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THE CLASH OF 20TH CENTURY REGULATION WITH 21ST CENTURY TECHNOLOGY

MARK PRUNER*

LAWYERS AT A CROSSROAD

The Internet is over 25 years old, but for lawyers, the impact of the Internet is only now having a major impact on the practice of law. The Internet became usable by the average attorney only after the creation of the easy-to-navigate World Wide Web by Tim Berners-Lee at CERN in Switzerland and the subsequent creation of the first web browser, Mosaic, by Marc Andreessen at the National Center for Supercomputing Applications on the University of Illinois Champaign/Urbana campus. Mosaic was conceived in December 1992 and the code was written in the first quarter of 1993. The World Wide Web, as most people know it, is therefore only nine years old.

Since the creation of the World Wide Web, no communications medium has ever experienced such rapid growth and change as has the Internet. The rapid growth of the World Wide Web, email, intranets, instant messaging and other Internet technologies is changing the way law firms operate and the way they market themselves.1 In June 1995, two years after Mosaic was created, the number of law firm websites was so small that they all could be visited in one hour of surfing the Internet. Since

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then nearly every medium and large law firm have established a website and the Internet has started to reshape the practice of law. The last nine years has also seen the rapid expansion of law firm marketing departments.

As a result lawyers now stand at a cross-roads. Law as traditionally practiced is a static set of services in a rapidly expanding set of professional service options. Until recently firms have been complacent as a growing economy had raised all boats, but other professions grew much faster. To see what kind of growth, technology can create, you need only look at the Big 4 consulting firms and other large professional services firms, which have been growing at compounded rates of 25% and what is even more impressive is that the Big 4 started from a much bigger base. For example, Arthur Anderson had been adding the equivalent of firms the size of Skadden Arps every year for the last several years, at the same time that law firm growth is usually measured in single digits. Law firms are also are not seen as innovators, though a few are trying. Limited law firm growth and high growth innovation by the professional services firms and some dot.coms will bring about major changes in the practice of law in the next 5 years.2

Some would argue that the recent auditing scandal that brought down Arthur Andersen and has resulted in the Sarbanes-Oxley bill3 mandating that accounting firms divest their consulting services is proof of the correctness of lawyers sticking with a narrow and traditional view on the practice of law. But such critics are looking at the wrong side of the MDP firm, it is not the auditing services that are a challenge to lawyers, but a combination of law plus other unlicensed professional services from organizations such as Accenture, IBM/PwC, CAP/Gemini/Ernst & Young, McKinsey & Company et al that is the real threat to law firms. These are so large that they will suffer during downturns in the economy, but will also grow more

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rapidly when the economy is good than will traditional law firms that don't try innovative service models.

ETHICAL REGULATION AS BUSINESS MODEL PROTECTION

One of the primary factors limiting law firm innovation and even growth are the Rules of Professional Conduct and its predecessor, the Code of Professional Responsibility. These rules not only help define responsible conduct, but also control the business model that attorneys can adapt. In some cases, attorneys are affirmatively prohibited from a particular business model, such as the prohibition against forming partnerships with non-attorneys. In other cases, the rules greatly impede a business model such as the prohibition against the use of sales agents.

As a result law firms offer only a very narrow range of professional services and business structures. Most firms from the smallest to the largest are structured as partnerships. The larg-


7. **Model Rules of Prof'l Conduct, R. 7.2 cmt. (1983)** (prohibiting attorney from paying another person to channel professional work). *See generally* Edward L. Birk, Protecting Truthful Advertising By Attorney-CPAs --Ibares v. Florida Department of Business & Professional Regulation, Board of Accountancy, Board of Accountancy, 114 S.Ct. 2084 (1994), 23 Fla. St. U.L. Rev. 77, 97 (1995) (claiming that while generalized attorney advertising is allowed, targeted mail solicitations immediately following personal injuries are not); Mark D. Flanagan, Lateral Moves and the Quest For Clients: Tort Liability of Departing Attorneys for Taking Firm Clients, 76 Calif. L. Rev. 1809, 1819 (1987) (expounding that attorneys have traditionally been barred from actively soliciting clients).
The major rules that restrict the creation of innovative legal services by law firms are:

1. State licensing

2. Zealous representation

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9 See MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2001) (requiring lawyers to be zealous advocate on behalf of client); see also Roberta K. Flowers, An Unholy Alliance: The Ex Parte Relationship between the Judge and the Prosecutor, 79 NEB. L. REV. 251, 261 n.73 (2000) (noting danger posed by restricting zealous advocacy by attorneys); Ross
State licensing is by far the greatest impediment to law firms developing economically viable new services, so we will examine it in some detail.

Lawyers have a monopoly within each state for traditional legal services.13 The laws and ethical restrictions protecting the lawyers monopoly, protect them not only from other professions, but also from lawyers in other states. The legal regulatory scheme provides a variety of examples of restricting inter-lawyer competition.14 The intent is to prevent "unseemly" competition


See Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 YALE L.J. 1239, 1258 (1991) (announcing that "the Supreme Court invalidated the bar's endeavors to control competition among lawyers through minimum fee schedules"); see also Robert D. Tollison, Public Choice and Legislation, 74 VA. L. REV. 339, 343 (1988) (stating that attorneys may restrict competition amongst themselves through code of ethics).


See Goldfarb v. Virginia State Bar, 421 U.S. 773, 793 (1975) (holding that adherence to minimum fee schedule set by state bar association was within reach of Sherman Act); see also Hoover v. Ronwin, 465 U.S. 558, 591 (Stevens, J., dissenting) (summarizing Goldfarb holding: "The State Bar... has voluntarily joined in what is essentially private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act."). See generally N.Y. GEN. BUS. LAW §340 (Lexis 2002).
between attorneys (i.e. maintain the status quo) rather than protecting the client by making sure that the attorney is qualified to practice the licensing state’s law. For example, being licensed without taking the bar exam is a classic example of how state licensing is not exclusively focused on protecting clients from lawyers not trained in that state’s law. Under this exception most states allow the admittance of lawyers on motion\textsuperscript{15} after a certain number of years of practice, frequently 5-7 years, an attorney can be admitted to practice in another state without being examined for their knowledge of the state’s substantive law. Curiously, the state may require the applying lawyer to pass the national MPRE exam, not an exam that focuses on the admitting state’s particular ethical differences.\textsuperscript{16} In New York where the older Code of Professional Responsibility applies, there is no requirement that a lawyer admitted on motion be tested for New York specific ethics rules, even if the lawyer is from a state like Connecticut, where the Rules of Professional Conduct apply.\textsuperscript{17} As a result the rules tend to prevent the movement of younger, “hungry” attorneys, while allowing for the limited movement that occurs after an attorney is established.

Law students arguing appeals is another example. The rules also allow unlicensed individuals to “take” cases from NY licensed attorneys, provided they can’t make any money.\textsuperscript{18} For example Second Circuit Local Rule 46(e) allows a law student to appear for an indigent person, if supervised by an attorney ad-

\textsuperscript{15} See e.g., CAL. ST. MISC. R. 983 (allowing out of state attorneys to appear \textit{pro hac vice}); N.Y. CT. R. 520.11 (outlining admission \textit{pro hac vice}).

\textsuperscript{16} See e.g., CAL. BUS. \& PROF. CODE § 6062 (Lexis 2002) (requiring applicant pass any state's professional responsibility exam).

\textsuperscript{17} See John M. A. DiPippa, \textit{Lawyers, Clients, and Money}, 18 U. ARK. LITTLE ROCK L.J. 95, 112 n.116 (1995) (stating: “New York bases its ethical requirements on the ABA's Model Code of Professional Responsibility.”); Nicholas Targ, \textit{Attorney Client Confidentiality in the Criminal Environmental Law Context: Blowing the Whistle on the Toxic Client}, 14 PACE ENVTL. L. REV. 227, 247 (1996) (stating Connecticut adopted Model Rules of Professional Conduct). See generally Thomas, \textit{supra}, note 14, at 256 n.89 (citing then Chief Justice of Nebraska Supreme Court, Norman Krivosha, that “[a] state's refusal to accept recent MBE scores, given the uniformity of the test, is made even more troublesome when such a state will nevertheless admit on motion an attorney of sufficient practice experience from another state, without regard to whether that other state's laws are similar or not.”).

mitted to the Second Circuit bar.\textsuperscript{19} Contrast this with Federal Rule of Appellate Procedure 46, which prohibits inexperienced attorneys who presumably have paying clients from even becoming a member of the Federal appellate bar.\textsuperscript{20}

One of the clearest recent examples of state licensing being used to prevent competition and the legislative reaction to this monopolistic practice is \textit{Birbrower, Montalbano, Condon & Frank, P.C. v. The Superior Court of Santa Clara County}.\textsuperscript{21} In this case Birbrower, Montalbano, Condon & Frank, a New York law firm, was retained to handle a software dispute for Esq. Business Services (EBS), a company whose headquarters were in California.

EBS, for whatever reason, decided that they did not want to pay for Birbrower, Montalbano's services and claimed that nothing was due, because Birbrower, Montalbano attorneys were not licensed in California. The California Supreme Court agreed that nothing was due for Birbrower Montalbano's work in California, but did allow a quantum meruit argument for work done when the attorneys were physically in New York State.\textsuperscript{22} This case epitomizes the inherent contradictions in trying to apply geo-

\textsuperscript{19} Mark Pruner, \textit{The Internet and the Practice of Law}, 19 PACE L. REV. 69, 81 (1998) (stating "Second Circuit Local Rule 46(e) provides that a law student can appear for an indigent person if supervised by an attorney admitted to the Second Circuit bar."); \textit{id.} at 81 (citing "2nd Cir. R. 46(e)").

\textsuperscript{20} \textit{See Fed. R. App. P. 46}; \textit{see also} \textit{S.C.L.C. v. Supreme Court}, 61 F. Supp. 2d 499, 506 (1999) \textit{aff'd} 252 F.3d 781 (5th Cir. 2001) (ruling law restricting law student participation in representation was not unconstitutional); Pruner, supra, note 17, at 81 (highlighting under Federal Rules of Appellate Procedure (FRAP), rule 46, any attorney admitted to practice in any state can be admitted to any federal appellate court).


\textsuperscript{22} Birbrower, 949 P.2d at 13 (stating law firm's statutory violation precluded recovery of fees attributable to practice of law in California but not recovery for services performed outside California). \textit{See Jacob J. Herstek, The Maryland Survey: 1998-1999: Recent Decisions}, 59 MD. L. REV. 1171, 1185 (2000) (stating Birbrower allowed for fee recovery for legal work performed in New York even though work was performed for California client); \textit{see also} Mark Pruner, supra note 20, at 82 (stating court held Birbrower and Montalbano could collect fees for work done outside California but not for work performed within California borders and also suggesting this policy is obsolete with improving technology, such as Internet and video-conferencing).
graphical restrictions from the 19th century when the primary form of transportation was horse and buggy, to an age of telephones, faxes, email, extranets, FedEx and 777s.

The most curious aspect in the Birbrower Montalbano case is the majority's holding that that Birbrower, Montalbano, could recover for the value of the work done outside of California borders.\(^2\) It did not matter whether the work Birbrower Montalbano did involved California law, it only mattered where they were physically located when they were doing the work. As the dissent pointed out such distinctions make little sense in a world where the Internet has made geography irrelevant.\(^2\)\(^4\)

The reasoning in this case if widely enforced would be a major problem for modern law firms who have attorneys meeting clients across the U.S. Today, with the use of technology, lawyers can practice lots of California law, even appearing in the state through video conferencing, without every being physically present in California.

The California legislature did not like the Birbrower decision and quickly passed legislation authorizing outside firms to come to California to represent companies in California mediation matters.\(^2\)\(^5\) Such legislative reversals of anti-competitive practices are common. For example the Texas legislature reversed Judge Barefoot Sander's decision holding that Parsons Technology's personal lawyer software constituted the unauthorized practice

\(^{23}\) See supra note 22 and accompanying text.

\(^{24}\) See Pruner, supra note 20, at 82 (arguing distinctions made by court regarding physical presence in state are irrelevant in face of Internet communication); see also Diane Leigh Babb, Take Caution When Representing Clients Across State Lines: The Services Provided May Constitute the Unauthorized Practice of Law, 50 ALA. L. REV. 535, 540 (1999) (noting Birbrower court recognized need to discourage unreasonable geographic restrictions on practice of law in mobile and modern society). See generally Jack Balderson, Jr., Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court: A Defensible Outcome, But a Striking Example of the Need to Reform Unauthorized Practice of Law Provisions, 36 SAN DIEGO L. REV. 871, 890 (1999) (arguing Birbrower decision exposes need for state legislatures to amend unauthorized practice of law statutes to comport with interstate nature of modern legal practice).

of law.\textsuperscript{26}

Internet enabled legal services are even more difficult for the traditional bar regulations than the issues in \textit{Birbrower}. On the Internet, location is irrelevant, every public website is accessible from every computer hooked up to the Internet. To put up a legal services website requires only one copy of a program or website to make it available to the millions of users on the World Wide Web. As a result companies engaged in e-commerce can easily grow to substantial size very quickly (though being profitable is harder.) Lawyers have seen the potential of this technology, but have come up against several barriers the greatest of which is the economic impact of state licensing.

As an example, imagine that the law firm of Roe & Doe is the leading firm in the nation in preparing UCC filings. They are hired in large deals to do UCC filings in all 50 states. They have developed an internal system to handle their client's UCC filings. The Roe & Doe internal system has quality assurance features that notify them when their might be a problem with a particular filing and links them to the appropriate case in their database and the appropriate parts of their UCC filing manual. They now want to put up a web-based front end on their system to allow the banks and even members of the public to fill out the forms and do the filings automatically. They even have a name for their new service "UCC-Esquire".

UCC-Esquire would be a "smart" web-based system that analyzes the information input and asks the user a series of questions. Based on the user's input the system would point out legal risks to the user, even citing cases and statutes where appropriate. The software would also recommend to the user the best alternatives to the legal risks discovered by the UCC-Esquire system, just as it has done internally for the Roe & Doe attorneys.

Roe, the traditional lawyer, has read Catherine Lanctot's article *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, and is concerned that since the system gives specific recommendations on specific fact situations, it is likely to be construed as the practice of law in many states. Roe thinks the firm will need to hire or affiliate with an attorney licensed in each of 50 states. Doe, the advocate of innovation, says this will be a huge additional burden to the development of the service and they have been doing UCC filings for 20 years and no one has ever accused them of the unauthorized practice of law before. Doe argues that the burden includes not only the attorneys salaries or retainers, but also the time and cost of finding and managing 50 cyber-literate attorneys.

Roe suggest that they simply strip out the "legal" component. But Doe says that is the firm's competitive edge. Roe knows that several other software companies offer UCC filing packages (see for example the Texas Secretary of State's list at http://www.sos.state.tx.us/ucc/edilinks.shtml) and without their "smart" features they are in a commodity filing business and will lose to big corporate America. Roe suggests that they test market the UCC-Esquire system only in their home state and worry about expansion later. Doe points out that if they do this, none of their large clients will want this service, because the reason they hire Roe & Doe is because they provide a one-stop shop, national solution.

Roe decides the UCC-Esquire has so much potential to capture part of the 9 million UCC filings made annually, that he agrees with Doe. They decide to go ahead with development and worry about hiring the attorneys in the other states later. Roe, being the lawyer's lawyer when it comes to UCC filings, is extremely concerned that their system may not be smart enough. While it contains their combined years of legal and technological experience, they are always coming across unusual situations that are just too rare to program into the system. Doe says they should do

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what the software manufacturer's do and disclaim all liability. Roe says that attorneys are not allowed to limit their liability under Rule 1.8(h).

Rule 1.8. Conflict of Interest: Prohibited Transactions

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.28

Doe says fine, then if they can't limit our liability, they'll will simply limit the scope of their representation to only those situations that UCC-Esquire is programmed to handle. The attorneys take heart, because Rule 1.2(c) provides

Rule 1.2. Scope of Representation

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.29

They will give each user, the option of consultation, before signing up. They see that the comment to Rule 1.2 offers further assurance:

SERVICES LIMITED IN OBJECTIVES OR MEANS. The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be sub-


29 MODEL RULES OF PROF'L RESPONSIBILITY R. 1.2 (c) (1983). See Susan Randall, Managed Litigation and the Professional Obligations of Insurance Defense Lawyers, 51 SYRACUSE L. REV. 1, 17 (2001) (stating Rule 1.2 (c) enables lawyer to limit objectives and scope of legal representation with consent of client); see also Zacharias, supra note 26, at 222 (stating Rule 1.2 (c) permits lawyers and clients to negotiate representation with limited objectives).
ject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means that the lawyer regards as repugnant or imprudent.\textsuperscript{30}

Until they get to the next paragraph and see the prohibition against a limited representation that would violate Rule 1.1.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer’s services or the right to settle litigation that the lawyer might wish to continue.\textsuperscript{31}

Roe points out that Rule 1.1 requires that an attorney shall provide competent representation to a client, which Doe says is exactly what their system does. Roe read the comment to Rule 1.1, which says:

THOROUGHNESS AND PREPARATION. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.\textsuperscript{32}

\begin{footnotes}
\item[30] \textit{Model Rules of Prof’l Responsibility} R. 1.2 cmt. (1983). \textit{See} Ann M. Scarlett, \textit{Representing Government Officials in Both Their Individual and Official Capacities in Section 1983 Actions After Johnson v. Board of County Commissioners}, 45 Kan. L. Rev. 1327, 1336 (1997) (stating comments to Rule 1.2 (c) indicate scope of legal services provided to client may be limited pursuant to agreement with client). \textit{But see} Zacharias, \textit{supra} note 29, at 210 (arguing comments to Model Rule 1.2 (c) circumscribe client’s right to limit objectives of representation by incorporating lawyer’s duty to provide client with competent representation).


\end{footnotes}
Roe says the standard for representation is a human standard, but Doe says so what, the natural tendency is to say no program can measure up to a human in performance. Doe says this is not always true. Programs do better than people where the number of possibilities is large, but finite and readily determinable. In such situations, humans tend to get bored, anticipate answers and fail to explore all possibilities; Doe says her program always checks all significant possibilities.

Roe agrees they have a great program that regularly catches errors made by their paralegals, but the real problem is that the person doing the input will input information improperly resulting in GIGO, Garbage In, Garbage Out. Doe says they can design in a mass customization feature so that not only is each state's law taken into account, but also the peculiarities of all of their major clients.

Doe then has a brainstorm and says some problems would actually be good for Roe & Doe. Whenever there is a problem the web system will provide a direct connection to an attorney, so we will be able to generate more billable hours. Roe says that more billable time is good, but he is still concerned about the multi-jurisdictional practice issue now that they will be on the web.

As Doe was thinking about the MJP problem she had another brainstorm. They had a database of tens of thousands of filings and the web would soon make it hundreds of thousands. Each of these filings had dozens of non-public items associated with it. He knew a partner at professional services firm that was using advanced data mining techniques to predict all sorts of amazing things. Doe's favorite was the convenience store that found they could increase beer sales if they put them next to the diapers on Fridays. It seemed that young fathers were stopping in on Friday afternoon, their payday, to pick up diapers and would be more likely to buy beer if it was next to the diapers. Doe was sure that if they partnered with his friend's firm, that they could develop a very lucrative business using data base mining.

When Roe heard about this he said absolutely not. Lawyers are not allowed to split fees with non-lawyers and they can't form associations with non-lawyers he said citing Rule 5.4 (a) and (d).

Rule 5.4. Professional Independence of a Lawyer
(a) A lawyer or law firm shall not share legal fees with a non-lawyer, . . . 33

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

   (1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

   (2) A non-lawyer is a corporate director or officer thereof; or

   (3) A non-lawyer has the right to direct or control the professional judgment of a lawyer. 34

Doe said that was no problem they could always create a subsidiary, Roe & Doe Data Miners. Roe said he didn't want to be a data miner, he was a lawyer and proud of it. Doe said, there was nothing immoral about what she was proposing. She went on and said that if she took this to idea to the Big 4, they could do the data mining services, and make Roe & Doe a strategic "captive" firm. She had seen this done in the District of Columbia, which had a special version of Rule 5.4(b), which allowed MDPs:

   (1) The partnership or organization has as its sole purpose providing legal services to clients;

   (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;

   (3) The lawyers who have a financial interest or managerial authority or holding a financial interest undertake to be responsible for the non-lawyer participants to the same extent as if non-lawyer participants were lawyers under Rule 5.1;

34 MODEL RULES OF PROF'L CONDUCT Rule 5.4 (2000).
Roe chuckled and said he didn’t see how if the sole purpose of the organization was to provide legal services, there was any benefit to letting in non-legal professionals, unless you were looking for a silent partner to provide financing. Doe agreed and said it seemed to be primarily designed to let former government officials join law firms to do lobbying. Roe said even if we were based in D.C. how would the other states react if Roe & Doe hired a UCC filing manager and she started giving legal advice over the web in their state. Doe said that was not a problem, because of the commerce clause and comity. Roe asked if Doe spelled the later comity or comedy.

Doe pointed out that the Big 4 already had lawyers in every state and an agreement with a Big 4 firm could even solve their MJP issue, since the Big 4 attorneys could join the “captive” Roe & Doe on a part time basis. Roe said he was quite aware that there were plenty of ways to structure these relations and stay within the rules and thought that the issue of multi-disciplinary practice was no big deal.

Doe agreed that from the rules viewpoint structuring a legal MDP was easy, but she still thought that restrictions were a big deal. She wanted to practice law and create new and valuable professional services. If she had to do it in two different organizations, one or the other would get short-changed. Roe agreed with that, he thought the way that most firms were creating subsidiaries was strange; no offices, little or no staff, limited advertising and marketing, and the attorneys were supposed to do the MDP’s work in their “spare” time.

Doe countered that there were several firms that weren’t taking this tact and were providing funds, staff, offices and even doing some advertising. Doe said, that for these sophisticated firms, she was concerned that affiliates were growing much, much faster than the law firm. How would the attorneys working in the MDP feel when their efforts were generating more than half the firm’s revenue. Roe said that was always possible, it certainly led to the split up of Arthur Andersen & Andersen Consulting, (now called Accenture).

Doe also pointed out that if you had separate organizations

35 D.C. RPC Rule 5.4(b).
rather than a true MDP, that the firm wouldn’t be a true one-stop shop. Roe said one-stop shops were over-rated, doing a few things well was better than doing everything mediocre. Doe said Roe just didn’t understand the power of the new technology to coordinate worldwide operations. She pointed out the way that the Big 4, airlines, media, financial and insurance companies were all merging to get bigger, which allowed them to take advantage of technology and spread their costs. Roe said there would always be a place for the experienced, well-connected attorney, who knew how to cut a deal. Doe agreed, but she said it wouldn’t be a very big place in the 21st Century.

Roe asked Doe, “Do you really thing we are going to make a lot of money?” Doe said, sure, most lawyers never leverage their capital investments. With our web-based system you pay for it once and then sit back and let the money roll in, that is after a lot of hard work, marketing, constant updating and improvements. Even better once we start getting a good part of the filings, the network effects will start kicking in. People will start accepting our system as a standard. It will be written into contracts, other people will design their systems to work with our system. It’s a great positive feedback loop. We will get rich and not have to knock ourselves out billing people on an hourly basis.

Roe said, that’s what has him worried. He pulled out ABA Formal Ethics Opinion 93-379 entitled Billing for Professional Fees, Disbursements and Other Expenses. It says here you can’t bill two clients for the same time if you are researching the same issue in each of their cases. Isn’t that similar to what we are doing in this on-line system. If one more person uses our system, it essentially costs us nothing, yet we bill them for it.

Doe pointed out that Rule 1.5 doesn’t say anything about that. It just says:

Rule 1.5. Fees

(a) A lawyer’s fee shall be reasonable. The factors to be con-

considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.37

Roe said, I know, but we used to do value billing. Our invoices used to read “For Services Rendered” your bill is “X” dollars. If the client didn’t like it they called up. Now there is a strong feeling that anything that is not billed by the tenth of an hour is a subterfuge for fee gouging, when I think too often its the hourly billing that results in unreasonable billing. Now that we can account for every minute, the client feels a lot less comfortable arguing that the amount billed is not related to the value to him, which he usually can’t quantify exactly. Now you want to introduce a system, where we use the same system over and over again and charge each time, even if don’t do a single hour of work for that client.

Doe got exasperated and told Roe, that they are going to being

doing the work better, faster and for less money than most firms. It sure seems to her that UCC-Esquire fees match up with many factors in Rule 1.5. I know, said Roe, but can’t you just see some practitioner including the fee issue in a complaint to an ethics board or an unauthorized practice of law committee.

Doe told Roe, that they would win in the long run. If not before the ethics committee, then before the legislature. Roe said he wished he had Doe’s optimism, because in a new business like this, even a minor hint of impropriety will result in many of our prestige clients abandoning us. With our big upfront costs, we are not going to have a lot of funds left over to fight multiple court fights and lobbying battles.

Doe say there was one thing that did worry her; the ethics boards strict construction of Rule 7.1, which says:

Rule 7.1. Communications concerning a Lawyer’s Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(3) Compares the lawyer’s services with other lawyer’s services, unless the comparison can be factually substantiated.38

Roe agreed you have to be careful about 7.1, but said it is really a guide to effective advertising. We are exposed to hundreds of advertising messages every day. He said, their clients can spot puffery in a second and they aren’t taken in by it. In fact they expect puffery, so if they didn’t do it, they would stand out. He said, their clients are going to believe numbers more than hype. At the

same time he agreed that with a strict interpretation, practically any description is a violation, but at least we have plenty of company. Roe said he couldn’t find a single law firm brochure or website, where there wasn’t some technical violation of this rule.

Doe said what really surprised her was the number of ways that the Internet could be used that the Rules hadn’t even considered. Take search engine rankings, there are lots of ways to manipulate the UCC-Esquire site so that it comes up higher than its competitors. In fact, Doe pointed out that they had better start doing so, because less qualified firms were coming up higher in search engine rankings than were Roe & Doe.

Doe also said they should work out linking arrangements with a variety of other sites to feed us traffic. This not only got them more traffic, but the more links they have to their site the higher they would come up in search engines.

Doe pointed out that the model rules say practically nothing about imagery. Could they put dollar signs in the photo montages on their website? How about pictures of jubilant “clients”? Could they put low cost clip art stock photos of “attorneys”? What if the “attorney” is “in court”, but has her backed turned to the camera, so you can’t tell if she is one of our attorneys? And could they link to articles on the websites of reputable publication, if the articles makes subjective statements about them that they couldn’t make themselves.

Roe asked Doe if she wanted to re-write the rules. Doe said she wouldn’t know where to start, but thought it wasn’t going to be an easy job. They both were glad the ABA was proposing to loosen this Rule in their Ethics 2000 initiative.

**LAWYERS ADVANTAGES**

As the Roe & Doe debate indicates law is at a crossroads. Entrepreneurial lawyers and non-lawyers are daily coming up with new ideas to provide legal services in new ways, but lawyers and traditional law firms are not going away. What you will see in the next five years is greater change than you have seen in the previous 50 years. Lawyers, and particularly certain specialties, are under significant economic strain that will only get worse over the next few years. At such times people are willing to try new things.
What may not be so clear from the Roe & Doe debate is that lawyers do have significant advantages.

Lawyers are used to a changing and uncertain environment. This is a significant advantage in today's economy. Lawyers have a tradition of rapidly expanding into new practice areas, and retooling their skills for new areas or when the market for their present practice area contracts is common. What is unusually in the changes today is that in addition to retooling their legal skills, lawyers need to learn how to manage technology and also how to create sophisticated marketing programs; and lawyers are doing just that.

For example, the Law Marketing Association has grown rapidly in the last 10 years. Lawyers now receive regular training in marketing and sales. Firms are now making strategic use of advertising, even television ads. Law firms are taking booths at trade shows and at least one firm has proposed creating an actual sales department rather than lumping sales in with marketing. Some firms are developing 5-year plans and setting up strategic planning committees that have real power.

One advantage rarely spoken of is that many of the people writing the laws and nearly all the people interpreting the law are themselves lawyers. As a result, the legislatures and the courts are not the driving force behind changes in legal practice; economics and public pressure drive the changes. Only when the organized bar makes public attempts to prevent people, and to a lesser extent companies, from getting better, faster, cheaper services as in the Parsons Technology case do legislatures tend to respond.

Lastly, people all other things being equal, will always prefer

39 See Prerequisites for Law Firms in the Market for a Marketing Pro, L. OFF. MGMT. & ADMIN. REP., Aug. 1999, at 1. (noting that law firm marketing has grown dramatically in past decade); see also Steven A. Meyerowitz, Marketing Ethics, N.Y. L.J., June 27, 2000, at 5 (noting Legal Marketing Association as important source of ethical advice); New Resources for Law Firm Marketers, L. OFF. MGMT. & ADMIN. REP., Sept. 1999, at 5. (discussing increased use of association for marketing advice).


41 See James W. Jones, Focusing the MDP Debate: Historical and Practical Perspectives, 72 TEMPLE L. REV. 989, 992 (noting that American legal profession has been resistant to changes in practice of law); see also Nicholas P. Terry, Bricks Plus Bytes: How "Click-and-Brick" Will Define Legal Education Space, 46 VILL. L.REV. 95, 127-28 (2001) (discussing impact of legal software on legal profession).
meeting face to face with a legal advisor. In the 21st Century lawyers must figure out how to efficiently deliver a wide variety of services, while using minimal amounts of time billed at $400+ per hour. People are very slow to change their personal habits as can be seen from the number of dot-bombs. They are not trusting of an organization that they do not know.

CONCLUSION

Lawyers, however, must not be complacent, expecting that people will always want legal services in the same way. If someone believes that their case or business issue will have an advantage with a firm that combines both traditional legal skills with technology, they will change firms. Also 21st technology can result in radically different services and such abrupt change cannot be discounted. Companies like Yahoo and Ebay have created new types of businesses. There are a dozens of business, both traditional companies and dot coms that have the potential to grow very rapidly and impact the traditional law practice through the use in Internet technology.