The Future of the Practice of Law: Forces of Change in the 21st Century

by James M. McCauley, ethics counsel
Nationwide, law school admissions have plummeted to levels not seen in years. From 2010 to 2014, applications are down by twenty-eight percent and down by nearly half over the last eight years.\(^1\) Excluding perhaps some first tier law schools, on the average, law schools are only placing about half of their new graduates in jobs that require a law degree and a law license.\(^2\) Recently, ABA mandated disclosure policies forced law schools to reveal that they are paying stipends to graduates to work short-term jobs for employers to beef up their placement statistics.\(^3\) Law students, saddled with unemployment and a six-figure non-dischargeable student loan debt for their law degree,\(^4\) filed class action suits against some law schools.\(^5\) In March 2012, a New York state court judge dismissed the complaint filed against New York Law School but not without acknowledging the large and growing “lawyer bubble”:

> There is no question that this dearth of [legal job] opportunity is an unprecedented situation in the modern history of the practice of law and it cannot simply be ignored. If law suits such as this have done nothing else, they have served to focus the attention of all constituencies on this current problem facing the legal profession.... All must take a long, hard look at the current situation with the utmost seriousness of purpose.... [I]t is this court’s fervent hope that all the heat generated around this issue over this last year will be replaced with a renewed sense of responsibility to prospective applicants and students, starting at the law school level, and extending to the entire legal industry as we strive to address the concerns that have risen to the surface in this changed, challenging career environment.\(^6\)

Yet, law schools are currently graduating 40,000 plus graduates per year\(^7\) with well over 1.2 million lawyers already in the United States, which translates to four lawyers for every 1,000 persons living in the US.\(^8\) Notwithstanding these disturbing statistics, new law schools continue to come on-line each year. Encouraging even more students to go to law school to incur crippling loans so that they can fill more law schools and graduate only to enter a shrinking legal job market places the legal profession in jeopardy of not being able to correct this course and self-regulate its membership.\(^9\)

Like everyone else, members of the legal profession suffered the consequences of the Great Recession. Observers saw that law firm profits plummeted, firms dissolved, and shrank with layoffs of staff and lawyers.\(^10\)

There are other forces compounding the challenges to the legal profession in the 21st Century. First, an increasing dissatisfaction with the billable-hour system by consumers of legal services has forced lawyers and law firms to compete by offering fixed and capped fee billing arrangements. Second, corporate consumers of legal services are bringing their legal service providers in-house. The expansion and influence of corporate counsel over the past twenty years cannot be overlooked. Third, there is an increasing consumer-driven demand for lawyers to “do more for less,” otherwise clients will turn away and look for other service providers. Coming out of the Great Recession, large corporations and small businesses alike are looking for ways to cut back their legal services budgets. Fourth, increasing competition from non-lawyer providers such as Legal Zoom and Rocket Lawyer has reshaped the business of providing legal information and legal document preparation to consumers unable to pay the fees that lawyers typically charge for wills, leases, powers of attorney, deeds, etc. Fifth, advances in technology have contributed to the commoditization of legal services and client expectation that lawyers will provide services more efficiently and less expensively.\(^11\) Sixth, technology has served to accelerate the globalization of legal services, assisting US law firms to enter legal services markets overseas, foreign law firms to explore footholds in US legal services markets, an increase in multi-jurisdictional law practice, and a decreasing relevance of geographical boundaries.

While there is approximately one lawyer for every 265 persons living in the US,\(^12\) only one legal aid attorney is available for every 6,415 low-income people.
Notwithstanding the oversupply of lawyers and the shrinking opportunities for placement in the legal services market, the unmet legal needs of the poor and middle class continues to grow. While there is approximately one lawyer for every 265 persons living in the US, only one legal aid attorney is available for every 6,415 low-income people. One consequence has been an explosion in self-representation in both transactional and litigation work. Numerous commentators have sounded the alarm that the organized bar and its regulators need to rethink the nature and provision of legal services. Some commentators believe that if the legal profession fails to take heed and right its course, the profession and its self-regulation will become irrelevant.

As can be seen, some of the forces come from within the profession, i.e., law school policies and billing for legal services. Other forces are external and beyond the profession’s control. Further, some of these forces appear permanent, indicating that there will be no turning back to “the good old days,” and therefore the profession must determine how to retool and reinvent itself in this post-recession global market.

UPL enforcement against non-lawyer service providers will not be a cost-effective solution to stem the stronghold taken by companies such as Legal Zoom, which has served more than one million customers with its legal document preparation service and is a billion dollar enterprise. Companies such as Legal Zoom and Rocket Lawyer are prepared to fight for their share of the consumer legal services market through litigation and by lobbying state legislatures to pass bills protecting them from being charged with UPL. Professional regulatory authorities, with limited resources, are not equipped to wage war with the growing number of competitive non-lawyer service providers. Moreover, an unsympathetic public, a large portion of which is finding their legal needs largely unmet by the legal profession, will only view the bar’s enforcement of the UPL rules as anti-competitive barriers to access to services.

To date, a few organized bars in a few states seem to have embarked on a mission to find solutions to the crisis of the legal profession. For example, on January 8, 2015, the Washington Supreme Court adopted the Limited Practice Rule for Limited License Legal Technicians and the Limited License Legal Technician Rules of Professional Conduct. This will enable trained and certified legal document preparers to open for business and serve the public. They will operate independently and not under the supervision of a lawyer or law firm. The program went into effect February 3, 2015. California and Arizona also license and regulate legal document preparers.

Some other organized bars, including the American Bar Association and Law Societies in Quebec and Ontario, Canada, have been looking at developments in the UK and Australia, which now allow professional service firms composed of lawyers and non-lawyers to serve the public. Non-lawyers are permitted to own and invest financial capital in professional service firms that provide legal services to the public. Further, both the UK and Australia have in place a framework to regulate not just the lawyers individually, but also the non-lawyers and even the professional services entity itself.

Last year, VSB President Kevin E. Martingale appointed a fourteen-member Committee to Study the Future of Law Practice. The committee has met twice with the goal of attempting to get out ahead and address some of the forces that are reshaping the profession and legal services market. The committee started with a review of the ABA’s Commission on Ethics 20/20, which issued a report in 2011 from its Working Group on Alternative Business Structures. The working group’s commission was to study and make recommendations regarding regulatory reform so that US lawyers and law firms could participate on a more even playing field with the emerging alternative business structures in the UK, Europe, and Australia. In other words, should lawyers and law firms in the US be permitted to structure themselves differently than is permitted under current states’ regulations?

As the working group noted in 2011, and which is currently the status in 2015, the District of Columbia is the only US jurisdiction that permits non-lawyers to hold an ownership interest in a law firm. The ABA rejected Multidisciplinary Practice (MDP) in 2000 and the Virginia State Bar’s Council rejected MDP in 2003. Since that time, no organized bar in the US has reconsidered the issue; however, the legal services market landscape has changed dramatically over the ensuing years making it desirable to reexamine what regulatory structures may need reform and how to implement those changes without sacrificing the core values of the lawyer-client relationship and the profession’s role of serving the public.

While the “Big-5” accounting firms encroachment into legal services was the impetus for the MDP movement, a paradigm shift has since occurred in both the domestic and foreign legal services market in which smaller, but far greater in number, non-lawyer providers are competing with lawyers and law firms. Unable to
obtain regulatory reform in the US, some US firms are forming alternative business structures in the UK where up to 25 percent of the ownership of the firm may be held by non-lawyers.

Australia commenced an expansive approach to ABS that began in 1994 with the development and growth of Incorporated Legal Practices (ILPs).22 There were more than 2,000 ILPs reported in 2010 and their number is growing rapidly.23 There are around seventy known MDPs and, as of the working group’s report in 2011, at least 20 percent of the lawyers in New South Wales were working in non-traditional business practices, including thirty MDPs.24 A primary reason for this dynamic change was the public’s view that the legal profession and traditional law practice in Australia was not meeting their needs.25 Through these alternative business structures, ILPs are permitted to provide legal services and any other lawful service. The attorney-client privilege and duty of confidentiality have remained intact and still protect clients of these ILPs. In addition to non-lawyer ownership, an ILP may be listed on the public stock exchange in Australia and outside investors may provide capital to ILPs.26 Nevertheless, the Legal Services Commissioner worked closely with Gordon & Slayton, the first publicly traded legal services firm, to ensure its prospectus spelled out to investors that its primary duty is to its clients, then the courts and then investors. Sanctions for non-compliance with ethics and practice rules can be levied against the ILP as an entity, a concept that is largely foreign to lawyer regulation in the US.27

Multidisciplinary practices are now permitted in Ontario, British Columbia, and Quebec. Lawyers must maintain control over the services the firm provides. Participation in the MDP includes a “good character” requirement.28

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 provide only legal services or legal services in conjunction with non-legal services.29 In October 2010, Scotland’s Parliament approved a Legal Services Act that permits and regulates ABS in which Scottish solicitors are permitted to partner with non-lawyers and to seek capital from outside investors, provided solicitors hold the controlling ownership of the firm.30 Under this regime, privileged communications by and between solicitors or non-solicitors with clients of the firm are protected by law. MDPs are now permitted in Germany, the Netherlands, and Brussels. New Zealand allows IDPs but non-lawyers may not hold voting shares.31

One of the primary factors cited for these changes in the UK and Australia was public dissatisfaction with the traditional law practice model and the professional regulation of lawyers.32 The regimes in the UK and Australia have been in place for seven years or longer so there soon should be some experiential and empirical data to analyze regarding their impact on the legal profession, service to the public, lawyer regulation, and public protection.

Some of the questions the VSB’s study committee might consider include:

1. Are there integrated (legal and non-legal) services to clients that law firms and non-lawyers should be permitted to offer to clients, through an alternative professional services entity, but that they currently are not permitted to offer due to restrictions on non-lawyer ownership and sharing of legal fees set forth in Rule of Professional Conduct 5.4?

2. Should the Virginia State Bar propose that Rule 5.4 be amended so as to allow lawyers and nonlawyers to work collaboratively, for the sole purpose of providing legal representation, and permit fee sharing with non-lawyers and allow nonlawyers to hold a noncontrolling ownership or financial interest in an alternative professional services entity? Is it necessary to limit services performed by nonlawyers to services related to the representation of a client?

3. Can the VSB regulate these proposed professional services entities in such a manner so as to ensure that the core values that apply to a lawyer’s representation of a client (competence, confidentiality, loyalty, and independent professional judgment) are preserved?

4. Will regulatory reform as suggested above improve the public’s access to legal services?

5. Can or should lawyers be held accountable for the conduct on nonlawyers working in a proposed professional services entity? See Rules 5.1 and 5.3?

6. Can or should such professional services be regulated by the VSB, and if so, can those entities be held accountable for the misconduct of both lawyers and nonlawyers?

7. What types of nonlawyer service providers (other than administrative assistants, paralegals, receptionists, and other support staff) currently assist lawyers in serving their clients?
a. Are they employees of the firm, independent contractors, or do they have some other status?

b. If lawyers employ these nonlawyers directly, why do they choose to do so rather than through a separately organized business structure, such as a law-related ancillary business? See, e.g., See LEO 1819 (lobbying firm); LEO1754 (attorney selling life insurance products); LEO 1638 (employment law firm/human resources consulting firm); LEO 1647 (employee-owned title agency); LEO 1634 (accounting firm); LEO 1564 (lawyer owned real estate settlement companies); LEO 1368 (mediation/arbitration services); LEO 1345 (court reporting); LEO 1318 (consulting firm); LEO 1311 (insurance products); LEO 1254 (bail bonds); LEO 1198 (court reporting); LEO 1163 (accountant; tax preparation); LEO 1131 (realty corporation); LEO 1083 (non-legal services subsidiary); LEO 1016 (billing services firm); LEO 187 (title insurance).

c. If it were ethically permissible for lawyers to allow a nonlawyer service provider to work in their firm and hold an ownership interest in the law firm, would lawyers do so?

These are not the only questions the committee may need to consider. Charting a new course to James M. McCauley at mccauley@vsb.org comes your feedback. Please send your comments to James M. McCauley at mccauley@vsb.org.

Endnotes:

1 The 202 ABA-approved J.D. programs reported that 39,675 full-time and part-time students began their law school studies in the fall of 2013. This is a decrease of 4,806 students (11 percent) from the fall of 2012 and a 24 percent decrease from the historic high 1L enrollment of 52,488 in the fall of 2010. ABA Section of Legal Education reports 2013 law school enrollment data (Dec. 13, 2013) at http://www.americanbar.org/news/abanews/aba-news-archives/2013/12/aba_section_of_legal.html (last checked 2/2/2015). Also, law school enrollments fell for the fourth straight year, according to figures released by the ABA. The number of first-year students who showed up on law campuses this fall declined by 4.4 percent compared with the previous year, which amounts to 1,751 fewer students. That means new student enrollment is down by nearly 28 percent since its historic peak in 2010, when many flocked to law school during the economic recession. Law School Enrollment Continues Historic Decline, National Law Journal (December 16, 2014) at http://www.nationallawjournal.com/id=1202679988741/Law-School-Enrollment-Continues-Historic-Decline (last checked 2/2/2015). US law school applications are down by nearly half from eight years ago. Richard Gunderman and Mark Mutz, The Collapse of Big Law: A Cautionary Tale for Big Med, The Atlantic, (February 11, 2014).

2 Nine months after graduation, only 56 percent of the class of 2012 had found stable jobs in law—meaning full-time, long-term employment in a position requiring bar passage, or a judicial clerkship. The Jobs Crisis at our Best Law Schools is Much, Much Worse Than You Think, The Atlantic (April 9, 2013). See also Above the Law: Top 50 Law Schools, reporting that 43 percent of the graduates failed to secure a job in law in 2014. http://abovethelaw.com/careers/2014-law-school-rankings/

3 Even leading law schools like University of Virginia and George Washington University are paying many of their newly graduated stipends or salaries to work in private law firms, non-profit organizations and government. For example, GWU paid salaries to 22 percent of its graduating class of 2012 and UVA law paid salaries to 17 percent, in order to pump up their job placements statistics for rankings in U.S. News & World Report. The price of success: Some American law schools are paying many of their graduates’ salaries, The Economist (March 15, 2014) at http://www.economist.com/news/business/21599037-some-american-law-schools-are-paying-many-their-graduates-salaries-price-success

5 85 percent of law graduates now carry at least $100,000 in debt. Gunderman & Mutz, supra at n.1.

4 A Dozen Law Schools Hit with Lawsuits over Jobs Data, Law Blog (February 1, 2012) at http://blogs.wsj.com/law/2012/02/01/a-dozen-law-schools-hit-with-lawsuits-over-jobs-data/


7 Eric Posner, The Real Problem With Law Schools, The Slate, April 2, 2013 at http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/04/the_real_problem_with_law_schools_to_o_many_lawyers.html indicating also that median starting salaries have declined from $72,000 in 2009 to only $60,000 in 2012.


9 As Eric Posner notes:

The figures are grim, and the human cost is real. Ninety-two percent of 2007 law school
The years of the Great Recession wreaked havoc on Big Law. Heller Ehrman LLP collapsed in 2008. Howrey LLP and Dewey & LeBoeuf LLP fell apart in 2011 and 2012. Patton Boggs in Washington DC trimmed its ranks by laying off at least 30 associates and expelling 20 partners. Noam Scheiber, The Crisis at Washington’s Ultimate Power Firm, New Republic, (May 9, 2013). Moreover, in the past decade 12 law firms with more than 1,000 lawyers have disbanded. Jason Small Law Firm, including document review and production has become commoditized by advances in technology, greatly reducing the costs of services in that area. Lawyers and law firms can outsource a big discovery project to a vendor using internet platforms and technology at a fixed commodity price. See, e.g., Nextpoint e-Discovery Pricing at http://www.nextpoint.com/pricing/

As Noam Scheiber explains: There are currently between 150 and 250 firms in the United States that can claim membership in the club known as Big Law, the group of historically profitable firms that cater to the country’s largest corporations. The overwhelming majority of these still operate according to a business model that assumes, at least implicitly, that clients will insist upon the best legal talent instead of the best bargain for legal talent. That assumption has become rickety. Within the next decade or so, according to one common hypothesis, there will be at most 20 to 25 firms that can operate this way—the firms whose clients have so many billions of dollars riding on their legal work that they can truly spend without limit. The other 200 firms will have to reinvent themselves or disappear.

As of August 2012, Legal Zoom had provided services to some 2 million customers, according to a prospectus it filed with the U.S. Securities and Exchange Commission in advance of a planned, but still postponed, initial public offering. In 2011, it brought in revenues of $156 million and was on track to bring in close to $200 million in 2012. Robert Ambrogi, Latest legal victory has LegalZoom poised for growth, ABA Journal (August 1, 2014)


Id.

Id. at 5; see also James M. McCauley, The Delivery of Legal Services Through Multidisciplinary Practices, http://www.vsb.org/site/regulation/legal-services-multidisciplinary-practices

Id. at 7-8.

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