

**THE VERMONT JOINT COMMISSION ON THE
FUTURE OF LEGAL SERVICES**

SEPTEMBER 24, 2015

**FINAL REPORTS & RECOMMENDATIONS
OF
THE FIRST YEAR
STUDY COMMITTEES**

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INTRODUCTION

On March 23, 2014, Chief Justice Paul Reiber of the Vermont Supreme Court gave a speech to the Vermont Bar Association calling for the bar, the Court, legal education providers, the business community, and the public to come together to study the question of how to ensure that Vermonters can obtain quality, affordable legal representation and efficient dispute resolution. The Chief Justice further challenged these constituencies to consider that question in light of the stark financial realities faced by the public, new lawyers, and the courts.

In answer to the Chief Justice's call, the Vermont Bar Association through its president and Board of Bar Managers convened a joint commission in September 2014 composed of lawyers, law school faculty, judges, paralegals, technology specialists, and other members of the greater legal community to identify the problems facing Vermonters and affecting the delivery of legal services to all in the twenty-first century and to propose ideas, points for continuing conversation, and potential solutions.

To approach this large subject, the Joint Commission was broken into four committees tasked with studying different, but overlapping, areas. These four committees, Legal Education, Court Process, Legal Services, and Technology, met on a regular basis from October 2014 until September 2015. During that time, the committees interviewed witnesses, researched what other jurisdictions have done to address similar problems, brainstormed, and had extended discussions and debate on the identified issues. Each committee was given a series of questions to start their process, but these questions were intended as a starting point. Some committees found these questions provided a field to explore. Other committees used the questions as a launching pad to new and unanticipated issues.

As requested in the initial charge, each of the committees have taken their findings and drafted them into a report. Collectively these reports comprise the work of the Joint Commission and represent the first phase of a two-year project.

In the coming year, the Joint Commission will shift into its second phase. Members of the Commission and the VBA Board of Managers will take the results of the committees' work and seek to implement the committees' recommendations through legislative process, executive orders, judicial administrative orders, judicial rule committees, and other avenues. The members of the Commission will also be charged with promoting the report to the general public and to various groups.

It is with deep gratitude that the Vermont Bar Association accepts these reports, and we thank each of the Committees, their chairs and their members for the extensive and thoughtful work that they have done.

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EXECUTIVE SUMMARY

If there is a common theme in the work of the Committees it is as follows: change is coming. In many places, it is already here. And it is the obligation of the legal profession to lead, follow, or get out of the way.

To understand the significance of this theme, simply consider the number of significant ways that the world has changed in just the past 20 years:

- Global trade and commerce has grown to the point where no profession or community is untouched. We are all members of the world market. For many of us this means unprecedented access to markets, commodities, and services, but it also means that we are tied to world events like never before ... As goes Abu Dhabi, so goes Brattleboro.
- Security and safety concerns have grown more prevalent. From criminal cyber-attacks to terrorist events to regional instability to natural disasters, our daily lives are touched directly or indirectly by random threats. The universal Armageddon and stalemate of the Cold War is gone. In its place is the threat that a single event could wipe out our livelihood, our jobs, or even our lives. We live in the world of the Airborne Toxic Event.¹
- Beyond the Internet: phone “apps,” and cloud-based companies have transformed life. In 1995, one could dream of owning every album ever made; in 2015, you need only a subscription to one of a dozen music sites. People do not watch TV, they subscribe to video streaming services and “binge-watch.” We save documents to “the cloud” and access them anywhere on multiple machines. No longer do we think of storing data at home. Now we simply expect to access it anywhere and everywhere.
- Social media has re-defined the way we interact. We now document our lives with the care of a museum curator. A good day in court merits a Facebook post. An interesting sight is posted on Instagram. A random thought is tweeted for posterity. Each of us has ever-larger social circles defined by these social networks and our responses to them.
- Technology has become integrated into a seamless web. We work on our desktops. We bring our tablets to meetings. And we check our smart phones constantly. In any conversation, the answer is not a matter of memory or persuasion but of searches and Wikipedia. We communicate with gifs and memes. We share cat videos and blog posts.

Each of these changes affects our daily lives, but moreover each has had or is having an immense impact on our profession. From the expectations of clients to the speed of business to the tools that we must adopt as practitioners, the world is shifting. It demands that practice moves with the times and not as tradition simply dictates.

¹ DON DELILLO, WHITE NOISE (1985) (portraying a mysterious chemical disaster that up-ends the characters in their college town insularity).

Throughout the committee process, it has been important to affirm and continue to re-affirm what we do as lawyers, judges, paralegals, and legal professionals. We are members, officers, and servants of the court. The court is our society's center for dispute resolution and criminal adjudication. As the world changes, so do the problems and crimes that affect society. Our challenge is to meet these changes and advance the process and profession to ensure the timely and fair delivery of justice to all.

It is to this end, that the reports of the committees should be viewed as an ongoing dialogue. The speed at which changes and new technologies emerge works on an electronic timeline. A single tweet, typed in an unthinking moment, can wreck a career.² One allegation of wrongdoing can go viral and upend a company.³ A simple moment becomes a global phenomenon.⁴ Today's problems will have changed by the time the solutions in this report can be implemented, and new issues will have arisen in the meantime. As a first step in the process, the Committees have sought to identify some of the long-term issues and trends and suggest changes and improvements that will address larger problems.

LEGAL EDUCATION COMMITTEE

The strongest recommendation to come from the Legal Education Committee is to adopt a paralegal licensing program. The purpose of this program would be to give paralegals, working with and under lawyers, greater authority to perform discrete legal tasks that are currently limited to lawyers.

In its thoughtful analysis, the Legal Education Committee looks at the growing need among pro se litigants in a number of areas (including landlord/tenant disputes and completing the forms for a basic divorce) and finds that paralegals with proper training and supervision could perform many of these tasks at a rate lower than an attorney.

This expanded paralegal licensure would allow law firms to offer lower-cost legal services, serve customers who might normally forgo legal representation and provide right-sized services to clients.

At the same time, the committee emphasizes that the role of paralegals should not be independent. The expansion of paralegals should complement, not supplant, existing legal

² Jon Ronson, *How One Stupid Tweet Blew Up Justine Sacco's Life*, NEW YORK TIMES, Feb. 12, 2015, at <http://www.nytimes.com/2015/02/15/magazine/how-one-stupid-tweet-ruined-justine-saccos-life.html>.

³ Caitlin Dewey, *A Vengeful Internet Trashed the Yelp Page of the Minnesota Dentist who Shot Cecil the Lion*, WASHINGTON POST, July 28, 2015, at <https://www.washingtonpost.com/news/the-intersect/wp/2015/07/28/a-vengeful-internet-trashed-the-yelp-page-of-the-minnesota-dentist-who-shot-cecil-the-lion>.

⁴ Caitlin Dewey, *The Three Stages of Going Viral in 2015, According to the Pizza Rat Meme*, WASHINGTON POST, Sept. 22, 2015, at <https://www.washingtonpost.com/news/the-intersect/wp/2015/09/22/the-three-stages-of-going-viral-in-2015-according-to-the-pizza-rat-meme>.

services. By working with and for attorneys, paralegals can reach out to serve a population that is not now being served and help support and integrate the practice of law.

The Legal Education Committee also acknowledges and reaffirms Vermont Law School's unique and vital connection to Vermont's legal profession. This recognition comes from the role that VLS has played in educating nearly one-third of the current bar membership, providing critical legal resources, and housing legal resources and programs. In plain terms, this finding means that it is in the bar's and the greater legal community's interest that VLS remains a thriving and successful entity into the future.

At the same time, the committee recommends that the Vermont Supreme Court continue to support alternative routes to licensure, particularly Vermont's clerkship program. These low-cost alternative programs are essential to creating opportunities and options for individuals with limited means who are seeking entry into the Vermont legal profession.

Finally, the committee recommends that the law school, the bar, and the Supreme Court work together to identify the skills and programs necessary to train law students for entry into the Vermont bar. This finding reflects the ongoing struggle to equip graduates with the skills and sense necessary to navigate the profession and provide good advice and representation to clients as quickly as possible.

COURT PROCESS COMMITTEE

The work of the Court Process Committee went beyond the discrete questions of the initial charge into the specific processes that the Court could implement to improve its delivery of legal services.

The Court Process Committee recognizes that much of court process and procedure is the result of careful deliberation within the judiciary. Therefore, the committee planted its recommendations in two camps.

First, the committee looked to specific dockets and subject areas where change could improve court process. In this respect, the committee concluded that changes to the consumer creditor docket, including removing it from small claims court, consolidating it in superior court, and changing the process could have a number of significant improvements on the lives of debtors, creditors, the court system, and the small claims court docket. The committee envisions bringing such cases into a single docket where the superior court judge would have access to a series of sticks and carrots. The purpose would be to get debtors into court sooner with an incentive to reveal their ability to pay. It would also seek closure so that if a party made timely payments in a reasonable agreement, the process could have a reasonable end.

Second, the committee recommends that the Court and the bar re-visit and revise the complex litigation process as embodied in V.R.C.P. Rule 16.1. The committee found that this rule does

not work as it was envisioned and does not bring greater consistency to complex actions. The committee found that this is deeper than a simple reluctance by parties to make such a designation or a problem with the language of the rule. Its problems go to the limits of resources in the judiciary. As a result, the committee recommends that the bar work with the Court to develop better methods to handle complex, multi-year litigation.

Third, the committee recommends that the Court and the bar explore the creation of a Business or Complex Litigation Court. Such courts already exist in 22 other states. The purpose of such a specialized court is to provide a forum for quicker, more sophisticated, and consistent decisions about business disputes and complex civil matters. In Vermont, this could have a number of positive benefits including better and timelier adjudication of civil matters, economic development by giving businesses an attractive forum, and an incentive for businesses to make Vermont their home jurisdiction. The committee recognizes that such a change would require the support and interest of the business community as well as the executive and legislative branches of government.

Fourth, the committee looked at the issue of rotation and recommends extending the rotation period for assignments, particularly in the civil and family units.

Fifth, the committee recommends that the bar and the Court revisit the question of a generalist judiciary. While the committee does not recommend that judges become specialists, the committee does find that there are advantages and trends in the law that recommend revisiting this question and looking at the benefits of developing judges with some specialization or focus. At the same time, the committee recognizes that this is not a simple proposition giving the resources and logistics of the judiciary or the function of judges as court and case managers. Yet, the committee believes that this is an issue on which discussion should occur.

LEGAL SERVICES COMMITTEE

The work of the Legal Services Committee focused on the interface between legal service providers, courts and lawyers, and the public. To that end, the committee came up with three specific recommendations and four secondary recommendations.

First the Legal Services Committee makes a strong case for an overhaul of the vermontjudiciary.org website. The committee outlines the vast amount of information on this website and its emerging role as the primary portal for pro se litigants and lawyers. As the judiciary will readily admit, this site needs updating, revising, and re-organizing. The committee recommends making the funds available to make this happen as soon as possible.

Second, the Committee finds that the bar, the judiciary, and its partners such as Vermont Law School need to put live legal advisors into the courthouses on a regular basis. As the committee writes,

[T]he courthouse should be seen as a community center for resolving legal disputes, much like a hospital is the center for medical issues. Other states have provided clinics and legal advice service centers at state courts, staffed with attorneys who can give limited legal advice, assist with forms and resources, and steer pro se litigants through the process.

The recommendation is to get more lawyers and legal assistants (paralegals, law students) into the courthouse, interacting and assisting real people. This would build on existing programs like the pro se education program to give a perpetual presence in the courthouse and encourage regular public traffic within the court.

Third, the committee makes a series of five sub-recommendations to make lawyers more accessible. These recommendations include: creating incentives and programs for lawyers to practice and settle in rural areas; assisting lawyers with technology to develop ways of reaching clients online and remotely; developing a legal resource manual for the bar and for each courthouse that is regularly updated; endorsing and creating models of unbundling and creative fee structures; and supporting alternative education programs that will help reduce law school debt loads on new graduates.

In addition, the Legal Services Committee recommends the following as additional steps:

- Obtain funding for more legal aid lawyers to meet the growing number of needy Vermonters;
- Expand the law student internship and practice rules to allow students to work with greater flexibility in rural areas;
- Create a statewide Office for Access to Justice that would promote and act as an ombudsman for existing legal services and that would focus and advocate for pro/low bono, modest means, unbundling, and ADR programs; and
- Expand the use of paralegals for common retail problems.

TECHNOLOGY COMMITTEE

The work of the Technology Committee was in many ways the broadest and least defined of the four committees. Its report is similarly the one least susceptible to summary. The work of this committee was focused on both how technology shapes our relationship with clients and what it ultimately means to the legal profession. Out of this wide-ranging discussion, the committee developed the following recommendations.

First, the committee strongly recommends that the updates to the judiciary's case management system continue as quickly as possible and be funded in a manner that will effectuate their implementation. The committee notes that this update is long overdue and a necessary predicate to many of the changes that we need to ensure an active and vigorous legal process.

Second, the committee emphasizes the need for a statewide court calendar system as a basic need for all practitioners. This is an example of fairly simple technology making life and practice easier and more efficient for attorneys.

Third, the committee endorses expanding video conferencing and phone appearances to avoid unnecessary court hearings, particularly in status conferences and procedural hearings.

Fourth, the committee makes a series of practice recommendations that are premised on the idea of lawyers taking steps to integrate more technology into their practice to meet the expectations of clients and the emerging world. Given that most of these changes require education and training, the committee recommends that the bar develop greater support through the following programs: a list of vetted technology solutions, a technology training center, a technology consultant, and regular trainings on new software.

Fifth, the committee makes a series of far-reaching suggestions on the adoption and incorporation of technology into the legal process through online dispute resolution programs and systems. This proposal is addressed to a future where the traditional court will not address disputes in a timely manner and will require quick, online forums where parties can make their case, receive legal advice, arbitration, or judgment. This would likely build on the models private companies like eBay and Amazon have developed but would have wider reach beyond single commercial transactions.

In total, the Technology Committee's report outlines the challenges and issues facing all of us, from online competitors (LegalZoom) to shifting public and client expectations to new options that can enrich legal work and bring sophisticated legal advice and solutions to a wider audience.

CONCLUSION

Over the next year, the Commission will be working on these recommendations and ideas, developing, refining, and seeking to implement them. To do this, we will need the help and support off the bar, the judiciary, Vermont Law School, the legislature, the executive branch, the business community, and the public. Not every recommendation in these reports, not even the recommendations in this summary, will come to pass, but if we can continue the conversation that the Chief Justice began and that this Commission has continued and make change, both bold and incremental, then we put Vermont's legal system in the best possible position to meet the needs that exist and poised to address the needs that will emerge.

On behalf of the Commission, we thank the Vermont Bar Association and its members for their support, and we look forward to continuing this work.

REPORT OF THE LEGAL EDUCATION COMMITTEE

INTRODUCTION

Change is not coming; it has arrived.

The legal education system is grappling with rising costs, burgeoning student debt, a significant decrease in applications to law schools, and a depressed job market for graduates. Meanwhile, the legal profession continues to struggle to match providers with consumers of legal services.

In response, law schools, state supreme courts, and bar associations have collaborated to make changes in pricing, educational options, licensing, and the regulation of the profession.

- Law schools, state supreme courts, and bar associations are working to ensure that law school graduates are “practice ready” and possess the competencies and skills to provide legal services upon admission.
- State supreme courts, through their licensing boards, are providing people who want to be lawyers with alternative paths to admission.
- State supreme courts are expanding the legal services that non-lawyers are authorized to provide.
- Law schools are working with bar associations to design educational programs to train the non-lawyer providers.

Without question, the very nature of the profession is changing from one that focuses on lawyers to one that focuses on the provision of legal services. Vermont’s stakeholders must recognize and accept the change that is underway.

The legal profession must endorse changes that substantially broaden access to legal services and that ease the path to acquiring a legal education and gaining admission to the bar. The bar and educational institutions together must identify the competencies and skills required to provide legal services and design educational programs that will equip providers of legal services with those competencies and skills.

SUMMARY OF RECOMMENDATIONS

- A. The Committee acknowledges and reaffirms Vermont Law School’s unique and vital connection to Vermont’s legal profession.

- B. The Committee recommends that the Vermont Supreme Court, the Vermont Bar Association, Vermont Law School, other institutions of higher learning, and stakeholders in Vermont’s legal profession:
1. Work to identify the competencies and skills expected of new lawyers; and,
 2. Collaborate to design and implement educational programs that will equip new lawyers with those competencies and skills.
- C. The Committee recommends that the Vermont Supreme Court authorize the training and licensing of Vermont Certified Paralegals.
1. The Committee recommends that the Court authorize Vermont Certified Paralegals, working in association with a licensed Vermont attorney, to provide specific legal services in the areas of family law, landlord-tenant law, and collections law.
 2. The Committee recommends that the Vermont Supreme Court, the Vermont Bar Association, Vermont Law School, and other stakeholders in Vermont’s legal profession:
 - a. Work to identify the competencies and skills expected of Vermont Certified Paralegals; and,
 - b. Collaborate to design and implement educational and licensing programs that will ensure that Vermont Certified Paralegals are equipped with those competencies and skills.
- D. The Committee recommends that the Vermont Supreme Court, through its licensing boards, continue to consider, design, and implement alternative paths to lawyer licensure and admission to the bar.

THE COMMITTEE’S WORK

A. Charge

The Commission tasked the Committee with studying the following questions:

- What reforms in the funding and provision of legal education could improve new lawyers’ ability to represent populations that currently lack representation?
- Can the VBA play a role in educating prospective and current law students about the financial realities of Vermont practice?
- Could reforms in loan repayment assistance programs result in increased representation of populations that currently lack representation and in the retention of more new attorneys in Vermont?

- Are there changes that can be made to Vermont’s unique clerkship program that would attract would-be law students to Vermont and enable new lawyers to provide more economical legal services?
- What legal education is currently available for paralegals and other legal support personnel?
- Could legal educators provide specific certification for paralegals? What would such certifications entail?
- What role would such graduates play in the legal market? How would certified paralegals work with attorneys?
- How can Vermont attorneys keep their fees affordable to more Vermonters?
- What expenses do Vermont attorneys regularly have in their practice? What expenses can be expected to increase? What new expenses will emerge in the coming years?
- Are there aspects to Vermont’s aging demographic and rural small practice setting that can be utilized in a positive way to transition young lawyers into the practice of law in Vermont both economically and in recognition of community-focused trends?

The Committee considered the questions at its first meeting. From there, an outline formed that served as the template for the recommendations in this report. The Committee met regularly from October of 2014 through August of 2015. The Committee took testimony and reviewed written material.

BACKGROUND

A. ABA Task Force on the Future of Legal Education

In January of 2014, the American Bar Association’s Task Force on the Future of Legal Education issued a report and recommendation.⁵ The report includes “key conclusions” related to the pricing and funding of legal education, the process by which the ABA accredits law schools, innovation in law school curriculum, the skills and competencies expected of law school graduates, and broadening the current model of the delivery of legal services. The Task Force made a series of recommendations directed at the ABA, law schools, law school faculty, universities and other institutions of higher learning, the legal profession, state supreme courts, state bar associations, and regulators of the practice of law.⁶

⁵http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf.

⁶ In February of 2014, the ABA Board of Governors accepted the Report. According to the meeting minutes from the Board’s meeting “The Board accepted the report of the Task Force on the Future of Legal Education, recognizing the comprehensive and innovative recommendations included in the report. The Board of Governors also expressed its appreciation and commended the members of the Task Force for their extraordinary efforts on behalf of the legal education system and the legal profession. The Board urged other institutions and individuals

Without taking a position on the Task Force’s conclusions and recommendations, the Committee recognizes that many of them are beyond the scope of what the Committee reasonably can address.⁷ However, the Committee identified aspects of the Task Force’s report as relevant to its charge and scalable to Vermont. Those aspects are the Task Force’s recommendations that:

1. Law schools provide graduates with the skills and competencies necessary to deliver legal services;⁸
2. States expand regulatory and licensing frameworks to authorize non-lawyers to provide legal services;⁹
3. Law schools and other institutions of higher learning design programs to train non-lawyers to provide legal services;¹⁰ and,
4. States consider alternative paths to licensure.¹¹

B. Proactive Steps by Vermont’s Stakeholders

In a sense, Vermont is ahead of the curve. Its stakeholders have already taken actions that are consistent with the Task Force’s recommendations. For instance,

1. Vermont has long offered the Law Office Study program as an alternative path to admission.¹²
2. In January 2013, the Chief Justice, representatives from Vermont Law School, and the Executive Director and president-elect of the Vermont Bar Association discussed both an incubator program and a limited license legal technician program.
3. In March 2013, Vermont Law School proposed an incubator program.
4. In March 2013, Vermont Law School asked the Supreme Court and the Vermont Bar Association to consider the possibility of a limited legal license technician program.¹³

playing leadership roles in the legal education system to give thoughtful consideration to each of the various recommendations of the report of relevance to them.”

⁷ For example, the Committee is generally aware of issues related to law school prices and student debt. The Committee understands that global market forces have significantly reduced the number people applying to law school, the number of people graduating from law school, and the number of legal jobs available to new graduates. The Committee is not in a position to address those issues.

⁸ ABA Task Force on Future Legal Education, Report & Recommendation, Section VII(E), p. 26.

⁹ ABA Task Force on Future Legal Education, Report & Recommendation, Section VIII(C)(3), p. 33.

¹⁰ *Id.*; ABA Task Force on Future Legal Education, Report & Recommendation, Section VIII(D), pp. 33-34.

¹¹ ABA Task Force on Future Legal Education, Report & Recommendation, Section VII(H), p. 28; Section VIII(C)(1)-(2), p. 33.

¹² Rules of Admission to the Bar of the Vermont Supreme Court, §6(g)(1). <https://www.vermontjudiciary.org/LC/d-BBELibrary/BBERules.pdf>.

¹³ Memorandum on Limited License Legal Technicians, Margaret Martin Berry & Bob Liu, March 8, 2013.

5. Vermont Law School has adopted a two-year J.D. program in order to reduce the cost of a legal education.¹⁴ The program allows students to save living expenses and enter the workforce a year earlier than in the traditional three-year program.
6. Vermont Law School has just begun a “3+2” program with the University of Vermont. The program allows qualified students to earn both an undergraduate degree and a J.D. in five years. The first year at VLS serves as the fourth year at UVM. The Program saves students at least one year of tuition, two years of living expenses, and allows them to enter the workforce two years earlier than students on the traditional path.
7. Vermont Law School has implemented several joint degree programs with the University of Vermont.¹⁵
8. The Vermont Bar Association and the Vermont Law School partnered to create an incubator program.¹⁶
9. Vermont Law School’s average tuition, net of scholarship and adjusted for inflation, has remained relatively unchanged for 10 years.¹⁷
10. In 2012, the Supreme Court amended the Rules of Admission to require new lawyers who gain admission without examination to attend 15 hours of continuing legal education on Vermont practice and procedure.¹⁸ The change made it easier for attorneys admitted elsewhere to gain admission in Vermont by eliminating the clerkship, a requirement that some perceived as an unnecessary barrier to admission.
11. The Supreme Court has conveyed to the Board of Bar Examiners its support for the “3L bar exam.” The Board is drafting rules that would allow law students to sit for the bar exam in their final semester of law school. The option would allow successful candidates to enter the workforce sooner and help them to avoid additional debt.
12. The Supreme Court has conveyed to the Board of Bar Examiners its support for the Uniform Bar Exam. The Board has proposed rules to implement the UBE. The Board expects to administer the UBE in July of 2016 after promulgation of appropriate implementing rules.
13. The Board of Bar Examiners, the Continuing Legal Education Board, and the Vermont Bar Association formed a committee charged with designing an educational program that will be required of new lawyers who are admitted upon exam.
14. Vermont Law School formed a Curriculum Competencies Committee that includes representatives from the faculty, the Vermont Bar Association, and the Supreme Court’s licensing boards. Vermont Law School has initiated a strategic planning process, the goals of which include addressing the interplay between issues of access to legal education and issues of access to legal services.

The Task Force recommended several changes that Vermont has already adopted.

¹⁴ Mihaly memo to the Committee, October 20, 2014.

¹⁵ <http://vtdigger.org/2013/09/27/uvm-vermont-law-school-plan-partner-law-degree>.

¹⁶ <https://www.vtbar.org/News/Details.aspx?NewsId=5238>.

¹⁷ *Id.*

¹⁸ Rules of Admission to the Bar of the Vermont Supreme Court, §7(g)(3), <https://www.vermontjudiciary.org/LC/d-BBELibrary/BBERules.pdf>.

C. It Hasn't Been Enough

Each of the proactive steps taken by Vermont's stakeholders is to be applauded. Still, even together, the steps have not done enough to provide Vermonters with sufficient access to legal services.

1. Many Vermonters do not hire lawyers

Vermont has an access to justice problem.¹⁹ The issue is better described as Vermont has an "access to legal services problem."²⁰ The problem is not new.

In 2012, the Honorable Amy Davenport analyzed the number of self-represented litigants in cases in the Civil Division of the Vermont Superior Court. The numbers were staggering. Defendants in small claims cases represented themselves 94% of the time.²¹ In the Family Division, 84% of active parentage cases and 54% of active divorces involved at least one self-represented litigant.²² Ninety percent of the defendants in landlord-tenant cases were self-represented compared to only 24% of the plaintiffs.²³ Defendants in collections and foreclosure cases fared marginally "better," respectively left to represent themselves 84% and 74% of the time.²⁴ This "improvement" was offset, if not rendered irrelevant, by the fact that 99% of foreclosure plaintiffs and 98% of collections plaintiffs had lawyers.²⁵

These numbers reflect a court system that would be unrecognizable to lawyers who practiced a generation or two ago. In 2012, small claims, collections, landlord-tenant, divorce, and parentage cases accounted for 72% of Vermont's civil docket.²⁶ The vast majority of ordinary Vermonters navigating a civil dispute are doing so without any help from a lawyer.

2. Self-represented litigants present challenges for the Vermont courts

¹⁹ See *Johnston v. City of Rutland*, No. 2014-380, slip op. (VT, April 23, 2015) (unpub. mem.) (Dooley, J., dissenting) ("We have a serious access to justice problem in this state. Particularly in family proceedings, a high percentage of litigants must represent themselves because they cannot afford to employ a lawyer.")

²⁰ See Andrew M. Perlman, *Toward the Law of Legal Services*, 37 *CARDOZO L. REV.* ____, ____, fn. 4 (2015); Suffolk University Law School Research Paper No. 15-5 (Feb. 1, 2015), <https://files.acrobat.com/a/preview/4c1bcd88-bbe8-43b3-b67b-b96518d20af6>.

²¹ Davenport Power Point, slide 4

²² Davenport Power Point, slide 2

²³ Davenport Power Point, slide 7; the defendant in a landlord-tenant case is almost always the tenant.

²⁴ Davenport Power Point, slides 5-6; the defendants in collections and foreclosure cases are debtors and home owners.

²⁵ Davenport Power Point, slides 5-6.

²⁶ Davenport, Slide 8

Vermont's courts strain to provide the services required of them. The judiciary faces significant budget constraints.²⁷ Already overburdened, the number of self-represented litigants exacerbates the courts' problems.

The Committee heard from court employees that self-represented litigants often do not understand the court process. Years ago, the judiciary attempted to address this problem by making required forms available online.²⁸ The Committee heard from court employees that ease of access to forms does not necessarily help. Rather, it changes the nature of the advice that self-represented litigants seek, as they now ask how to complete forms.

The advice sought by self-represented litigants goes well beyond questions that can be labeled as "customer service." Many seek legal advice of court employees. This saps resources and, in a sense, threatens the integrity of the court process by placing employees in the position of having to dispense legal advice.

The challenges are not limited to the counters. Self-represented litigants present challenges for judges. Self-represented litigants often do not understand rules of procedure or the proper methods to marshal admissible evidence. Their unfamiliarity with the rules and process can hinder judges' efforts to run efficient dockets.

3. Vermont will have an urgent need to attract new lawyers as current lawyers retire

Vermont's bar is not young.²⁹ Many lawyers who are approaching retirement have dedicated careers to serving the legal needs of small-town Vermonters. As they transition out of practice, new lawyers are not replacing them.³⁰

Supply is not meeting demand. It wants to, but cannot afford to.

Vermont's legal profession does not offer many jobs to new lawyers, and those that it offers tend to come with low salaries. Law school graduates face substantial debt loads. Nationally, average law school debt exceeds \$100,000.³¹ Graduates who intend to practice in Vermont face the additional problem of seeking employment in a state that does not offer many high-paying legal jobs. Indeed, many Vermont Law School graduates want to work in Vermont, but cannot find legal jobs that allow them to make a living.³² Thus, while Judge Davenport's statistics demonstrate that there is a demand for legal services, practicing lawyers are not meeting that

²⁷ http://www.benningtonbanner.com/columnists/ci_27612575/commentary-our-courts-crisis-justice-delayed-is-justice.

²⁸ <https://www.vermontjudiciary.org/MasterPages/Court-FormsIndex.aspx>.

²⁹ In 2013, lawyers older than 60 made up 35.6 % of the membership of the Vermont Bar Association, with lawyers older than 50 accounting for 63.5 %. By contrast, .009% of the VBA membership was younger than 30.

³⁰ See, e.g., M.D. Drysdale, "Where Have All the Lawyer Gone?", THE HERALD OF RANDOLPH, Aug. 13, 2015, at http://www.ourherald.com/news/2015-08-13/Front_Page/Where_Have_All_The_Lawyers_Gone.html.

³¹ <http://www.lsac.org/jd/financing-law-school/before-law-school>.

³² Mihaly memo to Committee, October 20, 2014.

demand and new lawyers cannot afford to try.³³ Given that over one-third of Vermont’s lawyers are already over 60 and another 28% are over 50, the problem is bound to get worse absent action.

Issues of costs of legal education are not limited to students. Vermont Law School, like most law schools, faces structural challenges related to cost. Efforts to keep tuition low threaten support for the law school’s renowned environmental program and clinics. Vermont practitioners find it difficult to train new lawyers due to financial pressures. Rather, they express a desire for “practice ready” lawyers. In turn, this calls for an emphasis on more experiential learning, which is a much more expensive model of content delivery than the traditional model.³⁴

4. Stakeholders have started to address these issues

To reiterate, change has arrived. In increasing numbers, law schools, state supreme courts, and bar associations have recognized the link between the mounting costs of legal education and legal services, and the soaring number of self-represented litigants. The response has focused on training competent lawyers, providing lawyers with alternative paths to licensure, authorizing non-lawyers to deliver more legal services than they are currently authorized to deliver, and training them to do so.

THE IMPORTANCE OF VERMONT LAW SCHOOL

The conversation about the future of legal education in Vermont must recognize Vermont Law School’s unique and vital relationship with the state’s legal profession. The Vermont bar includes more than 1,200 VLS graduates. On average, Vermonters make up 10% of each entering class, but 20% of each graduating class remains in Vermont. Many of those who stay intend to practice law in small towns. Vermont Law School is a net importer to the state and its imports often provide legal services to populations with limited access to legal services.³⁵ The Committee recommends that the Commission recognize and reaffirm Vermont Law School’s vital connection to the state’s legal profession.³⁶

³³ The ABA Task Force refers to this phenomenon as the “Misdistribution of Legal Services.” ABA Task Force on Future Legal Education, Report & Recommendation, Section IV(F)(2), p. 13.

³⁴ Mihaly memo to Committee, October 20, 2014.

³⁵ Mihaly memo to Committee, October 20, 2014.

³⁶ The Committee does not intend this recommendation to understate the importance of working to attract providers of legal services to Vermont – for instance, Vermonters who want to return home to practice after attending law school out of state, other graduates of out-of-state law schools who want to move to Vermont, or non-Vermont residents who are attracted to the state’s expanded authorization of the delivery of legal services.

RECOMMENDATIONS

A. Skills and Competencies of Lawyers

The ABA Task Force recommended that law schools design programs to ensure that graduates possess “(a) some competencies in delivering (b) some legal services.”³⁷ The recommendation flowed from the Task Force having “heard from recent graduates . . . a conviction that they received insufficient development of core competencies that make one an effective lawyer, particularly those relating to representation and service of clients.”³⁸

The Committee agrees that VLS should continue to work with the Court’s licensing boards, the VBA, and Vermont’s lawyers to ensure that its graduates are as practice ready for Vermont as possible upon graduation. The onus of delivering competencies and skills is not Vermont Law School’s to bear alone.³⁹ The Vermont Bar Association, the Supreme Court’s licensing boards, and other stakeholders in Vermont’s legal education must work with VLS to identify the core competencies expected of new graduates. Then, the stakeholders must collaborate to design an educational system that delivers those competencies pre-admission, assesses them in connection with admission, and reevaluates and reinforces them throughout an attorney’s career.

The Committee recognizes that, even now, Vermont’s system of delivering legal education encompasses many phases of an attorney’s career: during law school, in connection with admission, and in connection with relicensing through the mandatory CLE requirement. Stated differently, the Committee recognizes that many of Vermont’s stakeholders have already acted to ensure a supply of competent, skilled lawyers.

Vermont Law School’s decision to form a Curriculum Competencies Committee that includes other stakeholders demonstrates responsiveness to the ABA Task Force’s call. So does its collaboration with the Vermont Bar Association to implement an incubator program. The incubator program provides recent graduates with an opportunity to enter practice with support not previously available to new sole practitioners. An added benefit is the incubator program’s focus on selecting lawyers who intend to practice in small, rural towns.

Vermont’s admissions process includes assessing and enhancing lawyers’ competencies and skills. Applicants for admission without examination must complete CLE in Vermont skills and practice.⁴⁰ The Board of Bar Examiners, the Continuing Legal Education Board, and the Vermont

³⁷ ABA Task Force on Future Legal Education, Report & Recommendation, Section VII(E), p. 26.

³⁸ ABA Task Force on Future Legal Education, Report & Recommendation, Section VII(E), p. 26.

³⁹ See ABA Task Force on Future Legal Education, Report & Recommendation, Section VII(E), p. 26 (“[E]nsuring delivery of competencies in graduates is not and cannot be a responsibility of law schools alone.”).

⁴⁰ See Rules of Admission to the Bar of the Vermont Supreme Court, §7(d), <https://www.vermontjudiciary.org/LC/d-BBELibrary/BBERules.pdf>.

Bar Association have formed a committee to study a similar requirement for lawyers admitted upon examination.

The Committee acknowledges that the Board of Continuing Legal Education and the Vermont Bar Association have partnered to accredit and offer educational programs of high quality. This has helped to reinforce lawyers' competencies and skills throughout their professional careers.

The Committee recognizes the many proactive steps that Vermont's stakeholders have taken to improve lawyers' competencies and skills. The effort must continue in the future, so as to ensure that Vermont attorneys are competent upon admission and throughout their legal careers. The Committee urges the Commission to recommend that the Vermont Supreme Court, the Vermont Bar Association, Vermont Law School, other institutions of higher learning, and stakeholders in Vermont's legal profession continue (a) to work together to identify the competencies and skills required of new lawyers; (b) to collaborate to design and implement educational programs that will equip new lawyers with those competencies and skills; and (c) to offer continuing legal educational programs designed to maintain those competencies and skills over the course of a career. Finally, the Committee recommends that practicing lawyers consider involving themselves in the training and education of new lawyers. Mentoring a new lawyer, even informally, is an invaluable form of legal education.

B. An Expanded Role for an Existing Resource: Vermont Certified Paralegals

As discussed in Section III(C)(1), Vermonters are not hiring attorneys. In the vast majority of the civil docket, at least one party is unrepresented. The Committee examined various approaches to this problem. The Committee endorses a focus on one particularly promising approach: expanding the role of the paralegal who works under the supervision of a licensed attorney.

The future will include non-lawyers providing legal services that only lawyers are authorized to provide now. The pressing issues are who will those providers be, and how will they be trained, supervised, and regulated. If Vermont does not take a proactive position on the creation of new roles within the profession, the market may provide less desirable solutions that will not adequately address training, supervision, and regulation. It is critical to act now, rather than to let market forces invade the profession and unleash untrained and unregulated providers on those most in need of legal services.

1. The Basics of a Vermont Certified Paralegal Program

As a first step, the Committee recommends that the Vermont Supreme Court authorize the training, certification, and scope of practice for Vermont Certified Paralegals. In the Committee's view, the key elements of a program that allows limited practice by trained and certified paralegals are:

- a. Identifying specific categories of legal services that certified paralegals should be authorized to provide directly to clients;
- b. Stakeholders collaborating to design and implement an educational program that will equip certified paralegals with the skills and competencies to provide those legal services;
- c. Outlining requirements for certified paralegals to work in association with, and generally under the supervision of, a licensed Vermont attorney; and
- d. Developing a process for licensing, continuing legal education, and discipline of certified paralegals.

2. The Committee's Process

The Committee examined various approaches, including some modeled on the State of Washington's Limited Legal License Technician Program,⁴¹ Canada's approach to licensing paralegals,⁴² and responses that the medical community has developed as part of its attempt to increase access to health care.⁴³ The Committee's overarching goal was to devise a solution that would deliver legal services in areas of critical need at a reduced cost, in a competent fashion, and in a manner that would enhance and compliment the supervising attorney's practice.

The Committee paid particular attention to the practice areas identified in Judge Davenport's report, areas in which legal needs are going unmet and, therefore, self-represented litigants are most common: family law, landlord-tenant law, and collections law. The Committee met with and heard from practitioners in those areas and court employees. The Committee asked: is there a role for non-attorneys to provide legal services in these areas? Informed by testimony received and material reviewed, the Committee concluded that there is no doubt that the question must be answered in the affirmative.

Next, the Committee asked: who will provide those services? The Committee's response: it makes more sense to take an evolutionary approach built on an existing resource rather than to create a whole new profession as did Washington. Vermont's legal landscape includes a valuable resource that has not been fully tapped: paralegals.

Vermont has an experienced, talented, and substantial group of paralegals.⁴⁴ With additional training and supervision, the Committee is confident that Vermont's paralegals could perform

⁴¹ See Overview, Section IV(B)(1), *infra*.

⁴² <http://lsuc.on.ca/licensingprocessparalegal>.

⁴³ See, e.g., A. Dunker, E. Krofah, F. Isasi, *The Role of Physician Assistants in Health Care Delivery* (Washington, D.C.: National Governors Association Center for Best Practices, September 22, 2014), at <http://www.nga.org/files/live/sites/NGA/files/pdf/2014/1409TheRoleOfPhysicianAssistants.pdf>.

⁴⁴ Vermont's paralegals are quite active, even nationally. In 2016, the Vermont Paralegal Organization will host the annual meeting of the National Federation of Paralegal Associations. <http://vtparalegal.org/what-is-vpo.html>.

tasks heretofore reserved for attorneys, but for which litigants are not hiring attorneys, that would substantially improve access to legal services.

3. Vermont is at a Critical Juncture

It is time for lawyers to recognize the change that has arrived. No less than the American Bar Association is on record as urging state supreme courts “to undertake to develop and evaluate concrete proposals to authorize persons other than lawyers with J.D.’s to provide limited legal services without the oversight of a lawyer.”⁴⁵ Washington State’s limited legal license technician program has become fully operational.⁴⁶ The state bars of California⁴⁷ and Oregon⁴⁸ are considering limited licensure programs. Last year, the Chief Judge of the New York Court of Appeals announced a “navigator program” in which non-lawyers were authorized to provide legal assistance to consumers of legal services.⁴⁹ Central to each of these programs is the goal of improving access to legal services.⁵⁰

Judge Davenport’s numbers show that in a majority of the cases in the civil docket Vermonters choose not to avail themselves of lawyers. The Committee cannot say for certain that authorizing paralegals to assist these litigants would change consumer thinking. Indeed, the Committee heard from people who believe that a litigant who is unable to afford a lawyer may not be able to afford a paralegal, even at the (assumed) lower rate that a paralegal would charge. However, the Committee also heard from many who believe that expanding the role of paralegals will substantially improve access to legal services. The Committee’s strong belief is that it is important to make the effort. That is the only way we will learn whether it succeeds or how to improve our efforts.

The future of the legal profession will include more of what it has begun to include: non-lawyers providing legal services. The Committee is of the firm opinion that the future of legal education lies in designing and developing programs to educate and train those non-lawyers to provide competent services.

4. Attorney Supervision of Vermont Certified Paralegals

⁴⁵ ABA Task Force on Future Legal Education, Report & Recommendation, Section VIII(C)(3), p. 33.

⁴⁶ <http://wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Limited-License-Legal-Technician-Board>.

⁴⁷ <http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000013003.pdf>.

⁴⁸ http://bog11.homestead.com/LegalTechTF/Jan2015/Report_22Jan2015.pdf.

⁴⁹ <https://www.nycourts.gov/ctapps/soj2014.pdf>.

⁵⁰ See

http://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the.

While strongly favoring an expanded role for certified paralegals, the Committee is not prepared to recommend adoption of a limited license legal technician program. Washington and other states will benefit from what appears to be a valuable experiment in the nontraditional delivery of legal services. The Committee, however, sees drawbacks to mimicking the program in Vermont.

First, it takes too long to implement. Washington's rule was originally proposed, after years of study, in 2006⁵¹ and the program's first technicians only gained licensure this spring.⁵²

Second, Washington's program does not allow its participants to offer key services that would assist Vermont's huge number of self-represented litigants: court appearances and negotiation with opposing parties and counsel. By its very nature, a program that requires a degree of attorney supervision also provides an opportunity to expand the scope of legal services that certified paralegals are authorized to provide. This will only help to meet the needs of Vermonters who are representing themselves and would be a prudent use of an existing resource.

Third, and finally, the Committee is not prepared to support or recommend authorizing non-lawyers to provide legal services without any attorney supervision. Committee members have various views on whether, ultimately, Vermont should follow this path. The Committee recognizes, however, that, such a program would be, at a minimum, more expensive, time-consuming, and potentially controversial – all factors that make such a program less likely to provide a timely response to the critical need to provide Vermonters with wider access to legal services. For these reasons, the Committee recommends that Vermont Certified Paralegals work in association with or under the supervision of licensed attorneys.

However, the Committee envisions Vermont Certified Paralegal as playing a more expanded role than paralegals currently play. An attorney will provide general supervision and oversight, but a Vermont Certified Paralegal will operate independently within the relationship. The Committee does not envision an attorney having to approve each and every action of a Vermont Certified Paralegal. As will be discussed in the next section, the Committee foresees situations in which the Vermont Certified Paralegal confers with clients, meets with the opposing party or attorney, and appears at hearings.

Indeed, as contemplated, the Vermont Certified Paralegal program is similar to an approach that has worked in the medical field. As the National Governors' Association noted last year, the medical community's decision to allow physicians to delegate tasks and decisions to physician's assistants has enabled the rapid, efficient, and less expensive delivery of health care

⁵¹ See *Original Proposed Legal Technician Rule*, NONLAWYER PRACTICE BOARD REGULATIONS (Jan. 2008), available at

http://www.wsba.org/~media/Files/News_Events/News/LegalTechnicianRule.ashx.

⁵² <http://wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Limited-License-Legal-Technician-Board>.

services to people who otherwise did not, or could not, access it.⁵³ Similarly, this year, the Vermont Senate passed S-20,⁵⁴ a bill that would expand the services that hygienists are authorized to provide, thereby increasing “access to affordable, quality dental care for all Vermonters.”⁵⁵

The Committee considers the physician’s assistant model as an appropriate analogy for the Vermont Certified Paralegal program. Similar to their counterparts in the medical field, properly trained Vermont Certified Paralegals will provide rapid, efficient and less expensive delivery of legal services to Vermonters who, otherwise, could not access those services.

5. Specific Areas of Need

The Committee proposes to identify specific legal services within family law, landlord-tenant law, and collections law that Vermont Certified Paralegals should be authorized to provide to clients. The Committee heard from court employees and practicing attorneys that there are specific tasks within those areas of law that a well-trained paralegal could perform competently for clients. Within those areas, the events most frequently mentioned as ripe for non-lawyer assistance were the preparation and filing of forms in family court cases⁵⁶ and handling “rent-escrow” hearings in landlord-tenant cases.⁵⁷

The Committee agrees that family law and landlord-tenant law include specific tasks and events that a trained paralegal should be authorized to perform. Tasks might include assisting with forms, such as income affidavits;⁵⁸ events might include appearing at rent-escrow hearings.

Authorizing Vermont Certified Paralegals to appear at certain hearings is a key part of the Committee’s recommendation. Self-represented litigants need help in court. Judges want them to have help. Allowing a certified paralegal to assist a litigant in filling out a form or drafting a simple motion is valuable. However, unless the paralegal is authorized to appear at certain types of hearings, the program will be of little consequence.

⁵³ See, e.g., A. Dunker, E. Krofah, F. Isasi, *The Role of Physician Assistants in Health Care Delivery* (Washington, D.C.: National Governors Association Center for Best Practices, September 22, 2014).

⁵⁴ <http://legislature.vermont.gov/assets/Documents/2016/Docs/BILLS/S-0020/S-0020%20As%20Passed%20by%20the%20Senate%20Official.pdf>.

⁵⁵ <http://www.vdha.org>.

⁵⁶ <https://www.vermontjudiciary.org/MasterPages/Court-Forms-Family-All.aspx>.

⁵⁷ The Committee heard that forms and rent-escrow hearing are relatively straightforward matters that do not require full-blown representation but are complicated enough to require some assistance. Indeed, when considering the self-represented litigant with no legal training, consider that the link on the judiciary’s website to “family court forms” directs visitors to a page that has links to 160 forms with names and labels that may or may not make sense or be intuitive. Not one of the forms is labeled “start here for a divorce.” Surely it does not require a lawyer to answer the question “where do I start?”

⁵⁸ <https://www.vermontjudiciary.org/eforms/Form%20813%20A.pdf>.

In deciding the types of hearings at which to authorize certified paralegals to appear, “[t]he goal is to figure out which services require a formal legal education (i.e., a J.D.), which services could be performed competently with training short of a law degree, and which ones do not need any specialized training at all.”⁵⁹ This is not reinventing the wheel. The Committee recommends examining limited licensure programs already in place in other states. Significant work and research has been done on the types of cases that can be handled by someone with less than a formal legal education. Insight might be drawn from a comparison to instances in which Vermont already authorizes non-lawyers to perform certain tasks, including Officer of Child Support staff and the victims’ advocates in state’s attorneys’ offices.

Similarly, the Committee believes that there are matters in which a certified paralegal should be able to negotiate on behalf of a client. Consider as an example a routine eviction in which a tenant offers to vacate an apartment within 5 days if the landlord agrees to return 75% of the security deposit. If the landlord were to counteroffer a full return of the deposit if the tenant vacates within 3 days, it is difficult to imagine that a trained paralegal cannot competently convey the counteroffer or that the tenant would be at risk by discussing the counteroffer with a certified paralegal. Indeed, the statistics suggest that, now, the counteroffer is being delivered from a landlord’s attorney directly to a self-represented tenant.

Not all legal services require delivery by a person with a law degree. Given the staggering number of cases involving self-represented litigants, there are routine matters in which common legal services could be delivered competently with proper training. The Committee recommends that the Vermont Supreme Court, the Vermont Bar Association, Vermont Law School, and other stakeholders in Vermont’s legal profession identify specific legal services that could be delivered by Vermont Certified Paralegals.

6. Education and Training

Vermont Certified Paralegals must receive the education and training necessary to provide specific legal services in a competent and professional manner. The education and training need not be equivalent to that of a law student, nor does it matter if a trained law school graduate could perform the service “better” than a trained paralegal plus.⁶⁰

The Committee believes that Vermont Law School should play the lead role in designing and delivering the legal training for Vermont Certified Paralegals. The Committee heard testimony

⁵⁹ Perlman, *supra*, at 57 (“The focus should be on whether a particular service can be performed by someone who does not have a law license, not who can perform the service best.”).

⁶⁰ See Perlman, *supra*, at 57-58 (“The focus should be on whether a particular service can be performed by someone who does not have a law license, not who can perform the service *best*. After all, even when services must be performed by lawyers, we have never concluded that only the most skilled lawyers must handle a matter. The touchstone should be competence.”).

that Champlain College is willing to consider offering a certified paralegal program. The Committee encourages academic institutions to consider offering such a program.

The Committee does not feel it is in position to design the Vermont Certified Paralegal Program. However, the Committee believes that the program should include many of the same facets that exist in Vermont's current system of attorney regulation.⁶¹ The Committee recommends the following minimum requirements for Vermont's Certified Paralegal program:

a. Minimum Entry Requirements

1. An applicant must be at least 18 years of age; and
2. An applicant must be a citizen of the United States or an alien lawfully present in the United States.

b. Minimum Education/Work Requirements

Prior to enrollment in the Vermont Certified Paralegal program, an applicant must have:

1. Earned a bachelor's degree from a college or university within the United States that is authorized to grant a bachelor's degree by the law of the state in which it is located and three (3) years of substantive work as a paralegal, as attested by a licensed supervising attorney; or,
2. Earned an associate's degree in paralegal or legal studies from either an ABA approved paralegal education program or from a college or university within the United States that is authorized to grant an associate's degree by the law of the state in which it is located, and four (4) years of substantive paralegal work, as attested by a licensed supervising attorney; or,
3. Substantive paralegal work, as attested by a licensed supervising attorney, for 5 of the 7 years immediately preceding application to the program.

c. Course Requirements

Courses should be designed by the academic institutions participating in the program, with input from the Board of Bar Examiners, the Vermont Bar Association, the Professional Responsibility Program, and members of the Vermont bar. At a minimum, participants should be exposed to courses in general legal principles, the Vermont Rules of Professional Conduct, and Vermont's rules of procedure and evidence. Participants should be allowed to seek certification in one or more areas: family law, landlord-tenant law, or collections law. A participant should not be required to take courses not related to the anticipated certification.

d. Length of the Program

⁶¹ The Law Society of Upper Canada has a comprehensive system to regulate the licensing of paralegals. <http://lsuc.on.ca/licensingprocessparalegal>.

The Committee defers to the expertise of the participating academic institutions in determining the length of the Vermont Certified Paralegal program. Again, the length of the program must take into account the goal of reducing the costs of legal education, thereby allowing successful participants to provide legal services at lower costs.

e. Successful Completion

The Committee defers to the expertise of the participating academic institutions in determining the requirements for successful completion of the Vermont Certified Paralegal Program.

f. Authority to Provide Legal Services

The Committee recommends that the Supreme Court propose and adopt rules governing the application process for licensure as a Vermont Certified Paralegal.⁶²

1. The Committee does not recommend an admissions exam.
2. The Committee does not recommend a Character & Fitness requirement. The Committee views a Character and Fitness requirement as placing a burden on applicants and leaves it to supervising attorneys and law firms to make appropriate decisions in associating with Vermont Certified Paralegals.

g. Licensing Fees and Renewal

The Committee recommends that Vermont Certified Paralegals be required to renew their licenses every two years. The Supreme Court, acting through the Office of the Court Administrator, should propose rules on license fees and the length of the licensing period.⁶³

h. Continuing Legal Education

The Committee recommends that Vermont Certified Paralegals be required to earn 12 hours of Continuing Legal Education Credit, including 2 in ethics, every licensing period.⁶⁴ The Board of Continuing Legal Education is suited to propose rules governing the mandatory continuing legal education requirements of Vermont Certified Paralegals.⁶⁵

i. Discipline

⁶² See Rules of Admission to the Bar of the Vermont Supreme Court

⁶³ See Administrative Order 41, Licensing of Attorneys.

⁶⁴ See <http://www.paralegals.org/default.asp?page=20>.

⁶⁵ See Rules for Mandatory Continuing Legal Education.

The Committee recommends that Vermont Certified Paralegals be required to comply with rules of professional conduct.⁶⁶ The Professional Responsibility Program is suited to propose and oversee a discipline program.⁶⁷

j. Summary

The Committee recommends that the Vermont Supreme Court, the Vermont Bar Association, Vermont Law School, other institutions of higher learning, and stakeholders in Vermont’s legal profession:

1. work together to identify the competencies and skills expected of Vermont Certified Paralegals; and,
2. collaborate to design and implement educational programs that will equip Vermont Certified Paralegals with those competencies and skills; and,
3. partner to design and implement a system of licensing and continuing education that will allow Vermont Certified Paralegals to maintain those competencies and skills.

C. Alternative Paths to Licensure

The future of legal education and the legal profession will include alternative paths to admission to the bar. Vermont is poised to lead in this area.

The ABA Task Force recommended that state supreme courts and bar associations develop proposals to reduce the amount of study, both graduate and undergraduate, required to gain admission to the bar.⁶⁸ This is another area in which Vermont has already acted.

The Vermont Supreme Court allows people to sit for the bar exam without having attended law school.⁶⁹ The so-called “Law Office Study” program (hereinafter “LOS”) affords people the opportunity to study law with a practicing attorney and prepare for the bar exam without incurring educational debt. The LOS is run by the Board of Bar Examiners.

In addition, the Court recently conveyed to the BBE its support for both the Uniform Bar Exam and the 3L bar exam option. The former relieves some of the pressure on law graduates by opening additional job markets to them and, conversely, opening Vermont’s job market to

⁶⁶ For example, the Law Society of Upper Canada has rules that govern the professional conduct of paralegals. *See*, <http://lsuc.on.ca/paralegal-conduct-rules>.

⁶⁷ *See* Administrative Order 9, Rules Governing the Establishment and Operation of the Professional Responsibility Program; Vermont Rules of Professional Conduct.

⁶⁸ ABA Task Force on Future Legal Education, Report & Recommendation, Section VIII(C)(1)-(2), p. 33-34.

⁶⁹ *See* Rules of Admission to the Bar of the Vermont Supreme Court, §6(g), <https://www.vermontjudiciary.org/LC/d-BBELibrary/BBERules.pdf>.

graduates of law schools in other UBE jurisdictions.⁷⁰ The latter gives law students an opportunity to be admitted to practice – and employed – upon graduation.

Vermont Law School has adopted a two-year J.D. program in order to reduce the cost of a legal education.⁷¹ Not borrowing to pay for a third year of education makes a significant difference in a graduate’s ultimate debt burden, especially when coupled with the opportunity to join the work force a year early.

The Committee heard testimony on New Hampshire’s Daniel Webster Scholar Honors Program.⁷² The program is a joint effort of the New Hampshire Supreme Court and the University of New Hampshire Law School. It is a program designed to produce “practice ready” graduates through “practice courses” and evaluations that measure the skills that New Hampshire considers fundamental to legal practice in its state.⁷³ The Committee believes that the program is one that deserves consideration in Vermont.

The Committee recommends that the Vermont Supreme Court, the Board of Bar Examiners, and Vermont Law School continue to explore the creation of alternative paths to admission for law school graduates.

CONCLUSION

Vermont is at a critical juncture. An urgent need for competent legal services is going unfilled. The Committee recommends that the Commission respond to that need by:

- A. Acknowledging and reaffirming Vermont Law School’s unique and vital connection to Vermont’s legal profession; and
- B. Recommending that the Vermont Supreme Court, the Vermont Bar Association, Vermont Law School, other institutions of higher learning, and stakeholders in Vermont’s legal profession work together to identify the competencies and skills expected of new lawyers and continue to offer and to develop programs designed to equip new lawyers with those competencies and skills; and
- C. Recommending that the Vermont Supreme Court authorize the Vermont Certified Paralegal program outlined in this report; and
- D. Recommending that the Vermont Supreme Court consider alternative paths to lawyer licensure and admission to the bar.

⁷⁰ Many Vermonters attend law school in other states and hope to return home to practice.

⁷¹ Mihaly memo to Committee, October 20, 2014.

⁷² New Hampshire Supreme Court Rule 42, Section XII, <http://www.courts.state.nh.us/rules/scr/scr-42.htm>.

⁷³ <http://www.courts.state.nh.us/nhbar/index.htm>.

REPORT OF THE COURT PROCESS COMMITTEE

RECOMMENDATIONS

The Court Process Committee examined several issues over the course of the year concerning the function and future of the court. From this work, we have developed several recommendations for further study or action. The Committee recommends that the bar work with the judiciary and its Civil Oversight Committee and other interested parties to effectuate the following recommendations.

1. Rotation

It is the consensus of the Committee that the rotation system needs to be revisited, particularly for the civil unit and the family unit. Not all court cases function the same way, and a substantial number of civil and family cases have a longer life-span than the one-year rotation cycle. The understanding of the Committee is that the one-year rotation cycle is too short to deal with these longer cases—especially in the civil unit.

As an example, the Committee notes that the rotation system has the effect of removing a judge who has gained knowledge of a particular case over the course of a year and replacing her with a new judge who must, on top of the other workload demands, take the time to bring themselves up to speed on a case that has substantially developed and progressed. The result is redundancy, delays, and expense that do not benefit the parties or the system.

The Committee recognizes that this is not necessarily true for other units. Criminal cases are often resolved within a year of filing and are not necessarily harmed by the rotation schedule. The Committee further recognizes that the rotation system has three major benefits. First, it gives communities a rotating judicial perspective through a regular change in judicial officers. Second, it gives judges a break from difficult or stressful dockets and regular opportunities to refresh their perspective. Third, it gives the judiciary flexibility to move judges from court to court based on need and court management concerns.

These benefits, however, would not be entirely lost if the judiciary extended the rotation period to two to three years or granted itself greater flexibility to allow judges, particularly in civil units, to remain for longer terms. It is the understanding of the Committee that the Chief Superior Court Judge faces several pressures in scheduling the annual rotation schedule that require ongoing flexibility in his ability to schedule and move judicial assignments. Nevertheless, it is also the Committee's understanding that the office of the Chief Superior Judge has expanded the rotation process by regularly scheduling judges to serve two and three-year rotation terms in nearly 50% of the judicial assignments of the past 10 years.

The Committee would recommend the continuation of this process and would urge the judiciary to give litigants and parties greater understanding, where and when possible, of how long a judge will likely serve in a particular court and unit. The Committee further recommends that the judiciary consider formally extending the rotation term as a default for particular units, such as civil and family, where the longer terms would be most beneficial.

2. Complex Litigation

Currently, the Vermont Rules of Civil Procedure under Rule 16.1 have a process for designating a case as a complex action. The result of such a designation is the permanent assignment of a judge to the case who oversees the litigation from beginning to end.

The Committee finds that this rule is underused by parties and the judiciary. The Committee believes that this is due, in large part, to the lack of incentives for either side to claim such a designation and because of the cumbersome process for the rule.

In practice, if a judge is assigned a complex action, it becomes part of her assignment above and beyond the normal obligations of whichever unit and court they are assigned. Without electronic filing, it also means that any filing in a complex litigation must often be physically transferred to the judge who is likely sitting in a different county and unit. Given the judge's obligations, any hearings must be scheduled around her current court assignments and the schedule of the court of venue.

The rule as currently phrased also relies upon the parties and the presiding judge to make a motion for designation and assignment. As the judiciary has noted, "both have significant incentives to resist a single-judge assignment even where it would improve case management."⁷⁴ Thus, even if there is a situation where the case designation would render a case management benefit there is no way for the judiciary or the Chief Superior Court Judge to make such an objective evaluation or put in place protocols that would promote and effectuate such case management.

In short, the judiciary lacks the resources to effectively implement Rule 16.1, and in fact, the current situation provides disincentives to designating a complex action. The lack of widespread application of this rule, speaks to this division between purpose and practice.

The Committee recommends a revision of Rule 16.1 alongside the analysis of Rotation that would give both judges and parties incentives to designate cases as complex litigation. The Committee notes that the judiciary has previously studied this question and came to the same conclusions.⁷⁵ While this memorandum suggests a change to the Rule, the Committee urges the

⁷⁴ R. Hubbard, Memorandum to Judge Davenport on Pre-Trial Case Management at 13 (Feb. 23, 2010).

⁷⁵ *See id.*

relevant parties (including the Civil Rule Committee, the Civil Oversight Committee, the Chief Superior Court Judge, and the Court Administrator) to look to the larger logistical issues that will support any rule change that broadens the scope of Rule 16.1.⁷⁶

3. Specialization v. Generalization

The Committee has discussed the issue of whether judges should be specialized or generalists. The former would allow judges to stake out areas of the law where they would develop experience and skills to render more sophisticated decisions. The latter is the prevailing model for the Vermont judiciary and allows the trial bench the greatest amount of flexibility in assignments where all judges are superior court judges and can sit in any court.

The Committee has concluded that the adherence to generalization is at odds with the direction of the law and nature of legal practice. For practitioners, the last 20 years have represented a movement away from general legal practice toward specialization. Most lawyers have an area of specialization and emphasis where they develop particular knowledge and experience. Areas of law including commercial transactions, employment, regulatory areas, and criminal procedure have grown more sophisticated. For example, advancements to land use law prompted the state to develop an environmental unit with a dedicated staff of judges who specialize in the myriad regulatory and policy issues associated with zoning and development. While more rooted in history, we have seen similar advances in the probate unit where judges and staff have cultivated their specialization to deal with existing and emerging estate and trust issues.

Similar advances in other areas suggest that building a bench with a greater base of knowledge in particular fields and seizing on the opportunity to develop experience and sophistication within a particular areas of the law would generate a better and more efficient judicial process. It is the consensus of the Committee that this specialization must be reflected in the judiciary, even if only in broad strokes.

The most obvious opportunities lie within the division of units. Criminal practice is different from civil, which is different than family. As stated before, the Environmental and Probate Units already practice in this more specialized realm and have developed a dedicated staff of judicial officers.

At the same time, the Committee recognizes that specialization comes with a price. Currently, the judiciary is structured so that it has a wide range of flexibility and broad discretion in its judicial assignments and schedule. For example, if a sudden vacancy arises, the Chief Superior Court Judge can assign any available judge and does not have to juggle from a limited slate of

⁷⁶ This issue is also tied to the judiciary's lack of a modern case management and scheduling system. Without a statewide scheduling system, managing complex cases with judges rotating out of a county is difficult.

“specialists.” If a courtroom becomes available because a prior-scheduled case settles, the presiding judge can schedule another case without limitation on the subject matter of the court or judge. This flexibility is important in a rural state like Vermont that has limited resources and multiple courthouses to staff in every county. If there is a move away from generalist judges, it will have to be accompanied by more resources and be tempered by the reality of the current court structure and the needs that the present system fulfills. We must recognize that the current system of generalist judges was created and is maintained to suit the practical challenges of delivering judiciary services in a rural state.

The Committee further recognizes the exceptional skill and ability of the current members of the judiciary. In most cases, its members fluidly move from their traditional areas of practice into the larger judicial system. Public defenders have come to serve as excellent family judges. Civil litigators have become preeminent criminal court judges. Family law practitioners have excelled in the criminal courts. The idea of specialization is by no means a criticism of the work done by the judiciary on a daily basis. It is also not intended to take away the benefits of cross-pollination—where those with one background use their experience to advance another area of the law. Rather it is a reflection on the growing complexity and sophistication of several areas of the law where specialization, even in broad terms, has the potential to reward the public with more sophisticated, consistent, and quicker decisions.

While the Committee is not prepared to recommend specialization over generalization as the rule, the Committee does believe that this is the direction that the practice of law, like many professions, is headed and that judiciary will need to move in this direction—whether through the creation of specialized court, cultivating specialist judges, or the employment of experienced court staff trained in a particular area. The Committee recommends that the judiciary, the bar, and eventually the legislature engage in a conversation about specialization and take a careful look at the manner in which the trial courts in this state are organized and look to areas where greater specialization in courts and in judicial assignments could improve the administration of justice. At the same time, the Committee recognizes that any shift in the generalist quality of trial court judges would have larger repercussions on how the judiciary is managed and functions and how judges develop and apply their skills. These changes are not insignificant and should be included in the discussion.

4. Business Court

In line with the previous sections, it is the conclusion of the Committee that the time is ripe in Vermont to consider a Business/complex litigation Court.

The Business Court model has been adopted by 21 different states and generally provides a separate forum and process for either complex litigation or business-to-business litigation. The advantage of a business court is that the judiciary can dedicate judges who through experience and training are able to quickly and efficiently deal with complex litigation or commercial

litigation where both parties are represented by attorneys and are often dealing with higher level disputes. It can build a body of case law and decisions that are consistent and largely predictable. It can also offer process and oversight tailored to the nature of these types of cases.

To be clear, the Committee recommends a business court only to the extent that it is funded above and beyond the current judiciary budget. From its review and understanding of the judiciary's current budget and demands, the judiciary does not currently have the funds for this new court program and would not be able to serve this type of case at this level under its existing funds. Therefore, any adoption of the business court model represents an expansion of the court system and should be accompanied by additional funds, which could be raised in part by higher filing fees but would likely require an expansion to the judiciary's budget.

The benefit of a business court, beyond increasing the quality and sophistication of the decisions and timing of the delivery of justice is that it would be an economic benefit to the state. Efficient and consistent dispute resolution forums rank high on the needs for business and can be a critical factor in whether a business decides to re-locate or stay in a certain state.⁷⁷

Furthermore, this is a necessary innovation for Vermont. For the past several years, the criminal, family and juvenile dockets have drawn down greater and greater shares of the judiciary's limited resources. With the spike in CHINS and TPR cases continuing to grow, this trend does not look to reverse in the near future. As a result, the civil docket, particularly in counties where one or one and a half judges must manage multiple units, has felt a squeeze in resources that have ranged from a lack of consistent judge time to reduction in court staff and other resources necessary to render decisions in a timely manner. The civil docket's resources are further diluted by the numerous landlord-tenant disputes, foreclosures, and consumer credit card debt collection cases that will often consume large amounts resources and work days. Giving additional resources to this area of the docket is simply recognizing an underserved portion of the docket and giving it the resources to flourish.

The Committee recommends that the bar and Judiciary develop a plan that would create a stand-alone complex litigation/business court or a similar specialized docket that would fulfill the goals of developing a consistent and efficient forum for businesses and similar complex disputes.

5. Consumer/Debtor Docket

Along with the business court, the other area of the civil docket that the Committee believes would benefit from additional support and resources is the so-called debt collection cases.

⁷⁷ See Testimony of Clifford E. Haines, Chancellor, Philadelphia Bar Association, before Pennsylvania Senate Judiciary Committee Regarding Creation of a Specialized Business Court, Wednesday, March 26, 1997, at <http://www.philadelphiabar.org/page/Testimony032697Haines?appNum=4>.

Currently, the vast majority of these cases are filed in small claims court, and there are significant problems with how this court addresses debt collection cases.

In a debt collection case, there are often only a few questions on which judgment hinges:

- Does the Plaintiff own the debt?
- Does Plaintiff have the exclusive right to collect the debt?
- Does this debt belong to and correspond to Defendant?
- Has the debt been properly calculated?

Once those questions are proven in the affirmative, the only issue is whether Defendant has an unfair debt collection claim or similar affirmative defense to assert. As in foreclosures, Defendants have a limited number of defenses against a legitimate debt claim. In fact, after the establishment of the initial claim, the real question becomes the Defendant's ability to pay.

Here is where both superior and small claims courts struggle to deal with these cases. In many instances, the debtor/defendant does not appear, and it is left to the court to go through the questions above to show that Plaintiff has a legitimate right to judgment. Whether a court does this each and every time is inconsistent. Particularly in small claims court where the judge may be an assistant judge, a lawyer serving as an acting judge, a judicial hearing officer, or a superior court judge the range of scrutiny varies widely. Even if the judge scrutinizes Plaintiff's filing to ensure that the information is correct and corresponds, the court is left without the ability to raise defendant's ability to pay. Regularly, even if the defendant is present the court may simply issue the judgment and leave payment to the parties to work out.

The result of this second part is that the ability to pay is not scrutinized at the beginning of the process, and judgment is simply issued against defendants without examination or encouragement to pay. This is a problem because a number of debtors have exempt forms of income and do not have the ability pay. Identifying these individuals is helpful to everyone in the process. Collection attorneys do not want to pursue exempt debtors. These debtors do not want the scrutiny or pursuit of court and the hardship of attending. And the courts do not want to expend resources on cases where there is nothing to decide.

Even if a party is able to pay, what usually occurs is the debtor/defendant waits, ignores the initial complaint, ignores the judgment, and ignores the subsequent financial disclosure motions. When the debtor does arrive in court, the original judgment has accumulated interest at the statutory 12% annual rate, and the debt is often eclipsed by the interest. That makes it harder for a debtor to tackle the debt or make installment payment that keeps up with the interest. Given that the initial judgment can come any time up to six years after the debt started and that the post-judgment process can take equally as long, this process can string out for over a decade that is punctuated by cyclical court hearings and regular debt collection calls.

Beyond this process, the large number of consumer credit card debt cases in small claims court has overwhelmed the court and taken it away from its primary and intended process, which

was to provide a pro se friendly court for individuals to resolve lower monetary value disputes. Taking debt collection out of small claims would free this court up to do what it was originally intended to do. Moreover, small claims court is not a court of equity. Judges do not have injunctive power. They have the power to award or deny monetary damages under law.

What the Committee believes is a reasonable solution to this problem is to consolidate the consumer credit card debt cases onto a single docket and develop process and substantive laws that will treat the process as a type of mini-bankruptcy court. Like in bankruptcy, the questions about the legitimacy of the debt should be treated as threshold questions that once resolved clear the way for the primary question of payment. Courts in such a docket should have the authority to order and adopt payment plans that if followed would end the debt collection process by a date certain. The idea would be to give debtors the incentive to attend the hearings early and often, disclose their ability to pay, and adopt a reasonable payment plan. In such a situation, the court could provide equitable judgments along the process to ensure that the initial debt was fairly discharged but that the interest did not swallow the debtor.

It is the recommendation of the Committee that this area is likely the ripest for advancing and developing real and substantial change. It is the recommendation of the Committee that a working group with representatives of the creditor attorneys, legal aid, the bankruptcy bar, and the judiciary's Civil Oversight Committee begin to work on proposals based on the recommendations of this Committee and develop a proposal of court rules and legal statutes that will consolidate consumer debt cases and provide greater incentives and rewards to both creditors and debtors to resolve their collection cases in a more timely manner.

CONCLUSIONS

With the exception of the consumer/debtor docket recommendations, much of this Committee's report stakes out a position for the long-term future of the judiciary with a goal of beginning dialogue in the short term. One of the unique challenges of this Committee has been working through the current court processes and infrastructure to bridge the gap between perceptions of the judiciary and its actual internal processes. The Committee has spent a lot of its time considering the issues facing the civil and family units because these areas are the courts where individuals of lower or modest means are likely to come for relief and resolution of critical issues. Whether it is to resolve a credit card debt, settle a child custody dispute, or to enforce an agreement, the civil and family units are on the front lines of providing essential services to everyday Vermonters. It is with that in mind that the Court Process Committee makes its recommendations and commends further discussion and work between the bar and the bench.

REPORT OF THE LEGAL SERVICES COMMITTEE

OVERVIEW

At the initial organizational meeting, the Committee decided to take some time to study each of the questions posed by the charge, namely:

1. What kind of legal services can Vermonters obtain online?
2. What are the limits to such online legal services?
3. When do such services cross into unlicensed practice of law and what risks attend?
4. What can Vermont attorneys do to assist in particular dockets with large numbers of self-represented litigants?
5. How can other organizations and/or the Legislature assist with providing programs for self-represented litigants?
6. What role should unbundled legal services and limited representations play in the future of Vermont practice?
7. Is there a benefit to creating tiers of licensing specializations within the profession? If so, how would such tiers function and what benefit would they provide to the public?
8. What role do paralegals play in the present practice of law? Can they do more? Would paralegals benefit from tiers or licensing specialization?
9. What geographic areas and what types of cases need more attorneys? What reforms can address those needs?
10. What additional approaches to dispute resolution should be part of the profession?

After the meeting, each member of the group researched one or two of these questions. We spent several of the meetings that followed reporting back to the full group about our research, discussing each of the topics in depth, and identifying additional areas for research and further consideration.

In February, we held a special meeting to hear from various representatives of other interested constituencies and organizations: Tom Garrett from Vermont Legal Aid, Margaret Barry, Director of Experiential Programs at Vermont Law School, Anne Damone, Clerk of the Windham Superior Court. We discussed a series of innovative court-based programs and opportunities to adapt existing systems to provide better support for pro-se litigants and those who cannot afford representation.

In March, we met with five lawyers who are new to practice in Vermont and under forty years old. We asked them to talk about what their respective practices look like now, why they chose to come to Vermont, what they imagine as an ideal professional life in the future, what they see as the future of legal services in Vermont, and what challenges and opportunities they see in practice.

In May, we met with Justice Robinson of the Vermont Supreme Court. Justice Robinson chairs the judiciary's Self-Represented Litigants Committee. We exchanged ideas and insights and identified some important areas of overlap to ensure that the work of our committees would complement each other.

Throughout the spring and summer, we pooled together all of the ideas and recommendations that we had discussed over the year and identified and ranked priority action steps. The action steps set forth in the Legal Service Committee Report follow.

PRIORITY RECOMMENDATIONS

The Legal Services Committee identified a number of projects that it felt should be pursued in a perfect world. The first three listed are considered a priority, both in terms of impact and practicality, and are the subject of more extensive discussion. The balance are listed in no particular order for posterity and future consideration. Some of these secondary items overlap with a bent towards Access to Justice and are, at least in part, incorporated into the priority items.

1. Overhaul of Vermontjudiciary.org

Fortunately, many of the changes that hold promise for increasing access to justice and improving efficiency within our legal system are already underway. We have identified numerous programs, volunteer projects, pro se clinics, alternative dispute resolution opportunities, and electronic forms and legal information across the state that help facilitate affordable legal assistance for those who need it or to empower able individuals to represent themselves. The challenge is how to communicate all of this information to a broad audience: judges, lawyers, mediators, and non-lawyers seeking to resolve disputes, understand the law, and find professional assistance.

The priority that we identified is to ensure that Vermontjudiciary.org serves as central internet clearing house for Vermont legal information, providing separate portals with access tailored to the needs of individual audiences: court personnel, lawyers, and the general public.

Non-lawyers seeking legal information or to resolve legal disputes should be able to easily access: 1) basic information about the Vermont court system; 2) information on all of the methods available to resolve disputes (litigation, mediation, arbitration, collaborative law) ways to locate and hire law and ADR professionals; 3) information on alternative programs available to obtain legal assistance (pro bono, low bono, pro se clinics); and 4) information on how to represent yourself and how to complete and file standard and routine forms.

Attorneys should be able to find: 1) licensing and discipline information; 2) electronic sources of Vermont law (SCOV decisions, legislature website, etc.); 3) court forms and court information; 4) how to participate in various alternative programs; and 5) platforms to share information and ideas.

Judges and court administrators should also have access to the internal data collection systems to better understand who is using the website and how in order to keep the content relevant and to understand court trends.

Ideally, the redesign would be completed by a professional web-design outfit with input from the audiences that regularly use the site to ensure that content is accessible for lawyers, parties, and judges. The site should also include up-to-date forms, links to useful outside sites, such as the VBA and Vermont Legal Aid, and provide easy interface with electronic case management systems. It is critically important that the site be user-friendly in all aspects. Even with the recent updates, the current website remains a user challenge.

The Legal Services Committee recommends a complete overhaul of the Vermontjudiciary.org website.

2. Legal Advice at the Courthouse

Lack of quality, affordable legal representation and easily available dispute resolution services resulting in large numbers of self-represented litigants proceeding without the necessary direction or guidance was identified as a significant issue with no easy solution. Statistics provided by the Court Administrator's Office show the following pro se count over all counties: Civil Division 47%, Criminal Division 6%, Environmental Division 14%, and Family Division 69%. This affects litigants' experience of the legal system, the quality of justice, impacts the operation of the courts and draws on staff time and resources.

Many Vermonters lack the means to obtain representation even for the most basic legal needs. Or their grievances do not involve large enough amounts of money that would attract attorneys and/or justify the cost of representation. In an effort to address their issues, they turn to the courts for assistance and information. The courts can only provide so much information and cannot provide legal advice or representation. Our challenge is to find a way to assist self-represented litigants in obtaining sound legal advice, which will, in turn, support the courts where the dockets include large numbers of self-represented litigants.

The committee believes that the courthouse should be seen as the community center for resolving legal disputes, much like a hospital is the center for medical issues. Other states have provided clinics and legal advice service centers at state courts, staffed with attorneys who can give limited advice, assist with forms and resources, and steer pro se litigants through the process. The Vermont judiciary seems interested in the concept, though current plans to start a

pilot service center in Chittenden Civil Division should be expanded to having actual staff attorneys. This program could be expanded to other counties, perhaps using new lawyers as staff. Onsite legal advice centers at the courthouse could provide computer access, resources, and basic legal knowledge. Staff attorneys provided by the court or state would oversee volunteer attorneys, paralegals, and law students who provide one-time limited services to pro se litigants, and specific workshops (e.g., lunch hour pleading drafting clinic). The staff attorney would also help direct self-represented litigants to resources, including the enhanced judiciary website, statutes, robust legal forms bank, clinics/workshops, legal counsel (including those who do unbundling or reduced rate services) and ADR/mediation. The staff attorney would also provide on-site legal triage of cases and help explain the court process to self-represented litigants. In certain counties, the staff attorney might be onsite every day, while in other counties the staff attorney might rotate daily. Stakeholders should work together to advocate in the Legislature for funding of staff attorneys.

Fundamentally, courthouses should serve as the physical, central location where the public obtains information and assistance, while the vermontjudiciary.org website provides the virtual clearinghouse for those who are better able to take advantage of Internet resources. In addition to reallocating and bolstering staff resources, courthouses themselves can be better utilized to serve the 21st century public by continuing to provide space for mediation, attorney-client meetings, and settlement conferences. The Wing Center in Rutland is a great example of this and could be replicated, especially if paid mediators could rent the space and generate income for the program.

On site legal service clinics would start as pilot projects in a few of the busier counties and focus on family court or small claims court matters, where the need is greater. Funding would be requested from the Vermont Legislature. The bar and the courts would work together to advocate for funding. Additionally, the bar and the courts would work together to outline and pass any necessary Rules changes or Administrative Orders necessary. The review would include but not be limited to ethical rules, expansion of the law student practice rule, clerkship program, and CLE approval.

To draw volunteers to assist the staff attorney, a certain number of volunteer hours would be eligible for CLE credits. Additionally, a number of hours spent representing individuals in the clinics would count toward the clerkship requirements for those wishing to be admitted to the bar. Law students would get experience. Attorneys will have a direct and discreet way to volunteer their services for those in need.

We envision this program also connecting potential clients with lawyers and resources. Information can be provided at the courthouses, online, and on television and radio as well as in coversheets served with court papers to connect litigants to lawyers and resources. The clinics would also serve as a referral center where individuals could obtain a list of attorneys willing to do limited representation, a list of court mediators, and a description of dispute resolution services.

Additionally, pro se education would be expanded to provide “how to” clinics on filling out pleadings, financial affidavits, or other court forms.

The committee feels that the program needs to be organized and run at the courthouse by an in-house staff attorney. We could also draw implementation ideas and concepts from current programs. For example:

1. *Minnesota*. Courthouse clinics provide free legal advice on family law and consumer law topics such as bankruptcy, debt collection, garnishment, mortgages, and foreclosures. Volunteer attorneys provide 30 minute consults at the clinics on an appointment bases.⁷⁸
2. *Prince Georges County in Maryland*. Family Law Clinic for the Self Represented: 20 minute time slots, first come/first served, on Mondays through Thursdays serve the first 18 people who sign up. On Fridays the clinic closes at noon and they serve the first 9 people who sign up.
3. *Milwaukee Justice Center at the County Courthouse*. Family Law Self Help Clinic. Provides services related to divorce, child support, visitation, legal custody, and name changes. No legal advice. *Marquette Volunteer Legal Clinic*. Staffed by volunteer attorneys and students who provide legal advice and referrals for probate, small claims, large claims, landlord/tenant and family law.

The Legal Services Committee recommends making the courthouse the “go to” place for anyone who has a legal problem and who needs direction, legal advice and guidance from knowledgeable and capable attorneys (including law students). An enhanced judiciary website, a robust forms bank, staff attorneys, and resources would complement this effort and are critical to its success.

3. Making More Lawyers More Accessible

Depending on whom we talk to, there are either too few attorneys in Vermont or too many attorneys inaccessible to most Vermonters for various reasons. To some extent, both claims are true. However, the focus on the number of attorneys doesn’t entirely encapsulate the issue. Much of the challenge that lies ahead not only involves increasing access to legal services in certain places and among certain populations, but also restructuring how legal services and the courts are used. In this way, the issue is less a matter of “more lawyers” or “more pro se-friendly courts” but a re-balancing of both.

The Committee examined how some Vermonters in certain types of cases are in dire need of actual legal representation that they cannot afford, regardless of the pro se resources available,

⁷⁸ In many of the larger metropolitan areas, Spanish-speaking clinics are also available. We may want to consider offering clinics in areas where there is a large number of ESL residents.

because they may lack the education or language skills necessary to represent themselves that can't be remedied with greater knowledge. Other individuals, however, may benefit from continuing the trend towards improved pro se resources such as electronic forms, walk-in clinics, pro se education courses, online materials, and more streamlined processes. Still another group of individuals may require actual legal representation, can't qualify for legal aid services due to income or legal services are not available in that area, and also can't afford to hire an attorney. Among all of these groups, certain cases may not require litigation to resolve the underlying dispute. In that instance, individuals, with or without counsel, would benefit from greater access to alternative dispute mechanisms such as mediation, collaborative law, or Family Division case manager conferences.

A. Lawyers in Rural Areas

It was recognized that rural areas are hit particularly hard by the aging bar where older lawyers in Vermont's small towns are retiring or closing their law offices with few young lawyers moving in to replace them or transition practices. This decline in services could be the result of the increase in debt upon graduation making it difficult to support a rural practice, changing demographics, competition of online legal services, a tendency of more people to engage in self-help or seek no help, or some combination thereof. New attorneys are opening law offices in heavily settled Chittenden County and a few cities like Rutland and Montpelier, and hesitate to go into rural areas where they will feel isolated. A trend toward court closures may only hasten this gap.

The VBA/VLS New Lawyer Incubator Project attempts to address this problem by providing support and mentoring for new lawyers settling in rural areas. While 2-4 new attorneys will be served by this project each year, interest is growing and older attorneys are in touch to find a replacement.

We should provide more encouragement for new lawyers settling in our rural areas. Substantial discussion was focused on loan forgiveness or other incentives and subsidies to lure young lawyers into providing rural legal services – possibly modeled after the medical profession or Teach for America. The reality is that we might only need to subsidize 2-5 lawyers statewide to have a serious impact.

Other state/communities are providing subsidies ranging from cash to loan forgiveness to free office space to new lawyers. We could create a loan forgiveness (or repayment) program available to those who open an office in an underserved area of Vermont. The VBF already has LRAP, which provides up to \$5,000 each year to attorneys who are working in certain not-for-profit organizations such as Vermont Legal Aid and Law Line; the money is used for loan repayment. The federal government also has a loan forgiveness program for attorneys who are in non-profit organizations. Attorneys who work ten years in public services while consistently paying their student loans will have the balance of their loan forgiven. In order for new lawyers to access this program, they need to be working for a non-profit legal program or government agency. Expanding funding for legal aid offices in rural areas or helping new lawyers set up non-

profit entities to provide legal services would enable them to take advantage of this program. Stakeholders might consider soliciting community, state and federal funding for subsidies and loan forgiveness (perhaps similar to how doctors are persuaded to practice in rural settings).

Like any small business owner, another challenge for new lawyers entering private practice is the cost of healthcare. Subsidizing premiums for lawyers who serve in rural areas might incentivize new lawyers to open practices and help those new practices thrive by reducing overhead costs.

A program to place out-of-county lawyers into rural areas one or two days a week was also discussed. As well, we discussed simply expanding the incubator program and other existing legal services, such as Have Justice Will Travel and having the Defender General provide coverage of juvenile courts by having fewer contract attorneys with multiple county contracts.

B. Virtual Lawyering

We also discussed the possibility of virtual lawyering, for example, by setting up spaces in courtrooms or libraries. Courthouses are equipped with Wi-Fi service, thanks to efforts of the VBA. The next step could be to provide computers and a room where clients can connect with an attorney virtually, including the proposed court/state staff attorney at the courthouse.

Tennessee is pioneering an online pro bono project where low-income clients can post their legal questions on line for volunteer attorneys to answer. No meeting space is required, and the attorneys like the flexibility of doing legal work remotely and at times convenient to them—at lunch, at home in the evening or during a break a in court activity. The Access to Justice Coalition, VBA, VLS, and Legal Aid could partner in this effort.

Libraries provide computers and Internet service to patrons seeking answers to legal questions. Vermont's Access to Justice Coalition has provided training to librarians about online legal resources to better equip librarians to assist pro se patrons, and training should continue and be supplemented regularly.

C. Legal Resource Manual

Vermont has a host of legal resources, but no single place where those resources are cataloged, updated and publicized. Vermonters – including court staff and lawyers – don't know what is available to help pro se litigants. Accordingly, it is suggested that we catalog every program in the state and make sure the information is available on the court's website, at each courthouse, and the VBA. As it stands, at least some of the access to justice issues could be and should be addressed through expanding current services.

The VBA has a chart listing pro bono and low bono services throughout Vermont, but that chart needs updating and is not easy to find.⁷⁹ Efforts should be made to link this list with the Vermont judiciary webpage, and to update it regularly. It is important that the newly discussed website allow users easy access to this resource. These resources need to be easily accessible.

The Court has published a brochure about some legal resources and the 1-800-889-2047 intake number for VLA, LSL and other projects. All resources should be pooled into one catalog.

The Access to Justice Coalition should start a United Law Project, similar to United Way, that would be the first place people would go to seek legal help. The Access to Justice Coalition would determine where United Law would be housed, which organization would update it regularly, and how it would be publicized. Every court clerk should be able to reference it via an online link to the judiciary website.

D. Unbundling and Creative Fee Structures

Limited representation is a way to make legal help available to more people. Lawyers need to offer it more to clients, and the public needs to know unbundling is available. Predictable legal fees are also important, so lawyers should be encouraged to move away from hourly billing toward set fees for discrete services in some cases. Lawyers should discuss these options with their clients at the first meeting.

E. Legal Education

At present, legal education costs are so high that new lawyers have staggering debt and must charge high fees to be able to pay back their loans. They are less inclined to start a small town practice fearing low income will result. We should promote and support those reading for the law or pursuing a combined law school/ reading for the law program. The VBA could partner with VLS, UVM or Burlington College to run a monthly weekend law school for those reading for the law. This would fill in gaps of what the students learn in a law office setting, and what they would need for the bar exam. Vermonters especially should be encouraged to read for the law—they are the most likely group to remain in the state and practice here.

The Legal Services Committee recommends creative and innovative programs to better link lawyers with clients in all communities throughout Vermont.

SECONDARY RECOMMENDATIONS

1. More Legal Aid Lawyers

⁷⁹ <https://www.vtbar.org/UserFiles/files/Public%20Information/Pro%20Bono%20Low%20Bono%20Programs.pdf>.

Although more funding is a difficult hurdle, the Committee felt it important to start advocating for the importance of lawyers for low-income folks in civil and family court litigation. Although lawyers are generally more available in the criminal and juvenile context, many low-income litigants in family and civil court who risk losing custody or their house are self-represented. A number of studies document that it is cheaper to society when these litigants are represented – for example savings in shelter costs - and that the right to counsel is well established around the world. Advocacy should be enhanced for more funding for legal aid attorneys to rural communities and direct legal service projects of the Vermont Bar Foundation to rural communities.

2. Expansion of Law Student Internship

We should consider expanding and encouraging Vermont's existing law student practice rule (Section 13 of Rules for Admission) to provide, under the supervision of a licensed attorney, legal services to underserved populations in areas that are not currently covered by Legal Aid.

3. Create Statewide Office for Access to Justice

We discussed the possibility of a new statewide position of Director of Access to Justice, focused on issues of pro/low-bono, modest means, unbundling, and ADR. This office would educate the public and promote existing legal services throughout the state and assess the need for additional programs.

4. Use of Paralegals for Common Retail Problems

Paralegals could assist with the preparation, service and filing of forms, identify otherwise unseen issues, and generally direct traffic under attorney supervision. Paralegals would not appear in court.

Additional work would be necessary to clearly identify in plain English what constitutes the practice of law to give paraprofessionals (and, likewise, online service providers such as LegalZoom) guidance on the limits of the service they can provide.

The existing education structure of Burlington and Champlain Colleges could be utilized with an expansion of paralegal education to specific areas in need.

CONCLUSION

The Legal Services Committee supports a complete overhaul of the judiciary website, legal advice at the courthouse, and innovative ways of making more lawyers accessible to more people throughout Vermont.

REPORT OF THE TECHNOLOGY COMMITTEE

"I asked the question is Court a service or a place? Do we really need physically to congregate in one old building with people wearing wigs and robes to discuss a problem that arose two years ago and to pay more than the problem at issue."

Richard Susskind

"Change is the law of life. And those who look only to the past or present are certain to miss the future."

John F. Kennedy

INTRODUCTION: CHANGES IN LEGAL TECHNOLOGY AND THE EFFECTS THEY WILL HAVE ON THE PRACTICE

The legal profession is in the midst of a period of rapid and fundamental change. How we work, how we organize ourselves in our work, how we interact with clients, how we interact with other professions, and how we interact with lawyer regulators are all in the process of deep and permanent change.

A number of legal "futurists," perhaps the best known of which is Richard Susskind, technology adviser to the Lord Chief Justice of England, have described the evolution of the legal industry from the old artisan guild to a considerably more diverse, multifaceted marketplace in which a variety of providers seek to meet the needs of the more cost-conscious, technologically-oriented consumers seeking a vast array of legal services. Susskind argues that lawyers have traditionally done "bespoke" work -- traditional, one-to-one consultative professional service, highly tailored for the specific needs of particular clients. From the beginning, legal education has been designed to produce lawyers who will provide such one-to-one service to particular clients.

While there undoubtedly will continue to be bespoke work in the legal profession of the future – especially in criminal matters and in small communities – much legal work is evolving to take alternative forms. We are already witnessing the emergence of what Susskind calls standardized work: developing common frameworks of process and substance in areas where the work is repetitive. Large regional and national firms have standardized work for many years. Now standardization has spread into many sectors of the industry, such as bank work, foreclosures, real estate and transactions.

Indeed, we now are seeing a third step in the evolutionary process – the systematization of ever-larger pieces of legal work. Firms and private companies are developing systems internally to more efficiently accomplish legal tasks. Such systems include automated document

assembly, interactive checklisting, electronic workflow, and know-how databases. Today many of these systems are being “packaged” – systems that are used within the law firm are made directly accessible to clients, usually across the Internet. A final turn of the evolutionary wheel is today producing commoditized legal work: legal services or offerings are becoming very readily available in the market, often from a variety of sources, at competitive prices, and most often by private companies with investment capital and a business mentality. As law professor Bill Henderson notes, the real market growth is in the “systematized” and “packaged” sectors. Further beyond the artisan guild of bespoke legal work is the emergence of low-cost providers of isolated legal services, such as e-discovery vendors and legal publishers (like LegalZoom and Rocket Lawyer).

The Canadian Bar Association, in its “Futures” report on the legal profession, concluded that four features of the emerging practice environment are driving change in the legal profession: globalization, technology, changing client expectations, and lack of access to legal services.

As a result of globalization – or better said, at the heart of globalization – is the declining importance of geographic boundaries. Borders, place, and physical distance are becoming less meaningful in our interconnected, “flat” world, as geographical lines mean less and less. As business-associated legal problems transcend traditional boundaries, and as new technologies permit (and clients increasingly expect) distance to be no barrier, one’s state of residence is less significant in terms of with whom and how a lawyer practices. While the effects of these developments may be slow to come to Vermont, they will come.

Technology has been both driver of and driven by these developments. First websites, then blogs, then social media entered the profession. All were greeted initially with suspicion, but over time all have been incorporated into modern legal practice – even in traditional Vermont. New affinity groups based on these electronic means of communication have emerged. At the same time, we have seen the explosion of electronic document management and searching, and discovery, and courts are increasingly turning to electronic filing. Today it is reasonable to argue – and Vermont ethics authorities *have* argued – that a lawyer who does not understand electronic document management and ESI discovery may be less than competent.

Despite the Vermont courts’ troubled attempts to create a working system of electronic filing, there can be no question that at some time in the fairly-near future electronic filing will be *de rigueur* in this state. Tools like web-based conferencing and electronic file management increasingly pervade the practice of law. And while it is slow to come to Vermont, global and domestic legal outsourcing must inevitably be adopted, if only because clients will insist that lawyers and their firms work as efficiently and cost-effectively as possible. Add to this the spread of instantaneous communication via email, text, and web messaging, and a lawyer is always within reach of the client in a way that has dramatically altered the way we practice. There are, of course, pockets of resistance to these developments, but they are increasingly rare. As the next generation of lawyers, raised on the Internet, arrives in Vermont we can expect them to insist upon rapidly adopting new technologies. Courts, too, must adapt to the

changing ways of practice and court-user expectations in order to efficiently and intelligently resolve disputes.

In order to compete in the future emerging legal marketplace, lawyers need to make better use of well-established technologies (such as word processing) and to leverage technology and other innovations that facilitate delivery of legal services in entirely new ways – so-called “New Law.” This term includes automated document assembly, knowledge management systems that help lawyers find information efficiently within their own firm, expert systems (e.g., automated processes that generate legal conclusions after users answer a series of branching questions), cloud-based practice management, legal analytics (e.g., using “big data” to help forecast the outcome of cases and determine their settlement value), and virtual legal services – all organized through legal project management and process improvement techniques.

Clients increasingly expect the lawyers they hire to employ these tools effectively and efficiently. Some companies in the national market are starting to do technology audits of law firms and will refuse to hire firms that do not demonstrate proficiency in new, cost-saving technologies.

Beyond the new tools generated by client needs and technological innovation, we have seen a host of new players enter into the legal market and pose a significant and growing challenge to lawyers. To a great extent, the explosion of pro se representation in Vermont (and in national courts) has been driven by the average consumer’s belief that he cannot afford the services of a lawyer. But it has also been driven by new “self-navigation” tools. Legal advice, legal forms, and legal research are all available online to the general public, often at no cost, with the result that many legal consumers are content to proceed some distance through the legal system without full-time assistance of counsel. So striking is this trend toward self-navigation that Stanford Law professor, F. Daniel Siciliano, has remarked that “[i]n 15 years, two-thirds of lawyers won’t practice law, at least not the way they practice now. Many won’t be lawyers at all.”

A host of technology-based legal service providers – new players in the legal market – have facilitated the trend toward self-navigation. Companies like LegalZoom, Rocket Lawyer, and Cooley Go interactively create legal documents at reasonable cost (i.e., less than what a lawyer would charge without restraint).⁸⁰ So does Law Help Interactive, which does it for free. Shake is a tablet-based contract app. WeVorce provides family law services online. Neota Logic creates interactive systems that answer legal, regulatory, and compliance questions. Consumers can find answers to their own legal questions using the legal research capabilities of Google Scholar. A whole string of companies (e.g., Modria, Fair Outcomes, Inc., VirtualCourthouse) provide online dispute resolution that avoids the costs of lawyers, courts, arbitrators, and mediators. Vaster still is the open source information available on legal blogs, websites and forums, which many consumers may utilize rather than ever approaching a lawyer for assistance.

⁸⁰ LegalZoom recently filed an antitrust suit against the North Carolina State Bar, citing a US Supreme Court decision that held that a state dental board was engaged in restraint of trade when it tried to limit the activities of a new category of providers engaged in teeth whitening.

Legal process outsourcing, in which pieces of complicated legal work, often requiring legal judgment, are farmed out to providers in less expensive markets domestically and overseas has become common in certain strata of the legal market (through companies like Pangea3 and Integreon) and promises to spread more deeply because of the considerable cost savings it makes possible. And, finally, artificial intelligence has leapt out of the pages of science fiction and into the business world as intelligent machines have been developed to tackle more and more of the work once performed by trained professionals. There is absolutely no reason to think this development will not spread to the legal industry, quite possibly replacing lawyers with robots on a wide range of legal work.⁸¹

Each of these new players – the document companies, the dispute resolution services, the new legal services providers – promise to alter the landscape of legal practice in significant ways in the coming decade. One trend that is already emerging is the virtual law practice. Driven by the availability of new technologies, such practices may include the delivery of online legal advice, the creation, assembly, and review of legal documents and forms, and lawyer-client discussions – all without a face-to-face meeting, an office or conference room, or even location within the same geographical region of the world.

It is clear from this discussion regarding technology in the legal market that much of the change is driven by client expectations. Some consumers look for alternatives to lawyers because they cannot – or think they cannot – afford the hourly rates or flat fees charged by lawyers. Others balk because they cannot budget for legal costs and fear unpredictable, high fees due to the use of the billable hour. Many just assume that online sources are sufficient to get the result they need. All consumers seek to reduce their costs while achieving their ends in an efficient manner.

Lawyers are increasingly becoming an unattractive option for these consumers, made even more unattractive by the fact that lawyers can be inconvenient and inefficient to use, and that they are slow in delivering needed services, frequently because they lag behind technologically. Courts are victims too as they lag further behind and cannot meet the needs of the user population. Because change has already come to pass, lawyers must embrace technology and learn to use it to their best advantage before F. Daniel Siciliano's prediction becomes a reality.

⁸¹ One prognosticator has predicted that "AI will cause the structural collapse of law firms by 2030." Dan Bindman, *Report: Artificial Intelligence Will Cause "Structural Collapse" of Law Firms by 2030*, LEGAL FUTURES, Dec. 1, 2014, <http://www.legalfutures.co.uk/latest-news/report-ai-will-transform-legal-world>.

Committee Activity

A. Meetings and the Survey

In response to the Chief Justice's charge, the VBA board of managers decided to form a commission to study the four areas of concern laid out by the Chief. Each area became the subject of an individual study committee, with members of the board and the membership at large who agreed to serve and contribute to the discussion. For the Technology Committee, several initial meetings were held to brainstorm and lay out the areas of concern and then formulate a survey to poll the membership regarding those concerns. In advance of the March 2015 Mid-Year Meeting, the Committee circulated a survey to address technological issues practitioners were having inside their firms.

The survey questions focused on our members' use of technology in their firms. We received 131 responses from all 14 counties and nine responses from out-of-state. The survey gave a glimpse into the current state of technology among VBA members. Notably, 78% of the respondents were from offices of less than five attorneys.

Some of the concerns highlighted in the VBA's survey were:

1. computer speed and connection speed (including connectivity issues),
2. cost of the technology and cost of its maintenance,
3. pace and implementation of technological changes and updates, and
4. viruses and security.

While there were diverse answers to the question about primary technology issues, the themes noted above were consistent among multiple respondents.

The ABA Solo, Small Firm and General Practice Division also conducted a technology survey. The ABA survey found that the two most important technology issues facing their respondents nationwide were:

1. knowing what to buy or use, and
2. finding the time to learn.

Additionally, 58% of the 457 ABA survey respondents did not use law practice management software and 60% did not use stand-alone billing software. In Vermont, approximately 74% of the VBA respondents used case management software and over 95% used time and billing software. While 64% of the ABA respondents used cloud-based file storage, only 40% of the VBA respondents did.

The answers to these surveys were reviewed and considered while working on the agenda for the Technology Committee. Some of the responses were considered directly in conjunction

with the plenary session, which was offered at the VBA Mid-Year meeting in March. Other responses were considered in light of the commission's recommendations.

B. The Mid-Year Meeting and Beyond

On March 20, 2015, the Technology Committee held a roundtable discussion, "Technology in Our Future," at the VBA Mid-Year Meeting. Several members of the Committee were present, as was Jeff Loewer, Chief Information Officer for the Vermont Judiciary's Office of the Court Administrator. Roughly 20-25 members of the bar attended, and many contributed to the discussion.

1. Electronic Case Management System, Implementation, and Funding

Jeff Loewer briefly presented on one of the most obvious subjects of curiosity in technology and the practice of law in Vermont: the state's fledgling electronic case management and filing system, and the possibility of its expansion statewide. He discussed the prevalence of these systems across the country, and various other state judiciary approaches to implementation as compared to Vermont's. The VBA's technology survey showed that 90% of respondents have access to professional PDF-editing software that will enable them to jump right in to a statewide system. The bar is ready, and most attendants seemed to agree that this should be a priority for Vermont.

The primary problem blocking implementation of a statewide system is funding. Mr. Loewer noted that the judiciary considers this a top priority and is considering using capital bonds to fund it if necessary. However, the Governor's office has to approve the judiciary's budget before it is presented to the legislature for approval. In addition to funding, the judiciary faces several logistical issues with implementation, such as:

- 1) whether to go third-party or in-house for design and maintenance of the system;
- 2) how to standardize the system across units; and
- 3) whether to implement the system statewide or, as we have with eCabinet, to use a few units and/or divisions as test subjects.

There are many steps between the judiciary's dream of an integrated electronic case-management system and the reality of implementation some 3-5 years down the road. Mr. Loewer recommended that members of the bar speak with their legislators, particularly on the upcoming fiscal year budgets, as ultimately the legislature will determine how quickly this dream becomes reality.⁸²

⁸² For any who are interested, the judiciary provides information and materials about Vermont's evolving "Next Generation Court Case Management System" at <https://www.vermontjudiciary.org/ng-cms/default.aspx>.

2. Thoughts From the Bar

The Roundtable participants discussed a number of areas of interest relating to technology in practice, including:

- Discovery materials, and the possibility of requiring propounders to give opposing counsel a text version of discovery requests to aid in drafting responses;
- Arraignments by video, and privacy concerns related to such a practice such as the ability of criminal defendants to privately confer with counsel;
- Encouraging attorneys, and the courts, to consider the burden on clients/parties by requiring in-person appearances at hearings;
- Presuming remote or phone appearance and a requirement to file a motion for in-person appearance for certain routine hearings, rather than the converse;
- Firm electronic file management, concerns with the reliability of electronic vs. paper files, and firm experiences ranging from completely papered to completely paperless; and
- Various security concerns such as regular network backup, cloud networking, written information security policies, and encrypted emails.

3. Thoughts From a Future Practitioner

In addition to practicing members of the Vermont bar, the committee invited Amy Davis, a 2015 graduate from Vermont Law School, to participate in the committee and comment at the Roundtable from the point of view of future members. The Committee intentionally sought out a member of the “Millennial Generation” for input, as this generation has a unique perspective on the world before and after the Internet, and how technology integrates into everyday life.

Ms. Davis had this to say about her experiences straddling the largely paperless world of law school and, from her perspective, the confusingly papered world of practice she encountered during her internships:

Vermont Law School is one of the front-runners for the nation’s top environmental law schools, so it only makes sense that its students are taught to eliminate paper consumption as much as possible. Students are allowed a certain number of free copies from the computer labs before being charged; professors all permit exams to be taken on laptops; students receive and submit assignments via an electronic system; most students take their notes on their laptops; and many professors use Microsoft Word’s “Track Changes” feature to give electronic feedback on assignments.

However, in my Vermont internships I noticed numerous inconsistencies between law school and practice, between county court systems, and between the federal and state court systems. Within the state, the basics of pleading and practice vary depending on the county, creating an unnecessary learning curve for young attorneys and a burden on their mentors. Every firm uses a different system, ranging from all paper files, very basic conflict management, and reliance on staff to draft documents, to entirely paperless, mobile, and technology-driven. As more and more young attorneys come in to refresh the Vermont bar, older attorneys must accept that the younger generation is more comfortable with paperless and cloud-based operating systems, and they must be open to the younger generation helping them learn and explore other technological options. If my 84-year old grandmother can learn how to use an iPad, then you can learn the basics of SpiderOak. I promise.

In addition, practice in federal court vs. state court is surprisingly different. For example, in federal court an attorney need only throw an exhibit up on the Electronic Evidence Presenter (“ELMO”) for presentation to the jury, whereas in state court I have watched twelve jurors huddle around a laptop perched on a milk crate to watch a deposition because the court’s television wasn’t compatible with the video’s format. Trial practice is an ongoing skill developed over time, but the more uniform the various state and federal courts can make it, the shallower the learning curve will be for incoming attorneys.

As I see it, the solution to these problems is twofold. First, technology in our state needs to step up its game. To go from law school, where everything is online, e-mailed, and paperless, to a system where pleadings must be printed and mailed or hand-delivered, is 12 steps backwards, not a forward step for the profession. Second, Vermont Law School should take more of a proactive approach to producing practitioners rather than legal theorists hoping to practice in this state. We might know how to write a complaint when we graduate, but we often have no idea how to submit it to the court, whether we can email a pleading, if it has to be hand-delivered, and whether we can rely on that practice from county to county.

A more uniform system throughout the state coupled with a more practical education on Vermont pleading and practice will help produce attorneys who are ready to practice, have less to learn, and can better contribute to each firm’s bottom line when we are admitted to practice.

C. Security Concerns

One often-cited impediment to digitization or modernization of the average law office is the issue of security. Lawyers, especially those who have only used paper, are leery of any digital system at the onset, but even more so of any cloud-based system. Practices run the gambit from blind faith in all things cloud to total mistrust giving rise to triplicate paper products. What

many lawyers don't realize is that security is less a matter of protection from theft and nefarious actions and more a matter of reasonable diligence to safeguard the system in place and recover data using currently available reasonably competent systems.

Because a lawyer cannot see this system, lawyers may assume the data is more vulnerable because it is "out there." However, it is potentially more likely that a dishonest office cleaner, software vendor or visitor could steal paper files from a law office than it would be for an average thief to steal cloud-based files. A well-built cloud based system may indeed provide equal or better protection but the key is for lawyers to have some knowledge regarding the system and do their due diligence to ensure the reliability of the system.

Security must be a top consideration when moving previously paper-based functions to a digital environment. This is especially true when processes are virtualized in a cloud setting, where users cannot realistically inspect their service providers, their locations, or the subcontractors to which they outsource services. While any business has a duty to safeguard data with which it is entrusted, the duties for lawyers are heightened because lawyers are subject to both generally applicable laws and the rules of professional conduct. Increasingly, as outsourcing – and especially cloud-based outsourcing – becomes the norm, it is important to remember that while work can be outsourced, we cannot outsource responsibility. To this end, lawyers must educate themselves in some basic facts related to security.

There are several important cybersecurity facts to remember. First, security must not be seen as a product or outcome – is a process. Second, security should also not be seen in purely technical terms, or in purely compliance terms – security mindfulness must encompass three distinct types of controls: physical, technical, and administrative. In view of the process-based approach to security, the security lifecycle should involve iterative steps of risk-assessment, controls selection, implementation, and a learning feedback loop that informs necessary adjustments to security controls. Third, security should be governed by reasonableness, and the related concept of defensibility. Modern security practice recognizes that no security program is perfect. Finally – and perhaps most importantly – security practices can never neglect the human element. The greatest threat to information security is almost always insiders, either through malice, or more often foolishness or lack of knowledge.

Unfortunately, security does not add any new feature of value to a practice. For lawyers, it may not even be much of a product differentiator, as would-be clients probably assume that lawyers' services are "secure" anyway. However, security is essential, especially given the sensitive nature of the trust clients place in lawyers. The same will be true – perhaps more so – if and when state bodies undertake modernization efforts that digitize additional portions of court work. While security may not be glamorous or an obvious value addition, lawyers, the public, and the judicial system all have too much at stake *not* to make security a top consideration when making the daily decision to adopt new technologies or continuing to use one that is already in use.

A more thorough discussion of security matters is contained in the Appendix to this report.

RECOMMENDATIONS

A. The Court System

1. Court Case Management System – The Case for Case Management

At this point it is almost axiomatic to say that the Vermont judiciary needs new case management software. The judiciary has been using essentially the same case management software for over 30 years. By contrast, consider the changes in technology that have occurred over the same time period. For example, Microsoft first introduced Windows in 1985. Microsoft introduced Windows 10 in July 2015. Consider the changes in cell phones and the Internet that have driven even bigger changes in society over this time period. Hardly more needs to be said to justify updating this integral part of the judicial system.

The judiciary operates trial courts in every county in the state. It operates the Civil Division, Criminal Division, Family Division, Probate Division, Environmental Division, Judicial Bureau, and Supreme Court. Tens of thousands of cases are filed in the state court each year and litigants expect the cases to track through the system quickly and efficiently. Yet information about many individual cases is only available in each individual county. Much of the substantive information about these cases exists only on paper, paper located in individual courthouses. Much of the data has to be manually reentered by court staff based on paper filings of litigants. Implementing a modern case management system will assist with efficiencies by reducing redundant data entry, eliminating silos of information (whether they be County silos or Judicial Division silos), and ultimately permitting litigants easy access to information about the cases that they are involved in.

The lack of a modern case management system also undermines the public's faith in the judicial system. In the absence of a modern case management system, the gap between the judiciary's actual technological capability and the expectations of the court users and general public will continue to widen. Not that long ago, the court needed to manage the expectations of litigants accustomed to transacting business via computer. Now, the court serves litigants who are increasingly accustomed to being able to manage the affairs of their personal and professional lives on their smartphone.

The judiciary has implemented pilot programs to investigate electronic filing by attorneys and ultimately all litigants. Those programs have convinced the judiciary that it must investigate a new electronic case management system that will allow for electronic filing and the retrieval of documents and data from a web-based format. Much like with other public sectors' efforts to update or replace their software and procedures, the judiciary has met several hurdles in their efforts, including the need to cancel its contract with the vendor first hired to implement an electronic case management system, due to non-performance. That experience stalled the judiciary's efforts, but the Court Administrator's Office has now completed soliciting requests

for information (RFI) from current vendors and is now assessing the RFI responses to determine how best to solicit requests for proposals from vendors. Even if these procedures go smoothly, it is expected that full operation of a new case management system will not be achieved for several years. In the interim, the judiciary continues to update its procedures and forms, so that the transition to an electronic case management system will proceed as smoothly as possible. Currently, the court is serving most all hearing notices, orders and decisions via e-mail, thereby reducing postage and handling expenses.

Any future vision of the Vermont judiciary must also include provision for accepting electronic filings directly from both self-represented litigants and attorneys. Many attorneys already communicate with their clients electronically, serve motions on other parties electronically, and even sign contracts electronically. This is an area where the adoption of electronic documents by the general public has far outpaced the legal community, and we must try to catch up.

Our Committee believes that the bar needs to be patient as the Vermont judiciary moves forward in these efforts, but that the bar also needs to be persistent in its encouragement of the judiciary's efforts and in the Legislature's decision whether to fund them. These improvements will be significant, especially since the new system must be operational and accessible from each of the sixty or more courts that are spread throughout the fourteen Vermont counties. But a new, current electronic case management system for the Vermont judiciary is also essential if the court is to merely keep pace with how attorneys and their clients currently interact and communicate. The Vermont courts are not yet able to fully communicate in this manner.

2. Statewide Court Calendaring

One concern that the VBA's commission has heard repeatedly was the court's need for a statewide calendaring system. Many of Vermont's attorneys appear in multiple counties across the state and different divisions within a county. A consistent concern raised by these attorneys is the court's inability to schedule hearings without knowing whether a needed attorney is already currently scheduled in another county or another division. The problem is so prevalent that the court ultimately specifically designed a Motion to Resolve Scheduling Conflict to address these situations. The time and resources saved by eliminating scheduling conflicts is self-evident. While court staff can currently access the initial version of the court's pilot version of a statewide calendar system, attorneys' and others' access awaits later versions of the software, and may not be fully available until after the new electronic case management system is operational.

3. Virtual Court Appearances and Eliminating Appearances By Attorneys

Courts can and should hold routine hearings, particularly status hearings, via phone or interactive television. It is a waste of court and attorney resources to require motions to appear by phone, where these motions seem to be made in nearly every status case and are equally routinely granted. The entire practice could be streamlined by creating the presumption that these hearings *are* telephonic unless otherwise requested. The use of interactive television could also improve court and attorney efficiencies greatly.

Virtual hearings through enhanced video conferencing is a must. The Bankruptcy Court provides an excellent example of the efficiency of utilizing video appearances for routine hearings. Video conferencing would reduce the time and cost related to motion hearings, status conferences, and other non-trial proceedings. This would also mean providing the court system with sufficient resources to manage the conferences, including initiating and recording the proceedings.

4. Learning From Past Mistakes

While the State of Vermont has shown a willingness to incorporate new technology into state government, over the past several years it has encountered significant difficulty in purchasing and implementing new technology. Specifically, the State of Vermont has spent an enormous amount of money trying to develop functioning computer systems for Vermont Health Connect, the Vermont Department of Motor Vehicles, and the Vermont Department of Taxes. After this string of high profile setbacks, it is important for the State of Vermont to reflect upon the mistakes that it has made in purchasing computer technology and how it can improve as it approaches adopting new systems.

In its strategic plan for the next four years, the state concedes that learning from past successes and failures is important, but it does not address the high profile failures that it has experienced over the last decade.⁸³ In addition, the state has seemed resistant in the past to consulting with IT professionals who have relevant experience and free advice to offer.

While Vermont practitioners would like to see the state develop an electronic case management system, and soon, the state must first acknowledge and learn from its previous difficulties before spending more money trying to implement new technology into the legal system.

B. Lawyers and Law Firms

⁸³ See State of Vermont IT Strategic Plan 2015-2019: Information Enabling State Government (January 2015) (not discussing the purchase of IT for Vermont Health Connect, the Vermont Department of Motor Vehicles, or the Vermont Department of Taxes).

1. Needs, Solutions, and Challenges

The technology needs of lawyers over the next 5 to 15 years will depend on how attorneys address the potential disruptions and changes that might flow from the changes in the way legal services are provided. At one end of the spectrum, nothing much changes and lawyers and firms move slowly through the time span making use of current technologies with incremental improvements. The more likely scenario is that few firms will continue with the same model for services as they have in the past. Corporate clients will still need individualized litigation and transactional services. Firms will eventually understand how to become more valuable to their clients by providing risk assessment, business process review and other services before issues arise.

Practices concentrating in the areas of criminal defense, residential real estate, moderately complex civil litigation, and retail services will remain services that cannot easily be provided by someone other than an attorney.⁸⁴ Many other services such as business entity formation, basic contract drafting, and simple dispute resolution will likely pass from the smaller firms to larger firms or virtual practices. Due the hourly fee falling into disrepute in much of the country, some firms may also learn the benefits of non-traditional methods of setting fees to better serve the needs of specific clients. For the largest percentage of firms providing retail services to clients other than the most economically challenged, practitioners will have to determine how to provide services at a cost that the average consumer can pay.

The question is not whether disruptors that have touched other industries and the practice of law in other states will impact the practice of law in Vermont, but how quickly the disruption will occur and how significant the impact of the disruption will be when it does arrive.

It is clear that the ultimate solution to addressing the issues raised in this report must include the adoption of a number of technologies. The most likely challenge to adopting any such program or programs is reluctance on the part of most law firms to invest in both the capital cost and the training time required for new technologies. There are no particularly good options in the Vermont market for training new lawyers in the application of technology to the practice of law or the training of experienced attorneys in adopting new ways of doing things.

Legal education may offer one or two courses that touch upon technology⁸⁵ but not all students take the courses, and a 3 credit course is hardly enough time to really familiarize students with the integration of technology and practice given the vast number of options available to firms. Upon graduation from law schools, the options for training in Vermont are reduced to expensive courses at technology training facilities, adult learning courses at facilities like CCV, or the occasional short presentation at a bar association function. None of these options offer a

⁸⁴ Residential real estate is mentioned here only because attorneys have been successful in preserving the attorney's role in a real estate transaction. In most of the country outside of Vermont and New England, the attorney has a limited role in the real estate closing process.

⁸⁵ Vermont Law School offers an eLawyering course and has offered a Law Practice Management class, although it is unclear whether the practice management course will still be offered.

real training in the sense that attorneys do not have the opportunity to see how technology might apply to their specific practice. When an attorney seeks help for a particular situation, the most frequent advice is - get the program or the free trial and “play with it.” Most attorneys do not have the time to complete all the tasks on their list, so the idea that a person with average or lower than average computer skills will download and install an application to use as a toy is a bit farfetched. It is substantially more likely that an already overworked administrative assistant or paralegal will be tasked with getting the program and making it work. The issue with the latter solution is that there are no better solutions for administrative and paralegal assistants to learn about technology.

2. Recommendations for Training and Accessibility

The more reasonable solution to make technology more available is to provide information, training and technology solutions to lawyers in sufficient detail to allow attorneys to make realistic assessment of how new technologies might enhance their practice.

a. Vetted Solutions

We recommend a committee through the Vermont Bar Association that regularly reviews information sources to identify potentially useful items. The same committee would acquire the items for evaluation purposes and actually evaluate the usefulness and the expenses of implementation, but not be beholden to sponsorships or paid usage. Items that meet the criteria for usefulness are described in detail and the materials published on a regular basis for attorneys, staff and law firms to use as guides for their own research. The VBA could create its own technological stamp of approval to quickly indicate to practitioners looking for a quick solution which programs have been vetted and found useful.

b. Training Center

We recommend a training center that would have equipment, software, and other technology available to people who want to see currently recommended solutions, test various items, and become familiar with software before investing in it. This idea floated around in years past, but it is now time to put the plan in place.

c. Technology Consultants

There are a number of firms providing technology consulting to law firms, but none who have attorneys on staff as consultants. As a result, the advice tends to be generic, well meaning, but often not on target for what law firms need. Consultants tend to sell solutions in which they have developed a high level of comfort, but that are not necessarily optimized for law offices. We recommend that the VBA develop resources that IT consultants may access to help them understand the technology, security, and confidentiality requirements unique to the legal field.

d. Regular Trainings

When an optimal solution is discovered through the technology vetting process, law firms, attorneys and staff need regular training, both at implementation but also during use. Training is how law firms will be able to effectively and efficiently apply available technology solutions to the future practice of law.

3. Recommendations for Civil Case Dispute Resolutions

Another avenue for assimilating to the electronic world would involve a new dispute resolution system. A user-friendly dispute resolution service will require a different solution from a service that connects attorneys and clients needing non-litigation services.

a. Buy-in

Enough people need to see the benefit of choosing a specific solution to the challenge to make the solution viable. Hypothetically, presume a private dispute resolution system using a moderated mediation process is offered as a solution to providing a reasonable cost dispute resolution services to clients with small to medium value. It only works if all the potential parties adopt this as the solution. If there is one party that believes there is an advantage to traditional litigation, this whiz-bang solution doesn't work. It is very difficult to get people, like attorneys, to accept any new solution that is not like anything seen before, because "there's no precedent, what if I agree to do this new thing and it comes out badly, I'll get sued. At least if I litigate the traditional way, I know the risks." There the adoption of the new process ends.

b. Resources

Any solution that is not the current system will require redirecting already scarce resources in a new direction. When presented with the need to expend capital many people decide it is better to keep doing what they have done in the past. Developing a new dispute resolution service will require the expenditure of significant amounts of financial and intellectual capital. Those resources do not appear to be available in the public sector (courts) or the private sector (bar association or lawyers) and the Vermont market is just too small to attract commercial resources. There are already alternative dispute resolution sites, but it is highly unlikely that established attorneys will recommend a service that functions, and resolves disputes, without them. Those services also cannot address many of the family law issues, bankruptcy and other case types that can only be processed through a court system.

Developing and designing such a system would be a significant task, as would the process of getting the product, coded, tested, launched and then maintaining the system.

c. Efficiency

It is unlikely that any existing entity is going to expend the financial capital to create a new system, without either (a) public money, which is increasingly hard to come by; or (b) a reasonable return on investment which is unlikely given the limited market in Vermont for potential end users.

d. A new organization

A new organization should be created that will focus on the non-court dispute resolution service. There is no presently existing organization that would be able to work outside the existing system to create something that is not an incremental improvement with many of the same issues.

This new organization will probably be some form of foundation, potentially with tax-exempt status. It would initially be small, no more than two or three people with skills in system design, dispute resolution and sophisticated project development and then project management. Ideally this would be an entrepreneurial team, with no practicing lawyers (law school graduates that are not invested in traditional practice would be barely acceptable). This core team would look at the essential elements of dispute resolution and find a way to solve the time/money problem. There are already existing online dispute resolution systems – they usually operate like mediation sessions. Perhaps the solution is to have lawyers take off their advocate hat and put on a mediator hat occasionally. The attorney would not represent either side, but he or she would aid the parties in navigating the dispute resolution process.

The challenge to creation of this potential new organization is seed funding. None of the traditional legal services funding mechanisms will repurpose financial capital, or even intellectual capital, on a new and unproven concept. Other potential sources may include: (a) funding from a foundation interested in the concept that would not deplete legal services funding; or (b) a crowd funded/sourced project. There are a lot of good and bad projects being funded through crowd sourced funding mechanisms. This would hopefully be one of the better ones.

4. Recommendations for Other Services

Vermont residents will need services outside the court system and dispute resolution process. Many people would benefit from advice about legal affairs well before the problem ripens into litigation. At the same time, an attorney working at an hourly rate cannot provide counsel at a cost most middle-income citizens can afford. To the extent LegalZoom or one of the other online legal service providers has found a niche, Vermont attorneys could either concede the space to the online services or create a competing system for their clients.

One option would be a series of templates that a firm could use to create a custom system available through the Vermont Bar Association. It might be possible to develop a set of

templates through some collaborative process involving attorneys with experience in the subject matter. Other attorneys could acquire the templates and customize them to meet the needs of the firm and their clients. Having a template for a practice system reduces the investment necessary to practice in that area, potentially reducing the overhead cost and thus allowing more reasonable fees. This sort of publicly available system would also empower and provide resources to practitioners seeking to start solo practices in some of Vermont's rural areas where legal services are so desperately needed.

Another option is to encourage attorneys to offer these services at a flat-fee rate instead of an hourly rate. Many attorneys who frequently draft wills, leases, and trusts, have a template of their own available through their firm. While it is easy for the average consumer to pull a document off of LegalZoom and get an instant will, trust, or lease, those documents may not conform to Vermont laws and would cost the consumer more money down the road when they discover the document is not legally binding. Offering the protections of a Vermont-licensed attorney at a flat rate slightly higher than the rates of the online competitors might draw more clients into the office and away from the sometimes untrustworthy Internet sources.

CONCLUSION

The Technology Committee recommends restructuring and adding uniformity to the state court case management and calendaring system, greater access for law firms to new systems and technologies, exploration of a statewide dispute resolution system, and increasing availability of Vermont-specific advice and/or forms to provide a low-cost solution to the public unable to afford traditional fee structures.

APPENDIX: SECURITY

When security decisions are backed by a solid process and determinations as to what defenses are reasonable, a would-be defendant can invoke a digital interpretation of Judge Learned Hand's famous negligence formula articulated in *Carroll Towing*.⁸⁶

Sources of Obligations

Lawyers are subject to generally applicable laws pertaining to security. These can include consumer protection laws, contracts, and sector specific laws.⁸⁷ The most generally applicable data protection obligations in the United States flow from the Federal Trade Commission's power to sanction unfair and deceptive trade practices under the Federal Trade Act. The "unfair" and "deceptive" elements of this enforcement power are two distinct branches. Generally, to make promises to consumers about privacy or security practices can be seen as deceptive if these promises are not backed up by actual practice. The FTC has also successfully taken the position that to offer inadequate security protections is an unfair trade practice. In fact the developing body of FTC consent decrees can be read together as a list of practices to avoid for privacy and data security practices.⁸⁸

Additionally, many states – including Vermont – have breach notification laws. These laws typically require that a holder of "personal information" must provide notification if this information is breached. Like the vast majority of these laws, Vermont's defines "personal information" as a person's first and last name combined with one other key element, such as a Social Security number, account number, driver's license number, or account password.⁸⁹ In the event of a breach of this information, the holder must notify both the individuals and the office of the attorney general. The attorney general makes this information public on what could casually be called a data breach wall of shame.⁹⁰ As the number of out-of-state business on Vermont's list indicates, the jurisdictional reach of data breach statutes is defined by reference to the data subjects, not the location of the business holding their data. Other states define jurisdiction similarly. Thus, a lawyer holding personal information of residents of other states

⁸⁶ U.S. v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

⁸⁷ The U.S. is unusual in that that it has no generally applicable data security or privacy law, while most countries, including the vast majority of developed democracies, do. Notable examples include Canada's PIPEDA and national implementations of the EU's Data Protection Directive, EU 95/46.

⁸⁸ Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUMBIA L. REV. 538 (2014), <http://columbialawreview.org/wp-content/uploads/2014/04/Solove-Hartzog.pdf>.

⁸⁹ 9 VSA § 2430, 2435.

⁹⁰ The Vermont Attorney General posts data breach notification letters online at <http://ago.vermont.gov/focus/consumer-info/privacy-and-data-security1/data-security-breaches.php>. Guidance for those reporting a breach is at <http://ago.vermont.gov/assets/files/Security%20Breach%20Guidance.pdf>. Guidance for those reporting a breach is at: <http://ago.vermont.gov/assets/files/Security%20Breach%20Guidance.pdf>.

may be subject to those state's data breach notification laws as well. The overachiever in the personal information security field is Massachusetts, which requires not only notification in the event of a breach, but also a positive plan to prevent breaches, known as a written information security plan, or WISP (discussed below). Like most data breach statutes, Massachusetts' law has extra-territorial reach.

Lawyers retained by clients active in specific fields may also be governed by information security laws specific to those fields. Notably, these can include healthcare, banking, and education. Lawyers can also be subject to contractual liability for failure to keep promises related to data security or privacy, as well as common law causes of action in the event of a data breach. Although many lawsuits related to data breaches have long stumbled on the issue of damages if the breach is not followed by financial losses, some have speculated that the tide is turning.⁹¹

Of course, lawyers are subject to regulation above and beyond other businesses. The law relating to lawyers and applicable rules of professional conduct include additional lawyer-specific obligations. Generally, obligations of competence, communication, confidentiality and respect for the rights of third parties all impact data security.⁹² First, the duty of competence has been described in many ethics opinions as including a duty to either exercise due competence as regards to client competences stored electronically, or to retain expert assistance if the lawyer is not competent on his or her own. The following from an Arizona ethics opinion is typical of this vein of opinion; “[A] lawyer must act in a competent and reasonable manner to assure that the information in the firm’s computer system is not disclosed through inadvertence or unauthorized action.” The opinion goes on to state that a lawyer must either be competent to “evaluate the nature of the potential threat to the client’s electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish that end” or retain expert assistance.⁹³

Lawyers tend to follow the general trend in information security in that there is no iron-clad duty to deliver complete security. However, the focus is on “reasonable” security commensurate with the risks involved. This makes an overall risk-based approach to computer security essential such that lawyers can assess the level of risk and what security controls are necessary. The commentary to Model Rule of Professional Conduct 1.6 refers to “reasonable efforts” that a lawyer must make to ensure information security. Among the factors to be considered, the commentary suggests:

- The sensitivity of the information;
- The likelihood of disclosure if additional safeguards are not employed;

⁹¹ See, e.g., Kelsey Finch, *The Evolving Nature of Consumer Privacy Harm*, THE PRIVACY ADVISOR, International Association of Privacy Professionals, April, 2014, <https://iapp.org/news/a/the-evolving-nature-of-consumer-privacy-harm>.

⁹² See Model Rules of Professional Conduct Rules 1.1, 1.4, 1.6, 4.4, and the comments to those rules.

⁹³ Ariz. Bar Op. 05-04 (July 2005).

- The cost of employing additional safeguards;
- The difficulty of implementing the safeguards; and
- The extent to which the safeguards adversely affect the lawyer’s ability to represent clients.

This notion of “reasonable” security measures or security measures commensurate with the sensitivity of information in a system and the likelihood of harm is consistent with security practices in other contexts, such as HIPAA, or the notion of a written information security program, or “WISP.” Lawyers need no guarantee that all information will always be secure; indeed this would be impossible. Arizona Bar Opinion 09-04 addressed a case in which a lawyer had taken reasonable efforts, including encryption, password protection, and storing files under randomly generated names, but still fell victim to hackers. In finding that the lawyer had not engaged in misconduct, the committee noted that a lawyer’s duty “does not require a guarantee that the system will be invulnerable to unauthorized access.”

Outsourcing involves specific elements of “reasonable efforts,” including increasingly popular outsourcing to cloud providers marketed to lawyers as practice management software. The consensus view among ethics committees that have considered the issue is that “reasonable” efforts must include a lawyer insisting on a provider’s legally enforceable obligations of confidentiality.⁹⁴

Vermont follows the majority view in declining to define a “checklist” of what constitutes sufficient protections in cloud computing. However, Vermont Bar Association Advisory Ethics Opinion 2010-06 urges lawyers to investigate:

- a. the vendor’s security system;
- b. what practical and foreseeable limits, if any, may exist to the lawyer’s ability to ensure access to, protection of, and retrieval of the data;
- c. the material terms of the user agreement;
- d. the vendor’s commitment to protecting confidentiality of the data;
- e. the nature and sensitivity of the stored information;
- f. notice provisions if a third party seeks or gains (whether inadvertently or otherwise) access to the data; and
- g. other regulatory, compliance, and document retention obligations that may apply based upon the nature of the stored data and the lawyer’s practice.

⁹⁴ For example, Maine Bar Opinion 207 (1/18/2013); Massachusetts Bar Opinion 12-03 (undated, though clearly from 2012), at <http://www.massbar.org/publications/ethics-opinions/2010-2019/2012/opinion-12-03>; NC Bar Opinion 2011-06 – adopted Jan. 27, 2012 (draft was released in 2011), at <http://www.ncbar.com/ethics/ethics.asp?page=15&from=1/2011&to=12/2012>.

Types of Controls

Lawyers should familiarize themselves with some basic types of information security controls and some the nomenclature around these rules. Information security is typically seen as a task of protecting the “CIA triad”: confidentiality, integrity, and availability.⁹⁵ Confidentiality – ensuring that unauthorized individuals do not gain access to data – is already a familiar concept to lawyers, but integrity and availability are also important. Integrity seeks to ensure that data is accurate and not distorted -- a hack that deliberately changed data in a file would be an “integrity attack.” Availability is inherent in a Vermont lawyer’s duty to consider “what practical and foreseeable limits, if any, may exist to the lawyer’s ability to ensure access to, protection of, and retrieval of the data.”⁹⁶

A second information security triad divides security controls into physical, technical, and administrative. A physical control limits physical access to a resource or space; for example, locking an office door or a file cabinet. A technical control is a technical feature limiting or protecting access such as the use of passwords, encryption protocols, or an automatic logout feature after a specified period of inactivity, among many others. An administrative control is a rule governing behaviors, such as requiring all employees to use their own accounts and unique passwords or banning the use of sticky notes on a computer to remember passwords.

Typically, physical, technical, and administrative controls overlap. For example, for a server maintained in-house in a law office, the server is protected first by administrative controls, including whatever rules apply to the law office personnel, as well as generally applicable law such as the Computer Fraud and Abuse Act⁹⁷ that makes it illegal to access a protected computer without permission. The server could well also be encrypted and require password authentication, technical controls. Finally, locks on the door of the room where the server is physically located would serve as physical controls.

Thinking about security needs in terms of confidentiality, integrity, and availability and security measures in terms of physical, administrative, and technical, can help lawyers cover all the angles. For example, while any cloud solution might have some vulnerabilities, the relevant question should not be, “is this system totally secure?” Instead the question should be, “will this solution provide a comparable level of confidentiality, availability, and integrity to my other available options?” The next best alternative option to a cloud solution may well be an antiquated server maintained by part-time IT staff and located in a flood-prone basement of a building with weak physical security measures. The weaknesses of both solutions should be measured against each other. In a large number of cases, a careful analysis will reveal that the biggest vulnerabilities may be on the administrative side. For example, a theoretically secure

⁹⁵ See NIST Special Publication 800-33, *available online at* <http://csrc.nist.gov/publications/nistpubs/800-33/sp800-33.pdf>.

⁹⁶ Vermont Advisory Ethics Opinion 2010-06, at <https://www.vtbar.org/UserFiles/files/Webpages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Client%20Property/10-06.pdf>.

⁹⁷ 18 U.S.C. § 1030.

cloud offering might not be so secure if run on a computer with out-of-date malware, by an attorney who likes to use WiFi in coffee shops and uses his birthdate or anniversary as a password.

Security Is a Process

The biggest trend in information security generally, although perhaps slower to hit lawyers than other professions, is the idea of seeing security as a process, not a product. This overlaps with the idea of taking reasonable precautions tailored to the sensitivity of data or the likelihood of harm. This is evident in the numerous references to “reasonable” precautions in ethics opinions. The notion of “reasonable” precautions also exists in other laws such as HIPAA, GLBA, and others. It is also found in Massachusetts data privacy law, the first generally applicable law of its kind requiring information security efforts beyond breach notification.⁹⁸ Developing a Written Information Security Program (“WISP”) should involve steps of inventorying assets, identifying risks, selecting and implementing security controls, and periodically assessing the effectiveness of these controls. The results of risk analyses and decisions as to necessary security controls should be captured in the WISP, or in a similar document.⁹⁹ Whether termed a WISP or something else, risk-based decision-making is as appropriate for lawyers as it is for other fields.¹⁰⁰

Risk-based decision-making can also support defensibility in the event something does go wrong. As with traditional notions of negligence famously enunciated in *Carroll Towing*¹⁰¹, a lawyer should have a reasonable defense that he or she was not negligent if careful risk assessment revealed that the cost of a given security measure would have exceeded the reasonably expected possible loss. For example, if a risk assessment revealed that there was a 1 percent annual chance of a loss of data causing as much as \$100,000 in damages, the annual loss expectancy could be said to be \$1,000. If a lawyer had been offered a next generation subscription-based antivirus service costing \$150/ month, the cost can be said to be \$1,800 or nearly twice the annual loss expectancy. In the event of a breach that could have been prevented had the lawyer subscribed to this service, reference to the risk assessment and/or WISP could be very helpful if the lawyer considered and rejected the proposed security measure because it did not appear reasonably necessary and cost-efficient. Numerous ethics opinions support this approach by reference to “reasonable” security standards.

⁹⁸ 201 CMR 1700. Many states have long had breach notification laws requiring holders of personal information to notify the subjects of this information in the event of a breach. However, previous to the Massachusetts law, these relied on market or reputational forces to compel businesses to protect information. Other obligations, such as the HIPAA security rule, specified security efforts, but covered only specific industries.

⁹⁹ The concept of the WISP has the added benefit of meeting the standards of a number of laws, including the Massachusetts law and HIPAA, among others.

¹⁰⁰ For more on the importance of risk assessments in computer security for lawyers, see JILL D. RHODES & VINCENT I. POLLEY, THE ABA CYBERSECURITY HANDBOOK (2013).

¹⁰¹ *Carroll*, 159 F. 2d. 169.

A much fuller version of the risk-based approach to security is seen in the Risk Management Framework developed by the National Institute of Technology (“NIST”). The NIST has documented this methodology, and much other guidance in its 800-series of special publications. Among these are numbers 800-30 (Revision 1) describing an approach to conducting risk assessments, and 800-37 describing an overall risk-based approach to security. NIST guidance is mandatory for federal government agencies, but frequently (and increasingly) used as a reference by non-federal entities. NIST also recently released its Cybersecurity Framework¹⁰² in response to Executive Order 13636. Many large businesses have committed to using the Framework, which provides a more accessible process and nomenclature for assessing and mitigating information security risks. While the first adopters of the NIST framework are more likely to be big industry or big firms rather than Vermont solos, the framework provides potentially valuable insight into best practices and the future of the field. Any future nationwide cybersecurity or privacy law will probably draw much from the framework and other NIST work.¹⁰³

The Human Element

Much of what informs security will be outside the hands of even the lawyers who use a product or service. For example, most lawyers using a cloud computing service – even one designed for and marketed to lawyers – will not have the opportunity to negotiate a contract with specific terms of service. The average lawyer will not be able to participate in the building of a software product, nor choose the data center or centers in which the product hosts client information. While exceptions may exist for larger firms, government, or others ordering custom-built products, for most many products and services will be sold on a take-it-or-leave it basis.

Lawyers, however, should remember and address those elements over which they can exercise some control, starting with the decision to buy or build a given system or service. As many ethics opinions suggest, this decision should involve careful consideration of the security features and policies of the service in question. However, beyond this decision, lawyers should also consider those things already under their control. Even the smallest firms should take time to conduct a data inventory and risk assessment. Obviously a firm dealing with personal injury or divorce will have a very different risk profile from that of a multinational M&A shop.

However, the important first step is to appoint an identifiable single person as responsible for cybersecurity. Next, this person should engage with the question of what data (client confidences) the firm has, where it is located, and what systems host or process it. For each type of data and system element, consider the related questions of what could go wrong; how likely would a negative impact be, and what would be the negative impact of the possible

¹⁰² <http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214.pdf>.

¹⁰³ Sorrell has expressed concern that a federal bill could preempt stronger state protections and actually weaken consumer protections. See <http://thehill.com/policy/cybersecurity/247118-state-ags-warn-congress-against-preempting-data-breach-laws>.

harm? The ABA cybersecurity text¹⁰⁴ provides a good starting point on this, although perhaps tilted toward bigger and higher-end firms. If there are risks that are unacceptable, something should be done. Either the software or system that causes the risk should be replaced or upgraded, the practice that causes the risk should be discontinued, or the risk should somehow be mitigated. This process of self-assessment should be repeated periodically, such as annually.

Even when using outsourced services or products over which they have no¹⁰⁵ control, lawyers should be careful to take the steps they can take to maximize security. Many of the best security features are worthless if they are turned off or not used properly. Lawyers should be mindful of security basics, such as when it is appropriate – or not – to use public WiFi or what settings to use for office WiFi systems. For that matter, lawyers should know how to engage in security basics such as how to encrypt an attachment.¹⁰⁶ A good starting point – especially for solos or small firms engaged in e-Lawyering¹⁰⁷ is found in the collective wisdom of the lawyers who have been active over the years in the ABA’s eLawyering Task Force.¹⁰⁸ The lawyer or support staff person designated as being responsible for security issues should periodically research developing trends and send out educational reminders or security tips. For a solo, this will mean that a certain amount of time must be spent researching changing best practices. As recent history shows again and again, best practices are not static. For example, encryption techniques that were recently considered secure are frequently in need of updated as new vulnerabilities are discovered.

In short, the human element should dictate a philosophy and practice that even when outsourced technology is used, responsibility cannot be outsourced. The lawyer or firm should constantly strive to re-assess the appropriateness of the software or services in use. Much of security, particularly the administrative controls, can never be outsourced. One must remember to change passwords, lock doors, and remember what is and is not appropriate for unencrypted email. Even if the best technology is purchased it must be used properly, and yesterday’s best technology may no longer be secure today.

¹⁰⁴ *Supra* at n. 15.

¹⁰⁵ <http://apps.americanbar.org/dch/committee.cfm?com=EP024500>.

¹⁰⁶ At the March 20, 2015 VBA meeting, a surprising near unanimity of lawyers in the audience during the Technology Committee’s roundtable discussion admitted that they never, or very seldom, use basic encryption such as what is available through Win-Zip.

¹⁰⁷ E-Lawyering is the remote delivery of legal services. “E-Lawyering is doing legal work - not just marketing - over the Web.” <http://apps.americanbar.org/dch/committee.cfm?com=EP024500>.

¹⁰⁸ Notable among this group are Stephanie Kimbro, Marc Lauritsen, Bob Ambrogi, and Richard Granat, most of whom maintain blogs or are otherwise active online and in ABA forums and events. Kimbro’s book, *VIRTUAL LAW PRACTICE* (2011), is perhaps the best starting point for those interested in eLawyering, and includes basic tips on security considerations.