC only took further action against LegalZoom when it filed a counterclaim in subsequent litigation brought by LegalZoom. *Id.*

39. *Id.* at *7. The North Carolina State Bar contended that it did not register the plans because LegalZoom was engaged in UPL. *Id.* at *5.

40. N.C. State Bd. Of Dental Exam’rs v. FTC, 135 S. Ct. 1110 (2015).

41. Complaint for Damages and Injunctive Relief, LegalZoom.com, Inc. v. N.C. State Bar, No. 1:15-CV-439 (M.D.N.C. June 3, 2015), http://online.wsj.com/public/resources/documents/2015_0604_legalzoom.pdf.

42. LegalZoom.com, Inc. v. N.C. State Bar, No. 11 CVS 15111, 2015 WL 6441853, at *1 (N.C. Super. Ct. Oct. 22, 2015).

definition of the “practice of law” did not cover LegalZoom’s operations involving interactive legal software, provided that LegalZoom complied with provisions set forth in the Consent Judgment.⁴³ These provisions detailed a number of practices relating to LegalZoom’s dealings with North Carolina consumers.⁴⁴ The Consent Agreement also stated that the parties agreed to mutually support and use their best efforts to obtain passage of North Carolina legislation clarifying the term “practice of law.” In 2016, North Carolina adopted such legislation, adding a statutory exception for website providers who satisfy requirements described in the statute.⁴⁵

43. *Id.*

44. *Id.* In six paragraphs, the Consent Order describes practices that LegalZoom agreed to adhere to for the shorter of a period of two years after the entry of the Consent Judgment or until the enactment of a provision revising North Carolina’s statutory definition of the “practice of law.” *Id.* These practices covered consumer protection concerns, including the prohibition of disclaiming warranties and the requirement that LegalZoom’s forms be reviewed by an attorney licensed to practice law in North Carolina. *Id.*

45. According to the statute,

The practice of law . . . does not include the operation of a Web site by a provider that offers consumers access to 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 each and 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.

N.C. GEN. STAT. ANN. §84-2.2 (West 2018).

Before the North Carolina legislation was passed, the North Carolina State Bar successfully prosecuted a UPL action against Lienguard, an online commercial-lien filing service.⁴⁶ The court agreed with the North Carolina State Bar, enjoining Lienguard after concluding that the lien claims that Lienguard prepared were legal documents and the manner in which Lienguard participated in preparing the claims constituted UPL.⁴⁷

Across the country, the Washington Attorney General also brought a UPL action against LegalZoom.⁴⁸ The Washington action was settled under an Assurance of Discontinuance in which LegalZoom agreed not to engage in a number of acts, including the following: offering estate planning legal forms in Washington that do not conform to Washington law; “failing to have a [Washington-licensed lawyer] review all self-help estate planning forms offered to Washington consumers”; and “selling, transferring, or disclosing Washington consumer information to third parties . . . , except where the consumer is given the opportunity to opt in with regard to specific third-party offerings.”⁴⁹ Like the North Carolina Consent Judgment, the Washington settlement requires LegalZoom to disclose that it is not a law firm and not a substitute for an attorney or law firm.⁵⁰

Although regulators have brought a small number of UPL enforcement cases, other parties have also filed a number of actions against online providers.⁵¹ As with regulatory actions, available information reveals that

46. See *N.C. State Bar v. Lienguard, Inc.*, No. 11 CVS 7288, 2014 WL 1365418 (N.C. Super. Ct. Apr. 4, 2014).

47. *Id.* at *11. As stated by the court,

(1) the claim of lien is a legal document; (2) preparing that document constitutes the practice of law when done on behalf of another, save and except for limited assistance of a scrivener; (3) Lienguard performs beyond that of a scrivener, and in doing so it engages in the unauthorized practice of law in violation of [North Carolina law].

Id.; see also *Ohio State Bar Ass’n v. Lienguard, Inc.*, 934 N.E.2d 337, 340 (Ohio 2010) (concluding that Lienguard engaged in UPL when creating mechanic’s liens for another party).

48. See Press Release, Wash. Attorney Gen., Washington Attorney General Zooms in on LegalZoom’s Claims (Sept. 16, 2010), <https://www.atg.wa.gov/news/news-releases/washington-attorney-general-zooms-legalzoom-s-claims>.

49. Assurance of Discontinuance at 2-3, *In re LegalZoom.com*, No. 10-2-02053-2 (Wash. Super. Ct., Thurston Cty. Sept. 15, 2010), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/News/Press_Releases/2010/LegalZoomAOD.pdf.

50. See *id.*

51. In addition to the UPL actions brought by the North Carolina State Bar Association and the Washington Attorney General, the Dekalb Bar Association (Alabama) filed a UPL

these cases ended either in a settlement or a favorable outcome for the online provider.⁵²

Notably, while analyzing the merits of UPL claims brought by a South Carolina consumer, a referee appointed by the Supreme Court of South Carolina found that “LegalZoom’s sale of Online Interactive Self-Help Form Documents does not constitute the practice of law.”⁵³ The referee recommended that the South Carolina Supreme Court approve a settlement in which LegalZoom agreed to implement or maintain (for twenty-four months) certain business practices related to the sale of online interactive self-help form documents in South Carolina.⁵⁴

A contrary trial court determination that LegalZoom was engaged in UPL may have helped precipitate a settlement of a class action brought on behalf of a class of Missouri residents.⁵⁵ After a federal district court determined that, under Missouri law, LegalZoom’s document preparation services comprised UPL, the parties entered a settlement agreement and the case was dismissed with prejudice.⁵⁶ Under the terms of the settlement, LegalZoom agreed to pay attorneys’ fees and costs, as well as

complaint against LegalZoom.com., Inc. This action was dismissed because the bar association did not post the required security for costs. Robert Ambrogi, *A Correction on LegalZoom Lawsuits*, LAWSITES (June 20, 2014), <https://www.lawsitesblog.com/2014/06/correction-legalzoom-lawsuits.html>.

52. Individual plaintiffs and class representatives filed actions that asserted UPL challenges, as well as a wide range of claims, including those based on deceptive practices, unjust enrichment, unconscionability, breach of contract, and breach of fiduciary duty. For a guide outlining the claims, defenses, proof, and practice and procedure pointers, see Elizabeth O’Connor Tomlinson, *Cause of Action for Damages Against Consumer Online Document Preparation Provider, Based on Unauthorized Practice of Law*, 77 CAUSES OF ACTION 2D 701 (originally published in 2017, updated Mar. 2019).

53. Report and Recommendation at 12, *Medlock v. LegalZoom.com, Inc.*, No. 2012-208067, 2013 S.C. LEXIS 362 (S.C. Oct. 18, 2013) (applying South Carolina precedent).

54. *Id.* at 7-8. The business practices covered a range of issues, including access to forms, warranties, and disclaimers. *Id.* (describing the business practices). As with other settlements, LegalZoom agreed to include on its website a statement that LegalZoom is not a law firm or substitute for an attorney or law firm, or substantially similar language. *Id.* at 6. The South Carolina Supreme Court signed off on the referee’s report and recommendations. Terry Carter, *LegalZoom Business Model OK’d by South Carolina Supreme Court*, ABA. J. Apr. 25, 2014, http://www.abajournal.com/news/article/legalzoom_business_model_okd_by_south_carolina_supreme_court.

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

56. *Id.* at 1069-70. The court distinguished between the sale of blank forms and the document preparation assistance that was provided by LegalZoom employees. See *id.* at 1063-65.

up to \$6 million to class members. LegalZoom also agreed to certain business practices when dealing with Missouri consumers.⁵⁷

A class action brought by California consumers against LegalZoom also resulted in a large settlement in *Webster v. LegalZoom.com, Inc.*⁵⁸ The national class settlement was valued at over \$6.8 million and included a consent decree governing LegalZoom's future conduct ("Webster Settlement").⁵⁹

Concluding that the Webster Settlement was a national class-action settlement that applied to the plaintiff's claims, a North Carolina state court in *Bergenstock v. LegalZoom.com, Inc.* dismissed certain claims brought in a North Carolina class action.⁶⁰ The remaining claims in the North Carolina case were stayed based on arbitration.⁶¹ In *Bergenstock*, the court concluded that the plaintiffs accepted LegalZoom's Terms of Service by checking a box before consummating their purchase.⁶² A number of other courts reached similar conclusions in compelling

57. The following outlines practices described in the settlement agreement:

[1] 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.

[2] 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.

[3] LegalZoom will advertise that its "Peace of Mind Review" is not available in Missouri unless it is performed by a Missouri-licensed attorney.

[4] LegalZoom will provide an offer to consult with a Missouri-licensed attorney through certain of its programs.

TASK FORCE ON ON-LINE LEGAL PROVIDERS, N.Y. CTY. LAWYERS ASS'N, REPORT OF NYCLA TASK FORCE ON ON-LINE LEGAL PROVIDERS REGARDING ON-LINE LEGAL DOCUMENTS 26 (2017) [hereinafter NYCLA TASK FORCE REPORT], <http://www.nycla.org/pdf/NYCLA%20Task%20Force%20Report%20-%20Online%20Legal%20Providers%20of%20Forms%20%282017%29.pdf>.

58. See *Webster v. LegalZoom.com, Inc.*, No. B240129, 2014 WL 4908639, at *3-4 (Cal. Ct. App. Oct. 1, 2014) (rejecting challenges based on fairness).

59. *Id.* at *2.

60. See *Bergenstock v. LegalZoom.com, Inc.*, No. 13 CVS 15686, 2015 WL 3866703, at *1 (N.C. Super. Ct. June 23, 2015) (dismissing all of the claims based on purchases made during the period covered by the Webster Settlement).

61. See *id.* at *9.

62. By "clicking through" the Terms of Service under the circumstances of their purchases, the court concluded that the plaintiffs "are deemed to have signed the agreement to arbitrate." *Id.* at *7.

arbitration based on provisions in the online providers' terms of service.⁶³ It is likely that other consumer claims against online providers will suffer a similar fate and be stayed or dismissed under terms of service that require binding arbitration.⁶⁴

Moving forward, other dispute resolution provisions under online providers' terms of service will also affect the number and types of court actions that online providers face.⁶⁵ For example, terms of service may prohibit class arbitrations and class actions.⁶⁶ Such class action waivers may render litigation prohibitively expensive for low-value claims.⁶⁷

63. See, e.g., *LegalZoom.com, Inc. v. McIllwain*, 429 S.W.3d 261, 266 (Ark. 2013) (compelling arbitration of class-action claims alleging UPL, deceptive trade practices, and unjust enrichment); *Litevich v. LegalZoom.com, Inc.*, No. X04HHDCV146055757S, 2016 WL 401912, at *1, *5 (Conn. Super. Ct. Jan. 8, 2016) (compelling arbitration of claims bought by a purported beneficiary under a will a decedent prepared online); *LegalForce RAPC Worldwide, P.C. v. LegalZoom.com, Inc.*, No. 17-cv-07194-MMC, 2018 WL 2010981, at *1, *2 (N.D. Cal. Apr. 10, 2018) (staying, rather than dismissing, the case alleging UPL, negligence, breach of fiduciary duty, misleading and false acts).

64. In a series of decisions, the U.S. Supreme Court has made it difficult for consumers to challenge the validity of mandatory arbitration provisions in consumer contracts. See James P. Nehf, *The Impact of Mandatory Arbitration on the Common Law Regulation of Standard Terms in Consumer Contracts*, 85 GEO. WASH. L. REV. 1692 (2017) (analyzing the increased use of mandatory arbitration clauses in consumer contacts and the effect on consumer litigation).

65. Professor Benjamin M. Barton has suggested that the number of lawsuits against online providers of legal forms may be attributable, in part, to the extensive "terms and conditions" that disclaim any warranties and also require arbitration of any disputes. See Barton, *Early Thoughts on Liability Standards*, *supra* note 10, at 555 (citing *Terms of Service*, ROCKETLAWYER, <https://www.rocketlawyer.com/terms-and-conditions.rl> (last updated Oct. 4, 2018)).

66. See e.g., *UpCounsel, Inc. Terms of Use*, UPCOUNSEL, ¶ 22(i), <https://www.upcounsel.com/termsfuse> (last visited May 28, 2019) ("You and UpCounsel acknowledge and agree that we are each waiving the right to participate as a plaintiff or class member in any purported class-action lawsuit."). The U.S. Supreme Court has held that arbitration provisions in consumer contracts are enforceable and preclude class-action litigation. *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

67. See Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 277 (2015); Charles Gibbs, Note, *Consumer Class Actions After AT&T v. Concepcion: Why the Federal Arbitration Act Should Not Be Used to Deny Effective Relief to Small-Value Claimants*, 2012 U. ILL. L. REV. 1345, 1361 (evaluating the economic efficiency and deterrent value of class-action suits) ("When the individual dollar amount of the recovery is so low as to effectively prohibit individual legal action, however, the practical reality is that these suits will not be brought in any form other than a class action."). For a different perspective from a leading law and economics scholar, see Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209 (2000).

II. A Big Tent Approach to Automated Document Providers

Instead of supporting more litigation challenging the business practices of online legal document providers, some bar associations have made efforts to examine issues and to address concerns related to revolutionary technological developments, including automated documentation. In 2014, the then-president of the ABA, William C. Hubbard, established the Commission on the Future of Legal Services in the United States (“ABA Futures Commission”).⁶⁸ The ABA Futures Commission was comprised of prominent lawyers from a wide range of practice settings, judges, academics, and other professionals with varied perspectives on how legal services are delivered and accessed in the U.S.⁶⁹ After two years of study, factfinding, hearings, comment solicitation, and deliberations, the ABA Futures Commission issued a ninety-seven-page Report on the Future of Legal Services (ABA Futures Commission Report).⁷⁰ The ABA Futures Commission Report elaborates on three major findings: (1) “Despite sustained efforts to expand the public’s access to legal services, significant unmet needs persist,” (2) “Advancements in technology and other innovations continue to change how legal services can be accessed and delivered,” and (3) “Public trust and confidence in obtaining justice and in accessing legal services is compromised by bias, discrimination, complexity, and lack of resources.”⁷¹

In addressing technological innovations, the ABA Futures Commission Report discusses how “[n]ew providers of legal services are proliferating and creating additional choices for consumers and lawyers.”⁷² Under the second finding dealing with such innovations, the ABA Futures Commission recommended that “[c]ourts should consider regulatory innovations in the area of legal services delivery.”⁷³ Thereafter, the report makes more specific recommendations for courts and bar associations. The Commission recommended that courts “adopt[] the ABA Model Regulatory Objectives for the Provision of Legal Services.” According to the ABA Futures Commission, the ten regulatory objectives will provide

68. See AM. BAR ASS’N COMM’N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 1, 9 (2016) [hereinafter ABA FUTURES COMMISSION REPORT], https://www.americanbar.org/content/dam/aba/images/abanews/2016/FLSReport_FNL_WEB.pdf.

69. See *id.*

70. For a description of the ABA Futures Commission’s charge and work, see *id.* at 4.

71. *Id.* at IV-V.

72. *Id.* at 30.

73. *Id.* at 39.

“courts much-need guidance as they consider how to regulate the practice of law in the [twenty-first] century.”⁷⁴

Although the regulatory objectives are very general and unobjectionable when applied to lawyers, the ABA Futures Commission Report states that the “regulatory objectives are intended to cover the creation and interpretation of a wider array of legal services regulations, such as regulations covering new categories of legal services providers,” including nonlawyer providers.⁷⁵ This signaled to some that the ABA Futures Commission recognized “that non-lawyer provision of legal services is already a reality with which lawyers and the public must deal.”⁷⁶

Before the ABA Futures Commission Report was finalized, the Commission sponsored a resolution proposing that the ABA House of Delegates adopt the Model Regulatory Objectives for the Provision of Legal Services.⁷⁷ “[T]he debate at the ABA’s House of Delegates was highly contentious.”⁷⁸ Those who opposed adoption of the resolution believed adopting the regulatory objectives would effectively “bless

74. *Id.*

75. *Id.* at 40.

76. Thomas D. Morgan, *Inverted Thinking About Law as a Profession or Business*, 2016 J. PROF. LAW. 115, 122.

77. The regulatory objectives 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
- 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, disciplinary sanctions for misconduct, and advancement of appropriate preventative or wellness programs
- J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system

Am. Bar. Ass’n, Resolution 105: ABA Model Regulatory Objectives for the Provision of Legal Services (Feb. 8, 2016), http://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_midyear_105.docx.

78. See Alberto Bernabe, *Justice Gap vs. Core Values: The Common Themes in the Innovation Debate*, 41 J. LEGAL PROF. 1, 14 (2016).

nontraditional legal services providers by outlining guidelines for their regulation, as opposed to encouraging the bar to combat the nontraditional providers through [UPL] rules.”⁷⁹ Despite the very strong opposition, the resolution passed following an amendment that “emphasize[d] the importance of preserving lawyers’ professional core values and specifically reject[ed] the notion of nonlawyer ownership of firms.”⁸⁰

Under section two of its report, the ABA Futures Commission recommended that states “explore how legal services are delivered by entities that employ new technologies and internet-based platforms and then assess the benefits and risks to the public associated with those services.”⁸¹ Before adopting any new regulations, the ABA Futures Commission Report urged states to “study [legal services providers] in their legal marketplace, collect data on the extent to which [the providers] are benefiting or harming the public, and determine whether adequate safeguards against harm already exist under current law.”⁸²

The study described by the ABA Futures Commission is the type of examination the Board of Directors for the New York County Lawyers Association (NYCLA) launched when it appointed the NYCLA Task Force on On-line Providers (NYCLA Task Force). The Board of Directors authorized the Task Force to study all relevant issues related to online legal providers (OLP) and to make recommendations to the board.⁸³

After a year-long study that included an all-day public forum, the NYCLA Task Force issued its report.⁸⁴ The Report of NYCLA Task Force on On-Line Legal Providers Regarding On-Line Legal Documents (NYCLA Task Force Report) balances concerns related to access to justice and consumer protection.⁸⁵ On the issue of access, the NYCLA Task Force found, “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

79. See, e.g., Samuel V. Schoonmaker IV, *Withstanding Disruptive Innovation: How Attorneys Will Adapt and Survive Impending Challenges from Automation and Nontraditional Legal Service Providers*, 51 FAM. L.Q. 133, 171 (2017) (“ABA Family Law Section leaders and several voices speaking on behalf of solos and small firms stressed core professional values in their unsuccessful opposition to [the resolution].”).

80. Bernabe, *supra* note 78, at 14-15.

81. ABA FUTURES COMMISSION REPORT, *supra* note 68, at 41.

82. *Id.*

83. See NYCLA Press Release, *supra* note 21, at 1.

84. *See id.*

85. NYCLA TASK FORCE REPORT, *supra* note 57.

modestly priced on-line legal forms available.”⁸⁶ On the issue of consumer protection, the NYCLA Task Force stated, “Most important, many OLPs do not now provide basic protections for sensitive consumer information or for consumer use of on-line forms.”⁸⁷ To address public protection concerns, the NYCLA Task Force concluded:

[T]here 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.⁸⁸

In explaining why regulatory action is necessary, the report recognizes the difficulty in identifying specific problems arising from the business practices of online providers.⁸⁹ As stated, many claims against online providers are settled, arbitrated, or abandoned.⁹⁰ The report also notes that “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.”⁹¹ Moreover, the report explained that

86. *Id.* at 5.

87. *Id.*

88. *Id.*

89. *See id.* at 16 (noting that LegalZoom’s general counsel “emphatically argued that proponents of further regulation have largely failed to identify any specific problems arising from LegalZoom’s business”). For a discussion of “claimed dangers” of online legal documents and an oft-cited *Consumer Reports* test of the quality and usefulness of online services, see Barton, *Early Thoughts on Liability Standards*, *supra* note 10, at 552-53. Based on a review of 1200 complaints that SiteJabber.com prepared for CBS MoneyWatch, consumers should be aware of the following problems:

- (1) “Legal documents . . . may not hold up in court.”
- (2) “Online customer service can be poor.”
- (3) “Legal sites may not file documents correctly.”
- (4) “Online referrals to local lawyers may be no bargain.”
- (5) “Some legal sites charge subscription fees.”

Mitch Lipka, *Can You Trust Online Legal Services?*, CBS NEWS (July 20, 2015, 8:55 AM), <https://www.cbsnews.com/news/can-you-trust-online-legal-services/>; *see also* Catey Hill, *Don’t Buy Legal Documents Online Without Reading This Story*, MARKETWATCH (Nov. 27, 2015, 9:29 AM), <https://www.marketwatch.com/story/dont-buy-legal-documents-online-without-reading-this-story-2015-11-23> (identifying traps for consumers such as “[s]implicity today could lead to complications later”).

90. *See* NYCLA TASK FORCE REPORT, *supra* note 57, at 16.

91. *Id.*

“[r]egulation is justified based on the particular risks of handling personal information and not on a record of consumer abuse.”⁹² Thereafter, the report discusses regulation that would “target specific issues and practices to protect the public while allowing responsible providers to serve a significant need.”⁹³

First, the NYCLA Task Force Report addresses disclosure provisions. The NYCLA proposal calls for online providers “to acknowledge that the services they provide are not” substitutes for a lawyer and for advertisers “to ensure that disclosures are clear and conspicuous on all devices and platforms consumers may use.”⁹⁴ Second, in the interest of consumer disclosure, the report explains why online agreements should use “‘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.”⁹⁵ The third concern that the report discusses is the importance of warranties, noting that unlike other internet purchases of consumer products, “flaws in many legal forms cannot easily be discerned by most lay customers.”⁹⁶ Fourth, the NYCLA report justifies a number of proposed arbitration and dispute resolution provisions because many online providers’ contracts “require resolution in arbitration rather than in court, and require that arbitration take place in distant locations inconvenient to the customer.”⁹⁷ Finally, the report underscores the importance of consumer privacy regulation for sensitive consumer information.⁹⁸

Following its discussion of concerns, the NYCLA Task Force Report proposes a set of regulatory standards designed to protect consumers in such areas as disclosure, privacy, and warranties. Although the report expresses a preference for “traditional regulatory and legislative approaches” to “protect and effectively ensure the public is adequately informed of risks attendant on using forms generated by OLPs,” the report

92. *Id.* at 5.

93. *Id.* The NYCLA Task Force Report explains that its recommendations are intended to counter the “one-sided nature” of online form contracts that disclaim warranties, impose burdensome arbitration requirements, and fail to protect sensitive consumer information. *Id.* at 19. The report also notes that online contracts ordinarily do not prohibit online providers from selling personal data or using it for marketing purposes. *Id.*

94. *Id.* at 27-28.

95. *Id.* at 28-30.

96. *Id.* at 30-31.

97. *Id.* at 31. The report also explains its proposal forbidding online provider contracts that bar class-action litigation. *Id.* at 31-32.

98. *Id.* at 32-33.

proposes “the adoption of industry-wide voluntary standards is a useful interim measure.”⁹⁹ The report presents these voluntary standards as “Best Practices for Document Providers.”¹⁰⁰

In three double-spaced pages, the NYCLA Task Force Report outlines nineteen best practices for document providers (“NYCLA Best Practices”).¹⁰¹ These best practices cover the following areas: (1) the usefulness and propriety of forms,¹⁰² (2) protection of customers,¹⁰³ (3)

99. *Id.* at 6.

100. *Id.* at 42-44.

101. *Id.*

102. The following are the best practices related to the usefulness and propriety of 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.

Id. at 42.

103. The following are the best practices related to protection of 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.

recommendation of attorneys to assist,¹⁰⁴ and (4) dispute resolution.¹⁰⁵ In each of these areas, the Task Force Report describes how these measures relate to reasonable care, transparency, and fairness in handling complaints.

These NYCLA Best Practices formed the basis for the proposed ABA Best Practice Guidelines for Online Providers dated January 2019.¹⁰⁶ In

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.

Id. at 42-43.

104. The following are the best practices related to recommending 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.

Id. at 43-44.

105. The following are the best practices related to 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.

Id. at 44.

106. The best practices set forth in the ABA Midyear Resolution proposed in January 2019 were largely the same as the best practices described in the New York Task Force Report, with slight differences. The ABA version of best practices changed references from "shall" to "should." For example, the New York version stated, "Document provider services ('Providers') *shall* provide customers with clear, plain language instruction as to how to complete their forms, and the appropriate uses for each." *Id.* at 42 (emphasis added). The ABA Resolution version states, "Document provider services ('Providers') *should* provide customers with clear, plain language instructions as to how to complete their forms,

Resolution 10A, the New York State Bar Association and New York County Lawyers Association asked the ABA to adopt the best practices. As noted above, the proposal was withdrawn for additional work and consultation on the proposed best practices.¹⁰⁷ Subsequently, a thirty-person Working Group labored to address issues raised by those who expressed concerns about the approach and best practices described in the proposal. As revised, Resolution 10A and ABA Best Practices Guidelines for Online Legal Document Providers set forth fifteen best practices under the following categories: The Utility of Their Online Legal Documents and Forms,¹⁰⁸ Protection of their Customers,¹⁰⁹ Recommendation of

and the appropriate uses for each.” ABA Midyear Resolution 10A, *supra* note 23, at 1 (emphasis added).

107. Feldman, *supra* note 24.

108. The following are the best practices related to the utility of 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.

ABA 10A Resolution and Report, *supra* note 22.

109. The following are the best practices related to the protection of customers:

Attorneys to Assist,¹¹⁰ and Dispute Resolution.¹¹¹ The ABA House of Delegates will consider the Resolution and Report at the ABA annual meeting in August 2019.

-
- (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.

Id.

110. The following are the best practices related to recommending an attorney 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.

Id.

111. The following are the best practices related to 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.

Id.

Proponents of the revised Resolution 10A recognize that the clock cannot be rolled back. They also maintain that the organized bar should not take an ostrich approach to online providers. These proponents acknowledge the important role that online services can play in bridging the justice gap, but believe consumer protection requires that online providers make changes to deal with a variety of issues. They see the tent as a big one that can accommodate lawyer and nonlawyer providers if consumer protection concerns are addressed.

Similarly, a certification process engages online providers by incentivizing them to adopt certain standards. Building on the best practices approach, the next section proposes that persons interested in consumer protection help develop a private governance approach that would enable online providers to obtain certification and distinguish themselves in the marketplace.¹¹²

III. Advantages of Using a Private Governance Certification Regime

When considering the current state of affairs related to automated documentation, some may believe the only options are “no regulation” or “government regulation.”¹¹³ This assessment fails to recognize models of “private governance.” Private governance or ordering refers to “regimes that are designed to achieve traditionally governmental ends but are independently designed, created, driven, and controlled by private sector actors and institutions.”¹¹⁴ The governmental ends that may be served by private governance “include the protection of public values, the provision of public goods, and the regulation of social conduct in a manner that is beneficial to society.”¹¹⁵

Private governance can serve as an attractive alternative to governmental regulation.¹¹⁶ Affected enterprises or industries may prefer

112. See Hadfield, *supra* note 28, at 248 (proposing a private governance approach relying on competitive private regulators overseen by public regulators). The “superregulator” approves and oversees the private regulators. *Id.* at 266. “This approach harnesses the benefits of private regulator, but without turning to self-regulation.” *Id.* at 248.

113. See Emily S. Bremer, *Private Complements to Public Governance*, 81 MO. L. REV. 1115 (2016) (confronting the idea that “no regulation” and “governmental regulation” are mutually exclusive alternatives).

114. *Id.* at 1116. Professor Bremer describes how regulatory regimes may fall on a spectrum that ranges from government regulation at one end to private governance at the other end. See *id.* at 1117.

115. *Id.* at 1116.

116. *Id.* at 1122.

a private governance approach over governmental regulation because the private governance approach is “predominantly controlled and driven by private institutions and actors.”¹¹⁷ Such private governance may provide more latitude than government regulation in that private governance relies on voluntary participation or compliance with standards.¹¹⁸ For example, private nongovernmental actors have adopted private standards and certification systems to set environmental norms.¹¹⁹

Private certification programs now play an important role in consumer protection.¹²⁰ A Department of Commerce Directory lists 180 U.S.-based nongovernmental organizations “that certify more than 850 types of products.”¹²¹ In characterizing “[p]rivate certification as a means of risk regulation” and declaring quality assurance to be “widespread,” Professor Timothy D. Lytton describes the role of private certification as follows: “Sometimes, private certification fills a void where government is unwilling or unable to regulate. At other times, private certification merely fills gaps in an area where government regulation operates but is not comprehensive.”¹²²

In the context of regulation, “certification” refers to a decision regarding “whether a particular product, service, or provider meets a standard.”¹²³ Outside of government certification and compliance, third-party companies or professional associations may certify goods, services, or industries.¹²⁴ “Modern technology, consumer convenience and considerations of efficiency and economy have been . . . the impetus for adopting industry-wide standards and implementing certification

117. *Id.* at 1120.

118. *See id.* at 1123.

119. *See id.* at 1120 (describing how private standards have emerged because of the failure of states and the federal government to meet widespread standardization needs and to address environmental problems).

120. In the United States, some certification is done by the government and some is done by private groups, such as trade and professional associations.

121. Timothy D. Lytton, *Competitive Third-Party Regulation: How Private Certification Can Overcome Constraints That Frustrate Government Regulation*, 15 THEORETICAL INQUIRIES L. 539, 540 (2014).

122. *Id.* at 540, 542.

123. Harry S. Gerla, *Federal Antitrust Law and Trade and Professional Association Standards and Certification*, 19 U. DAYTON L. REV. 471, 473 (1994).

124. *See Lytton, supra* note 121, at 543. For example, the private certification programs for kosher food and fire safety have been recognized for providing “reliable information to consumers and an incentive for the certified entities to improve the safety and quality of their products, services, or institutions.” *Id.*

programs.”¹²⁵ Although certifications cover a range of undertakings and concerns, private certification schemes “share the common features of (1) voluntariness, and (2) compliance with standards that go beyond legal obligations.”¹²⁶

As a form of private regulation or ordering, certifications offer various advantages. Because providers have the option to seek certification, the voluntary process is less threatening than more coercive approaches.¹²⁷ In addition to its voluntary nature, third-party certification can be used when special expertise is needed for the development of standards and the assessment of those standards.¹²⁸ Certifying bodies may also “be able to respond more nimbly, efficiently, and cost-effectively than administrative agencies to changes in technology, industry practice or other circumstances.”¹²⁹

Certifications also serve consumer interests in various ways. First, certifications may raise consumer awareness as to the significance of particular features of goods and services marketed by providers. By learning about the certification, consumers may obtain valuable and accurate information that they could not easily gather on their own.¹³⁰ In this sense, certification approaches are pro-competition because consumers may be provided information on which they can make their purchasing decisions.¹³¹ Second, if providers believe certifications influence consumer choices, a certification process may incentivize providers to make improvements necessary to meet standards to earn certification.¹³²

125. Tedd Blecher, *Product Standards and Certification Programs*, 46 BROOK. L. REV. 223 (1980).

126. Sarah Saadoun, Note, *Private and Voluntary: Are Social Certification Standards a Form of Backdoor Self-Regulation?*, 45 COLUM. HUM. RTS. L. REV. 281, 286 (2013).

127. See Gerla, *supra* note 123, at 503 (noting that “voluntariness” is a “vital factor in determining if standards pass muster under the antitrust laws”).

128. See Bremer, *supra* note 113, at 1123.

129. *Id.* (citing Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 139 (2005)).

130. See Gerla, *supra* note 123, at 504.

131. See *id.* (arguing the incentive to adhere to standards is created by the preferences of informed consumers and that “[t]his is the essence of the competition and free markets which the antitrust laws seek to promote”); see also Hadfield, *supra* note 28, at 262, 263 (suggesting that market mechanisms fail when consumers are presented with standard-form contracts on a take-it-or-leave-it basis and accept contracts without knowing what they are agreeing to).

132. See, e.g., Lisa Bollinger Gehman, Note, *Achieving Transparency: Use of Certification Marks to Clean up the Fashion Industry’s Supply Chains*, 9 DREXEL L. REV.

IV. How a Certification Program Benefits Consumers and Online Providers

In addition to the general advantages of certification regimes, there are particular benefits to using a certification approach to promote competition and to provide consumer protection related to automated legal documentation.¹³³ A certification approach may be more effective and efficient than relying on government regulation of online providers. As suggested above, there does not appear to be much of an appetite for governmental regulation of online providers of automated documentation. Governmental bodies may not have the resources to develop, implement, and enforce regulations related to online document providers.¹³⁴

Even if a governmental body expresses interest in regulating online providers of automated documents, government regulators' authority is limited to their own jurisdictions. This poses challenges when dealing with online providers that operate in numerous jurisdictions.¹³⁵ A provider doing business in multiple jurisdictions could be subject to different, even conflicting regulatory requirements.¹³⁶ A certification process could help

161, 177 (2016) (suggesting certification may incentivize fashion companies to clean up their supply chains in order to obtain more positive brand recognition among customers); see also Michael Vandenberg, *The Emergence of Private Environmental Governance*, 44 *Env'tl. L. Rep. (Env'tl. Law Inst.)* 10,125, 10,128-29 (2014) (referring to a survey of literature on private sustainability certification systems that concluded that, "despite the data limitations and difficulties of establishing causation, certification standards have had extensive influence on the adoption of sustainability practices").

133. The proposed certification of online providers would cover the entity that satisfies the standards for certification, not individuals associated with the entity. Another author has proposed "creating a certification system for legal paraprofessionals" who work with automated legal technology. Moxley, *supra* note 32, at 581.

134. In comparing the costs of government regulation to private certification, Professor Lytton notes that "private certification can generate fees to cover these costs." Lytton, *supra* note 121, at 540.

135. For example, as a licensed Alternative Business Structure in the United Kingdom, LegalZoom is subject to stringent regulations. Separate licensing and compliance may be necessary in other jurisdictions where LegalZoom provides services, such as states in Australia. See Emma Beames, *Technology-Based Legal Document Generation Services and the Regulation of Legal Practice in Australia*, 42 *ALTERNATIVE L.J.* 297 (2017) (examining the regulation of legal document generation services provided to the public in Australia).

136. For a discussion of how voluntary standards, certification, and labeling help address other jurisdictional problems that regulators encounter, see Tracey M. Roberts, *The Rise of Rule Four Institutions: Voluntary Standards, Certification and Labeling Systems*, 40 *ECOLOGY L.Q.* 107, 134-36 (2013). Additional transaction and compliance costs could contribute to an increase in consumer costs.

harmonize standards.¹³⁷ Providers that meet the standards can use the certification in marketing around the U.S. and internationally.

A private certification process could benefit providers if it forestalls or preempts government regulation.¹³⁸ Although regulators may not pursue UPL complaints, online providers must still deal with uncertainty related to possible government action by legal profession or other government regulators.¹³⁹ Providers also face the possibility of legislative action, as illustrated by a 2019 bill sponsored by a Tennessee legislator.¹⁴⁰ Such legislation may be less likely to be proposed or to pass if decisionmakers believe certification standards address consumer protection concerns.¹⁴¹

Online providers also must deal with uncertainties related to the enforceability of contract provisions.¹⁴² If certification standards specify that online providers' agreements include particular contract provisions that are generally considered to be fair and reasonable, a court should be more likely to enforce the provisions.

A certification for online document providers could improve transparency by providing reliable information to consumers. As suggested by Dean Andrew M. Perlman, law-related services are

137. See George Richards, Note, *Environmental Labeling of Consumer Products: The Need for International Harmonization of Standards Governing Third-Party Certification Programs*, 7 GEO. INT'L ENVTL. L. REV. 235, 257-61 (1994) (discussing the advantages of international harmonization of standards used to assess companies and their products).

138. See Bremer, *supra* note 113, at 1122 (referring to private governance generally).

139. For example, the NYCLA Task Force Report suggested that “[r]egulators 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 [online providers].” NYCLA TASK FORCE REPORT, *supra* note 57, at 37.

140. See H.B. 1411, 111th Gen. Assemb. (Tenn. 2019), <http://www.capitol.tn.gov/Bills/111/Bill/HB1411.pdf>. This bill generally tracks the North Carolina statute providing an exemption for online providers who meet certain requirements, but the Tennessee bill adds a provision requiring that a provider furnish professional liability insurance for lawyers who review the provider's forms. *Id.* For more information on the North Carolina statute, see N.C. GEN. STAT. ANN. § 84-2.2 (West 2018).

141. See Saadoun, *supra* note 126, at 283 (asserting that certification may act as a signal to regulators that helps corporations avoid more rigorous regulation in the present, “in addition to fending off pressure for more stringent legal obligations enacted in the future”)

142. For example, a Missouri federal court refused to enforce the forum selection clause in the online provider's Terms of Service that stated that “the courts of the city of Los Angeles, state of California, [had] exclusive jurisdiction over any disputes.” See *Janson v. LegalZoom.com, Inc.*, 727 F. Supp. 2d 782, 785, 789 (W.D. Mo. 2010); see also Marjorie A. Shields, Annotation, *Validity and Enforceability of Forum Selection Clauses in Internet Transactions*, 84 A.L.R. 6th 589 (2013) (noting that “courts generally enforce forum selection clauses unless doing so would be unfair, unreasonable, or unjust”).

“credence goods,” meaning, “services whose quality is difficult to measure or assess.”¹⁴³ With credence goods, consumers have virtually no access to information about what they are purchasing either before purchase, during use, or after use.¹⁴⁴ Given the nature of law-related services, the lack of transparency related to the consequences of using online documents, and the disparate positions of the provider and the consumer, a certification could help consumers make informed choices.¹⁴⁵

Informed consumers may be willing to pay a price premium if they understand the value of the certification.¹⁴⁶ Advertising and public relations campaigns could be used to promote consumer awareness of the value of certification.¹⁴⁷ With targeting publicity, those consumers who are already using the internet to search for online legal documentation should be able to readily access information on the certification process and standards. From the standpoint of marketing, online providers may be interested in seeking certifications issued by a reputable body. Such a certification could help the certificate holders differentiate their products and services when competing with other online providers.

A website of a well-known technology-management and process-outsourcing company illustrates how a provider can use a certification in marketing. On the main page of Cogneesol’s website under “Welcome to Cogneesol,” the company refers to the International Organization for Standardization (ISO) standard that it holds.¹⁴⁸ This certification

143. Perlman, *supra* note 19, at 94. “For example, the ordinary consumer can have a difficult time assessing whether some kinds of transactional documents are well drafted and address a reasonable range of contingencies or existing law.” *Id.* See also Markovic, *supra* note 9, at 344 (noting that ordinary individuals who retain lawyers are not in a position to negotiate protections or assess the quality of legal services they receive).

144. See Roberts, *supra* note 136, at 123.

145. The certifying body would serve as a type of intermediary in evaluating whether the provider met certification standards.

146. See *id.* at 126 (suggesting that favorable press and price premiums can incentivize participation in voluntary standards, certification, and labeling systems).

147. See Patricia A. Moyer, Note, *Private Certification Versus Public Certification in the International Environmental Arena: The Marine Stewardship Council and Marine Eco-Label Japan Fisheries Certification Schemes as Case Studies*, 43 VAND. J. TRANSNAT’L L. 533, 559 (2010) (referring to a consumer survey to illustrate that eco labeling cannot influence consumer decisions when consumers are unaware of the existence of the label, let alone, its meaning). Consumers who do not recognize or value the certification may continue to make their purchasing decisions on the basis of price.

148. See COGNEESOL, <https://www.cogneesol.com/> (“Cogneesol is a global ISO 9001:2008 company offering impactful business & technology solutions across industry verticals to help them grow & remain profitable.”).

communicates that the company has its management house in order.¹⁴⁹ An online provider of automated legal documents could also use a certification to signal to consumers that the provider has met certification requirements.

Law firms have also obtained ISO certifications to communicate that they have implemented quality management systems.¹⁵⁰ These law firms may use the certification in business development and in meeting the requirements of consumers who only do business with holders of ISO certifications.¹⁵¹ Even experienced consumers of legal services may rely on certifications to distinguish “outstanding legal service providers from mediocre ones.”¹⁵² Similarly, an online provider could point to a certification in marketing and business development. An internet-savvy consumer could rely on the certification to evaluate the many online providers that now provide automated legal documents.

Online providers could also use a private governance certification program to help address the “lemons problem” that arises when information asymmetries in unregulated markets prevent consumers from distinguishing the quality of products and services.¹⁵³ A certification

149. To obtain an ISO 9001:2008 certification, a company must meet the requirements that the International Organization for Standardization specifies for quality management systems. *See ISO 9001:2008*, INT’L ORG. FOR STANDARDIZATION, <https://www.iso.org/standard/46486.html> (last visited Apr. 22, 2019).

150. “Some law firms have pursued ISO 9000 certification— (or the international standard LAW 9000), a specialized quality management standard for legal practices.” Patrick J. McKenna, *Six Elements of Meaningful Differentiation*, INT’L REV., Spring 2013, at 4, 6, <https://www.jdsupra.com/post/fileServer.aspx?fName=2b64a268-9877-41ca-ac0f-efe6af41eb67.pdf>. Law firms can obtain other ISO certifications. For example, to help address client concerns related to data security, some law firms are seeking ISO 27001 and 27001 certifications, which set forth standards for information security. *See* Heather Evans & Michele C.S. Lange, *The Cure to the Big Data Headache: What to Know for Peace of Mind*, ACC DOCKET, Dec. 2014, at 71, 72.

151. *See* Susan Saab Fortney, *The Role of Ethics Audits in Improving Management Systems and Practices, an Empirical Examination of Management-Based Regulation of Law Firms*, 4 ST. MARY’S J. LEGAL MAL. & ETHICS 112, 125 (2014) (reporting that a small number of law firms sought ISO certification for business development purposes).

152. Kriss Will, *A Quality Odyssey: What Quality Assurance Means in a Law Firm Environment*, 15 LEGAL MGMT. 21, 22 (1996).

153. The following concisely describes how information asymmetries create market failures:

In a lemons market, however, buyers lack the information to distinguish among high-, medium-, and low-quality products or services. When sellers cannot reliably signal high quality to buyers, it is rational for buyers to assume that all products or services are of equally lower quality. The standard example is

program, as a reputational system, can alleviate the lemons problem by assisting consumers in making better informed decisions.¹⁵⁴ The certification effectively acts as a shorthand signal about the quality of the products and services provided.¹⁵⁵

Most importantly, from the industry perspective, a certification process may enable providers to play a role in helping shape standards. Providing legal documentation to consumers around the U.S. and other countries poses unique challenges. Through a private governance approach, providers can have a voice in formulating feasible standards that address the special circumstances related to automated legal documentation.¹⁵⁶

Although the voluntary nature of certification may appeal to providers, one risk is that the certification process loses credibility if the standards do not address consumer protection concerns.¹⁵⁷ From the outset, this concern should be recognized and addressed by engaging a representative group of persons interested in meaningful standards that not only are feasible for online providers but also that protect consumers.

Exploring a certification process should be a collaborative endeavor that provides interested persons the opportunity to evaluate possible standards.¹⁵⁸ Rather than relying on the online providers to develop a

an unregulated used car market, where there is no way to know which cars are lemons and which are not. This uncertainty depresses the price of good cars as well as bad.

Amy Shapiro, *Who Pays the Auditor Calls the Tune?: Auditing Regulation and Clients' Incentives*, 35 SETON HALL L. REV. 1029, 1077-78 (2005).

154. See Adam Thierer et al., *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the "Lemons Problem,"* 70 U. MIAMI L. REV. 830, 849-54 (2016) (using the lemons-problem framework to examine reputational incentives in commercial interactions).

155. *Id.* at 853.

156. For example, the certification standards may include a form of online dispute resolution for claims. Online dispute resolution may provide "fair, efficient, effective, convenient and inexpensive solutions for disputes in the global e-commerce market." Dafna Lavi, *Three Is Not a Crowd: Online Mediation-Arbitration in Business to Consumer Internet Disputes*, 37 U. PA. J. INT'L L. 871, 877-87 (2016) (analyzing the advantages and concerns related to different models of online dispute resolution of consumer internet disputes); see also Amy J. Schmitz, "Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178 (2019) (examining the potential of binding online arbitration to resolve consumer disputes).

157. Using the approach proposed by Professor Gillian Hadfield, public oversight to protect consumer interests would be provided by a "superregulator" responsible for making sure that markets for rules are competitive and accountable. Hadfield, *supra* note 28, at 265.

158. See Roberts, *supra* note 136, at 129 (suggesting that "voluntary standards, certification and labeling institutions facilitate norm development").

certification system, a non-profit group could spearhead a process to examine different approaches to certification. Two such groups with representatives from around the world are the International Bar Association (IBA) and the Conference of Legal Regulators (ICLR).¹⁵⁹ These organizations could assemble stakeholders, including representatives from consumer groups, state and federal regulators, bar associations, certification professionals, and online providers.¹⁶⁰ The process for developing the standards and certification process must be both inclusive and rigorous. Otherwise, the certification approach could be viewed as a form of toothless regulation designed to serve the interests of industry.¹⁶¹

Conclusion

For over two decades the organized bar has been split on the proper strategy for dealing with nonlawyer providers of automated legal forms. One camp staunchly believes interactive documentation amounts to the unauthorized practice of law. Persons in this camp are concerned about overtures or initiatives that may appear to legitimize online providers. In the opposite camp are those persons who applaud online providers for assisting millions of consumers who otherwise may not have access to lawyers. Supporters of online providers criticize regulatory actions as protectionism. Some warn that more government regulation hurts consumers by contributing to the providers “dumbing down” technological improvements to avoid legal challenges.¹⁶²

159. According to its website, ICLR members are “individuals working in legal sector regulation and associated fields.” *About Us: Organisations*, INT’L CONF. OF LEGAL REGS., <https://iclr.net/about-us/organisations/> (last visited May 28, 2019). The website for the International Bar Association (IBA) states that the IBA is the “*global voice of the legal profession*” and “the foremost organisation for international legal practitioners, bar associations and law societies.” *About the IBA*, INT’L B. ASS’N, https://www.ibanet.org/About_the_IBA/About_the_IBA.aspx (last visited May 15, 2019).

160. See Gerla, *supra* note 123, at 516 (“The participation and acquiescence of consumers in setting of the standard[s] furnishes some assurance that the standard is not a form of overreaching by a producer or provider cartel because consumers have an interest in avoiding exploitation by producers.”).

161. See Jeanne C. Fromer, *The Unregulated Certification Mark(et)*, 69 STANFORD L. REV. 121 (2017) (advocating for “robust procedural regulation of certification standard-making and decision-making that would detect and punish poor certification behavior”).

162. See Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J. L. & BUS. 1, 65 (2012) (suggesting that companies may not

Between these two extremes is the perspective reflected in the NYCLA Task Force Report and ABA 10A Resolution and Report. Both reports recognize how online providers of automated documentation have enhanced access to justice for persons of modest means. At the same time, the reports identify consumer protection issues that merit attention and some form of regulation. To address these concerns, the reports advocate the adoption of industry-wide voluntary standards described as best practices. In doing so, the reports effectively take the middle ground between no regulation and government regulation because the proposed best practices operate as a form of private governance.

To give online providers an incentive to actually adopt the best practices, this Essay proposes the development of a certification approach. In developing certification standards, the NYCLA Task Force Best Practices and the proposed ABA Best Practices Guidelines provide a foundation for tackling consumer concerns.

Certification based on such standards may protect consumers who otherwise would be unable to evaluate providers. A certification system promotes both transparency and consumer choice. When certification influences consumer choice, the process rewards those online providers who provide safeguards for consumers. In short, certification of online providers can balance self-interested, entrepreneurial innovation with consumer protection and service.¹⁶³ Such a process promises to serve millions of modest-means consumers who should not have to forgo certain protections in order to obtain access to justice.

improve customization and diagnostics if such moves would subject them to more regulation).

163. In proposing best practices, the NYCLA Task Force Report expressed a similar sentiment in suggesting that self-regulation along the lines of the best practices “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 TASK FORCE REPORT, *supra* note 57, at 38. *Compare id. with* ABA 10A Resolution and Report, *supra* note 22, at 4 (arguing for 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”).