



THE NEW NORMAL:

The Challenges Facing the Legal Profession

Board of Governors'
Challenges to the Profession Committee
July 2011



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Part 1: EXECUTIVE SUMMARY

Legal Profession Is in the Midst of Dramatic Change

The legal profession is in the midst of a dramatic transformation, and it is not leading the rapid change that is occurring in the world. Legal futurists and commentators cite many factors effecting this change that were in play long before the collapse of the global economy in late 2007. They also agree that once the economy improves, the profession will not return to pre-recession prosperity.

“The golden era is gone, but this is not because the law itself is becoming less relevant. Rather, the sea change reflects an urgent need for better and cheaper legal services that can keep pace with the demands of a rapidly globalizing world,” writes Prof. William Henderson, director of the Center on the Global Legal Profession, Indiana University Maurer School of Law, and attorney/legal affairs writer Rachel Zahorsky in their July 1, 2011, *ABA Journal* [article](#). They state that the current recession – a catalyst for change – provided an opportunity to re-examine some long-standing assumptions about lawyers and the clients they serve.

Patrick Lamb, who writes and speaks about the change taking place in the profession in the *ABA Journal*’s “The New Normal” blog, [observes](#) that lawyers suffer from an incredible lack of interest in understanding the forces that are changing the foundation of the profession.

To succeed in this new reality, attorneys need to keep abreast of the changes so that they are prepared to assist, counsel, and advise their clients. Lawyers also must be aware of these challenges so they can take advantage of the opportunities for those prepared for what lies ahead.

““ The single biggest challenge facing lawyers today is dealing with loss of control. The profession’s future success depends on how well lawyers adapt to that loss and adjust our expectations and behavior. . . . ””

– Jordan Furlong

The Committee’s Charge

In mid-2010, State Bar of Wisconsin President Jim Boll appointed the Challenges to the Profession Committee (Challenges Committee), comprised of members of the Board of Governors, to examine the changes impacting the future of the practice of law in Wisconsin. The committee’s first step was to conduct an environmental scan, summarized in this report. The next step is for the State Bar to identify ways that it can assist, guide, and lead Wisconsin attorneys to recognize, adapt to, and take advantage of the opportunities these challenges present Wisconsin-licensed lawyers.

The Challenges Committee refers this report to State Bar President Jim Brennan and the Strategic Planning Committee for further action. The committee thanks, in particular, those committee members who contributed to the writing of this report: Kimberly Haines, chair; Kevin Klein, vice chair; and committee members Christine Rew Barden, Lynn Laufenberg, Athenee Lucas, TJ Molinari, Michael Remington, Robert Swain, and Nicholas Vivian; and Joyce Hastings, staff liaison.

The Environmental Scan

In conducting its environmental scan, the committee considered the following questions: What is the current state of our professional landscape? What has changed or remained the same since 2006, when it last identified the competitive challenges facing Wisconsin lawyers? And, what opportunities lie ahead?

The committee began its environmental scan by reviewing the October 2006 Competitive Challenges Report, which was developed to assist the State Bar in fulfilling its strategic goal related to introducing new or improving existing solutions to the competitive challenges facing members. In addition, committee members conducted independent research from many resources, including research conduct by other bar associations, legal educators, and other legal entities; legal and general media coverage; legal futurists' and commentators' analyses of the state of the profession, and personal interviews. *See Bibliography.*

In its scan, the committee explored economic, demographic, political/legislative, social/cultural, competitive, and technological factors. Once the committee completed its scan, it prioritized the challenges, identifying the most pressing concerns impacting members' ability to practice law in the future. While the challenges facing the profession are many, in the committee's collective opinion, identifying solutions to the following challenges will deliver value and demonstrate the State Bar's relevancy to its members.

Top Challenges

The top challenges identified by the committee include: 1) economic pressures on the practice; 2) technology and the practice of law; 3) regulation of the legal profession; and 4) new lawyer training/development.

1. Economic Pressures on the Practice

The legal profession faces unprecedented economic pressures fueled by many factors, including societal changes and economic downturn. These pressures often dovetail with other challenges facing the profession. In today's buyer's market, clients determine what services are needed and at what cost. They will continue to demand efficiency and responsiveness from their lawyers – and for less cost.

2. Technology and the Practice of Law

Advances in technology are occurring exponentially. These advances increase the pace of practice and client expectations, forcing lawyers to adapt or face extinction. Understanding and implementing new technologies are difficult and time-consuming for lawyers. Clients are often ahead of lawyers in implementing new technologies, and they have increased access to legal information, much of it readily available on the Internet. However, technology also is the "great leveler," allowing innovative solo and small-firm practitioners to compete with larger firms.

3. Regulation of the Legal Profession

Rapidly evolving technological advances, changing expectations on the part of the

“Above all: we need to understand our place in this new market ... Lawyers can still dominate legal services delivery – but on the merits of our skill, professionalism, efficiency and client service, not on the fading influence of an historical *de facto* monopoly.”

– Jordan Furlong

public concerning access to information and services, as well as sociologic and economic globalization, combine to require a reconsideration of traditional ethical rules and regulation mechanisms for the legal profession.

Ari Kaplan, in *The Evolution of the Legal Profession: A Conversation with the Legal Community's Thought Leaders*, opines that these issues will force the legal profession to restructure how it delivers legal services. In order for the profession to stay relevant and thrive, lawyers must examine who can invest in firms, models for publicly traded firms, and lawyer partnerships with other professionals.

“The profession is practicing on a 100-year-old platform that is out of date,” say attorneys Frederic S. Ury and Thomas Lyons, who recently addressed bar association executives and presidents at the NABE and NCBP meetings in Atlanta. Multijurisdiction practice was a cutting-edge concept 12 years ago; however, the profession has yet to adequately address the issue.

4. New Lawyer Training/Development

The reality of today's economy means fewer opportunities for law school graduates. With fewer clerkships, internships, and law firms hiring new graduates – and access to mentors – law schools are graduating more lawyers with less experience. With an average law school debt of \$80,000, new lawyers hang out their own shingles, often without having acquired practice basics such as understanding trust account requirements.

The profession must share the responsibility for assisting these new practitioners, and that support must come from the State Bar, Wisconsin lawyers, the Board of Bar Examiners, the bench, and the law schools that produce new lawyers.

Recommendations: Next Steps

The Board of Governors' Challenges to the Profession Committee recommends State Bar President Jim Brennan refer this report to the Strategic Planning Committee (SPC) for further action. The next step is for the State Bar to identify ways that it can assist, guide, and lead Wisconsin attorneys to recognize, adapt to, and take advantage of the opportunities these challenges present its members.

This Challenges Committee recommends that the next group developing recommendations for addressing these challenges also consider the results of the State Bar's spring 2011 member needs assessment, which will be available later this month.

For a thorough examination of outsourcing and other trends in the legal profession, the Challenges Committee recommends the New York State Bar Association's [Report](#) of the Task Force on the Future of the Legal Profession. The report, issued on April 2, 2011, focuses on four areas: Law Firm Structure and Billing, Educating and Training New Lawyers, Work-Life Integration and the Practice of Law, and Technology and the Practice of Law. Its 112 pages of analysis and recommendations make interesting and educational reading.

Going forward, the State Bar should continue to identify and analyze developing trends affecting the practice in Wisconsin, and communicate to members their impact on the practice in Wisconsin.

Other recommendations

While conducting this scan, the Challenges Committee identified several natural, next steps the State Bar could take in addressing the issues addressed in this report. Those recommendations include:

- The State Bar, through its Ethics Committee, should actively participate in the ABA Ethics 20/20 Commission work, which will thoroughly review the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments. During this dialog, the Challenges Committee recommends the Ethics Committee consider ways in which the regulation of the profession can keep pace of change.

- The State Bar should communicate the challenges facing the profession – and the opportunities they present – to members so that, through the individual delivery of legal services, lawyers can begin to adapt their practice as appropriate. The committee asks that the Communications Committee and Publications Department staff consider the issues in this report in their future editorial planning.

- The profession must share the responsibility for new lawyer training and development, and that support must come from the State Bar, Wisconsin lawyers, the Board of Bar Examiners, the bench, and the law schools that produce new lawyers. In particular, the State Bar of Wisconsin and Wisconsin's law schools are necessary partners in properly educating new attorneys in the rigors of the practice of law. On July 1, 2011, Prof. Margaret Raymond takes over as the new U.W. Law School dean, which presents an opportunity for the State Bar to dialog about issues related to new lawyer transition.

- The State Bar should continue to urge the Board of Bar Examiners to revise SCR 31.07 to allow accreditation of training in the content or skills necessary to effectively practice law, even if such content or skills are not directly related to substantive law or ethical obligations.

- The Challenges Committee encourages the State Bar to further support the development of mentoring opportunities between experienced and new lawyers as a means of developing new lawyers. A recent Young Lawyers Division survey reveals that mentoring is one of the top three concerns of its members. The YLD reports in its recent newsletter that it expects to implement a mentoring program in the coming year.

- WisLAP expects the results of its compassion fatigue study later this summer and a lawyer career satisfaction study by late fall or early 2012. Both studies offer the State Bar and the profession insight into lawyer satisfaction issues. The committee encourages the State Bar to use this research to help members lead balanced lives.

- One of the biggest differences in how lawyers will practice in the future, according to resources cited in this report, is how lawyers value and price what they sell. The first step is to understand that lawyers are selling knowledge, not 'legal services' or 'time.' The State Bar must take steps to help its members understand this change and help them transition away from the billable hour to alternative billing strategies. This transition is not easy, as lawyer compensation systems are often tied to traditional billing methods.

Part 2: THE CHALLENGES

Economic Pressures on the Practice

The attorney's role in society was once sacred. The attorney was a counselor, a confidant, the most respected members in the community. Over time, the role of the lawyer has evolved, and societal changes, the economic downturn, and other factors have forced the attorney to view the practice of law less as a profession and more as a business.

The legal profession faces unprecedented economic pressures. It faces competitive pressures from accountants, realtors, financial advisors, and title agents, and others – and the Internet is making it easier for them to compete. Add to the mix competition from global legal service providers, as the doors to transnational practice by lawyers widen by the World Trade Organization's General Agreement on Trade in Services (GATS).

Attorneys also are exposed to new competitive challenges from within the profession. The era of technology subjects attorneys to rating systems, both internally from the legal community and externally from the public. Rating systems like Avvo and Martindale require the modern attorney to maintain both a private rapport with clients and a public reputation for excellence.

In a buyer's market, the client determines what services are needed and at what cost. To survive, lawyers and firms are looking for competitive advantages. In addition to the issues discussed below, lawyers and firms are turning to law firm managers and legal information managers to examine trends and identify competitive advantages. To increase economic stability, the State Bar can play an important role in identifying, analyzing, and communicating these trends to members.

“ How will lawyers practice law in 2019 and beyond? The biggest difference will be in the way you value and price what you sell. ”
– Jay Shepherd

News Flash: How Lawyers Value and Price Knowledge Big Change

How will lawyers practice law in 2019 and beyond? “The biggest difference will be in the way you value and price what you sell. And before you can make that change, you have to understand what it is you sell,” says Massachusetts lawyer Jay Shepherd, in his Ignite Law 2011 presentation. “Spoiler alert: It ain't ‘legal services,’ and it sure as hell ain't ‘hours’ or ‘time.’ Instead, lawyers sell knowledge. How you value and price that knowledge will be the greatest change in your 2019 practice.”

Lawyers Consider Price Reductions and Alternative Fee Arrangements to Remain Competitive

Nonlawyers compete to provide legal type services. This may occur through the unauthorized practice of law or through foreign jurisdictions that allow this competition. On June 28, 2011, the *ABA Journal* [reported](#) that nearly every state in the U.S. has an oversupply of lawyers when comparing the number of new lawyers with the estimated number of job openings in those states. Clients have more information available to them,

“Clients expect their lawyers to focus more on the outcome and less on time spent on a legal matter.”

and fewer dollars to spend in today’s economy. The result is less money spent on legal services as a whole.

To remain competitive, many lawyers are forced to consider price reductions. This may simply involve doing the same work for less than in the past. But it may also involve a complete analysis of the competitive marketplace, so that the firm or attorney understands where the competitive pressures are coming from. Instead of drafting a document now readily available to the client, the lawyer may provide only a review of that document and bill only for that task. The lawyer must consider leveraging the work already done by others.

To remain competitive, lawyers also must consider alternative fee arrangements (AFA). These may include fixed, contingent, results based, hourly, graduated, or any such combination. In the past, in a seller’s market, lawyers determined how to charge for their services, and clients would simply purchase those services. Today, we have a buyer’s market, and clients want an AFA to fit their needs. If a firm or attorney cannot fit the need, the client is likely to go elsewhere. More and more, clients are demanding predictable fees, and the changes necessary in billing structure to get there.

Is the billable hour dead?

The answer to this question is “no,” but law firms must consider long-term restructuring of their billing practices to remain competitive. Critics believe the hourly billing rate breeds inefficiency, and clients expect their lawyers to focus more on the outcome and less on time spent on a legal matter. The billable hour does not measure value.

In this age of technology and information, many clients want to complete some legal tasks themselves to reduce overall fees, or at least not pay for readily available information or documents traditionally drafted from scratch. In seeking predictable fees, the client wants to avoid situations where the meter just keeps running. The result is a trend away from the billable hour, with lawyers assuming more risk, especially for large firms representing larger corporate clients.

Still, the billable hour will survive for some time for several reasons. In some cases, law firms find it difficult to structure nontraditional billing arrangements, and lawyer compensation is often tied to hourly billing. Some services don’t lend themselves to alternative billing. In situations where the services to be performed are simply not predictable, clients may actually prefer hourly billing. At the opposite end of the spectrum, certain finite services are often better handled with the billable hour, such as preparing a deed or simple will, or making a single appearance in a litigation matter.

Clients Focus on Adding Value and Increasing Efficiency

In the past, clients were more likely to decide that they needed a lawyer, and that they would just have to pay whatever the cost. Now, clients are more likely to ask, “What is this particular legal service worth to me?” And, when obtaining the service, the client is more likely to set the parameters of the legal representation. A client comes to a lawyer presuming he does quality work; they are more interested in the value that lawyer brings to the situation.

Armed with information and forms, will the client want to take on some of the work and hire a lawyer to review her work or perform part of the needed services (see limited-scope representation below)? Will the client agree to pay only a certain amount for services, unless there are contingencies or results or success? If the focus is value, who will determine how the services are actually provided? These questions raise additional concerns as client demands and economic realities intersect with ethics rules.

Clients will continue to demand efficiency and responsiveness from their lawyers. They expect lawyers to create efficient internal processes, completing work quickly and for less cost. They expect lawyers to use technology to perform tasks previously done by junior associates, and some corporate clients refuse to pay for the work of first-year associates.

Limited-scope Representation: One Way to Serve New Clients

Given the unprecedented rise in the numbers of self-represented litigants in Wisconsin courts in recent years, the Wisconsin Supreme Court's PPAC Limited Scope Representation Subcommittee is examining the status of limited-scope representation (LSR) in Wisconsin. It is considering whether the court system should implement additional changes to encourage more clients to retain lawyers for at least part of their legal matter, increase the number of lawyers willing to offer LSR services, and convince more courts to support or encourage LSR for lawyers and litigants.

Limited-scope representation (LSR), sometimes referred to as “unbundling,” refers to an agreement between an attorney and client that apportions the tasks in a legal matter between them. SCR 20:1.2(c), effective July 1, 2007, permits lawyers to limit the scope of representation if the limitation is reasonable and the client gives informed consent.

Some self-represented individuals go to court without counsel because they can't afford a lawyer or cannot afford traditional fee services or full-scope representation, while others do it alone because they don't recognize the value of hiring a lawyer. Whatever the reason, self-represented litigants impact the efficiency of the court system. When litigants come to court better informed and prepared, they reduce their reliance on court resources and prevent delays in the courtroom.

The Limited Scope Representation Subcommittee distributed surveys to circuit court judges, administrative law judges, court commissions, and lawyers. The results of this input will guide the subcommittee in making its recommendations this fall.

Companies May Expand Inhouse Legal Departments

As information becomes more and more available, and as technology allows individual or small groups of attorneys to “expand” their practice, it is likely companies will create or expand inhouse legal departments. They will do so for the efficiency of the service, and to save costs. While this may create opportunities for individual lawyers, it will most certainly create competition concerns for the lawyers or firms now representing those companies. Companies are measured by their output, and inhouse lawyers demand the same from their outside counsel.

These concerns only serve to magnify the need for lawyers and firms to examine trends, restructure as necessary, and attempt to remain competitive in the marketplace.

“Clients expect lawyers to create efficient internal processes, completing work quickly and for less cost.”

Identifying Opportunities: New Substantive Areas of Law

According to legal futurist Stuart Forsyth, lawyers are trained to look backwards for precedent so it is difficult for them to see forward to the future. Encyclopedia Britannica was nearly driven out of business by Bill Gates who gave encyclopedia software away for free in order to sell computers.

Lawyers must learn where to look for opportunities, says Forsyth in his *Texas Law Review* article, “Perspectives from a Legal Futurist: Challenges to the Courts and the Legal Community.” Attorneys need to significantly broaden and organize what they see, and be particular where they look for these opportunities. For example, he suggests lawyers follow science and technology developments if they want to predict opportunities in substantive areas of practice. *Wired* and *The Economist* are required reading for lawyers today.

New substantive areas that lawyers can pursue and offer as a niche to innovative clients include renewable energy, “coming” sciences, atomic energy, global health, and emerging economies, says Forsyth.

The University of Wisconsin Law School offers annual outreach workshops for lawyers to gain additional insight and training in the rising substantive areas of law. In 2012, the law school will offer a unique post graduate dual degree program in neuroscience and law. Neuroscience is an especially appropriate scientific field for students of law because recent research has called into question many widely held assumptions about the brain that could impact our understanding of criminal responsibility, brain death, the capacity of adolescents and mental health patients to stand trial, impairment of decision-making capacity by drug or alcohol use, and the relationships between mental impairment and dangerous behavior.

Part 2: THE CHALLENGES

Technology and the Practice of Law

During the past 30 years, technological change has occurred at considerable speed. The ascendancy of information technology and the availability of communication tools have transformed the practice of law. Despite the fact that the nature of legal issues handled by practicing attorneys have remained the same, the way that lawyers practice and deliver advice has changed dramatically.

Technology Empowers Clients

Clients are often ahead of lawyers when it comes to technological tools and the integration of knowledge. Because clients often invest heavily in new technologies, they often control the economic equation. For example, in January 2010, the *Wall Street Journal* reported that clients of a major Wisconsin law firm have web-based access to the amount of attorney time and cost incurred for a particular matter. Clients expect electronic billing in increments broken down by task. The client then takes a monthly bill, understands it in terms of total costs, and questions any dubious charges.

Along with lawyer accountability comes rising expectations of clients. Today, clients expect their attorneys will proactively look for ways to be efficient and will offer options in terms of workflow and results, according to Ari Kaplan, in *The Evolution of the Legal Profession*. Many firms provide client service plans that contain provisions relating to technology interfaces, billing (including alternative billing options), workflow, and accountability.

The integration of knowledge – much of it available in the public domain free of charge – places pressures on the attorney-client relationship. Societally, consumers increasingly shop, bank, conduct business activities, and pay bills (and taxes) online. Not surprisingly, many of them seek legal advice online from their lawyers and law firms, telephonically, or through portals, blogs, or cloud computing. Others look for advice from online companies.

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Solo Practitioners and Small Firms Can Compete with Large Firms

Every law firm – solo, small, medium, or large – is affected by technological change. Yet, solo practitioners and small firms are not disadvantaged by technology. As noted in the New York State Bar Association April 2011 Report of the Task Force on the Future of the Legal Profession, “technology is a great leveler.” Small firms have a distinct advantage over large firms in the area of contract-based and flat-fee services. Individual practitioners

“ We now must be ready to practice in a way that allows our clients a new method of access to legal services by using the technology and communications tools around us. ”

– ABA eLawyering Task Force

and small firms can also band together to handle complex issues or large litigation matters. Just as technological changes are generated by small groups of software engineers and programmers, small-firm lawyers may be more flexible, expeditious, and inexpensive in terms of providing legal services than their counterparts in large firms.

Large law firms also have the advantages of entrepreneurial spirit as well as personnel and monetary resources to invest in technologies. Free client services – like alerts, educational seminars, and newsletters provided through emails or webcasts – provide large firms with competitive advantages.

Current Trends and Tools

Lawyers are experimenting with and adapting various applications and technologies to their practices. The legal profession is actively exploring eLawyering, that is, the practice of law on the World Wide Web. Lawyers are not only marketing, blogging, and engaging in social media, they are rendering online legal advice as well. As observed by the ABA eLawyering Task Force (of the ABA Law Practice Management Section), “We now must be ready to practice in a way that allows our clients a new method of access to legal services by using the technology and communications tools around us.”

Every law firm is affected by technological changes. Attorneys must devote time and resources to identifying ways to use new technologies to add value to client work, reduce overhead costs, and improve their ability to compete for legal services.

Virtual law practice

A virtual law practice is a professional law practice that functions entirely online through a secure portal that is readily accessible to both client and attorney anywhere the parties can access the Internet. Virtual law practices generally operate with lower overhead than traditional law firms.

Lest one think that virtual law practice is a figment of a futurist’s imagination, the ABA Law Practice Management Section has published a book, entitled *Virtual Law Practice*, by Stephanie Kimbro. The book provides a wealth of information about how to operate a virtual law office along with ethics issues, marketing ideas, and products that facilitate a virtual law practice. Many solo practitioners have availed themselves of a computer, a modem or WiFi, and a portal to represent clients virtually. And at least one Wisconsin lawyer, Brookfield attorney Martin Ditkof, maintains a virtual office, which allowed him to cut the cord from his home office.

eLawyering

According to the ABA eLawyering Task Force, eLawyering is doing legal work – not just marketing – over the Web to communicate and collaborate with clients, prospective clients, and professional colleagues; draft, edit, and finalize documents; engage in dispute resolution; manage legal knowledge; and file court and governmental documents.

Lawyers who resist this trend will find that their clients (and potential clients) routinely use the Internet to identify cost-effective legal resources and ways to solve their legal needs. Information is readily available from online legal document preparation and self-help sites, like [LegalZoom](#), Inc., accessible for specific areas of law (in this instance, for business services, trusts and estates, and intellectual property). During March 2010,

more than a half million people searched Legal Zoom for online legal solutions. [Nolo, Inc.](#) offers free legal information, estate planning software, and do-it-yourself legal forms (Quicken’s WillMaker is its top seller). [CompleteCase.com](#) provides an electronic toolkit and forms for uncontested divorces. It is impossible to predict the next new online legal services delivered over the Internet. What is known is that online services compete with lawyers providing traditional legal services.

Consumers using these self-help sites may face additional legal problems. The work product generally is not reviewed by a lawyer, and the one-size-fits-all solution may not fit the situation. In addition, forms may be inaccurate, out of date, or not in compliance with state laws.

Easy access to legal answers on the Internet is changing how individuals and organizations use lawyers. Competitive legal resources are available for little to no cost. Killer applications – like web-enabled document automation – eliminate law firm process steps (such as a secretary or paralegal inputting client information into a computer). It is difficult to “compete for free.” As online sites increase, pressure will grow for lawyers to change how they bill and staff legal controversies. The commoditized part of law practice may contract (or even disappear), outsourced overseas, or subject to alternative fee structures.

Cloud computing

Cloud computing is getting considerable hype as lawyers explore ways to lower IT costs and increase access to their practices from remote locations or mobile devices. Cloud computing offers a way to avoid investing in hardware and software through pay-as-you-go providers over the Internet. Services generally are scalable, growing or shrinking to match changing technology demands; and the access is instant, receiving services when they are needed, paying only for the services used.

In cloud computing, the user’s computer contains almost no software or data (except perhaps an operating system and a browser), operating only as a display terminal for processes operating on a distant network of computers. Those who use web-based email (such as Gmail or Hotmail) or an email client program (such as Outlook or Mozilla Thunderbird) are using cloud email servers. Cloud computing involves the pooling of computers in the “cloud” to achieve an on-demand task. A cloud may be public, community-based, or private.

As with other aspects for eLawyering, cloud computing proves law firms and lawyers with distinct advantages and disadvantages. Cloud computing provides identifiable economic benefits to small firms and solo practitioners. At the same time, cloud computing entails a number of legal risks for firms of any size. Risks can be reduced by drafting a contract that resolves privacy, cross-jurisdictional compliance, search warrants, e-discovery, and data security issues. In addition, lawyers must address protection of privileged documents and the attorney-client privilege. Technology does not solve all problems; people do.

Artificial intelligence

In the context of the practice of law, artificial intelligence usually refers to either a decision-making support system or an expert system.

Generally, decision-making support systems are rule-based software products that use “if-then” constructs to assist attorneys in legal-related tasks. Attorneys use rule-based software systems in various areas of private practice, and judges use these systems to

“ “ Easy access to legal answers on the Internet is changing how individuals and organizations use lawyers. ” ”

assist with sentencing. For example, Lawgic (www.lawgic.com) probably uses a rule-based construct to assist attorneys in the creation of wills, trusts, and marital agreements. Based upon the choices made by the attorney through an online “interview” format, the software automatically produces documents that cover all of the issues that need to be resolved for that particular type of document. While decision-making support systems may benefit attorneys, it is easy to see how expert legal systems have evolved to specifically target clients’ legal needs.

Expert legal systems are software programs that actually provide legal advice. In 2007, two web-based expert systems designed to prepare bankruptcy filings were found to constitute the unauthorized practice of law by the Ninth Circuit Court of Appeals. The now debunked Ziinet.com and 700law.com allowed individuals to enter financial data, and the software generated a complete set of bankruptcy forms. The court of appeals **reasoned** that the personalized nature of the software was automated counsel, which constituted the unauthorized practice of law.

Nonlawyer consumers may see expert legal systems as convenient time and cost-saving options; however, the use of such systems without attorney review has the potential to cause greater harm to the consumer. In addition, are the systems asking the correct questions and updated regularly to capture new laws? Expert systems also lack legal governance to ensure the legal integrity of the information.

Law.Gov: Greater Access to the Law

The movement to create **Law.Gov** will give those outside the profession greater access to legal research materials. The movers behind this development include Thomas Burke of Cornell Law School’s Legal Information Institute and Ed Walters, Fastcase founder and CEO. They believe the government should provide free access to high-quality, machine-readable primary legal materials (court opinions, regulations, and statutes) and supporting documents (dockets, hearings, forms, oral arguments, and legislative histories) without restriction on re-use.

In 2010, Law.Gov hosted 15 workshops, with attendance of more than 600 people, to examine issues such as privacy, technical needs, authentication, copyright, and other aspects of the distribution of primary legal materials.

What is the public currently doing with law on the web? Hospital administrators, police officers, and nonlawyer professionals are using the information to manage risk and verify what their lawyers tell them. Similar to WebMD, consumers are finding answers to routine questions and looking for support from others in similar situations.

Although this idea is still in its infancy, it is not difficult to speculate the impact of greater access of legal information on lawyers, commercial publishers, and the public. Lawyers need to understand the informed client. Commercial publishers need to better understand a changed marketplace. For lawyers, what opportunities exist as purveyors of legal information? Is there a latent legal market?

“ “ It is not difficult to speculate the impact of greater access of legal information on lawyers, commercial publishers, and the public. ” ”

ABA to Clarify Lawyer Use of Social Media

A 2010 American Bar Association survey shows that lawyer use of social media is on the rise, and unlimited articles tout the importance of using social media as a means of generating new clients and developing a professional network.

“When you’re going after a muskie, you go fishing where the muskie are, [explains Wisconsin Lawyer](#) author Larry Bodine. The same is true for clients.” He explains that the business conversation – and source of new business – has moved online. “If a client can’t find you with Google, you are invisible on the world’s largest source of information.” Online marketing is the great leveler for small-firm practitioners looking to gain a reputation as a knowledge source.

Lawyer use of social media has received the attention of the ABA as it evaluates its Model Rules of Professional Conduct. The ABA 20/20 Commission on Ethics [released](#) its draft recommendations June 29, 2011, related to Lawyer’s Use of Technology and Client Development. These recommendations impose no new restrictions on lawyer advertising; however, they offer clarification for the profession:

“Technology has enabled lawyers to communicate about themselves and their services more easily and efficiently, and it has enabled the public to learn necessary information about lawyers, their credentials, and the particular legal services those lawyers provide as well as the cost of those services.”

“Lawyers, however, need to ensure that these communications satisfy existing ethical obligations. The Commission’s proposals are designed to give lawyers more guidance regarding these obligations in the context of various new client development tools.”

““ If a client can’t find you with Google, you are invisible on the world’s largest source of information.” ”

– Larry Bodine

Part 2: THE CHALLENGES

Regulation of the Legal Profession

“Some lawyers advocate a “one-stop-shopping” approach to the practice so that a consumer can receive all of these services from one source.”

Rapidly evolving technological advances, changing expectations on the part of the public concerning access to information and services, as well as sociologic and economic globalization, combine to require a reconsideration of traditional ethical rules and regulation mechanisms for the legal profession. Easy access to legal information and competition from nonlawyers in areas traditionally thought to be the province of the legal profession has contributed to a demystification of the practice of law and a consequential change in the image of lawyers. Changes in the political landscape and concerns about how the profession has policed itself in some high-profile cases have fueled calls for moving oversight from a judicial to a legislative/regulatory framework. In addition, 31 percent of State Bar members live outside the state of Wisconsin, and most of them belong to other jurisdictions that may subject them to additional ethical responsibilities.

Impact on Ethical Rules

According to interviews with Tim Pierce, State Bar of Wisconsin ethics counsel, and Dean Dietrich, past chair of the State Bar’s Professional Ethics Committee, Wisconsin lawyers currently may not engage in practice with nonlawyers, such as architects, engineers or accountants. This is changing in foreign countries, but has not gained any real traction in the United States. The UK and Australia allow limited public ownership and one Australian firm issued stock (see related discussion, Nonlawyer Equity Investment in Law Firms, page). Some lawyers advocate a “one-stop-shopping” approach to the practice so that a consumer can receive all of these services from one source. Such an approach would be difficult, if not impossible, under current ethical rules. The other professionals are subject to a different regulatory scheme and are not bound by the rules applicable to lawyers, such as those concerning confidentiality and conflict of interest.

In addition, there is a push for changes in multijurisdictional practice rules to permit lawyers with a license in one state (or even country) to practice in another state (or even country) without qualifying for separate admission to that state (or country’s) bar. Under this concept, a law license becomes akin to a “drivers license,” which is valid anywhere in the nation or, conceivably, the world. Inhouse lawyers for multijurisdictional companies already have some degree of flexibility in this regard, but lawyers in private practice do not. Questions arise as to whether these changes should be approved for certain restricted areas of practice, such as tax, real estate or transactional law, but not to others. Issues also arise concerning how competence is determined, which ethical rules apply and uniformity of enforcement.

According to Dietrich, competition from nonlawyers has led some lawyers to advocate changes in the ethical rules which will “level the playing field” with those who are now providing what were traditionally seen as legal services. For example, accountants and real estate professionals are either not restricted at all or have limited restrictions on providing

advice to both parties of a transaction. Current rules also preclude divorce mediators from representing one of two (or both) pro se parties in finalizing an agreement reached through divorce mediation. Current Wisconsin rules are interpreted by some as precluding this involvement.

Changes in how the general public seeks professional services and competition from nonlawyers for certain services have led some lawyers to continue to push for further relaxation of rules which restrict direct, in-person solicitation of those believed to be in need of these services. As technology, including the use of social media such as Facebook and LinkedIn, evolves to make interpersonal contacts easier, this issue will have to be addressed.

Ethics 2020: ABA Considers Changes to Model Rules of Professional Conduct

The ABA Commission on Ethics 2020 was created in August of 2009 to examine the ethical and regulatory impact of advancing technology and increasing globalization on the legal profession and to make recommendations, where appropriate, to the ABA House of Delegates concerning changes in the ABA Model Rules of Professional Conduct. The commission has created separate working groups that have produced a number of “Issue Papers” addressing the following topics:

- Alternative Business Structures
- Domestic and International Outsourcing
- Multijurisdictional Practice
- Lawyer’s Involvement in Alternative Litigation Financing
- Inbound Foreign Lawyers Issues
- Lawyers’ Use of Internet Based Client Development Tools

On May 2, 2011, the commission presented initial draft proposals for changes in the Model Rules as they relate to Outsourcing, Technology and Confidentiality and Inbound Foreign Lawyers. Comments to these proposals are due July 15, 2011. The commission intends to release proposals with regard to the other issues no later than September 2011. Final versions are to be presented in May 2012 for deliberation by the full ABA House of Delegates at the August 2012 Annual Meeting.

Impetus for Legislative and Regulatory Influence

As lawyers seek more flexibility in the modern technological and commercial world, they face attempts to make them subject to broader regulation. Congress and federal agencies have sought to bring lawyers within the coverage of laws and regulations primarily aimed at businesses, banks, and other financial service providers.

The organized bar, including the ABA and state bar associations, has opposed these efforts, recently winning some victories. For example, at the urging of the organized bar, Congress recently excluded practicing lawyers and their employees from key new

““ As lawyers seek more flexibility in the modern technological and commercial world, they face attempts to make them subject to broader regulation. ””

“The unauthorized practice of law in Wisconsin is an issue that has plagued lawyers and the State Bar for years.”

provisions of the new Dodd-Frank Wall Street Reform and Consumer Protection Act that apply to providers of financial services to consumers. State bars have also been instrumental in the ABA’s fight against the FTC’s attempt to define lawyers as “creditors” under the Fair and Accurate Credit Transactions Act, which would have required lawyers to develop and implement programs to detect warning signs or “red flags” of identity theft. Other proposals being opposed would potentially interfere with client confidentiality requirements, such as requiring lawyers to report “suspicious activity” by clients.

In Wisconsin, economic and budget pressures have prompted some legislators to raise the idea of taxing legal services. According to Lisa Roys, State Bar public affairs director, in a time of decreasing tax revenues because of tax breaks for businesses and resistance to increases in traditional sources of tax revenue, there is pressure to find other sources of such revenue. In addition, Wisconsin has moved from a production-based economy to more of a services-based economy, prompting efforts to identify potential ways of taxing the return on these enterprises.

According to Roys, more attention is also being given by some legislators to a change in the way lawyers are regulated in light of recent high-profile news accounts focusing on attorney misconduct and perceived failures or weaknesses in the Wisconsin Supreme Court’s system of lawyer regulation. In 2010, a Wisconsin district attorney was accused of “sexting” a domestic abuse victim. When the Office of Lawyer Regulation (OLR) concluded that the conduct was “inappropriate” but did not amount to “professional misconduct,” questions were raised in the press about the integrity of the review process. Political and public pressure prompted the OLR to re-open the investigation, but not before there were calls for inquiries into how the process works. A *Milwaukee Journal Sentinel* series beginning in February 2011 similarly challenged the supreme court’s oversight, highlighting a number of attorneys who had been convicted of crimes but were still practicing – some keeping their licenses even while serving time for their crimes. The authors also expressed concern about rules that require investigations be kept secret until formal charges are filed – putting unknowing additional clients at risk in the interim.

Unauthorized Practice of Law Continues to Raise Concerns

The unauthorized practice of law in Wisconsin is an issue that has plagued lawyers and the State Bar for years. Most recently, the Wisconsin Supreme Court adopted SCR 23.01, defining the unauthorized practice of law; however, it omitted any enforcement mechanism.

Other jurisdictions, such as the Massachusetts Supreme Judicial Court (SJC), concluded that a specific definition of the practice of law is impossible and that each case must be decided on its own particular facts. The SJC held that the drafting and preparing documents for others, including documents with legal implications, does not automatically constitute the practice of law.

Whether such activities constitute the practice of law depends to some degree on the type of document, whether legal rights and obligations are being established, whether the document involves providing legal advice or a legal opinion, and whether the document is tailored to address a client’s individual legal needs. Given that there are numerous cases (e.g., concerning document preparation companies), this is unlikely to be the last word on this important question, says Suffolk University Law School Professor Andrew Perlman.

Nonlawyer Equity Investment in Law Firms

Until early May 2011, the conventional wisdom when it came to nonlawyer equity investment in American law firms was: won't happen.

The rules in every state, most of which generally track the ABA Rules of Professional Conduct, were thought to clearly prohibit outside investment. Wisconsin rules, such as those dealing with confidentiality (SCR 20:1.6) and conflicts of interest (SCR 20:1.7), resolved the question.

Further, SCR 20:5.4: Professional Independence of a Lawyer, prohibits practice with a firm where “a nonlawyer has the right to direct or control the professional judgment of a lawyer.” A lawyer could not surrender management or control of her practice to the whims of a financial market concerned only with performance.

Then, in 2007, Slater & Gordon, an Australian personal injury law firm, was listed on the Australian Stock Exchange. According to an article on Law.com, it was the first law firm in the world to go public. The news did, of course, set off a flurry of interest among the world's lawyers. If it happened in Australia, a country with an essentially common law system, would it be long before it happened elsewhere?

Although the *New York Times* and other publications speculated that English law firms would soon follow suit, legislation to permit public stock offerings in British firms was slow to develop. However, on October 6, 2011, restrictions on public ownership of stock in UK law firms will be lifted, and law firms in the British Isles will be free to sell stock. The question is, will they? And the question for American lawyers is, will we?

As this report was being drafted, the working assumption was that any change in current law was a long way off. But lawyers, being a litigious bunch, couldn't resist a challenge to the status quo. The May 19, 2011, edition of the *Wall Street Journal* reported that on May 18, Jacoby & Meyers, a New York-based personal injury law firm, “filed lawsuits challenging state laws in New York, New Jersey and Connecticut that prohibit nonattorneys from owning stakes in law firms.” The plaintiff alleged that “restrictions have hurt its ability to raise capital to cover technology and expansion costs, and have hampered it in providing affordable legal services to its working-class clients.”

The challenge to equity restrictions also spread to North Carolina where a legislator introduced a bill authorizing nonlawyer investing. At this time, the bill is in the very early stages of consideration. A member of the North Carolina bar association staff believes the bill was introduced as a challenge to the status quo and that even its author does not give it much chance for passage.

At least for now, the provisions of SCR 20:5.4 preclude outside equity investment; however, the Jacoby & Meyers lawsuit, whenever resolved, may point the way to an entirely new fiscal approach to the practice of law in the U.S.

This is not to say, however, that the matter has not received considerable scrutiny. In 2007, Georgetown University Law Center hosted an extended debate on the question of whether, even under current rules, some type of public equity funding might be possible. The conclusion: perhaps.

The current restriction on U.S. law firms is not without consequences. If British and Australian law firms adopt a public funding model, American law firms will find themselves in economic competition with firms holding the possibility of significantly greater resources supporting them. In a global legal sphere, this financial advantage may work to the detriment of American law firms practicing in the international market.

“Until early May 2011, the conventional wisdom when it came to nonlawyer equity investment in American law firms was: won't happen.”

“While outside funding certainly allows some deserving plaintiffs to initiate potentially costly litigation, it also opens the door to questions of investor control over the management of the case.”

Does equity investment threaten the ability of American lawyers to compete in the global legal market? Probably not, at least for the time being. While Australian lawyers have the option of selling capital shares in their firms, there appears to have been no rush to do so. And while British lawyers will soon have the equity investment option, they seem to show no great enthusiasm for it. We find no indication that the possibility of equity funding is under active consideration in other European legal communities.

It is clear, however, that our assumptions about the future of equity funding of law firms will increasingly come under challenge. The view of the future is, at best, seen through a dark glass.

Third-party Litigation Financing

Even today, American law firms need not rely entirely on their own internal resources for funding legal actions. It has already become a relatively common practice in the U.S. for law firms to seek and obtain outside sources of funds for support of litigation.

A number of websites offering loans for funding litigation are advertising on the web. Among them are “anylawsuits.com,” “fairratefunding.com,” and “lawsuitcash.com,” all of which appear in paid advertising ads on Google when the search entry is “finance litigation.” These sites advertise loans to individuals (not lawyers), who are free to use the money as they see fit, and that includes, of course, expenses necessary to pursue their cases.

A long article in the November 11, 2010, edition of the *New York Times*, headlined “Investors Put Money on Lawsuits to Get Payouts,” began with this statement:

“Large banks, hedge funds and private investors hungry for new and lucrative opportunities are bankrolling other people’s lawsuits, pumping hundreds of millions of dollars into medical malpractice claims, divorce battles and class actions against corporations – all in the hope of sharing in the potential winnings.”

But investor funding has both advantages and drawbacks. While outside funding certainly allows some deserving plaintiffs to initiate potentially costly litigation, it also opens the door to questions of investor control over the management of the case. The *Times* cited at least one investor-funded case that was thrown out on the grounds that it should never have started. In another case, the interest on the investor’s loan wiped out the plaintiff’s recovery.

A party’s lawyer will probably be obligated to not only tell the client that the lawyer may seek a litigation loan, the lawyer should also explain in detail the pros and cons of taking such a loan. The *Times* article stated that, “Lawyers are not required to tell clients that they have borrowed money, so the client may be unaware that there is financial pressure to resolve cases quickly.” That observation, however, appears to run afoul of Wisconsin SCR 20:1.4: Communication, which obliges a lawyer to consult with the client, keep the client informed, and provide the client with information necessary to make informed decisions regarding the lawyer’s representation.

A June 16, 2011, article in the *New York Law Journal* titled “Ethics Opinion Urges Wariness in Dealing With Lawsuit Funding” states:

“It is not necessarily unethical for attorneys to take clients who are receiving non-recourse litigation financing from third-party lenders, but the attorneys should be wary of potential conflicts of interest and breaches of confidentiality.”

According to the article, the New York City Bar’s recent Ethics Opinion 2011-2, “Third Party Litigation Financing,” calls non-recourse litigation financing “a valuable means for paying the costs of pursuing a legal claim, or even sustaining basic living expenses until a settlement or judgment is obtained” for many clients. However, the opinion says, the financial involvement of a third party in a lawsuit requires lawyers to tread carefully to avoid ethical breaches.

Outsourcing Legal Services to Foreign Entities

Another source of competition for Wisconsin lawyers is outsourcing: the practice of hiring foreign entities to perform routine legal services such as research and document review. As an example, more than one million lawyers in India are willing to work for much less than American attorneys. In 2007, the U.S. exported \$6.7 billion in legal services, while importing only \$1.6 billion. While law firms may not be enthusiastic about outsourcing, large firms with corporate clients find themselves under increasing pressure to hold down costs as clients see outsourcing as a way to save money.

The ABA’s Ethics 20/20 Commission recently released its draft recommendations on several subjects including outsourcing. The ABA’s April 15, 2011, *Law News Now* reported:

“Without taking a position on the practice [of outsourcing], the commission proposes revisions to comments to existing rules in the ABA Model Rules of Professional Conduct, which are widely followed by the states, that identify factors lawyers need to consider when retaining outside lawyers to work on client matters, and affirming that a client’s informed consent should be obtained before outside lawyers are retained.”

An article in the May 10, 2011, edition of *The Legal Intelligencer* contained these observations about the current state of outsourcing:

“Outsourcing: Although there have been published reports to the contrary, outsourcing of basic legal work to firms in India continues to be hot. Furthermore, it is not just to India. Originally founded in New York, Axiom Global Inc., which provides lawyers-for-hire to major corporations, has just purchased another legal staffing company based in Chicago.

“More outsourcing: U.K. firm CMS Cameron McKenna has gone a step further and is outsourcing all support functions except business development and communications. This will reduce their support staff by possibly 90 percent. However, many of the now-former staff will be employed by Integreon, the outsourcing firm, and still work in some of Cameron’s offices.”

“More than one million lawyers in India are willing to work for much less than American attorneys.”

“*Outsourcing within the limits of the rules of professional conduct is here to stay.*”

Enter the term “legal outsourcing” in a Google search, and a click of your mouse will return 140,000 entries plus ads for outsourcing services including offerings from India and the Philippines. Not to be left behind, the search result lists a number of American firms offering outsourcing services.

Outsourcing within the limits of the rules of professional conduct is here to stay. The only question is, what changes to the rules, such as those covering the client-lawyer relationship found in SCR 20:1.1 to 18, will be made to accommodate the new realities of the practice of law?

Globalization is a reality, and American lawyers will be faced with that reality, probably even in small- and medium-size cities across the country. When a lawyer in Wausau can seek financial backing from a company in California or even Australia, her colleagues will be forced to expand their horizons as well.

Likewise, with the resource of instant access to legal support from anywhere in the world, outsourcing, though within the limits of the rules governing lawyer ethics, is another challenge – or opportunity – for Wisconsin lawyers.

Part 2: THE CHALLENGES

New Lawyer Training and Development

The challenges identified in this report create great difficulties for practitioners, especially those who are new to the profession. The young, new, or inexperienced practitioner bears the responsibility to conquer these challenges. However, the profession shares the responsibility for assisting these practitioners along the way. Support must come from not only the State Bar, but also from the Board of Bar Examiners, the bench, and the law schools that produce the new attorneys.

The challenge for any lawyer is to differentiate themselves from others in the marketplace. New lawyers will need to develop business skills, language, engineering / science – traits that set them apart from their peers. Many new lawyers are well situated to take advantage of the latest technologies.

Change must start with law school education. They must train lawyers for real-life practice challenges, teach entrepreneurial skills, and paint a realistic picture of employment opportunities and law school debt.

Law Students Need Training for Real-life Practice Challenges

The final report from 2009 ALI-ABA & ACLEA Critical Issues Summit, entitled “Law School Education CLE & Legal Practice in the 21st Century,” highlights the need to improve legal education, emphasizing the tools necessary for new lawyers to transition from law school to practice. The report indicates that new lawyers are ill-equipped to step directly into practice lacking the core skills necessary to effectively participate in the practice. The result is damage to the attorney, the attorney’s employer, and the client.

The report recommends law schools take responsibility for properly educating students to the demands of practice and suggests more rigorous course work with a primary emphasis on improving professional skills. It notes that while the practice of law has significantly changed over the last 100 years, the fundamental law school curriculum has not.

The report also finds that law schools, and the bar and bench, should develop and encourage transitional training programs to begin in law school and continue through at least the first two years of practice. Transitional training programs should include testing and post-admission supervised apprenticeships. Additionally, more rigorous efforts to help law students obtain the core competencies needed to practice, including bridging the gap between analytical and practical knowledge, the business of building an efficient practice (client relations, technology, trust accounting, billing, timekeeping).

According to PINNACLE Director Bill Connors, a Board of Bar Examiners (BBE) committee is in the early stages of exploring the possibility of requiring new lawyers to take specialized training as a condition of practice. While some law students take practice skills and participate in clinical programs during law school, such courses are not required before a new lawyer begins the practice of law.

“While the practice of law has significantly changed over the last 100 years, the fundamental law school curriculum has not.”

Ultimately, law schools are necessary partners in properly educating new attorneys in the rigors of the practice of law. New attorneys need to obtain the core competencies needed for practice and can't be left to fend for themselves in a market that offers limited opportunities to learn and grow professionally.

Accredit Training in the Content or Skills Necessary to Effectively Practice Law

One of the primary areas of agreement from all sources is that CLE regulators should accredit training that is not directly related to substantive law, as “effective client service requires lawyers to be good managers of their time and offices, skilled managers of the financial aspects of running a practice, and knowledgeable in areas that do not necessarily involve substantive law.”

In Wisconsin, the Board of Bar Examiners (BBE) interprets the applicable Supreme Court Rules related to continuing legal education ([SCR 31.07](#)) to mean that only courses that address “lawyer skills” receive CLE credit, according to PINNACLE Director Bill Connors. This interpretation includes substantive law, and legal procedures and processes like depositions.

Connors adds that the BBE will accredit negotiation skills courses, and it may give credit for communications skills. However, courses on the effective use of technology to run a law practice generally will not get CLE credit, nor will anything about the business of running a law practice, unless the training relates to ethics rules (e.g., alternative billing practices or managing trust accounts). It is not clear how BBE determines which courses receive CLE credit, says Connors.

The State Bar should continue to urge the BBE to accredit training in the content or skills necessary to effectively practice law.

Recent Economy Impacted Learning, Mentoring Opportunities

Mentoring has always played a prominent role in the legal profession, writes Michael Moore, a Milwaukee-based consultant to the legal profession, in his August 2011 *Wisconsin Lawyer* career column. “For lawyers, mentors do more than simply pass on knowledge and information. They pass on the true art and science of the practice of law. They help lawyers acquire vital knowledge and skills more quickly and effectively. Individualized mentoring and support can therefore be crucial to any lawyer’s professional development.”

Recent rollback on summer clerkships and internships reduced hands-on learning opportunities for law students

The recent economy has greatly impacted the ability of new law students to receive practical, hands-on training to develop their skills to enter the practice of law. In highlighting that law firms were once richer teaching environments, Martha Solinger, co-general counsel for Lehman Brothers Holdings observed, “The training system is different because the pressure on lawyers to get clients and bill time has ratcheted up.”

This pressure has reduced the opportunities for new lawyers to spend time with older

lawyers and osmotically learn from them. While law students over the ages remain eager for such opportunities, the realities of practice, both at the governmental and private levels, have left practitioners with little time to dedicate to providing these opportunities to law students. Aside from anecdotal evidence, several reports and surveys support this conclusion.

Reduced law firm hiring means recent grads may rely on solo practice or contract work

When hiring by law firms and corporations dropped exponentially, many recent law school graduates found themselves faced with the difficult choice of either taking a nonlaw job or starting their own solo practice, either by hanging out their shingle or taking in contract work. The risk of the former is that of skill atrophy – a law degree is a tremendous investment with a limited shelf life. The longer you remain out of the law field, the worse your chances of taking a job in the field. The latter option allowed new graduates to use their degrees immediately, but with an unmentored jump into the practice of law. Starting your own law practice as a newly minted lawyer involves not only learning the substance of practice on your own, but also learning how to run a business. The State Bar has offered several educational opportunities over the years on building and running your own law practice, including the Law Office Management Section’s Saturday program, Considerations for Starting a Law Practice. However, due to rules set by the Board of Bar Examiners, such courses generally do not qualify for CLE credit.

It is the strong recommendation of this Challenges Committee that educational offerings dealing with the business of starting and maintaining a law practice be granted the same status as so-called “substantive” courses: qualification for CLE credit in Wisconsin.

Opportunities for mentorship programs

Four year ago, attorney Joseph Melli of the Dane County Bar Association’s Senior Lawyers Division and attorney Joshua Kindkeppel of its New Lawyers Section partnered to create a successful mentorship program in Dane County that is thriving today. Now in charge of the program, attorney Jack Sweeney says the program’s goal is to develop professionalism in young lawyers. Notoriously short lived, Joe Melli stated that most mentorship programs started with finding mentors. Hoping to change that history, Joe challenged Joshua to come up with 10 mentees first, then Joe would find the mentors. Joshua found the mentees in short order. Joe reports that he made only 11 telephone calls to secure the first 10 mentors.

Now comprised of 20 mentor/mentee pairs, organized in “pods” by subject matter, the entire group meets quarterly. Pods meet monthly, and the individual mentor/mentee pairs meet more often, as they agree. Jack reports that he currently has a waiting list of mentors, who qualify as such if they have at least 10 years of practice and commit to spend at least one hour per month with their mentee.

Bolstered by the success of the DCBA program, Melli and former State Bar President Jim Boll issued a mailing on January 28, 2011, inviting all local bar leaders in the state to start similar programs at the local level. Some of the more sparsely populated, rural areas in our state are considering banding several local bars together to create a mentor program.

In addition to formal programs sponsored by the DCBA, an informal program is in place in the Fox Valley. The Fox Valley Young Lawyers Association maintains a database of

“ “The recent economy has greatly impacted the ability of new law students to receive practical, hands-on training to develop their skills to enter the practice of law. ” ”

veteran attorneys willing to serve as mentors to new lawyers. Once a pair is matched, the attorneys decide how the relationship will proceed and for how long.

One of the most successful mentoring organizations in the country is the American Inns of Court, founded in the late 1970s by Chief Justice Warren Burger. There are now more than 350 Inns nationwide, including four active organizations in Wisconsin – the James E. Doyle American Inn of Court, Madison; the Leander J. Foley Jr. Matrimonial American Inn of Court, focusing on family law, Milwaukee; the Thomas E. Fairchild American Inn of Court, Milwaukee; and the Hon. Robert J. Parins American Inn of Court based in Green Bay.

The State Bar Young Lawyers Division, in its July 2011 newsletter, reports that its members rank mentoring opportunities as one of their top three concerns. As a result, the YLD's Mentoring Committee researched local and national programs, and it expects to implement a program in the coming year.

For years, the State Bar has published the Lawyer-to-Lawyer Directory in the annual *Wisconsin Lawyer Directory*, listing approximately 500 lawyers willing to share their expertise in particular areas of law with other lawyers through brief telephone consultations. This network of volunteers contributes to greater competence within the profession and improved delivery of legal services to the public.

In addition to these efforts, some medium to large firms, in Wisconsin and nationally, support formal mentorship programs. In these instances, firm management believes that mentoring is valuable, explains why, and dedicates financial resources to monitor and measure feedback. As in the volunteer programs mentioned earlier, senior attorneys often play a leading role in these programs. At the same time, there is growing recognition that a one-size-fits-all mentoring solution does not apply to every law firm.

The Challenges Committee encourages the State Bar to further develop mentoring opportunities between experienced and new lawyers.

Part 2: ADDITIONAL CHALLENGES

While conducting its environmental scan, the Challenges Committee identified additional challenges impacting the culture of Wisconsin’s legal profession.

Demographics: Too Many Lawyers Now, Too Few in the Future?

According to a June 27, 2011, [post](#) to *The New York Times* Economix blog, nearly every state is producing more lawyers than it needs. It reports that, across the country, there were nearly twice as many new law school graduates than estimated job openings. Currently State Bar statistics reflect 24,158 members, 31 percent of which are nonresident members.

However, attorneys Frederic Ury and Thomas Lyons, who frequently speak about the future of the legal profession to bar association leaders and lawyer groups, believe that fewer lawyers will enter the legal profession in the future. They report that within five to ten years there will be 10 percent fewer lawyers practicing law. Legal futurist [Charlie Robinson](#) predicts there will be 10 to 40 percent fewer lawyers practicing in five to ten years.

Fifty-five percent of U.S. lawyers are baby boomers, report Ury and Lyons. In Wisconsin, 49 percent of its members are age 50 and older.

Currently 68 percent of State Bar of Wisconsin membership is male and 32 percent is female, while the men and women graduating from law school nears a 50-50 ratio.

A number of questions come to mind as the State Bar thinks about the future of the profession and bar associations:

- As older boomers reach retirement age, can they afford to retire? What impact will this have on new lawyers looking for work?
- Will outsourcing and technology offset the future decline in the number of lawyers?
- How will fewer lawyers impact bar associations and the services they provide?
- How will the increase in the number of women in the profession impact the culture of law firms, and the profession? How will this affect the State Bar and the services it provides?

“ “As older boomers reach retirement age, can they afford to retire? What impact will this have on new lawyers looking for work? ” ”

Diversity: Also a Business Growth Strategy

The demographics of the legal profession do not reflect the demographics of our population as a whole, according to the ABA in report, *Diversity in the Legal Profession: Next Steps*.

Ninety-two percent of State Bar members self-report that they are white, compared to 85 percent of Wisconsin’s population and 66 percent of the U.S. population. (Note: 3,445 members have not voluntarily reported their race or ethnicity.) Wisconsin’s Hispanic lawyer population is nearly 2 percent, compared with 5 percent of Wisconsin’s population and 15 percent of the national population. Six percent of Wisconsin’s population and 13 percent of the nation’s population is black, compared to 2.4 percent of State Bar members.

“Demographic trends in the United States clearly illustrate that work/life balance issues and the need to embrace diversity are crucial objectives that may affect any law firm’s bottom line.”

– Michael Moore

Michael Moore, a Milwaukee-based consultant to the legal profession, writes about diversity and women in his August 2011 *Wisconsin Lawyer* column. He says, “By 2040, it is estimated that 50 percent of the population will be made up of people from racial and ethnic backgrounds currently considered ‘minorities.’” Ten times more women than men are starting their own businesses, and a steadily growing number of general counsels and senior executives are women.

According to the ABA’s report, “... a diverse legal profession is more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes.”

The ABA offers four compelling arguments supporting a diverse legal profession:

- The Democracy Argument – our political system requires broad participation by all its citizens. When attorneys and judges come from diverse backgrounds, people have greater trust in the government and judicial system.
- The Business Argument – global customers, suppliers, and competitors are composed of workforces from diverse backgrounds and clients expect their lawyers to be culturally and linguistically proficient.
- The Leadership Argument – individuals with law degrees often possess the skill sets necessary to become leaders in their communities. Access to a legal education must therefore be broadly inclusive.
- The Demographic Argument – the demographics of the legal profession do not represent the demographics of our nation’s population as a whole.

“Demographic trends in the United States clearly illustrate that work/life balance issues and the need to embrace diversity are crucial objectives that may affect any law firm’s bottom line,” says Michael Moore. Nonetheless, because lawyers are trained in the value of precedent, they might underestimate the impact of trends. So long as our traditional systems still appear to be working, and especially in the absence of a proven alternative, change often is uncomfortable and usually is resisted. However, economics as well as demographics have now thrust upon us this brave new world of diversity and inclusion.”

Moore quotes futurist Alvin Toffler, “Change is the process by which the future invades our lives. The illiterate of the 21st century will not be those who cannot read and write, but those who cannot learn, unlearn, and relearn.”

Lawyer Satisfaction

Many notable factors contribute to low career satisfaction in the law profession. Those factors include: unrealistic career expectations, law school debt, technology and its impact on client expectations, work-life balance, compassion fatigue, midcareer burnout, and negative public image. An emphasis on work/life balance will increase lawyer satisfaction, according to various reports and studies.

The Challenges Committee commends the State Bar, through its Wisconsin Lawyers Assistance Program (WisLAP), for taking some important steps to better understand lawyer satisfaction and compassion-fatigue issues of concern for Wisconsin lawyers.

Wisconsin is one of several bar associations currently participating in a study conducted by a nationally renowned research team. The study seeks information on factors, personal and professional, that contribute to life and career satisfaction. This study will provide data on the psychosocial effects of not only the law school experience but the

experience of practicing attorneys and those who are retired or have left the law. WisLAP, as well as bar leaders and law school faculty nationally, will use the data to prevent ethics, and mental health and substance abuse problems within the profession.

Over the past year, the Wisconsin State Public Defender participated with WisLAP in a study on compassion fatigue and its impact on SPD lawyers and support staff. WisLAP will use the results to develop training materials and techniques to help SPD staff deal with difficult subject matter. In addition, the results will be shared with legal professionals across the nation.

WisLAP expects the results of the compassion fatigue study later this summer and the lawyer satisfaction study by late fall or early 2012. Both studies offer the State Bar and the profession insight into lawyer satisfaction issues.

Below is a summary of some of the issues impacting lawyer satisfaction identified during the Challenges Committee’s environmental scan:

- **Law school debt.** “Law schools must continue to examine the real cost in human terms that flows from new graduates carrying such large debt loads and ensure more realistic financial expectations for those entering law school by providing more transparency in employment data.” (New York State Bar Association Report of the Task Force on the Future of the Legal Profession, April 2, 2011) Nilesh Patel, a U.W. Law School career advisor, reports that 74 percent of its 2010 class graduated with debt, averaging nearly \$80,000. Tuition ranged from \$90,000 to \$150,000, depending upon scholarships, says Patel.

- **Technology:** Technological advances such as smartphones make it easier for attorneys to work from almost anywhere. The ability to work anywhere, anytime also creates the challenge of increased expectations that lawyers will give immediate attention even to matters that do not require it and raises the expectations of clients who anticipate speedy responses even after business hours.

Attorneys also feel the need to be accessible via electronic means. “Research has recognized that the failure to detach from office demands can lead to stress-related medical issues, burn-out, and decreased productivity.” Therefore, attorneys must prepare for and preserve their time away from the office. The benefits are likely to include enhanced performance and a more satisfying personal life. (New York State Bar Report)

- **Compassion fatigue.** “Compassion fatigue” is defined as the cumulative physical, emotional, and psychological effects of being continually exposed to traumatic stories or events when working in a helping capacity,” according to Linda Albert, in her [article](#), “Keeping Legal Minds Intact: Mitigating Compassion Fatigue Among Legal Professionals.”

Research conducted in 2003 by A.J. Levin found that, compared to mental health providers and social service workers, attorneys had “significantly higher levels of secondary traumatic stress and burnout.” The report concludes that this is likely due to higher case loads, lack of supervision or support, and lack of education regarding the impact of ongoing exposure to traumatic material and events.

- **Negative public image.** A negative public perception of lawyers directly impacts a practitioner’s satisfaction with his/her chosen profession. Earlier this year, the Journal Sentinel featured a two-part exposé about attorneys who violated the law and/or the code of ethics: [Part 1: Convicted attorneys are still practicing](#) and [Part 2: Clients kept in the dark](#). In addition, lawyers are subject to rating systems, both internally from the legal community and externally from the public.

- **Work-life balance.** Although work-life balance began as a women’s issue, the increasing number of dual-earner families has made it an issue that impacts both men

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and women. “Men are increasingly taking responsibility for the care of their children and elderly parents as well as for other family-related tasks and, in so doing, report dramatically increased work/life conflict.” (New York State Bar Association Report)

Most lawyers are miserable because they are following the wrong business model: selling activity by the hour. “Attorneys must stop selling activity and start selling knowledge,” says Jay Shepherd in his Ignite Law 2011 presentation, *Quantum Leap: How You Will Practice Law in 2019*. If the business model is changed to value lawyers for their knowledge, they will be happier and be able to take on more important issues: glass ceiling, work/life balance, diversity, and pro bono.

“It is important to understand that attorneys who seek work-life balance are not necessarily less committed to the practice of law or their clients. Although some attorneys do want to work fewer hours, many are often simply trying to attain more flexibility or predictability in their work responsibilities,” according to the New York State Bar Report. The benefits of focusing on improved work/life balance are from three perspectives: expense reduction, revenue enhancement, and risk minimization. Ignoring problems impacts lawyer health and wellness.

Legal professionals who have achieved a healthy balance between pursuing successful careers and living fulfilling personal lives have one thing in common: each is master of his or her domain. The evidence that solos and small-firm lawyers (micro-firm lawyers) can use the control they have over their practices to achieve work/life balance is more than anecdotal. Ten years ago, in “On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession,” Notre Dame Law School Professor Patrick J. Schlitz discussed a number of then-recent studies that found greater career satisfaction among micro-firm lawyers than among lawyers at large firms.

“The findings are consistent with the results of the Gallup-Healthways Well-Being Index, a 2009 survey of more than 100,000 people in 11 job categories. That survey found that business owners had the highest overall well-being score, followed closely by professionals, on a composite measure of six factors, including emotional and physical health, job satisfaction, healthy behavior, access to basic needs, and self reports of overall life quality,” writes Lisa Solomon, in her *ABA Journal* article, “Work-Life Balance Lessons for (and from) Micro-Firm Lawyers.”

Court System Funding Deficits

The state’s budget deficit impacts Wisconsin court system, the practice of law, and the public’s access to legal services. Wisconsin’s public defender program relies on both staff attorneys and assigned counsel to handle this caseload. Under current Wisconsin law, the state pays private attorneys \$40 an hour for representing indigent criminal defendants. This is the same amount Wisconsin paid private attorneys for these services 15 years ago and only \$5 more per hour than the original rate established in 1978. Today, it is the lowest such hourly rate in the nation.

Due to reduced funding for the State Public Defender’s office, State Bar Past President Jim Boll, in his April 2011 [President’s Message](#), reports that he is raising private funds for a study to examine whether the current rate of pay for assigned counsel of indigent defendants adversely affects the quality of representation and the appropriate rate of pay for assigned counsel for the indigent in Wisconsin.

The defense bar is not the only group affected by the lack of funding in the court system. District attorneys face significant challenges as their offices around the state continue to be inadequately staffed and underfunded. A 2007 report issued by the Wisconsin Legislative Audit Bureau showed that prosecutor positions have been cut while prosecutors' workload has continued to rise, forcing them to spend less time on each case or even to choose which offenses to prosecute. As a result, according to Boll in his May 2011 [President's Message](#), DA offices do not have adequate time to work with victims and witnesses or with law enforcement officers. The shortage of prosecutors has negative effects on protecting crime victims and decreases the prosecution of cases that directly affect our communities.

To learn more about future [trends](#) in state courts, the National Center for State Courts recently published a series on how courts nationwide are enhancing access to justice through the use of technology, specialized courts and services, and other special programs.

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