

Report: The Study Committee on the Future of Law Practice

Introduction

The VSB Study Committee on the Future of Law Practice was charged with evaluating current developments and assessing how these changes will impact the practice of law. We were asked to make recommendations for further study by the Bar. We are presenting this report to the VSB Council with the hope of disseminating it to members of the VSB with the Council's approval.

With the rapid pace of change, we hope to illuminate the changing landscape of the practice of law both to help educate lawyers and to help prepare them for a future that seems to continually and rapidly morph. The changes are no longer evolutionary – they are revolutionary, fueled especially by technology, and by a populace more receptive than lawyers to technology and new and different ways of learning, obtaining information, and consuming professional services. The changes in law practice will no doubt continue at a furious speed.

The Committee recognized early on that it had undertaken a Herculean task – due to both the scope of potential review and the moving target as changes hit even during our review. We read everything we could find on the future of law practice – articles, ethics opinions, studies by other bar associations – the list goes on and on.

We identified a number of external forces affecting the practice of law: (1) advances in technology that have changed the way lawyers practice, giving clients the expectation that lawyers will provide services more efficiently and cheaply, and giving consumers the belief that they can obtain legal information and handle many legal matters on their own; (2) increasing competition from non-lawyer service providers that offer legal information and legal documents to consumers; (3) generational pressures that are likely to impact law firm business models – estimates are that 70% of law firm partners are baby boomers, while millennials are expected to make up half the global workforce by 2020; (4) clients' dissatisfaction with billable hour arrangements encouraging lawyers to offer fixed fees and other alternative billing arrangements; (5) increased insourcing of legal services by corporate clients, along with increased unbundling of tasks so that lawyers are only asked to complete the specific tasks that require legal judgment; and (6) accelerated globalization of legal services via both traditional models and technology, leading to an increase in multijurisdictional law practice and a decreasing relevance of geographical boundaries.

We determined that we should narrow the topics we would explore in a single year and therefore divided ourselves into three subcommittees:

Technology and the Practice of Law—this subcommittee looked at advances in technology and how law practice is being changed by new technologies. It also studied how the Internet and other forces have created a market for non-lawyer legal service providers.

Access to Justice—this subcommittee focused on the “justice gap” - the unmet legal needs of a large majority of our low and middle income population despite an oversupply of lawyers in the U.S. It also focused attention on initiatives by the organized bar and the efforts of other organizations to address the justice gap, including some projects in other U.S. jurisdictions to allow licensed paraprofessionals to deliver legal services.

Alternative Business Structures—this subcommittee looked at jurisdictions outside the U.S. that permit nonlawyers to participate and have ownership in legal services firms, as well as the status of any similar initiatives or proposals in U.S. jurisdictions.

We realized that we needed input from outside our Committee and sought the perspective of some of those involved in shaping the future of law practice. The following people possessed knowledge and experience of interest to the Committee, and we invited them to make presentations to further our knowledge followed by wide-ranging questions from Committee members. We thank all of the guests below.

- Mary Bauer, Executive Director, Legal Aid Justice Center
- Henry N. Butler, Dean and Professor of Law, George Mason University School of Law
- Karl A. Doss, VSB Director, Access to Legal Services
- Leonard C. Heath, Jr., Chair, VSB Mandatory Continuing Legal Education (MCLE) Board
- Dan Lear, Avvo, Director of Industry Relations
- Gary D. LeClair, co-founded and served for more than 25 years as Chairman and CEO of LeClairRyan
- Judy Martinez, Chair of ABA’s Presidential Commission on the Future of Legal Services
- Chas Rampenthal, LegalZoom General Counsel
- Thomas A. Williams, III, Immigration Attorney, Law Offices of Thomas Williams, Founder of LiveImmigration.com

While the Committee is dedicated to teaching lawyers how to prepare for the future, it also recognized that it should not engage in any form of protectionism. We say this because we mean to be very clear. As legal futurist Richard Susskind states in *The End of Lawyers?*, the law does not exist for the purpose of keeping lawyers busy or employed. Likewise, the organized bar does not exist to regulate the market. The mission of the VSB is to regulate the legal profession of Virginia, to advance the availability and quality of legal services provided to the people of Virginia, and to assist in improving the legal profession and the judicial system.

We feel the pain of lawyers overwhelmed by a digital world that is foreign to them – hence our emphasis on the need to educate lawyers and identify developments so they can find their place in that world, be competitive, and provide high quality legal advice and professional services.

This is a report that is meant to be read easily and used to enhance lawyers’ practices and to advise them of probable changes they will see in the near and long term.

Technology and the Practice of Law

It is easy to forget how much technology has impacted the legal profession. Richard Susskind said in the mid-1990s that e-mail would become the primary means of communication between lawyers and clients. He was labeled by critics as “dangerous” and “possibly insane.”

Well, we all know what happened. The e-mail deluge began to rule our professional lives. The practice of law has changed more in the last 25 years than in the previous 250.

The accelerating pace at which technology is changing cannot be overstated. Regulations, standards and best practices aimed at technology present challenges. Even so, attempts to keep up must be made. For example, the Legal Cloud Computing Association has developed basic and concise standards that lawyers and law firms should use in selecting a cloud computing provider. <http://www.legalcloudcomputingassociation.org/standards/>.

Broadly speaking, technology has changed how law is practiced and will continue to force the legal profession to rethink and assess how lawyers use technology; how they bill for services and develop alternative billing methods; how they communicate with clients; how they market, and how they protect client confidences in a world where information is stored and accessible in cyberspace.

The Rise of the Machines: Artificial Intelligence – Watson and his Progeny

In 2011, a lot of TV viewers were glued to their TV screens as IBM’s Watson, a computer with artificial intelligence, took on two of the best players “Jeopardy” had ever seen and beat them handily.

At its core, Watson is a question answering system. He (how easy it is to personify a machine!) takes a question expressed in everyday language, seeks to understand the question in detail, and then returns a precise answer to the question.

Watson has many children now, in many sectors.

Watson’s entourage knew from the beginning that they would tackle the healthcare industry first, but they correctly judged that any information-intensive industry (and yes, that means the legal industry) was ripe for Watson’s talents.

News reports began to indicate that IBM was moving into the legal market in 2015. The stories reported on the Watson University Competition, at which a group of University of Toronto students built a legal application on top of the Watson platform. The “son of Watson” was called “Ross, the super intelligent attorney.”

What makes Watson so powerful is his ability to learn - so the more lawyers use him, the better he gets. Ross, by taking advantage of the natural language and cognitive computing platform that Watson offers, can predict the outcome of court cases with a confidence rating, assess legal

precedents, and suggest readings to prepare for cases. Ross, who his creators say has “gone to law school,” is now being funded by Dentons, a global law conglomerate with over 6,000 lawyers. Another major law firm, Baker Hostetler, has agreed to license Ross for use as a “legal assistant” in its bankruptcy, restructuring, and creditors’ rights practice.

Without question, Ross can replace some lawyers. Who needs an army of associates to do legal research when you can just ask Ross? On the other hand, there are lawyers who are irreplaceable because of who and what they know and their expertise in “custom” law – negotiating, strategic planning, litigation skills, etc.

The Altman Weil 2015 “Law Firms in Transition” Survey had responses from 320 law firms, including 47% of the 250 largest U.S. law firms. The survey indicated clearly that legal thought leaders increasingly anticipate that work handled by human beings in 2015 will be handed over to intelligent systems.

When respondents were asked whether they could envision a law-centric artificial intelligence (AI) system replacing workers in their offices **within five to ten years**, 47 percent said paralegals could be replaced by AI in that time, 35 percent said first year associate work could be replaced, and 19.5 percent indicated that intelligent systems would be able to handle work done by third-year associates within that time frame.

Perhaps the most telling statistic is that the percentage of respondents who believed “computers will never replace human practitioners” has dropped dramatically from 46 percent in 2011, to only 20.3 percent in 2015. If this is what legal thought leaders are thinking, it is time to do some planning for our future. We acknowledge that no one can precisely determine when artificial intelligence will cause what is called “technological unemployment” but there is little question that the day will ultimately come.

This is causing a phenomenon known as “automation anxiety.” Vendors who sell machines with artificial intelligence are prone to say (because they do of course want to sell their machines), that lawyers should not worry about “temporary dislocation” because there will be “redeployment” of people to “higher-value activities.” No one has yet identified what those “higher-value activities” might be. But perhaps that makes sense. The World Economic Forum reported in 2016 that 65% of children entering primary school today will work in roles that don’t currently exist. (http://www3.weforum.org/docs/Media/WEF_FutureofJobs.pdf).

It is often said that the best way to predict the future is to create it, and that is certainly what legal innovators have done. We are now in the second generation of artificial intelligence, and there are many intelligent systems at work in the legal sector; we have discussed only Watson and Ross as the most visible and perhaps the most compelling story. We cannot fight the rise of the machines, but we may, if we embrace the inevitable, learn to co-exist with them.

Cybersecurity

The Supreme Court of Virginia made changes to Rules 1.1 and 1.6, effective March 1, 2016.

Rule 1.1 addresses a lawyer's duty to maintain competence. The Court added one sentence to Comment [6]: "Attention should be paid to the benefits and risks associated with relevant technology."

The Court amended Rule 1.6, (confidentiality of information) by adding a subsection (d) that reads: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule."

The Court also added four paragraphs of comments to Rule 1.6, recognizing that a breach of information security can occur in an office setting despite taking reasonable precautions. The comments include these important points:

- "The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure."
- A lawyer is not subject to discipline "if the lawyer has made reasonable efforts to protect electronic data, even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information."
- "Nevertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms."
- Reasonableness can depend on the size of a law firm and the nature of the practice and information.
- The lawyer need not be the one with the required technical competence. "The lawyer can and more likely must turn to the expertise of staff or an outside technology professional."
- Law firms should address practices such as staff training, access policies, procedures for third-party access, backup and storage, passwords and protective measures.

Following the announcement that these changes were coming, cybersecurity, already a hot topic at Virginia CLEs, became hotter still. Most of the law firms in Virginia are small law firms. We bear that fact in mind as we offer practical advice and best practice tips in the attached Appendix.

There is no such thing as "set it and forget it" when it comes to security. The threats and the defenses to those threats change constantly and firms must strive to keep up with the changes.

Lawyers once thought that we could stop attackers from entering law firm networks and we focused all our energies there. We now realize that a skilled hacker with sufficient funding and advanced technology is likely to succeed in attacking us. So the new mantra is Identify (assets that need to be protected), Protect, Detect, Respond, and Recover.

Even with our best efforts, a data breach may occur. We have only to look around to see major law firms that have been breached – and major companies as well. So the essential message of our new rules is "Don't let perfection be the enemy of the good." The focus is on reasonable efforts, which will certainly vary by size of law firm.

Law firms are being pressured by clients and insurance companies to up the ante on their security. Many law firms are now proactive about securing their data – a smart move on many fronts. Clients are more likely to engage law firms that have strong cybersecurity in place and some law firms use their security measures as a marketing tool. Clients’ concerns about law firm information security are likely to increase following the “Panama papers” leak, which revealed almost 40 years of client information about alleged money laundering and tax avoidance, apparently due to poor information security by the law firm involved.

For the smaller firms, the de facto standard has become the National Institute of Standards and Technology (NIST) Cybersecurity Framework. Law firms can self-certify that they are compliant or, if desired or required by a third party, engage an independent third-party auditor.

Larger law firms most often choose to be certified under ISO 27001 from the International Organization for Standardization (ISO). This certification is well beyond the reach of all but large firms because it is expensive in time and resources, and requires annual surveillance audits and recertification every three years.

Hence, the NIST is a better solution for most Virginia law firms.

Cybersecurity will continue to be a pressing concern for law firms, undoubtedly for all time. Protecting our confidential data in the digital world requires vigilance and re-education, which the Virginia State Bar is committed to providing via reports such as this and educational resources such as the VSB TECHSHOW, the Solo and Small Firm Conferences, the Annual Meeting Showcases and other educational outlets. The FBI is now partnering with the ABA to deliver Private Sector Notification cyber alerts to lawyers. The initial alert revealed that at least one cybercriminal has posted on a cybercrime site a “who’s who” list of mostly American law firms (nearly 50 of them) that he seeks to compromise with the assistance of a skilled hacker, promising to pay the hacker and share profits from insider trading with the hacker. The second alert warned that ransomware is becoming an epidemic and gave pointers for protecting data from a ransomware attack.

Non-lawyer Legal Service Providers

Avvo, RocketLawyer, and LegalZoom are but a few of the many Internet marketplaces for legal advice and document preparation for consumers. Although they will not all survive, Robert Ambrogi has noted that the number of non-lawyer legal startups —not law firms— has grown nearly threefold in the last two years, to a stunning 1,094. New legal startups have been added almost every week, according to Mr. Ambrogi, and the number is likely to continue increasing.

Avvo advertises that it is “the largest legal marketplace” in the country. LegalZoom asserts that within the next 4-5 years, it will have somewhere in the range of 30,000 to 50,000 lawyers

working for it. Companies like LegalZoom and Avvo have garnered the most attention but there are many others.

Both LegalZoom and Avvo offer short-term limited legal advice for a small fixed fee, i.e., Avvo Advisor—where \$39.00 will get a 15-minute consultation with a lawyer. LegalZoom allows consumers, for a fee, to follow up with a lawyer about the legal documents they have purchased to see if any changes or revisions are necessary.

In February 2016, Avvo launched its Avvo Legal Services using a network of private lawyers from which a consumer may select a participating lawyer to provide a particular limited legal service for a fixed fee. The services range from review of legal documents like business contracts and nondisclosure agreements to more involved matters such as uncontested divorce and citizenship applications. The company collects the flat fee from the client and keeps it until the lawyer completes the work, then deposits the fee directly into the lawyer's bank account and immediately afterwards withdraws Avvo's "marketing fee," which depends on the nature of the work done and the amount of the fee paid by the client.

Avvo also uses a "Frequently Asked Legal Questions" archive that allows a consumer to research over 10,000 FAQs that have been answered by lawyers. A consumer may post a new legal question on Avvo's "ask a legal question" site, and lawyers will respond with an answer. This is a free service that Avvo uses to attract viewers to its website and a feeder into its fee-based services. Avvo has also recently started offering free legal forms through its website and plans to have nearly 200 free forms available by the end of 2016.

For a fee, JustAnswer.com will connect a consumer "in minutes" with a lawyer after the consumer posts his or her question. RocketLawyer also promises "legal advice in minutes" to consumers, legal document preparation, and "legal plans" in which a customer may sign up for continuing consultation and document preparation. LawPivot is a Silicon Valley legal industry start-up with a legal advice Web site that provides legal answers through a network of attorneys. Like Avvo, sometimes the legal advice or legal information is free and sometimes the consumer pays a fee. Richard Granat, a law and technology commentator, stated that he posted a very complex legal question on LawPivot and within 24 hours had 8 answers from as many lawyers for a fee of \$49.50.

Granat says that these online legal services companies have "Uberized" the legal services market, referring to the crowd-sourcing company's revolution in the taxi services market. Like Uber, companies like LegalZoom and Avvo rely on a network of independent providers who are available or "on call." The online company links the consumer with the provider and takes a fee for making the connection. These are sophisticated lead-generation companies that have leveraged technology to advertise and market legal services over the Internet and link persons in need of legal advice or services with participating lawyers in the company's network.

Critics of these legal service providers complain:

- They do not play by the rules that apply to lawyers, when marketing and delivering legal services;
- Lawyers cannot participate without violating fee-sharing prohibitions and rules that prohibit a lawyer from paying for a referral [See Rules 5.4(a) and Rule 7.3(b)];
- They disclaim liability and do not warrant the legal sufficiency of the documents they create, whereas lawyers cannot limit their liability to a client for malpractice;
- Their work product is deficient or of poorer quality than an attorney's work product;
- A lay company cannot hold itself out as providing legal services;
- Participating lawyers are aiding and assisting in the unauthorized practice of law;
- They impermissibly set the legal fees and collect and hold those fees, raising issues of how the Internet company can be made to refund those fees in whole or in part if the client terminates the representation before the work is completed. For example, is Avvo required to refund an unearned fee to its customer if the customer/client terminates the engagement with the lawyer before the services are completed? See Rules 1.16(e) and 1.15(b). Is the customer/client entitled to a refund if Avvo becomes insolvent?

Some claim that many of these online legal service providers are cheaper, faster and more convenient than finding, hiring and paying for a lawyer directly. Proponents contend that the online marketing and client-generation these companies offer could be attractive to lawyers trying to establish a practice in the Commonwealth, especially new, solo and small-firm lawyers that lack the financial resources, time or know-how necessary to market their services and attract clients. The ban on lawyers sharing fees with nonlawyers in Rule 5.4(a) and on paying referral fees to nonlawyers in Rule 7.3(b) prohibits lawyers in Virginia from participating in many online legal services networks.

Consumers are more comfortable using the Internet to search for answers and solutions to their problems, including legal matters, and knowing up front what those services will cost. We now live in a do-it-yourself—learn-it-yourself world where consumers are interested in getting help solving their problems without bearing the expense of a professional service provider for a complete engagement. Younger consumers are accustomed to a world of mobile technologies and are less likely to engage a lawyer via the traditional method of making an appointment at a law office to consult with a lawyer. In other words, affordability is not the only reason consumers choose online legal service providers over hiring a lawyer. Consumers also increasingly look to social media to locate, rate, and recommend service providers, including lawyers. While in the past lawyers built their reputations by word of mouth, a lawyer's Google or Avvo rating now may be equally or more important. Avvo provides a rating system for lawyers and allows clients and former clients to post online reviews of their lawyers.

Lawyers in Virginia will be forced to rethink how they practice law and how to use technology to engage interested consumers. As Oregon State Bar's 2016 President Ray Heysell explains:

“[o]ne of the biggest challenges for the profession today. . . is that consumers are turning away from lawyers and seeking out alternative solutions, mainly by opting for *pro se* or self-representation.”

The VSB needs to study the current rules prohibiting lawyers from participating in these for-profit referral networks and whether the policies these rules are supposed to advance remain important in today’s law practice and legal market. Do they materially advance an important public protection interest? Or are they an unnecessary obstacle for lawyers trying to compete in a legal market whose landscape is rapidly changing?

State bars lack the resources to fight companies like LegalZoom and Avvo that have established a firm foothold in the legal services market. Further, UPL enforcement actions against these service providers would likely be viewed by the public and state legislatures as lawyers “protecting their turf” and impeding access to more affordable legal services. In an age of consumerism, enforcement actions successful in the short term could be a classic case of the bar winning the battle but losing the war.

LegalZoom does business in all 50 states and has delivered online legal document preparation since 2001. Efforts by regulatory bars to enjoin or shut down LegalZoom have not met with success. In 2014 the Supreme Court of South Carolina approved a settlement agreement in which it was stipulated that LegalZoom’s business model is not the unauthorized practice of law. On October 22, 2015, the North Carolina Bar and LegalZoom settled their case by a consent order, permitting LegalZoom to continue operating in North Carolina subject to some conditions:

- Conspicuously warn in multiple places on its website that it is not a law firm and is not a substitute for seeking legal advice from a lawyer;
- Remove its disclaimer of liability to the consumer; and
- Review of all of its form documents by a licensed North Carolina lawyer.

In June 2016, lawmakers ended the long-running dispute between the North Carolina State Bar and LegalZoom by passing legislation that allows online services to provide legal documents in that state.

Except for problematic attempts by regulatory bars to enforce UPL laws, lawyer regulators lack the authority to protect consumers that purchase legal services provided by online or other non-lawyer legal service providers. However, various state attorney generals and the Federal Trade Commission can enforce consumer protection laws and regulations that target unfair trade practices and deceptive marketing by those entities.

Assuming non-lawyer legal service providers are here to stay, they will at the very least force the legal profession to rethink and assess a vastly different competitive landscape; how the use of the lawyer’s service adds value over the new competitors, how to market that value; how lawyers can provide high-quality and faster services in a way that clients can afford and understand; and

how the bar regulates ownership of practices and what practices will look like. The *North Carolina Lawyers Weekly* commented: “LegalZoom’s settlement with the North Carolina State Bar might not be a harbinger of the demise of traditional legal services, but at the very least it’s showing lawyers throughout the state and country where the hands are on the clock.”

Some law firms are responding radically to the changing legal landscape reshaping the way they market and offer their services. Taking a cue from Avvo and LegalZoom, they are offering “unbundled,” or a la carte, legal services and free consumer self-help with legal issues. For example, Robert Ambrogi reports that a Florida law firm launched a website, LegalYou.com, that is in part a portal for self-represented litigants and in part a storefront for selling the law firm’s unbundled services. The site educates and assists people who are representing themselves while also providing them access to professional services on an as-needed basis. The new website educates consumers in a fun and creative way and makes legal information more interesting and consumer-friendly. Most importantly, it is owned and operated by a law firm.

Lawyer Advertising Rules and Internet Marketing, Social Media, etc.

The Internet and digital communications have required lawyer regulators to reexamine their lawyer advertising rules. Lawyers like to advertise that they have skill and experience in the practice of law by advertising successful outcomes, case results, or stating that they have been certified as a specialist in a field of law. Rule 7.1(b) requires a disclaimer if a lawyer wants to post a truthful case result, regardless of whether it is his own case:

A communication violates this rule if it advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Further, if a lawyer wants to post a truthful statement that he or she is certified in an area of practice, Rule 7.4(d) requires a disclaimer that there is no procedure in the Commonwealth for approving the certifying organization.

Twitter is a prime example of the struggle to comply with these rules, which were written in the time of print advertising, and do not always easily translate to new technology. Perhaps at first blush the disclaimer required by Rule 7.1(b) does not appear burdensome; however, the rule makes it impossible for a lawyer or law firm to mention case results on Twitter because of the

140 character limit on tweets.

A 2015 report issued by the Association for Professional Responsibility Lawyers calls for the simplification and deregulation of truthful commercial speech by lawyers:

The clear direction in which the United States Supreme Court has taken the regulation of commercial speech emphasizes that government must prove that the regulation it is defending does in fact advance an important regulatory interest, refusing to accept mere “common sense” or speculation as a sufficient basis for restrictions on advertising. In other words, the government must present objective evidence to support a ban or restriction on truthful commercial speech and cannot simply ban or restrict speech by fiat grounded in subjective intuition that the advertising is “potentially misleading.”

Association of Professional Responsibility Lawyers Regulation of Lawyer Advertising Committee Report (June 22, 2015) at 30 (citations omitted).

Truthful commercial speech cannot be regulated unless (1) the asserted governmental interest is substantial; (2) the regulation directly advances the governmental interests; and (3) the regulation is not more extensive than is necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

In *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990) the U.S. Supreme Court struck down an Illinois lawyer advertising rule that prohibited Gary Peel, a board-certified civil trial specialist, from advertising his National Board of Trial Advocacy (NBTA) certification on his letterhead stationery. The Court held that the contents of the attorney’s letterhead were neither misleading nor deceptive because the certification and licensure were both true and verifiable facts. The Court pointed out that the state’s complete ban on statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA, were too extensive, and therefore, did not meet the *Central Hudson* test, where the state could have imposed lesser restrictions such as “screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty.”

The plurality opinion in *Peel* left open the possibility that regulatory bars could require a “disclaimer” as a “lesser restriction” if a truthful and objectively verifiable statement or claim is “potentially misleading.” But reliance on the plurality opinion in *Peel* is a slim reed when reviewing the *Central Hudson* standards for regulating truthful commercial speech. The use of the “potentially misleading” standard to require lawyers to use disclaimers when making literally truthful and accurate statements or claims may fail the *Central Hudson* test.

The VSB should consider whether the current specific case results and specialization certification disclaimer requirements should continue.

Access to Justice

We reviewed various reports and information regarding initiatives undertaken which affect the practice of law and their impact on the access to justice. This material primarily discussed changes implemented by court systems; with one exception noted below, there is little information on internal changes undertaken by law firms or solo practitioners in structure, pricing or the manner of delivery of legal services.

The Access to Justice Gap

Research shows that legal services in civil matters for low and moderate income persons or families are an unmet need. One study reports that 80% of civil legal needs of the poor and up to 60% of the needs of middle-income persons remain unmet. The reasons for this are varied: funding for legal aid for the indigent has been substantially reduced (legal aid funding in Virginia has been reduced by 20% and IOLTA revenue decreased from \$500,000 in 2006 to \$50,000 today); the cost of private legal representation has increased; individuals often fail to recognize that a problem requires legal assistance; some want to avoid involvement in the legal system and resolve the issue another way; and funding for the court system to assist unrepresented litigants is limited. The decrease in federal funding resulted in a 20% reduction of legal aid attorneys and staff statewide. At the same time, the population in poverty increased by more than 30%. There is no question that the need to increase legal services to these groups exists now and will continue to exist in the future.

Programs Addressing the Gap

In Virginia

Research and presentations made to the committee and subcommittee identified a number of ongoing programs to reduce this justice gap. In addition to legal aid, pro bono representation has traditionally been a significant source of representation for this underserved group, but pro bono representation does not meet the needs. Although the aspirational goal for pro bono work contained in Rule 6.1 of the Rules of Professional Conduct should produce over 900,000 hours of pro bono work (40 hours per lawyer) annually in Virginia, the best estimate based on the data available is that Virginia lawyers are providing 80,000 hours annually.

Renewed initiatives are underway, such as the Firms in Service program and the Virginia Bar Association Pro Bono Council. The Firms in Service initiative is a collaboration of law firms and corporate law departments working in specific areas of the Commonwealth (such as Northern Virginia, Richmond, Roanoke and Tidewater), created to facilitate a one-stop shop for pro bono attorney recruitment to work with Legal Aid and other not-for-profit groups working with the underserved.

The Pro Bono Council exists to promote pro bono participation and awareness within the Virginia legal community; to assist legal aid organizations and other poverty law programs; to support the pro bono initiatives of the VBA Young Lawyers' Division; to assist with the 2016 Chief Justice's Pro Bono Summit; to help implement initiatives of the Access to Justice Commission; to coordinate with the VSB Special Committee on Access to Legal Services; and to execute special pro bono initiatives of the President of the VBA.

One example of how legal aid organizations try to serve as many eligible clients as possible despite their funding constraints is the Legal Aid Justice Center. The LAJC, which is funded by the Legal Services Corporation of Virginia and receives no funding from the federal Legal Services Corporation, utilizes pro bono lawyers in various ways to assist those individuals who cannot be served by the program's staff. Usually, pro bono attorneys accept referrals from legal aid on matters that fit within the program's service priorities and case acceptance policies. This allows programs to assist additional clients whom the program does not have the resources and staffing to serve directly. They may also participate in pro bono legal advice clinics. Occasionally, applicants who need help in an area outside the case priorities of the legal aid program, but who qualify financially will be served by one of the program's pro bono volunteers, but they also may be referred to the private bar if there isn't a suitable pro bono attorney available and willing to take the case. A client who is financially ineligible for services is provided with information about lawyer referral services and may also be directed to self-help information such as www.VALegalAid.org.

The Supreme Court of Virginia's Access to Justice Commission is pursuing a number of projects to coordinate, mobilize and strengthen access to justice activities in Virginia. The Commission seeks to enhance access through better use of technology, unbundling of lawyers' services, ongoing judicial education and revisions to the Canons of Judicial Ethics to improve the level of assistance the judges and Court personnel can provide to unrepresented litigants, and support for statewide and local pro-bono activities. Research also shows that while cost is often cited as the barrier to obtaining the service of lawyers, a significant number of people with legal needs do not engage a lawyer because they choose to represent themselves, because they do not think they need a lawyer, or because they want to resolve the matter without turning to legal intervention. (Only 17% of people in a recent Utah survey said cost was the barrier to seeking legal services.) The Supreme Court Access to Justice Commission is engaged in a program to educate the public through public service announcements about the importance of getting legal assistance and how and where to get it.

It is worth noting that 50% of the potential clients who request legal assistance from legal aid are turned away due to a lack of resources.

The Committee strongly supports these initiatives and others that are directed to enhancing access to justice through pro bono representation, increased financial support for legal aid groups, and additional programs that assist unrepresented litigants to secure legal services and navigate litigation processes. These initiatives, however, are only one part of the picture and are not necessarily responses to the ongoing changes to the practice of law, much of which is being driven by external forces.

In 2015, the Virginia Access to Justice Commission and the VSB Special Committee on Access to Legal Services Committee recommended that the VSB host a pro bono website. In August 2016, the VSB will launch virginia.freelegalanswers.com where low-income Virginians will be able to post legal questions and get answers from volunteer lawyers licensed in Virginia. This website is part of a new initiative by the ABA Pro Bono Committee to build and maintain a fifty-state website to provide online pro bono assistance to low-income citizens.

The Virginia Judicial System Court Self-Help Website, a project of the Virginia Access to Justice Commission, has been launched as of June 14, 2016, and can be found at <http://selfhelp.vacourts.gov/>. The newly launched website offers legal information on topics such as divorce, custody, visitation, support, landlord-tenant, small claims and traffic tickets. The website also enables the visitor to search for and download approved court forms, locate their case and find a court.

We think that lawyers and bar associations should also develop additional means to educate consumers on the selection of providers of legal services or self-help services, explaining the pros and cons.

Programs Addressing the Gap

Other Jurisdictions

A number of changes to the practice of law have been implemented by court systems or supreme courts in other jurisdictions. For example, New York and Arizona have “court navigators” who are non-lawyer volunteers trained in assisting unrepresented persons in limited civil proceedings (nonpayment, debt, and other civil proceedings) through retrieving information or research about a case. “Courthouse facilitators” have been introduced in California and Washington. This program often requires working under the supervision of a lawyer or completing certain qualifications and training requirements in order to provide information about procedure in certain types of cases as well as referring individuals to other available resources.

Non-Internet based programs have also been initiated by court systems in other jurisdictions that allow the delivery of limited legal services by persons who are not attorneys. These programs are referred to as Limited Licensed Legal Technicians (LLLTs) or legal document preparers (LDPs). In general, these programs authorize persons to engage in a limited legal practice area even though they do not have a JD degree or license to practice law. The practice areas include selecting and completing real estate closing documents (WA), family law (WA), and document preparation in such areas as uncontested divorces, bankruptcies, and wills (AZ, CA, NV).

In December 2015, the Utah Supreme Court created a Paralegal Practitioner Steering Committee to study whether paralegals should be permitted to independently represent clients in matters involving family law, residential evictions, and debt collection. The Committee is considering whether paralegals would be allowed to engage in the following tasks without being supervised by a lawyer: interviewing clients; informing clients of options; providing information for

navigating the legal system; explaining what forms may be needed and how to fill them out; preparing a form order based on a settlement agreement; and advising clients about their rights and obligations under a court order, how to enforce the order, and whether and how the order can be modified.

According to an ABA report, Oregon, Minnesota, Colorado, Connecticut, Florida, Michigan, and New Mexico are considering ways to expand the legal and law-related services that can be provided by nonlawyers. Each jurisdiction has its own education, training, supervision, and licensing standards but they share a purpose “to make available discreet and cost-effective legal and law-related services to those whose legal problems may not require a legal services provider with a law license.” These providers “are not meant to replace lawyers. They are intended to fill gaps where lawyers have not satisfied existing needs.” One assumption in creating these programs is that non-lawyer legal service providers will be able to offer services at a lower cost. This premise is based on the belief that the cost of their education will be less than that of graduating lawyers who must amortize their educational debt.

Another program designed in part to address the justice gap is the Pro Bono Scholars program introduced in New York in 2015. This program allows third year law students to take the February bar exam and then spend three months working at a public interest organization or in law school clinics. In its first year, 107 law students participated in the program and 85% passed the February bar. Arizona and Oregon also allow third year law students to sit for the February bar, although these states do not tie early bar examination eligibility to pro bono work.

Reaction to these programs has been mixed. Some commentators have argued that allowing or licensing nonlawyers to engage in even limited areas of law practice is unwise and unnecessary to bridge the access to law gap. They maintain that the number of currently licensed attorneys (1.268 million in 2012) along with the number of law graduates who are unable to find legal employment suggest that the supply side of legal service providers is adequate to meet the need for legal services. They contend that the “imperfect system of supply and demand for the delivery of personal legal services by lawyers” should be addressed.

Others argue that adding non-lawyer limited legal service providers will adversely affect solo and small firm practice. Commentators suggest that there is no evidence that the provision of services by non-lawyer providers will be lower in cost. Some commentators argue that allowing non-lawyer provision of legal services does not address the fact that many consumers do not understand the need to engage a lawyer. Others contend that non-lawyer limited service providers combined with Internet-based legal services supports and encourages the perception that lawyers are not necessary to consumers. Sixty percent of Utah lawyers disagreed with the proposal to provide a limited legal license for non-lawyer paraprofessionals adopted by the Utah Supreme Court.

Commentators uniformly expect that limited legal services provider programs will be regulated in some manner with provisions for ethics and discipline. However, there is not uniform agreement as to who will have oversight or how it will be funded.

A project jointly supported by the American Bar Foundation, the National Center for State Courts, and the Public Welfare Foundation – The Roles Beyond Lawyers Project - is creating a design for and evaluation of programs for non-lawyer provision of legal services. The project is also conducting an empirical study of the New York Court Navigators program and Washington State’s Limited License Legal Technician program.

In January 2016, a law firm in Florida opened a website, LegalYou.com, which offers free documents, informational materials, case tracking tools, and advice from its attorneys. The site states that it “is revolutionizing access-to-justice and capable of empowering EVERY CITIZEN with effective legal independence.” Users receive free access to various resources such as videos providing overviews of legal topics and guided interviews to assist in creating non-litigation documents, such as a residential lease agreement. The firm also sells additional services through memberships ranging from \$20 to \$100 per month. Members can purchase unbundled legal services advice from a lawyer at a price per minute, and receive “concierge services” such as arranging a mediator, court reporter, notarization, or courier services.

While these new initiatives allowing the provision of discrete legal services by nonlawyers have the promise of providing more access to more consumers at lower cost, the programs are new. There is little data to measure the programs’ impact on access to legal services. Additionally, there is no data regarding any adverse consequences to clients of non-lawyer supplied services or the costs of the additional licensing apparatus. The Committee suggests that the work of the Roles Beyond Lawyers Project should be reviewed and taken into account when considering similar programs in Virginia.

We need to be vigilant in identifying methods that will make legal services more accessible.

Alternative Business Structures

The Committee looked at steps being taken by other lawyer professional regulatory authorities to address the forces and disruptors (or innovators, depending on your point of view) in the legal services market through alternative business structures (ABS). In the United States, a few states are studying or have implemented reforms regarding who can deliver legal services. Outside the United States, some countries have adopted changes in how the delivery of legal services is regulated.

Actions Outside the United States

In the United Kingdom and New South Wales, Australia, lawyers are permitted to practice as part of an ABS in which nonlawyers hold an ownership interest and participate in the delivery of law-related services or are passive investors in firms that deliver legal services. In 2001, New South Wales enacted legislation permitting legal practices to incorporate, share receipts and provide legal services either alone or alongside other legal services providers who may, or may not, be legal practitioners. In addition to non-lawyer ownership, an incorporated legal practice (ILP) may be listed on the public stock exchange in Australia and outside investors may provide capital to ILPs.

In England and Wales, under the Legal Services Act of 2007, alternative business structures that have lawyer and non-lawyer management and ownership are permitted and may either provide legal services only or legal services along with non-legal services. In October 2010, Scotland's Parliament approved a Legal Services Act that permits and regulates alternative business structures in which Scottish solicitors are permitted to partner with nonlawyers and to seek capital from outside investors, provided solicitors hold the controlling ownership of the firm. Under this regime, privileged communications by and between solicitors or nonsolicitors with clients of the firm are protected by law.

A key component to regulating ABS in the U.K. and in Australia is called proactive management-based regulation (PMBR). This regulatory framework holds the firm or entity accountable for noncompliance with ethical requirements. Each firm must designate a practice manager that interacts with the regulator on an informal, collaborative and proactive basis, including audits and self-assessments, to ensure that their systems and procedures comply with ethical and regulatory requirements. While an individual lawyer may be subject to professional discipline, sanctions may also be imposed against the law firm for noncompliance. In contrast, attorney regulation in the U.S. is reactive, based upon lawyer misconduct having occurred. In most U.S. jurisdictions, a law firm may not be sanctioned if one of its lawyers engages in professional misconduct. The system implemented in Australia, which the profession there has embraced, has resulted in up to a 40% reduction in disciplinary complaints against regulated firms and lawyers.

Multidisciplinary practices (MDPs) are now also permitted in Germany, the Netherlands, Brussels, Ontario, British Columbia, and Quebec. In those practices, lawyers must maintain control over the services the firm provides. Participation in the MDP includes a “good character” requirement.

Actions within the United States

The American Bar Association has looked at this issue twice in the last six years. The ABA Commission on Ethics 20/20 was tasked with looking at the effects of globalization on the practice of law in the United States. The Commission considered a proposal to permit a limited form of non-lawyer ownership. That proposal was put out for comment but ultimately the Commission did not make any recommendation concluding that “there does not appear to be a sufficient basis for recommending a change to ABA policy on lawyer ownership of law firms.”

In 2014, the ABA Commission on the Future of Legal Services (“ABA Commission”) was created and charged with examining how legal services are delivered in the United States and recommending innovations to improve the delivery of, and the public’s access to, those services. The Commission held open forums across the country and looked at the different types of legal service providers that were authorized to perform clearly defined roles at the state and federal level. The closest they came to addressing ABS was a resolution, passed by the House of Delegates in February 2016, that urged “each state’s highest court, and those of each territory and tribe, be guided by the ABA Model Regulatory Objectives for the Provision of Legal Services when they assess the court’s existing regulatory framework and any other regulations they may choose to develop concerning non-traditional legal service providers.” That resolution, however, reaffirmed its support for the long-standing ABA policy against non-lawyer ownership of law firms.

In April 2016, the ABA Commission stoked the debate again by issuing a 15-page issues paper for public comment on whether it should ask the ABA House of Delegates to pass a resolution encouraging state courts to liberalize ethics rules that forbid non-lawyer ownership in law firms and multidisciplinary partnerships between lawyers and other professionals. Ultimately, no proposal was submitted before the deadline for consideration by the House of Delegates, so no action will be taken this year.

Finally, after two years of studying the delivery of legal services in the United States, the ABA Commission issued its final report in August 2016, finding that 80% of the poor and middle income populations do not get the legal help they need and recommending broad changes for improving the delivery and access to legal services. Paralleling much of what has been recommended in our report, the ABA Commission did not suggest how the profession should approach the issues of non-lawyer ownership of law firms, nonlawyers giving legal advice, and the regulation of legal service companies such as LegalZoom, Rocket Lawyer and Avvo Legal Services. The ABA Commission acknowledged that the traditional law firm model inhibits innovations that could enhance and make more cost-effective the delivery of legal services but did not recommend any changes in regulation that would remove the ethical constraints on non-

lawyer ownership and fee sharing with nonlawyers.

Several individual states have examined the issues surrounding the delivery of legal services and the question of amending their rules to allow non-lawyer ownership of firms.

The New York State Bar Task Force on Nonlawyer Ownership was charged with evaluating the non-lawyer ownership proposal of the Ethics 20/20 Commission. The Task Force found in a survey of NYSB members that over 78% of the membership was opposed to the change, with the largest majority being from solo and small firms. In the end, the 2012 Task Force Report found that there was a lack of meaningful empirical data about non-lawyer ownership of law firms and what its potential implications would be for the future of the legal profession.

The California Bar Civil Justice Strategies Task Force was set up to analyze the justice gap and develop an action plan. In the process they looked at a broad range of options including unbundling services, LLLT pilot programs, and ABS. Ultimately, the 2015 report recommended promoting limited scope representation and studying the design of an LLLT pilot program. As to ABS, they concluded that the California Bar should monitor the concept in other jurisdictions.

At this time, the only other actions taken by jurisdictions with respect to non-lawyer legal service providers is in the area of Limited Licensed Legal Technicians or licensed paralegal practitioners. The District of Columbia has allowed non-lawyer ownership of law firms, albeit in a very limited fashion, since 1991. Until very recently, it stood alone in that position. However, when Washington established its LLLT program, discussed above in the section on access to justice, the Washington State Supreme Court amended the Rules of Professional Conduct to allow lawyers to share fees and partner with nonlawyers (as minority owners) that are licensed LLLTs in that state.

Analysis of Impact

The question remains as to whether the ABS would significantly impact the issues facing the future of the practice of law. In D.C., where the ABS has existed for twenty-five years, there is still no conclusive evidence to answer this query. Representatives of the D.C. Bar told the Ethics 20/20 Commission that practical use and experience with the Rule has been sparse and the results hard to track.

The D.C. Bar's Global Legal Task Force has been examining the effects of globalization on the practice of law. The Task Force has been looking at the international efforts to deregulate the legal sectors, changing the ownership paradigm of law firms and allowing certain work to be done by nonlawyers. As they are evaluating these issues, the chair of the Task Force noted recently, "The reason [these other jurisdictions] adopted the change in the law was they thought they'd have lower costs for consumers with a lot more competition and with creative business structures. We are waiting to see if that happens."

Slater & Gordon, a large international firm with ILPs in Australia and the U.K. told the ABA Commission on the Future of Law Practice about the benefits in the regulatory changes that permitted them to become a publicly traded company - access to additional external capital (at lower cost) which has enabled them to expand the breadth of practice areas, the geographic reach of services, and choice of service models for clients. However, it is difficult to translate the impact or relevance of a publicly traded firm with 5,200 employees across 107 locations to the experience of a solo or small firm in Virginia.

Some argue that smaller law practices would benefit and have greater long term success, by the ability to bring in, with equity interests, other professionals or quasi-professionals, such as experts in business systems, marketing, technology, , leadership, and finance. This is an area that deserves further, in-depth examination.

Recommendations

The Committee makes the following recommendations:

1. That the Virginia State Bar Standing Committee on Legal Ethics review Rules 5.4(a) and 7.3(b) of the Virginia Rules of Professional Conduct, particularly with respect to fee sharing in the digital era, extending its examination to the various arrangements online where legal fees may be shared with nonlawyers; and whether to continue the prohibition on lawyers paying a fee to a non-lawyer company for referring a client.
2. That the Virginia State Bar Standing Committee on Legal Ethics examine whether the rules on lawyer advertising and marketing, including electronic marketing, as currently written, are practically and legally viable.
3. That the Virginia State Bar promote the availability of legal technology education, especially focusing on cybersecurity, striving to ensure that such education is available to Virginia lawyers through the Solo and Small Firm Conference, events such as VSB TECHSHOW and the VSB annual meeting, conferences developed by VSB committees. Further, that the VSB explore the possibility of giving webinars on this topic, which would help those who live in all regions of the state to attend quality programming.
4. That the *Virginia Lawyer* and other VSB publications regularly feature articles on the changing future of law practice.
5. That appropriate practice management, involving issues such as technology, case management, ethical marketing, and accounting, promotes the efficient, ethical and competent practice of law. The VSB's Mandatory Continuing Legal Education Board should consider exercising its discretion in favor of approving CLE courses that focus on law practice management topics and firm management, provided their primary

objective is to increase the attendee's professional competence and skills as an attorney and improve the quality of legal services rendered to the public, and promote the attendee's compliance with the Virginia Rules of Professional Conduct. See MCLE Regulation 103(b) and MCLE Op. 17.

6. That the VSB focus on broadening access to justice through traditional programs of legal aid and pro bono work, as well as efforts to make legal services more affordable and attainable through limited-scope representation and programs to enhance assistance to pro se litigants.
7. That this Committee continue to study the evolving issues surrounding alternative business structures.

Respectfully submitted,

A handwritten signature in black ink that reads "Sharon D. Nelson". The signature is written in a cursive, flowing style.

The Study Committee on the Future of Law Practice
September 14, 2016

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APPENDIX

Cybersecurity Best Practices

Cybersecurity best practices will evolve with new threats and new technologies. And what is reasonable to do will vary by size of the law firm, kind of practice, the costs, and the sensitivity of the data held, among other factors. But these are some good practices to consider:

1. All security patches should be promptly installed.
2. Software which is no longer supported, and therefore not receiving security updates, cannot ethically be used.
3. Authentication – passwords which are used to gain access to law firm data should be a minimum of 14 characters, using capital and lower case letters, numbers as well as special characters.
4. Passwords should not be shared or used in multiple places.
5. Law firms should have a password policy including some of the advice above as well as mandating that passwords be changed regularly (the recommended time period is every 30 days).
6. Where two-factor authentication is available, it should be utilized.
7. All mobile devices should be encrypted and have the ability to be remotely wiped if they are lost or stolen. They should also be protected by security software.
8. We are rapidly reaching the point where e-mails containing confidential data should be encrypted. Several years ago, encryption was cumbersome. Today, it is inexpensive and simple. Lawyers may wish to have an IT professional install and configure their encryption solution.
9. There should be a checklist for departing employees to ensure that all law firm data is returned to the firm and that no further access to the law firm network is technically possible.
10. Law firms should consider annual security assessments.
11. All law firms should have anti-malware software – larger firms should have enterprise grade software. Today’s software is not just antivirus software, but can also filter spam, recognize and prevent dangerous components in e-mails and attachments and remove them, and use heuristics to identify potentially dangerous communications.
12. Larger firms will want to explore intrusion detection systems and data loss prevention hardware/software.
13. All firms, of any size, should have an Incident Response Plan, in addition to other security related policies, including disaster recovery plans, BYOD (bring your own device), BYON (bring your own network), etc.
14. Identify all laws and regulations which may apply to your data. Do you hold data which is governed by HIPAA, HITECH or Sarbanes Oxley? Do you hold PII (personally identifiable information)?

15. All firms should have an updated network diagram so it is clear where all data resides and to assist digital forensics experts in the event of a security incident.
16. The security of all third-party vendors which hold law firm confidential data (including data in the cloud) should be investigated – again, the standard of reasonableness applies. Lawyers certainly need to read the Terms of Service of anyone who holds their confidential data.
17. Law firms should conduct annual training about data security, including the dangers of phishing and social engineering.
18. As ransomware has evolved, it is now critical that backups be engineered to be impervious to ransomware. In a very small firm, with an external hard drive backup, it may suffice to simply unplug the drive. But more complex backup systems are needed by larger firms.
19. Backups need to be tested on a regular basis.
20. Wireless networks should be protected by WPA2 encryption – the only encryption which has not yet been broken.
21. Logging should be enabled on servers whenever possible to aid in the investigation of security incidents.
22. Physical security is also important. Servers should be physically protected. Depending on the size of the law firm, lawyers may include server room door keys, prox cards, alarm codes, video cameras, etc. as part of physical security.
23. If you permit access to your wireless network for guests, their access should be on a properly configured guest network so that they cannot access your confidential data.
24. Make sure there is access control to important data – as an example, there is no reason why a secretary needs to access the firm’s financial data.
25. Change all default IDs and passwords – they are freely available on the Internet.
26. Consider a redundant Internet connection, in case your primary connection goes down.