Law Practice in the 21st Century – Where Are We Heading?
An informal survey of how practicing lawyers view seven significant trends affecting the legal profession

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Editor’s Note: These survey results with comments are a follow up to the presentation done by Professor Sieberson at the 10th Annual Creighton University School of Law/Omaha Bar Association Seminar on Ethics and Professionalism on Friday, April 8, 2016.

Introduction – A Changing Scene

Admission to law practice and the provision of legal services are evolving rapidly in the 21st century as a result of new attitudes, new demands, new patterns in American society, and advances in technology. The following are a few examples of this changing scene:

○ Legal education is less and less local. Every law school attracts students from different states, every law school offers a broad, national curriculum in keeping with ABA requirements, and J.D. graduates from every accredited law school have the freedom to sit for the bar exam in any state. At the same time, bar exams are becoming more standardized throughout the country. In most states the exam no longer serves as a barrier to students who have studied elsewhere.

○ Within American society, business, investing, personal affairs, disputes, and even criminal activity are increasingly multistate in character, and it is natural that clients would wish to have their attorneys provide services wherever needed.

○ For many segments of the U.S. population, the cost of traditional legal services is simply too high. There is a critical need for less expensive options.

○ There is increasing awareness that persons other than fully trained lawyers can offer competent legal advice and handle legal tasks. This trend is also seen in health care, where a variety of practitioners with different levels of education and licensure are supplementing and even competing with the services traditionally provided by medical doctors.

○ The complexity of modern life makes it increasingly difficult to separate legal services from other services such as financial advising, tax counseling, and accounting. Lawyers may find themselves competing with other professionals, and attorneys must often coordinate their professional activities with those of non-lawyers.

○ More significant than any of the above is the fact that technology has changed the way people find information, communicate, seek advice, and manage data. In law practice
there are new ways to connect clients with attorneys and new ways for lawyers to carry out their work.

Impact on the Legal Profession – How Do Lawyers View the New World?

During the spring of 2016 we studied how the above developments have been reflected in concrete changes in the legal profession. As our research proceeded, we focused on seven trends in legal education, licensing, and practice – significant developments that lawyers might consider to be an opportunity, a threat, or simply another challenge in an already demanding career. We then created an informal survey to discern the attitudes of practicing lawyers toward these developments.

On April 8, 2016, we presented the survey to the annual Seminar on Ethics and Professionalism conducted by Creighton Law School and the Omaha Bar Association. Seven survey questions were presented by Dr. Sieberson in PowerPoint format and a written handout, and we used the Survey Monkey app to allow audience members to vote by smart phone, tablet, or laptop immediately after each question was presented. In addition, the survey was held open for four days after the seminar, to allow responses by those individuals who were not prepared to answer during the presentation. Of an audience of more than 400 practicing attorneys, we received an average of 225 responses to each question.

Questions and Responses

Each question below is preceded by a brief description of the topic. For the live presentation, that description was presented orally and accompanied by bullet points on the PowerPoint slides.

For each survey question we tried to offer at least one response that reflects resistance to the trend, one that embraces the trend, and one or more that demonstrate some form of middle ground. The seven questions, along with their response options and the results from our audience, are presented below. Percentages are rounded to tenths of a percent.

Topic 1: A Single Bar Exam. Traditionally, each state offered its own unique exam, largely made up of essay questions. Today, states have the option of using the Multistate Bar Exam (MBE), Multistate Essay Exam (MEE), and Multistate Performance Test (MPT). In 2011 the MBE, MEE, and MPT were first offered as a package, the Uniform Bar Exam (UBE). Twenty-one states have adopted the UBE. Others have adopted one or more of its components, supplemented by tests on local law.

Question 1: Which bar exam is desirable?
---[231 responses]

○ No UBE at all – local exam only
  ● 7 responses, 3.0%

○ Uniform Bar Exam à la carte – with one or more local components
Comment: The overwhelming majority of responders supported the current trend toward a uniform bar exam, with this group split evenly between those who favor a local component to the exam and those who do not. Very few responders would turn back the clock to unique exams in each state. A relatively small percentage of responders would eliminate the bar exam entirely (the Wisconsin model for graduates of in-state law schools), and this result may well reflect the fact that most people in the audience had already “paid their dues” by surviving a bar exam. We imagine that a poll of current law students would produce many more votes for the no-exam option.

Topic 2: Multistate Practice. Each state’s supreme court has authority over lawyers in its jurisdiction, and each court issues law licenses valid in that state only. Lawyers can hold multiple licenses, subject to paying fees and following all rules of practice in each state, which can vary. Admission in a different state may occur by transfer of UBE scores, waiving in based on similar bar exams, or “admission on motion” if a lawyer has practiced for several years. Rule 5.5 prohibits unlicensed practice, but allows a lawyer to provide temporary services in another jurisdiction. The range of such services is carefully limited.

Question 2: What type of license is desirable?
--[230 responses]

○ One state at a time, based on bar exam, no admission on motion
  ● 2 responses, 0.9%

○ One state at a time, with easily attainable admission on motion
  ● 134 responses, 58.3%

○ Multistate license with one state handling the administration
  ● 24 responses, 10.4%

○ Multistate license within a region, with regional administration
  ● 21 responses, 9.1%

○ National license, with national administration
  ● 49 responses, 21.3%

Comment: It is clear that very few responders wished to require lawyers to take a second or third bar exam, and 99 percent preferred to facilitate multistate practice. Our suggestions (options 3 – 5) for a true multistate license, whether administered by one
state or a regional or national administration, are not, to our knowledge, under serious consideration anywhere, likely because state supreme courts have jealously guarded their control over the legal profession. Nevertheless, these rather novel options received 40.8 percent of the votes. A majority of 58.3 percent favored easy reciprocity, even if that means being subject to more than one set of rules and more than one governing authority.

Topic 3: Online Legal Assistance. It is now possible to purchase a number of legal services online, including a will, trust, incorporation, dissolution, and power of attorney. In the process, the client fills in an electronic form. The online service provider reviews the form, but disclaims any offering of legal advice. Rule 5.5 prohibits unlicensed law practice, but there have been longstanding accommodations for selling legal forms and for having real estate agencies and title companies prepare certain forms. The new online providers claim that they operate like these traditional services. The providers have settled challenges by bar associations, and there is growing acceptance of the practice.

Question 3: How may clients be assisted online?
--[227 responses]

○ Only law firms, legal aid, or bar association should provide and fill out legal forms  
  ● 84 responses, 37.0%

○ Allow non-lawyers to provide and fill out legal forms through a service company only if each matter is reviewed by a lawyer  
  ● 96 responses, 42.3%

○ Allow non-lawyers to provide and fill out forms through a service company without lawyer review  
  ● 47 responses, 20.7%

Comment: Despite the increasing presence of online form-sellers such as LegalZoom, RocketLawyer, Nolo, and Docracy, nearly eighty percent of our responders indicated that lawyers should handle or supervise the provision of legal documents. Whether those lawyers take any steps through their bar associations, and whether the courts respond in their favor, will be worth watching. Without active intervention, we should expect the online businesses to continue vigorously promoting their services.

Topic 4: Limited Law Licenses. The state of Washington has recently created two types of licensing for non-lawyers. (1) A Limited Practice Officer (LPO), after passing an exam, may prepare documents for loans and real and personal property transactions. The documents must be based on approved forms. An LPO does not represent separate clients, but all parties to a transaction, and may not offer legal advice. An LPO may work independently. (2) A Limited License Legal Technician (LLLT) must study for one year and work for 1-2 years for a lawyer, and then the LLLT must pass an exam. An LLLT may work independently, represent clients, and offer legal advice in family law matters only, although the subject areas may expand in the
future. An LLLT compares to a nurse practitioner.

**Question 4:** Should there be limited practice licenses?

--[223 responses]

- There is no need to have limited-license law specialists
  - 71 responses, 31.8%

- Limited-license law specialists should be required to work under lawyer supervision
  - 107 responses, 48.0%

- Limited-license law specialists should be allowed to work independently within specified limits
  - 45 responses, 20.2%

*Comment:* The idea of limited license practitioners who can operate independently was favored by only 20.2 percent of our responders. Nearly half approved a new form of licensing, but only as long as the technicians work as paralegals and legal assistants currently do, i.e., under lawyer supervision. The Washington model will undoubtedly be watched by lawyers and courts in other jurisdictions, and a key consideration should be whether the new types of practitioner will help fill the need for less expensive legal services.

**Topic 5:** Multi-Disciplinary Firms. A multi-disciplinary firm (MDF) is one that offers a variety of professional services. In the U.S., Rule 5.4 prohibits lawyers from fee-sharing with non-lawyers, and this has prevented lawyers from participating in MDFs in which non-lawyers are equity owners. MDFs are common in other countries. In the state of Washington, new Rule 5.9 allows Limited License Legal Technicians to own a share in a law firm as long as lawyers retain control.

**Question 5:** Should lawyers be allowed to practice in an MDF?

--[224 responses]

- No, Rule 5.4 should be retained as is
  - 67 responses, 29.9%

- Yes, but only if lawyers retain control over the MDF
  - 45 responses, 20.1%

- Yes, if lawyers retain professional independence despite non-lawyer control over the MDF
  - 89 responses, 39.7%

- Lawyers should not be restricted from participating in an MDF, regardless of its control

● 23 responses, 10.3%

Comment: Looking at options 2 – 4, 70.1 percent of responders approved the concept of a multi-disciplinary firm that includes lawyers providing legal services. This is a rather significant rejection of Rule 5.4 as it has traditionally been interpreted. Nevertheless, very few of those in favor of the MDF selected option 4, which would allow the lawyers in an MDF to be subject to control by non-lawyers without restriction.

Topic 6: Referral Fees. Rule 5.4 prohibits sharing fees with a non-lawyer. Rule 7.2 prohibits paying referral fees except to certain nonprofit referral agencies, but it does permit a lawyer to pay for “advertising or communication.” A new for-profit online company refers clients to its list of lawyers, collects a fixed fee for the services up front, and then pays the lawyer the full fee when the work is completed. However, the company then charges the lawyer a “marketing fee” of approximately 15-20% of the lawyer’s earned fee. The company claims that its marketing fee is consistent with the rules of ethics.

Question 6: Should lawyers be allowed to pay referral fees to “for-profit” companies?

--[225 responses]

○ No, such fees should be limited to a bar association or nonprofit referral agency

● 110 responses, 48.9%

○ Yes, but only if the fee has no relation to the number of referred cases or size of legal fees

● 68 responses, 30.2%

○ Yes, allow such a fee after the referral and based on size of legal fee

● 28 responses, 12.4%

○ Yes, there should be no restrictions on referral fees to anyone

● 19 responses, 8.4%

Comment: The company referred to in this question is Avvo, although others may be using a similar business model. Option 1 would reject the new model and preserve the traditional system of lawyer referrals. Option 2 would allow a lawyer to pay a true marketing fee to a company, but that fee would have to be based on the marketing efforts and not the results. Only 20.6 percent of responders selected options 3 or 4, which would approve the Avvo model or some other form of referral fee to a for-profit company. A substantial majority selected options 1 or 2, expressing a rejection of percentage-based fees being paid to a for-profit company.

Topic 7: Outsourcing Support Services. It is possible to retain an outside firm to provide support services such as document review, research, document drafting, and data management. Such “legal process outsourcing” providers may be local, but may also be anywhere in the world – India, for example. Ethical issues in outsourcing include Rules 5.1 and 5.3 (a lawyer’s supervisory responsibilities), Rule 1.7 (conflict of interest – who else is the provider working
for?), and Rule 1.6 (confidentiality/privilege).

**Question 7: Should there be limits on outsourcing? [223 responses]**

- Outsourcing should not be allowed in any form
  - 61 responses, 27.4%

- Allow outsourcing only to firms with which the lawyer has ongoing face-to-face contact
  - 72 responses, 32.3%

- Allow outsourcing only to firms within the U.S.
  - 43 responses, 19.3%

- No geographical restrictions on outsourcing
  - 47 responses, 21.1%

*Comment:* Option 1 received more than a quarter of the vote, even though it is likely that every lawyer at one time or another has retained an outside service company for assistance in printing or managing data or technology. Therefore, we should interpret option 1 as rejecting only those support services that closely resemble legal work such as research, document review, and drafting. There was a fairly even split among the four options, although a clear majority of 59.7 percent of responders favored options 1 and 2 and would require careful lawyer control over all legal services, either by keeping them in-house or by demanding close supervision of the outsourced work. Still, it is significant that nearly three-quarters of responders (options 2 – 4) approved of outsourcing, including nearly forty percent (options 3 and 4) who would permit outsourcing to a remote service provider.

**Limitations of this Survey**

The limitations of this survey are several: First, our description of each of the seven trends was distilled into a format that could be explained, digested, and voted on in approximately five minutes. Thus, the questions and responses lacked the detail and nuance that they undoubtedly deserve. Second, to keep things manageable, for the response to each question we offered only a handful of alternatives, and we required the responder to select only one of them. Again, simplicity triumphed over subtlety. Third, although we did our best to present the material in a lucid and objective fashion, we did not test the survey in advance to uncover our own biases or whether our descriptions were clear to the audience. Fourth, to keep our focus on the practice of law, we emphasized the practical aspects of each subject. Legal and ethical concerns were present in the entire exercise, but we did not emphasize the technical requirements of the applicable rules. Fifth, we did not ask for demographic information from responders, and thus we do not know how the responses might have reflected age, gender, ethnicity, years of practice, type of practice, or other factors.

**Final Observations**
We conclude by reminding ourselves and the bar that we cannot simply ignore these trends in how our profession is constituted and in how legal services are being delivered to the public. We urge state and local bar associations and the courts to keep abreast of these developments and to address them thoughtfully, in order to preserve the professionalism of law practice, but more importantly, to insure that quality legal services can be made available to all members of society.