

# **APPENDIX D**

# **BACKGROUND MATERIALS**

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# The Florida Bar

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## MEMORANDUM

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To: Board of Governors

From: Lori S. Holcomb

Date: August 16, 2019

Re: Online Legal Service Providers Activity in Other Jurisdictions

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Online legal service providers have been operating for many years. As technology improves and advances, so do the services offered by the online providers. What started out as a disk or CD with fill in the blank legal forms, has now evolved into interactive software assisting consumers. The problem is that for the most part, the online service providers are not regulated which means the public is not protected. Several jurisdictions have addressed the issue of online legal service providers from the standpoint of the unlicensed practice of law. The approach of chapter 23 is a bit different.

### Activity in Other Jurisdictions

North Carolina and Tennessee have statutes exempting websites that offer consumers legal forms and interactive software from the definition of the unlicensed practice of law. There is a similar proposal being considered in Washington. The rules provide that the practice of law does not include a web-based provider who offers access to interactive software that generates a legal document based on the consumer's answers to questions presented on the software as long as the requirements of the rule are met. Generally, the rules require that the form be reviewed by a lawyer licensed in the jurisdiction, contain a disclosure that the form is not the substitute for the advice of a lawyer and provide for a consumer satisfaction process. Registration with the state bar or equivalent regulatory agency and annual renewal is also required.

The California report of the state bar task force on access through innovation of legal services issued in July also addresses online services providers from the unlicensed practice of law standpoint but goes further than the other jurisdictions and proposes possible rules for service providers that mirror some of the Rules of Professional Conduct. The relevant recommendations are:

- Add an exception to the prohibition against the unauthorized practice of law permitting State-certified/registered/approved entities to use technology-driven legal services delivery systems to engage in authorized practice of law activities.
- State-certified/registered/approved entities using technology-driven legal services delivery systems should not be limited or restrained by any concept or definition of “artificial intelligence.” Instead, regulation should be limited to technologies that perform the analytical functions of an attorney.
- The Regulator of State-certified/registered/approved entities using technology-driven legal services delivery systems must establish adequate ethical standards that regulate both the provider and the technology itself.
- Client communications with technology-driven legal services delivery systems that engage in authorized practice of law activities should receive equivalent protections afforded by the attorney-client privilege and a lawyer’s ethical duty of confidentiality.
- The regulatory process should be funded by application and renewal fees. The fee structure may be scaled based on multiple factors.

Interested companies could voluntarily submit to the additional regulations and receive a safe harbor from unlicensed practice of law prosecution. Lawyers who use approved technology products would be exempt from claims regarding assisting in the unlicensed practice of law and improper supervision. The California recommendations are still in the comment period.

In August 2018, the New York State Bar Association, a voluntary bar association, drafted a resolution on best practice guidelines for online legal document providers for presentation to the ABA. The resolution was withdrawn before a vote was taken. The resolution was brought back before the ABA in August 2019 and was approved by the House of Delegates. The resolution created the ABA Best Practice Guidelines for Online Legal Document Providers and urges the online providers to adhere to the guidelines. State adoption is voluntary.

The guidelines include the following:

- Online service providers should provide their customers with clear, plain language instructions as to how to complete their forms and the appropriate uses for each form.
- The forms that providers offer to their customers should be valid in the intended jurisdiction.
- Providers should keep forms up-to-date and promptly account for material changes in the law.
- Online service providers should notify customers of the terms and conditions of their relationship and customers should have to consent, such as by clicking on an “accept” button, to those terms and conditions.
- Providers should notify customers that the information they provide is not covered by attorney-client privilege or work product protection.

## Chapter 23

In Florida, nonlawyer preparation of legal forms has not constituted the unlicensed practice of law since 1978 when the Supreme Court authorized nonlawyers to sell legal forms and complete them with information provided in writing by the customer. *The Florida Bar v. Brumbaugh*, 355

So. 2d 1186 (Fla. 1978). Later, the rules were amended to allow a nonlawyer to engage in limited oral communication when assisting a customer in the completion of a Supreme Court Approved form. *The Florida Bar re Amendment to Rules Regulating The Florida Bar (Chapter 10)*, 510 So. 2d 596 (Fla. 1987). As technology changed, the Court's rules and holdings were applied to the different media. Therefore, in Florida it is not the unlicensed practice of law for a website to provide legal forms that are completed with answers to questions generated by the program.

Because it does not constitute the unlicensed practice of law for an online service provider to provide forms completed with interactive software, chapter 23 focuses on how the services can increase access while at the same time protecting the consumer. Chapter 23 creates a new program that allows online service providers to voluntarily register with The Florida Bar. The chapter provides requirements for online service providers to voluntarily register, permissible and prohibited communications, required disclosures to consumers, permitted and prohibited charges, and how registration is granted and revoked. Chapter 23 defines an online service provider as an internet-based business that provides or offers to provide legal services to the public. The legal services are limited to 1) providing legal forms the consumer can complete without the assistance of a lawyer, 2) providing legal forms with the availability of a lawyer to answer the consumer's questions, and 3) referring the customer to a lawyer.<sup>1</sup> Online service providers who register under the rule must certify, among other things, that the online service provider will not interfere with the lawyer's independent professional judgment thereby protecting against the rationale for prohibiting fee splitting. Registered online service providers may advertise that they are registered with The Florida Bar and may use an approved logo. Many of the best practices recently approved by the ABA are included in chapter 23.

The advantage of the approach taken by chapter 23 versus the approach taken in other jurisdictions is that chapter 23 can require additional safeguards. Merely stating that the conduct is authorized and requiring the forms be prepared by a licensed lawyer does little to protect the consumer. By voluntarily agreeing to regulation, The Florida Bar can exercise some oversight and control of services that are now largely unregulated.

<sup>1</sup> Chapter 23 recognizes that some registered online service providers will also be considered qualifying providers under rule 4-7.22. If this is the case, the chapter makes it clear that the registered provider must comply with both the chapter and the rule to the extent the rule is applicable.