



# The Two Sides of Online Legal Documents

By James Kobak Jr.

**I**s the rapid proliferation of online legal documents and related information a bad thing – tantamount to the unlicensed practice of law? Or are these documents, referred to as OSPs, merely electronic versions of those printed legal forms that were sold in stationery stores long before there was an internet? Or do they fall somewhere in between?

To answer these questions, the New York County Lawyers' Association held

**JAMES B. KOBAK, JR.** is currently Senior Ethics Counsel at Hughes Hubbard & Reed LLP and was previously the firm's general counsel and a partner for 40 years. He is a member of NYSBA's Law and Technology Committee, COSAC and the House of Delegates and a life fellow and director of the New York Bar Foundation and a former president of NYCLA as well as a member of the task force that prepared the report described in the article

a day-long forum that examined the growth and nature of online legal services. Contributing to the discussion were representatives of online legal providers, consumer advocates, online technology experts and experts in attorney ethics, along with David P. Miranda, a past president of the New York State Bar Association and New York Assemblyman Matthew Titone (D-Staten Island), as well as research and analysis by a NYCLA task force.<sup>1</sup> The result of that forum, held at NYCLA on September 30, is a report (the Report) that was adopted by the NYSBA House of Delegates at its November meeting. Several other bar associations around the state have also added their endorsements.

The Report notes that the growth of online legal services is impressive – a multibillion dollar market that continues to expand. It warns that such success cannot be ignored and clearly

reflects a consumer need that is not being met for the indigent, the middle class and small businesses by traditional legal practice. But the Report also identifies a need for safeguards, and looks at ways to assure that those safeguards will be put into place.

The Report is limited to examining online documents and related information and does not examine in detail the extension of OSP platforms into the significant and lucrative – and potentially more complicated – area of recommending or otherwise providing access to lawyers. As will be discussed in a later article by a member of NYSBA's Law and Technology Committee, this broader scope of activity implicates prohibitions on referral services as well as fee-splitting with non-lawyers. These issues, particularly concerning Avvo, have been the subject of recent ethics opinions in New York and elsewhere<sup>2</sup> and may be the subject of further work or events at NYCLA. They will also be a focus for further work by the NYSBA Law and Technology Committee.

The Report concludes that a knee-jerk reaction to online documents as the unauthorized practice of law will be unproductive and is shortsighted and inappropriate. At their core, online documents and related information offered by the OSPs are the modern equivalent of form books and legal guides dating back hundreds of years, and to the legal forms once sold in stationery stores. The Bar's challenges to form books and other services have generally been unsuccessful as these products are protected by the First Amendment and efforts to eliminate them will likely founder on constitutional as well as other grounds. They may also raise antitrust concerns as old-fashioned, anticompetitive protectionism.

Moreover, in the opinion of the NYCLA task force that conducted the research and analysis into these issues, the growth of OSPs reflects a serious unmet need the legal profession must come to grips with in a responsible way. Properly monitored and regulated, the explosion of OSPs provides one way to narrow the justice gap faced by so many poor and middle class Ameri-

cans, even if OSPs are not the ultimate or optimal solution.

While the Report recognizes the inevitability of the online service market, it also recognizes and discusses a number of attendant risks and limitations and possible ways to address them. The Report recommends three broad categories in which reform and recognition of obligations and standards of behavior should be required:

1. Disclosure of the limitations and risks of not consulting a lawyer, along with the need for transparency and improvement in terms of agreements, including warranties and duties to keep forms up to date and reliable.
2. Barring unfair and one-sided arbitration clauses.
3. Protecting the confidentiality and privacy of user information.

The Report expresses a preference for legislation or regulation to address the product quality and consumer protection issues it identifies, and lists 18 requirements that would ideally be included in any statute or regulatory regime (see sidebar). Recognizing that implementation of such an approach would face obstacles and, even if successful, would not take place immediately, the Report also suggests voluntary best practices for providers to adopt to gain a competitive advantage through recognition of the relative adequacy and reliability of their services.

The OSP market continues to grow and new services have proliferated, even in the short time after the Report was issued. Innovation in this area abounds, and poses both risks and benefits for lawyers and consumers alike. NYSBA's Law and Technology Committee, as well as bar associations like NYCLA, will be closely monitoring and reporting on future events. ■

1. NYCLA's Board of Directors established the task force at the recommendation of its then-president, Carol A. Sigmond. It was headed by Arthur Norman Field and members included NYSBA President-elect Michael Miller. Other members were Joseph J. Bambara, Vincent Chang, Sarah Jo Hamilton, James B. Kobak Jr. and Ronald C. Minkoff.

2. New York State Bar Association Comm. on Prof'l Ethics Op. 1132 (Aug. 8, 2017). See also Utah Advisory Committee Op. 17-05 (Sept. 27, 2017); N.J. Advisory Committee Op. 732 (2017); Pa. Op. 2016-2000 (2016).

## What Every OSP Should Do

1. Provide clear, plain language instructions as to how to complete and use each form.
2. Either (a) warrant that the form of documents provided to customers will be enforceable in the relevant State, or (b) inform customers, in plain language, that the documents may not be enforceable and steps that can be taken to make them enforceable, including, if necessary, retaining a lawyer.
3. Keep documents up to date and account for changes in the law.
4. Assume legal responsibility for the proper recording or filing of the document if the online provider selects the service agent.
5. Use only clickwrap agreements with customers and require customer consent and express opt-in to any changes made to the customer agreement after initial registration.
6. Inform customers of any intended use or sharing of customer information and ask for consent and express opt-in authorization.
7. Inform customers, in plain language, that the information customers provide is not covered by the attorney-client privilege or work product protection.
8. Use "best of breed" data security practices to maintain the privacy and security of information provided by customers.
9. Protect customer information from unauthorized use or access by third persons and inform customers of any system breach.
10. Make all efforts to remedy and cure any harm a breach of customers' personal and legal information may cause.
11. Not sell, transfer or otherwise distribute customers' personal information to third persons without express opt-in authorization.
12. Retain customer information and any completed forms for a period of three years and make the form available for customer use during that period free of charge.
13. Inform customers, in plain language, of the importance of retaining an attorney to assist them with any legal transaction.
14. Not advertise their services in a manner that suggests that they are a substitute for the advice of a lawyer.
15. Disclose their legal names, addresses, and email addresses to which customers can direct any complaints or concerns about their services.
16. Submit to the jurisdiction of the courts in New York and permit customers to opt for arbitration of any disputes.
17. Not preclude their customers from joining in class actions or require shifting of legal fees to customers.
18. Make all notifications clearly legible and capable of being read by the average person and intelligible if spoken aloud. (In the case of OSP websites, the required words, statements or notifications should appear on their home pages.).