


AMENDMENT

Title:	CHAPTER 23 REGISTERED ONLINE SERVICE PROVIDER PROGRAM
Type:	Rule Regulating The Florida Bar
Companion Rules:	None
Sponsor:	Special Committee on Technologies Affecting the Practice of Law
Staff Contact:	Lori Holcomb
News Notice Summary:	Creates a new chapter of the Rules Regulating The Florida Bar that provides requirements for online service providers to voluntarily register with The Florida Bar, permissible and prohibited communications, required disclosures to consumers, charges, and how registration is granted and revoked.
Justification for Amendment:	
History:	Special Committee on Technologies Affecting the Practice of Law approved 7-0 on February 7, 2019. Board of Governor's first reading on May 24, 2019. The bar's chief financial officer has determined that this new chapter could result in a significant fiscal impact. The Budget Committee approved 10-0 on July 18, 2019. Rules Committee approved 8-0 on a procedural basis on July 8, 2019. Program Evaluation Committee approved 16-0 on a strategic basis on July 18, 2019.
Section Committee Opinion	
Impact Statement	 FIS Chapter 23.pdf
Substantive Committee:	
Assigned to Substantive Committee on:	
Substantive Review Completed on:	
Approved?	<input checked="" type="radio"/> Yes <input type="radio"/> No By Vote of: 7-0
Budget Review Completed on:	
Approved?	<input checked="" type="radio"/> Yes <input type="radio"/> No By Vote of: 10-0
Program Evaluation Review Completed on:	
Approved?	<input checked="" type="radio"/> Yes <input type="radio"/> No By Vote of: 16-0
Rules Committee Review Completed on:	
Approved?	<input checked="" type="radio"/> Yes <input type="radio"/> No By Vote of: 8-0
Ready for Board Final Action?	<input type="radio"/> Yes <input checked="" type="radio"/> No
Board Review Completed on:	
Approved?	<input type="radio"/> Yes <input checked="" type="radio"/> No By Vote of:
Date Publication of Notice of Proposed BOG Action:	5/1/19 7/1/19 09/01/2019
Dates of Board Readings:	5/24/19 7/19/19
Next Referral:	BoG - Final Action
Referral History:	PEC - Strategic Review, Budget - Fiscal Review, BoG - Final Action PEC - Strategic Review, Budget - Fiscal Review, Rules -

Procedural Review, BoG - Final Action
BoG - 1st Reading

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Attachment:



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Proposed Amendment

CHAPTER 23

REGISTERED ONLINE SERVICE PROVIDER PROGRAM

23-1 PURPOSE

Every resident of Florida should have access to the legal system. A person’s access to the legal system is enhanced by the assistance of a qualified lawyer. Floridians often encounter difficulty identifying and locating lawyers who are willing and qualified to consult with them about their legal needs. Qualifying providers meet certain of these needs under rule 4–7.22 and chapter 8 of these rules governing nonprofit lawyer referral services. Notwithstanding those services, a significant gap remains in the access to the justice system for the residents of Florida.

The purpose of this chapter is to allow the voluntary registration of online service providers to provide greater access to legal services and the legal system and greater protection of the public.

This chapter sets forth the registration requirements for an online service provider to qualify for the safe harbor under this chapter. Registration is voluntary. Nothing contained in this chapter may be used in an unlicensed practice of law proceeding under these rules or may be construed to permit any activity that is otherwise prohibited as the unlicensed practice of law, as that is determined by the Florida Supreme Court.

COMMENT

The chapter is intended to provide greater access to legal services, the legal system, and members of The Florida Bar while at the same time providing public protection which is lacking. These goals are achieved by creating voluntary registration for online companies that are providing or offering to provide legal services to the citizens of Florida. The chapter is not intended to establish regulation of the online service providers that are not registered under this chapter. Online service providers that voluntarily register under this chapter agree to be regulated by The Florida Bar and the Supreme Court of Florida. Online services providers that

voluntarily register under this chapter also receive benefits that are not available to online service providers that do not register. This chapter recognizes that some online service providers that do not voluntarily register will be subject to other rules contained in the Rules Regulating The Florida Bar. Nothing in this chapter is intended to replace or supersede those rules. This chapter does not permit activities that would otherwise constitute the unlicensed practice of law or provides as a defense in an unlicensed practice of law matter.

23.2 DEFINITIONS

RULE 23-2.1 GENERALLY

For purposes of this chapter, the following terms have the following meaning:

(a) Online Service Provider. An online service provider is an internet-based business that provides or offers to provide legal services to members of the public. Legal services for the purposes of this chapter include only the following: 1) providing legal forms the consumer can complete without a lawyer's assistance, 2) providing legal forms with the availability of a lawyer to respond to questions from the consumer including assisting the consumer in completing and filing the legal form, and 3) referring the consumer to, or matching a consumer with, a lawyer. Nothing in this rule allows or authorizes an online service provider to engage in the unlicensed practice of law.

(b) Registered Online Service Provider. A registered online service provider is an online services provider that has registered with The Florida Bar under this chapter.

(c) Legal Form. A legal form is:

(1) a current form approved by the Supreme Court of Florida as defined elsewhere in these rules; or

(2) a form consistent with current Florida Law that has been reviewed and approved by a member of The Florida Bar eligible to practice law in Florida.

(d) Board. The board is the Board of Governors of The Florida Bar.

(e) The Bar. The bar is The Florida Bar.

(f) Lawyer. A lawyer is a member of The Florida Bar eligible to practice law in Florida.

(g) Consumer. A consumer is a person or legal entity which uses, or seeks to use, the services of a registered online service provider.

23-3 APPLICATION OF QUALIFYING PROVIDER RULE

RULE 23-3.1 GENERALLY

An online service provider that meets the definition of a qualifying provider under rule 4-7.22 must comply with that rule, except that a registered online service provider may advertise, charge, and collect fees as provided elsewhere in this rule and is not required to file advertisements with The Florida Bar for review.

COMMENT

In some instances, a registered online service provider will also be considered a qualifying provider as defined elsewhere in these rules. This would occur, for example, where the registered online service provider matches a consumer with a lawyer to assist with a legal issue. If a registered online service provider is also a qualifying provider, the registered online service provider must also comply with the requirements of the qualifying provider rule including complying with lawyer advertising rules, referring consumers only to persons lawfully permitted to practice law in Florida, receiving no payment that is an improper division of legal fees, placing no requirement or pressure on participating lawyers for cross referrals, annual reporting to The Florida Bar of the names and bar numbers of participating lawyers, providing documentation of compliance with these rules to participating lawyers, responding to any official bar inquiry within 15 days, using its actual or registered fictitious name in all communications with the public, not leading the public to believe the provider is a law firm or directly provides legal services to the public, and disclosing to prospective clients at the time of referral the lawyer's bona fide office location by city, town, or county. However, unlike a qualifying provider who is not registered pursuant to this chapter, a registered online service provider may advertise using the designation "Registered With The Florida Bar," may include an approved logo on all advertisements and communications, and may collect the lawyer's fee directly from the consumer and take a portion of the fee for the referral or match.

Not all registered online service providers will also be considered a qualifying provider. For example, a registered online service provider would not be a qualifying provider and would not have to meet the requirements of rule 4-7.22 if the registered online service provider only provides forms that can be completed without the assistance of a lawyer, instructions and general information about the legal process and legal issues. This type of registered online service provider would be able to use the designation "Registered With The Florida Bar" and include an approved logo on all advertisements and communications.

23-4 REQUIREMENTS

RULE 23-4.1 APPLICATION

(a) Application. To register under this chapter, an online service provider must complete and send to the bar at its headquarters address in Tallahassee an application promulgated by the bar that is signed by an individual having the authority to bind the online service provider and includes the following:

- (1) the name and the URL address of the online service provider;
- (2) a description of the services offered by the online service provider;
- (3) the name, address, telephone number, and e-mail address to which a consumer can direct any complaints or concerns about the services received from the online service provider;
- (4) a certification that the online service provider will not interfere with the

lawyer's independent professional judgment in representing clients or direct the lawyer's activities in representing clients;

(5) a certification that the online service provider will submit to jurisdiction in a Florida forum for resolution of disputes with Florida consumers;

(6) a certification that the online service provider will provide The Florida Bar with copies of all consumer complaints about the suitability of the form used or the quality of the services provided and will notify The Florida Bar how all these consumer complaints were resolved without disclosing any information confidential under law;

(7) a certification that the online service provider understands that registration and revocation of registration under this rule is solely at the discretion of The Florida Bar;

(8) a sworn statement by an individual having the authority to bind the online service provider that the online service provider has read and will abide by the provisions of this rule; and

(9) a registration fee set by the bar's executive director.

(b) Review by The Florida Bar. The bar will review every application received for compliance with this chapter. If the online service provider meets all of the requirements of this chapter, the online service provider will be added to the roll of Florida Bar registered online service providers and a certificate of registration will be issued. If the bar determines that the application is incomplete or that the online service provider does not meet all of the requirements of this chapter, the bar will notify the online service provider.

RULE 23-4.2 ANNUAL RENEWAL

A registered online service provider must re-register annually with the bar to retain its registered status. The annual registration process will follow the time requirements for annual membership fees payments by Florida bar members. The annual registration process will require that registered online service providers pay a fee set by the executive director and provide a certification by an individual having the authority to bind the online service provider that it remains in compliance with the requirements of this rule.

RULE 23-4.3 DUTY TO UPDATE

A registered online service provider must inform the bar promptly of any circumstance that would render the entity ineligible for registration and any changes in the information required by this rule.

23-5 ADVERTISING AND COMMUNICATIONS

RULE 23-5.1 GENERALLY

(a) Designation. A registered online service provider may use the designation “Registered With The Florida Bar.”

(b) Prohibited Communications. A registered online service provider may not state or imply that its services, including forms that are provided, are a substitute for the advice of a lawyer. A registered online service provider may not state or imply that the bar has approved an advertisement, the registered online service provider, any participating lawyer, or the services offered by the registered online service provider or any participating lawyer.

RULE 23-6 REQUIRED DISCLOSURES

RULE 23-6.1 GENERALLY

(a) Source of Form. If the registered online service provider is using a form approved by the Supreme Court of Florida, the form must be designated as a Supreme Court Approved form. If the registered online service provider is using a form that has been reviewed and approved by a member of the bar, the form must state that it has been reviewed by a member of The Florida Bar.

(b) Lawyer-Client and Work Product Privilege. The registered online service provider must inform consumers that communications with the registered online service provider may not be protected by the lawyer-client privilege or work product privilege before allowing the consumers to provide the registered online service provider with information about their matters. The registered online service provider must require the consumer to acknowledge this disclaimer before the consumer may proceed with the service.

(c) Dispute Resolution. The registered online service provider must inform consumers of the process for submitting complaints and of the process for resolving disputes, including a statement that the registered online service provider will submit to jurisdiction in a Florida forum for resolution of disputes with Florida consumers. The registered online service provider must require the consumer to acknowledge this disclaimer before the consumer may proceed with the service.

(d) Use of Consumer Information. The registered online service provider must inform the consumer of all the ways, if any, the registered online service provider intends to use and share the consumer’s personal and legal information. The consumer must be informed before initiating the relationship and be provided with an affirmative opt-in so that the consumer has expressly acknowledged understanding that the information will be used and shared.

COMMENT

Registered online service providers operating in Florida must comply with state and federal requirements regarding privacy and security of consumer information, which may include personal, legal, medical, and financial information. These requirements are in addition to any

requirements imposed by this chapter.

23-7 CHARGES

RULE 23-7.1 GENERALLY

(a) Permissible Charges. When the services of a registered online service provider include the participation of a lawyer, the registered online service provider may impose a charge on the participating lawyer. The charge must be reasonable and based on the registered online service provider's costs for marketing and administration and may allow a reasonable profit. In all events, any charge imposed on the participating lawyer must be imposed regardless of whether the lawyer is hired by the consumer. Except as provided elsewhere in this rule, the registered online service provider's charge may vary, and the registered online service provider may set the fee the lawyer charges.

(b) Impermissible Charges. A charge imposed under this rule may not be based on the perceived or actual value of the consumer's legal matter or on the outcome of the services provided.

(c) Collection of Payments to Lawyers. When the services of a registered online service provider include the participation of a lawyer, the registered online service provider may collect the participating lawyer's fee directly from the consumer, retain its charge imposed on the participating lawyer from the fee collected from the consumer, and remit the remainder to the participating lawyer.

COMMENT

A registered online service provider may charge a lawyer who participates in its service. Charging a lawyer is not prohibited unless the charge constitutes fee sharing. The prohibition against fee sharing is based on preserving the lawyer's independent professional judgment and discouraging improper solicitation of clients by a third party who expects to collect a portion of the lawyer's fee for doing so. A charge based on the registered online service provider's advertising and administrative costs plus a reasonable profit would not constitute fee sharing and is allowed as long as the lawyer is charged regardless of whether the consumer ultimately chooses representation by that lawyer. This charge may vary based on the method of advertising and the type of matter. For example, a registered online service provider may have a standard charge for a dissolution matter that varies from the standard charge for an immigration matter. Because the charge is the same regardless of the actual or perceived value of the consumer's legal matter or whether the lawyer accepts the case or the client accepts the lawyer, the charge is not improper fee splitting. Conversely, a registered online service provider's charge based on the perceived or actual value of the consumer's legal matter would constitute improper fee splitting and is prohibited.

How the lawyer is paid is a factor that must be considered in determining whether the payment constitutes improper fee splitting. Collecting the payment and remitting it to the lawyer mitigates in favor of a conclusion that the charge is impermissible. Therefore, an online service provider who is not registered with the bar may not collect the payments due to the lawyer. On the other hand, a registered online service provider may collect the payments due to the lawyer and remit that payment to the lawyer. When registering, the online service provider agrees to be

bound by this chapter, which contains safeguards to prevent the registered online service provider from affecting the lawyer's independent professional judgment and engaging in improper solicitation. Collecting the payment and remitting it to the lawyer is not improper with these safeguards in place.

23-8 REVOCATION OF REGISTRATION

RULE 23-8.1 GRANTING AND REVOKING REGISTRATION

Granting registration of an online service provider under this chapter is solely at the discretion of The Florida Bar and may be revoked.

COMMENT

The Florida Bar may revoke registration including, but not limited to, for failure to comply with these rules. For example, The Florida Bar may revoke registration for nonpayment of registration and renewal fees, failing to timely update information required by these rules, and failing to provide the required sworn statement of compliance signed by an individual with authority to bind the online service provider. The Florida Bar may revoke registration based on consumer complaints about the registered online service provider, although The Florida Bar will not directly handle or resolve any consumer complaints about the registered online service provider.

Composed by Elizabeth Tarbert **on** 03/13/2019 **at** 09:49 AM

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MEMORANDUM

To: Board of Governors

From: Lori S. Holcomb

Date: August 16, 2019

Re: Online Legal Service Providers Activity in Other Jurisdictions

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 statues 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.¹ 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.

¹ 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.