

Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve

*Jonathan G. Blattmachr, New York, New York**

Change is exploding at an ever increasing rate. One expert estimates that human knowledge will increase by more than 100 times in just the next ten years. This article addresses how lawyers and their firms may prepare for successful practices over the next few years in light of these dramatic changes. It addresses the preparation for legal practice in the future in general and focuses more specifically on trusts and estates practices.

INTRODUCTION	3	R
I. LAWYERS HISTORICALLY HAVE DONE LITTLE BUSINESS FORECASTING	4	R
II. WHY FORECASTING THE FUTURE IS MORE DIFFICULT THAN BEFORE	6	R
III. PEEKING AT THE RECENT DEMOGRAPHICS OF AMERICAN LAWYERS.....	7	R
A. Number of Lawyers	7	R
B. Lawyer Earnings and Cost of Living	7	R
C. Some Recent Trends	9	R
D. Specialization	10	R
E. Billing Rates	11	R
F. Incidents of Malpractice Claims	13	R
IV. SOME DISTINCTIONS AMONG LAW PRACTICES	13	R
V. WHAT AFFECTS SUPPLY AND DEMAND IN THE LEGAL BUSINESS.....	16	R
A. Supply of Legal Services	17	R
B. My Experience with Legal Zoom	21	R

* Copyright 2010 by Jonathan G. Blattmachr. All rights reserved. This article expands upon the Joseph Trachtman Memorial Lecture, "Looking Back and Looking Ahead – Preparing Your Practice for the Future." The author expresses his extreme gratitude to Dennis I. Belcher, immediate past president of ACTEC, for inviting him to present the 2010 Trachtman Lecture. It was a great honor and privilege. The author gratefully acknowledges the contribution of Ashleigh M. Garvey, a third year student at Hofstra Law School, for her invaluable assistance in preparing this article. Her work was outstanding.

C. Back to the Law of Supply and Demand	22	R
D. Demand for Legal Services.....	23	R
1. Demand Driven by Changes in the Law or Regulation	23	R
2. Demand Affected by Attorney “Advertising”	25	R
3. Legal Products Offered by Many, “Invented” by Few	26	R
4. Curbing the Use of “Techniques” Others Develop	27	R
5. Effect of Globalization on the Demand for Legal Services	29	R
6. Demand for Legal Services Affected by Litigation	29	R
7. Demand for Legal Services Affected by Changing Demographics	30	R
8. Demand Affected by Changes in Wealth	30	R
9. What Drives Changes in the Law?	31	R
10. Demand for Legal Services Affected by Changes in Science	32	R
VI. THE ROLE OF TECHNOLOGY IN LEGAL PRACTICE:		
A PEEK AT THE PAST	32	R
A. Document Preparation	33	R
B. Tax Return and Other Reports	34	R
C. Written Communication.....	35	R
D. Voice Communication	35	R
E. Calendaring Events	35	R
F. Law Libraries	36	R
G. Calculations	37	R
H. In Person Meetings	37	R
I. Education and Learning.....	38	R
J. Billing Practices	39	R
K. Litigation and Dispute Resolution.....	40	R
L. Technology and the Erosion of the “Monopoly” of Lawyers.....	41	R
M. The Role of the <i>American Lawyer</i>	41	R
VII. PUTTING FUTURE CHANGES IN CONTEXT.....	42	R
VIII. WHAT PRACTITIONERS SHOULD DO TO PREPARE FOR THE FUTURE OF THEIR PRACTICES	44	R
A. Determine If You or Your Firm Is Willing to Undertake Planning for Future Practice	44	R
B. Determine What Goals You Have for Your Practice	45	R
C. Determine Whether or How Your Practice Can Achieve the Goals Sought.....	46	R

D. Understand What Planning Means	46	R
E. Keep Vigilant of Changes in the Your Legal Marketplace.....	47	R
F. Keep Vigilant in Marketing Opportunities.....	48	R
G. Ensure Consistent and Up to Date Education	49	R
H. Develop an Interactive Website to Drive Clients to Your Practice	49	R
I. Develop an Electronic Newsletter that Drives “Subscribers” to Your Website	50	R
J. Be Prepared for and Consider Using “Outsourcing”.....	50	R
K. Changes in Government “Mandated” Health Care ...	51	R
L. Keep Current on Billing and Charging Practices.....	51	R
M. Develop Greater Standardization in Practice	52	R
N. Consider the Realistic Needs for Actual Office Space	52	R
O. Develop Ways to Stop Defection.....	53	R
P. Develop Data Sharing Deal Flow	53	R
Q. Decide on Your Business Model	54	R
1. Internal Leverage Model	54	R
2. External Leverage Model	56	R
3. Software Leverage Model	57	R
4. Tailored Product Practice.....	58	R
5. LegalZoom Model for Law Firms	59	R
6. Contingent Fee Models.....	60	R
7. Historic Models	60	R
R. Legal Firm Fee Structure.....	60	R
IX. MY FORECAST FOR LEGAL PRACTICE CHANGES IN THE NEXT DECADE	61	R
X. WHERE I PART COMPANY WITH RICHARD SUSSKIND	62	R
XI. CONCLUSIONS	63	R

INTRODUCTION

An initial question is why an attorney or law firm should prepare for the future of his, her or its practice. This article, in large measure, is premised on the notion that at least some lawyers will consider planning in order to maintain, improve or prevent a serious reduction in the profitability of their legal practices. Certainly, there may be other reasons an attorney should plan for his or her future practice such as being able to obtain or maintain intellectual or personal (emotional) satisfaction (for example, “standing in the community”) from rendering legal services. In some cases, profitability and these other non-financial “rewards” a lawyer obtains in practicing law will conflict. However, even

for those whose principal purposes in practicing law include non-financial reasons, preparation for the future likely will be necessary to allow those purposes to be achieved.

Preparing for a legal practice to be sustained over the next few years includes, of course, forecasting the future, which usually is difficult to do. However, many businesses, whether publicly or privately owned, do so. They do that to try to maintain or improve profitability. Non-profit organizations also plan. Although not-for-profit entities do not seek to achieve profits in the sense of financially rewarding their owners as for-profit businesses do, their goals almost always involve sound financial resources and, in that sense, must be profit motivated which suggests attention to planning.¹ In any case, business forecasting, whether of a for-profit or non-profit entity, involves many aspects from anticipating demand from customers in the marketplace in which the business operates to determining the needs to operate the business (such a “working capital” and employees), among many other factors. It seems likely that those businesses that plan are more likely to succeed (that is, have greater profits or smaller losses) than those that do not plan.²

Winston Churchill once remarked, “The farther back one can look the better able to see the future.” We will look back to about 1970 to attempt to forecast anticipated changes in legal practice up to around 2020.

I. LAWYERS HISTORICALLY HAVE DONE LITTLE BUSINESS FORECASTING

Historically, lawyers and law firms have not done significant business forecasting or planning, at least beyond a very short timeframe.³ That may reflect that such firms, by and large, are an aggregation of individual lawyers, each of whom may maintain a “profitable” practice (that is, each has his or her own legal “business”) even if the firm of which the attorney is a partner or associate “folds.” In other words, lawyers really do not seem to be “Musketeers.”⁴ That also may be true

¹ See, e.g., Robin Pogrebin, *N.Y.U. 20-Year Plan Seeks Big Expansion in Village and Beyond*, N.Y. TIMES, March 23, 2010, at A1.

² See, e.g., Robert A. Normand, *Four Reasons Why Small Businesses Succeed (or Fail)* (2004), <http://www.businessknowhow.com/startup/succeed.htm>; The Entrepreneur’s Guidebook Series, Guidebook #12: *Learning Why Companies Succeed and Why They Fail*, p. 18 (2007) available at <http://www.smbtn.com/books/gb12.pdf>.

³ John L. Remsen, Jr., *Smart Law Firms are Planning for the Future and Getting Closer than Ever to Clients and Referral Sources*, SC BAR NEWS Vol. 13; No. 4 (Apr. 2002) link available at <http://www.theremsegroup.com/55>. Because there is a focus on urgency, it seems there is a focus on the short-term over the long term.

⁴ In other words, lawyers do not seem to be of the view “One for all, all for one” as in Dumas, *The Three Musketeers*.

of other professional service providers such as physicians and accountants. It may reflect that these professionals do not view themselves as being in another “money getting” trade. However, it likely reflects, or also reflects, the fact that, historically, each individual professional could leave whatever business arrangement he or she has with others and join a different group of the same professionals or practice alone or end his or her private practice and work “in house.”⁵ That, of course, does not explain lack of planning for solo practitioners, who may make up about 45% of all practicing attorneys.⁶ That may mean that the lack of planning by lawyers, whether solo practitioners or not, may reflect or may also reflect a lack of business training lawyers receive. In addition, law firms have not been permitted to have outside investors who presumably would seek maximum return on their investment, although Australian law firms now have outside investors and some envision that may occur for U.S. and British firms.⁷ The investors in a law firm are the partners who usually have a financial interest in the business only while they are actively practicing and, to a significant degree, are paid based upon their individual efforts, not from their capital investment in the firm of which they are part.

⁵ One difference today compared to the situation for lawyers in firms a decade or so ago is that many, if not most firms, wrap themselves with limited liability entities. Previously, almost all firms were general partnerships and each lawyer was individually liable for contract, tortious and other claims against the firm. That changed primarily in the 1990s by states allowing professional firms to be formed as limited liability companies, etc. under which partners who did not engage in the action that caused the damage and did not supervise it had no liability for the action. Hence, today, the other partners may simply “walk” when a significant claim is brought for actions by others without personal financial concern.

⁶ Other sources put the number of solo practitioners at about 25%. U.S. Dep’t of Labor, Bureau of Labor Statistics, *Lawyers*, Occupational Outlook Handbook, 2010-11 Edition available at <http://www.bls.gov/oco/ocos053.htm#nature>. [hereinafter *Lawyers*]. This difference may be based on how the number of lawyers is determined (e.g., only those in “private” practice as opposed, for example, to those who work “in house”).

⁷ An excerpt from Susskind’s book is available online at <http://business.timesonline.co.uk/tol/business/law/article2840923.ece>. A more thorough explanation of the situation is available at Milton C. Regan, Jr., *Lawyers, Symbols and Money: Outside Investment in Law Firms*, 27 PENN ST. INT’L L. REV. 407 (2008) available at http://www.law.georgetown.edu/legalprofession/documents/outside_investment.pdf. At one time, stock brokerage firms, such as Merrill Lynch Pierce Fenner & Smith, also were prohibited from having outside investors. However, the rules changed with respect to brokerage firms in the 1960s. See Robards, *Big Board to Let Brokers Go Public; Governors Approve Sales of Stock in Member Firms — Other Changes Likely Big Board Approves Public Ownership of Member Firms*, N.Y. TIMES, Jul. 18, 1969, at 1. The NYSE timeline also provides that March 26, 1970 was the date on which it was first approved that the public could own member firms. See NYSE Euronext, Timeline, http://www.nyse.com/about/history/timeline_1960_1979_index.html.

II. WHY FORECASTING THE FUTURE IS MORE DIFFICULT THAN BEFORE

Two thousand years ago, the rate at which human knowledge doubled was approximately one thousand years. By 1900, even though the amount of human knowledge was vastly greater than it had been 1900 years before, human knowledge was doubling at a rate of one hundred years. Today, it is estimated that human knowledge doubles so rapidly that we will experience 20,000 years of progress (in terms of 20th century annual increases in knowledge) in the 21st century.⁸ In the next ten years, it will increase by more than 100 times.⁹

Another way to think about the rate of change is to think about someone who pondered in 1900 what changes would occur over the next century. It is difficult to believe that he or she could envision changes such as aircraft, radio, television, nuclear power, space rocketry, computers, cell phones, satellite communication and the Internet.¹⁰ Yet, as stated above, it is estimated that the amount of change that will occur in the next 100 years will be 20,000 years' worth of changes to annual changes as they occurred in the last century—a thousand times more progress than in the 20th century. I call the speed of change the “change curve.” It is now trending nearly in a vertical direction—that is, nearly straight up at this point in the human experience; no longer a gradual or even a sharp increase. It means, in part, that those whose businesses are significantly affected by the change curve cannot afford to get behind it—change is increasing so rapidly that there will be little time to “catch up.”

⁸ Ray Kurzweil, “An Exponentially Expanding Future from Exponentially Shrinking Technology,” Council on Foreign Relations, New York, New York, Nov. 30, 2005, available at http://www.cfr.org/publication/9431/exponentially_expanding_future_from_exponentially_shrinking_technology.html.

⁹ Ray Kurzweil provides that we double our rate of progress every decade, and that we will see a century of progress (at the 2001 rate of advancement) in only 25 years. Kurzweil, *The Law of Accelerating Returns*, Mar. 7, 2001, <http://www.kurzweilai.net/articles/art0134.html?printable=1>. Using this theory, Alex Bogusky theorized that human knowledge doubles, on average, every 10 years, thereby allowing us to solve problems more quickly than was possible at earlier times. See Posting of Janneane Blomenberg to Kristian Anderson + Associates Blog, SXSXW 2009: Doubling Human Knowledge, Mar. 16, 2009, <http://www.kaplusa.com/blog/2009/03/sxsw-2009-doubling-human-knowledge/>.

¹⁰ My mother's mother was born in 1883 in Southampton, Long Island. Her father ran a stable. Her girlhood home was heated by a wood stove. There was no indoor plumbing other than for a pump in the kitchen. Light at night was provided by oil lamps. Her greatest thrill as a young girl was to travel in 1890 to Brooklyn to see gaslights. Yet she lived long enough to see a man walk on the moon. All of us alive today who live as long as she did will see an even greater quantum of changes. And our children will experience even more.

A columnist wrote a piece about a special challenge his ninth grade daughter and her classmates received from their teacher. Each of them was required to choose a prior civilization and for one week live as those people lived. His daughter chose 1990 and he said she felt as though she really suffered: no cell phone, no text messaging, no TiVo, no Internet, no Facebook, no Twitter, no Skype.¹¹

In light of those soon-to-occur anticipated changes, it is humbling to try to forecast the future and even looking out ten years may be too ambitious. However, as Sir Winston suggested, we need to look backwards to see forward.

III. PEEKING AT THE RECENT DEMOGRAPHICS OF AMERICAN LAWYERS

A. Number of Lawyers

Estimating the number of American lawyers is somewhat complicated. Lawyers in prior decades did not have to register to practice once they were admitted. Also, some attorneys did not practice law and many, of course, were not in private practice but worked as “in house” counsel. It appears that the number of lawyers has steadily increased from about 300,000 to 350,000 in 1970 to over 1,150,000 by the end of 2007.¹² This growth is much greater than that for the American population as a whole.

In 1970, there were virtually no paralegals although some secretaries and accountants (not necessarily certified public accountants) who worked for law firms acted much as paralegals do today.¹³ In any case, the separate “nature” of paralegals began to develop in the early 1970s and today they number somewhere between 250,000 and 300,000 and possibly more.

B. Lawyer Earnings and Cost of Living

Data about trends in lawyers’ income does not seem readily available. One source states that attorneys “consistently had earnings far above

¹¹ Chloe Mapes, et al, “Do you think society could go back to living without technology?”, *DAILY AMERICAN*, Jan. 20, 2010, http://www.dailyamerican.com/articles/2010/03/14/teens_talk/qow/question987.txt; cf. Joe Burris, *Study: Kids, teens spending 53 hours per week using gadgets*, *THE SPOKESMAN-REVIEW*, Mar. 8, 2010, <http://www.spokesman.com/stories/2010/mar/08/young-age-of-technology/>.

¹² For 2008 and 2009 lawyer data, see Am. Bar Ass’n, *National Lawyer Population by State*, http://new.abanet.org/marketresearch/PublicDocuments/2009_NATL_LAWYER_by_State.pdf.

¹³ See Gary Meluish, *The Paralegal Profession: How Far We Have Come; How Far We Can Go?* Sept. 20, 2008, <http://carolebrunoparalegalsauthor.blogspot.com/2008/09/paralegal-profession-how-far-we-have.html>.

state [of Georgia] norms” and that in 1960 the median income of employed lawyers was estimated to be \$9,300 a year.¹⁴ However, “[t]he legal sector, after more than tripling in inflation-adjusted growth between 1970 and 1987, has grown at an average annual inflation-adjusted rate of 1.2% since 1988, or less than half as fast as the broader economy, according to Commerce Department data.”¹⁵ “In May 2008, the median annual wages of all wage-and-salaried lawyers were \$110,590. The middle half of the occupation earned between \$74,980 and \$163,320.”¹⁶

The approximate median (not the average) salary for attorneys practicing in law firms seems to be somewhere between \$80,000¹⁷ and \$110,000.¹⁸ On average, it is claimed that attorneys make \$90,300 per year according to the US Bureau of Labor Statistics.¹⁹ A trusts and estates lawyer, on average, supposedly makes \$98,489 annually.²⁰

¹⁴ James L. Hunt, *Government and Politics, Legal Profession*, NEW GEORGIA ENCYCLOPEDIA, available at http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h_1352.

¹⁵ Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers - Growth of Legal Sector Lags Broader Economy; Law Schools Proliferate*, WALL ST. J., Sept. 24, 2007, at A1.

¹⁶ Answers.com, *How much money does a lawyer earn?*, http://wiki.answers.com/Q/How_much_money_does_a_lawyer_earn.

¹⁷ Payscale.com, *Salary Snapshot for Attorney / Lawyer Jobs*, http://www.payscale.com/research/US/Job=attorney_%2F_Lawyer/Salary.

¹⁸ *Lawyers*, supra note 6.

¹⁹ Job Employment Guide, *Average Lawyer Salary*, <http://www.job-employment-guide.com/average-lawyer-salary.html>.

²⁰ CBSalary.com, *Lawyer Probate Salary*, <http://www.cbsalary.com/national-salary-chart.aspx?specialty=lawyer+Probate&tid=24950&cty=&kw=Lawyer&jn=jn030&edu=&sid=>. This salary figure is for a “Probate Lawyer” who “Specializes in settlement and planning of estates: drafts wills, deeds of trusts, and similar documents to carry out estate planning of clients. Probates wills and represents and advises executors and administrators of estates”, whereas a “Lawyer” generally makes \$118,199. For this survey, a “Lawyer” was described as one who

Conducts criminal and civil lawsuits, draws up legal documents, advises clients as to legal rights, and practices other phases of law. Gathers evidence, conducts research, interviews clients and witnesses, prepares legal briefs, and develops strategy, arguments, and testimony in divorce, civil, criminal, and other cases to formulate defense or to initiate legal action. Files briefs with court clerk. Represents client in court and before quasi-judicial or administrative agencies of government. Requires completion of law school with an LLB degree or JD degree and admission to the bar. Interprets laws, rulings, and regulations for individuals and businesses. May confer with colleagues with specialty in area of lawsuit to establish and verify basis for legal proceedings. May act as trustee, guardian, or executor. May draft wills, trusts, transfer of assets, gifts and other documents. May advise corporate clients concerning transactions of business involving internal affairs, stockholders, directors, officers and corporate relations with general public. May supervise and coordinate activities of subordinate legal personnel. May prepare business contracts, pay taxes, settle labor disputes, and administer

The cost of living has risen as well over the past many decades. It took about \$552 in 2009 to match the spending power of \$100 in 1970.²¹ Lawyer compensation has grown faster than the cost of living during that time but it has not grown as quickly as average income in the United States. Attorneys making \$9,300 in 1960 were making approximately 175% of the median income for the time while an attorney making \$80,000 now would be making approximately 158% of the median household income.²² But at \$110,000 a year, it would be about 217% of the median household income.²³

C. Some Recent Trends

In the past ten years, the legal field has seen many unprecedented events, including demand, growth, profitability, competition and compensation.²⁴ The slight recession at the beginning in the early 2000s did not adversely affect legal practice and, in fact, there was even a short supply of lawyers shortly thereafter.²⁵ From 2001 to 2007, “both revenue and profit grew at near double-digit rates every year, a phenomenon that was unparalleled in the prior history of the legal profession.”²⁶ However, the current Great Recession has adversely affected lawyer

other legal matters. May teach college courses in law. May specialize in specific phase of law.

While the \$118,199 average differs from the other average salary estimate, there are many additional characteristics included here that may not be included in the first calculation.

²¹ The People History, *Money and Inflation 1960's*, <http://www.thepeoplehistory.com/1960s.html>. The 1960 average CPI was 29.6, while the 2005 average CPI was 195.3. U.S. Dep't of Labor, Bureau of Labor Statistics, *Consumer Price Index, US City Average, 1982-84=100* (Mar. 18, 2010), available at <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt>.

²² Press Release, U.S. Census Bureau, Household Income Rises, Poverty Rate Unchanged, Number of Uninsured Down (Aug. 26, 2008) available at http://www.census.gov/Press-Release/www/releases/archives/income_wealth/012528.html.

²³ In 2007, the median US income was \$50,740. U.S. Census Bureau, *Table 690: Household Income – Distribution by Income Level and State: 2007*, <http://www.census.gov/compendia/statab/2010/tables/10s0690.pdf>. Of the 112,378,000 U.S. households included, 26,924,000 earned under \$25,000; 28,379,000 earned between \$25,000 and \$49,999; 21,288,000 earned between \$50,000 and \$74,999; 13,676,000 earned between \$75,000 and \$99,999; 13,152,000 earned between \$100,000 and \$149,999; 4,508,000 earned between \$150,000 and \$199,999 and 4,449,000 earned \$200,000 or more. *Id.* For income breakdown by each fifth and the top 5% of US households, see U.S. Census Bureau, *Table 678: Share of Aggregate Income Received by Each Fifth and Top 5 Percent of Households: 1990 to 2007*, <http://www.census.gov/compendia/statab/2010/tables/10s0678.pdf>.

²⁴ Hildebrandt, *Unprecedented*, <http://www.hildebrandt.com/Unprecedented-12-21-2009>.

²⁵ *Id.*

²⁶ *Id.*

employment and compensation by a considerable extent, although some firms' "profits per partner" continued to increase.²⁷

D. Specialization

Generally, in the legal profession, specialization is becoming more and more common, especially after the "information explosion."²⁸ By and large, "the solo practitioner and the very small law firm are becoming things of the past."²⁹ Because clients expect immediate expertise and want attorneys who are informed of the most up-to-date changes in the legal field, specialization is largely replacing the general practice firm.³⁰ Specifically, within the field of trusts and estates law, there is a trend towards boutique firms because most large firms feel that the department is a "loss leader" otherwise.³¹ While trusts and estates law depends largely on an attorney's ability to develop relationships with clients, many larger law firms provide trusts and estates services simply to keep their extant clients from going elsewhere for those services.³²

The American Bar Association reports that attorney specialization as a whole is rising (as measured by the number of specialty certificates issued annually), and trusts and estates specialization accounts for 8% of all specialization.³³ Currently, specialization programs in Estate Planning and Elder Law are among the 13 approved by the ABA House of Delegates or about 15% of the specialized programs.³⁴ Additionally, specialization in Elder Law is increasing faster than average.³⁵ Speciali-

²⁷ Jim Newell, *Nice Work, Recession! DC Lawyers Losing Jobs Fast*, Feb. 17, 2009, <http://www.nbcwashington.com/news/local-beat/Nice-Work-Recession-DC-Lawyers-Losing-Jobs-At-Rapid-Pace.html> (stating that about 1,000 attorneys were fired from jobs in big firms the week before) citing Bill Myers, *Big Law Firms Hit Hard by Layoffs*, Feb. 17, 2009, <http://www.washingtonexaminer.com/local/Big-law-firms-hit-hard-by-layoffs-0217-39690327.html> (stating that "nearly 70 of the nation's biggest law firms have cut staff.").

²⁸ Dorothy Fischer, *The Small Law Firm — Making It!*, 70 *MERCER BUSINESS* (Nov. 1, 2000).

²⁹ *Id.* (internal quotations omitted).

³⁰ *Id.*

³¹ See Anonymous guest post on *Above the Law*, blog, Tuesday, September 15, 2009 2:24 PM. Post available at http://abovethelaw.com/2009/09/open_thread_trusts_estates.php?show=comments#comment-1232318.

³² *Id.*

³³ Am. Bar Ass'n, Standing Committee on Specialization, *Informational Report to the House of Delegates*, "National Totals – Certified Specialists by Practice Area 2008", 2 (2009). While 8% does not seem like a large amount of the whole, only Civil trial (24%), the combined category of criminal law and criminal trial advocacy (9%) and family law (also 9%) are higher; wills, trusts and estates and personal injury trial have 8% each, whereas 12 other categories make up the remaining 42%.

³⁴ *Id.*

³⁵ *Id.*

zation is not the only indication that attorneys practice in any given area (because it is certainly possible to practice a type or law without specific certification in that area).

Because there does not seem to be any generally accepted definition of trusts and estates practice, it is not possible to determine with precision the number of lawyers whose practice is concentrated in that field. However, it seems that a reasonable estimate for the number of lawyers significantly engaged in trusts and estates practice would be approximately 30,000³⁶ of the 1,200,000³⁷ total lawyers nationwide (about 2.5%)³⁸ and, perhaps, more.

E. Billing Rates

Although many attorneys have and do charge other than by the hour, it seems many lawyers over the past few decades have charged in that manner.³⁹ It seems quite certain that hourly rates for lawyers have risen significantly since 1970, although there does not appear to be “hard” evidence of that.

In *Hogan v. R. I. Turnpike & Bridge Auth.*,⁴⁰ it was stated that the general rate in 1970 was between \$35 and \$40 an hour.⁴¹ That fee “may have gone to \$75.00 or \$80.00 an hour by 1982.”⁴² Other attorneys in 1974 billed between \$40 and \$50 an hour and still others billed approximately \$60 an hour.⁴³ A third attorney in this case, whose hourly rate went from \$50 to \$85 an hour “over the years”, determined he was

³⁶ The ABA Section of Real Property, Trust and Estate Law serves approximately 30,000 members according to its website. While many of these members (perhaps about half) practice primarily in real property practice, the number does not include any of the many attorneys who are not members of the American Bar Association, and attorneys who are not members of the Section are presumably the most actively engaged in the discipline. Accordingly, the actual number of lawyers specializing in these areas is probably higher. See generally ABA Section of Real Property, Trust and Estate Law, *Estate Planning FAQs: Who We Are*, <http://www.abanet.org/rpte/public/who-we-are.html#who-we-are>.

³⁷ As of December 31, 2008. Am. Bar Ass’n, *National Lawyer Population by State*, http://new.abanet.org/marketresearch/PublicDocuments/2009_NATL_LAWYER_by_State.pdf

³⁸ Additionally, a directory of registered attorneys and firms practicing trusts and estates law by state is available at: <http://www.hg.org/law-firms/Estate-and-Trust.html>. However, this list is by no means exhaustive.

³⁹ After the 1950s, the hourly rate billing model came to be the most popular fee arrangement for lawyers, and continues this way today. See RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 150-51 (2008).

⁴⁰ *Hogan v. R. I. Tpk. & Bridge Auth.*, 1986 WL 732876 (R.I. Super. 1986).

⁴¹ *Id.* at *2.

⁴² *Id.*

⁴³ *Id.* at *3.

charging \$65 an hour in 1974.⁴⁴ An expert testified in this case that he “felt that [the average rate] was anywhere from \$70 to \$85 an hour for an attorney who was practicing for more than five years” at that time.⁴⁵ Another attorney called to testify in the case stated, “an hourly rate of \$70.00 to \$75.00 was the top of the scale in 1970 and that for the Rhode Island area it would be \$65.00 to \$70.00 an hour.”⁴⁶ Additionally, “[h]e thought that he had seen the \$60.00 to \$65.00 rate in 1970 for [one attorney] and had since learned that it was \$45.00 an hour for [another].”⁴⁷ Because Rhode Island fees had historically been about 10% lower than fees in Massachusetts, the Massachusetts attorney’s fee of \$225 per hour in 1986 was comparable to the rate of \$175 to \$200 an hour in Rhode Island at the time.⁴⁸ Another attorney called to testify stated “[i]n 1971, a fair and reasonable rate for an experienced trial lawyer was \$37.50 to \$40.00 an hour.”⁴⁹

In a symposium discussion, one attorney stated, “I think when I first started practicing law in 1970, I think my hourly rate was \$25 an hour and I don’t know what that is in 2005 dollars, but I know it was low in comparison.”⁵⁰ Another discussion in Minnesota states, “Since 1970, lawyer compensation has skyrocketed. The recommended minimum hourly rate in 1970 was \$30-\$50 per hour.”⁵¹ The ABA recently did a study on Civil Practice and their representative sample of attorneys had an average hourly rate of \$375 an hour (and about 23 years of practice).⁵² Finally, 2005 marked some of the highest rates of billable hours until that point in history, with a partner at one firm surveyed bringing in \$1000 per hour.⁵³ The overall partner high average was at Reed Smith, which reported having a partner who charged \$875 per hour.⁵⁴

⁴⁴ *Id.* at *9.

⁴⁵ *Id.* at *10.

⁴⁶ *Id.* at *11.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at *15.

⁵⁰ Justice Patrick Higginbotham (moderator), *Judge & Jury Symposium Transcripts*, S. TEX. L. REV. 367, 386 (2005).

⁵¹ Robert J. Sheran & Douglas K. Amdahl, *Minnesota Judicial System: Twenty-Five Years of Radical Change*, HAMLIN L. REV. 219, 366 (2003).

⁵² See ABA Section of Litigation, *Member Survey on Civil Practice: Survey 2*, Dec. 11, 2009, <http://www.abanet.org/litigation/survey/docs/summary-aba-report.pdf>. The survey data was collected between July 21, 2009 and September 1, 2009. *Id.* at 1.

⁵³ Lindsay Fortado, *Hourly Billing Rates Continue to Rise: Upward trend still in evidence at law firms, with some notable figures at the high end of the scale*, THE NAT’L L. J., Dec. 12, 2005, available at <http://www.law.com/jsp/article.jsp?id=1134122711101&hbxlogin=1>.

⁵⁴ *Id.* This firm attributes such high hourly fees to work in London and the requisite exchange rate.

Dorsey & Whitney had the highest associate billing rate, \$835.⁵⁵ The lowest associate billing rate reported in the 2005 survey was \$75, and the lowest partner billing rate was \$105.⁵⁶

Hence, it seems that the hourly charge for legal services in the United States has increased around ten-fold between 1970 and 2010.

F. Incidents of Malpractice Claims

According to one factsheet, personal injury plaintiffs brought about 25% of all lawyer malpractice claims, real estate law accounted for 16% of all claims, and probate/estate claims and business startups accounted for approximately 10 % each, in the early 2000s.⁵⁷ Hence, it does not seem that trusts and estates practitioners are the subject of more frequent and greater claims than lawyers practicing in at least some other fields.

IV. SOME DISTINCTIONS AMONG LAW PRACTICES

In attempting to think about legal practice planning for the future, it may be appropriate, as hinted about above, to distinguish between each individual lawyer and a law firm that has more than one partner. Preparing for the future of an entire law firm may be quite different than preparing for the future of one individual lawyer whether he or she is a solo practitioner or a member of a firm with more than one attorney.

Some law firms may be viewed as more “true” partnerships in that all partners share equally with the others.⁵⁸ In other firms, a lock step model of compensation is used, and equal sharing happens among partners in different tiers of seniority.⁵⁹ Still other firms use “incentive” based models of compensation,⁶⁰ simple unit reward based models of compensation,⁶¹ and models of compensation that reward partners for

⁵⁵ *Id.*

⁵⁶ *Id.* These figures both come from Cozen O'Connor in Philadelphia. *Id.*

⁵⁷ Statistics on Legal Malpractice, http://www.legal-malpractice-lawyers-attorneys.com/legal_malpractice_statistics.html.

⁵⁸ Michael J. Anderson, *Partner Compensation Systems in Professional Service Firms Part I 3*, http://www.edge.ai/files/compensation.partner_compensation_systems.pdf.

⁵⁹ *See id.* at 5. This lock step model is used at Cravath Swaine & Moore. Asnwers.com entry for Cravath, Swaine & Moore, <http://www.answers.com/topic/cravath-swaine-moore>.

⁶⁰ *See* Anderson, *supra* note 58, at 6. The modified Hale and Dorr system gives those who find clients, those who are responsible for the client, and those who actually do the work a different share in the profits. *Id.*

⁶¹ *Id.* at 7. The simple unit method uses an objective formula to reward seniority, client generation, production, and non-billable activity. *Id.*

subjective and objective productivity.⁶² Finally, while some law firms reward department performance and tend to look away from individual contributions,⁶³ other law firms have a more “eat what you kill” configuration⁶⁴ which, to some extent, represents an office or cost sharing arrangement. Hundreds of thousands of lawyers practice alone. In some senses, most lawyers, even though in law partnership, practice alone in that their compensation is determined by their own practice and, almost always, they can leave their firms and either join another or practice on their own as solo practitioners. Even though the law and ethical rules suggest that clients are clients of the firm,⁶⁵ the clients typically will use the new law firm of the partner (or non-partner attorney) who has provided the bulk of the legal services or who had the most direct and constant relationship with the client.⁶⁶

Many lawyers obviously perceive sufficient benefits in not practicing alone; practicing with others has become the more common way to practice than practicing alone. These benefits may include the perception of more efficient cost sharing, more consistent annual earnings, need to combine sufficient capital to efficiently function as a business, business referral opportunities, ability to attract more (or more profitable) business by offering a more full array of legal services, a perception of being able to provide “better” legal services, sharing workload, re-

⁶² See *id.* at 8. The 50/50 Subjective/Objective model values objective criteria (like client generation and receipts for billable time) alongside subjective criteria (like the partners’ perceptions of a partner’s ability to handle clients).

⁶³ See *id.* at 9. The Team-Building model focuses much more on how the firm does and how each practice group does than what an individual contributed to the end product. *Id.* at 9-10.

⁶⁴ See *id.* at 10. In this model, directly opposite to the Team-Building model, only an individual’s contributions will determine compensation. *Id.* See also Milton C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2006); KIM ISAAC EISLER, *SHARK TANK: GREED, POLITICS AND THE COLLAPSE OF FINLEY KUMBLE, ONE OF AMERICA’S LARGEST LAW FIRMS* (2004) (1990).

⁶⁵ See MODEL RULES OF PROF’L CONDUCT R. 1.10(b) (2009):

When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

⁶⁶ While law firms and lawyers do not own their clients, it is likely that a partner switching firms will bring his or her clients to the new firm. See William Schuman, *Liabilities for Lateral Movers: When a partner moves to a new firm, what can he tell his clients—and when?*, XXIX LEGAL TIMES (May 1, 2006), available at <http://careers.mwe.com/info/l4l.pdf>.

ducing the risk of making errors in the delivery of legal services (for example, by having another lawyer read a legal document for sufficiency), and camaraderie.⁶⁷

Capital is an important factor in some legal practices. It is necessary to acquire tools needed to practice such as computers and software, to pay rent (or to purchase office space), to hire workers (such as secretaries, legal assistants, associate attorneys, technical data and accounting/billing personnel) and to advertise.⁶⁸ In some law firms, each partner may have a capital contribution requirement of one million dollars or more. Few who become partners readily have sufficient means to make that type of contribution so the firm, as a whole, indirectly provides that capital. In some firms, the firm borrows the capital and charges interest to the partner for the amount outstanding. In other firms, the contributions to capital come out of the profits otherwise allocated and distributable to the partner.

On the other hand, an argument can be made that today it is easier and less costly to open and operate a law firm than ever before on account of the ability to operate a “virtual” law firm. Such a virtual firm would be operated from the attorney’s computer in significant measure. No law library likely has to be maintained other than electronically which almost certainly will be more cost effective than a traditional book library. Such an office can be made nearly paperless.⁶⁹ Certainly, for the immediate future, lawyers will meet in person with clients and have to appear in person in courts and other government agencies, such as the Internal Revenue Service (IRS). However, as discussed later in this article, most in person meetings and appearances likely will decline in the near future.

⁶⁷ One vendor of products to estate planning attorneys advertising that by “joining” their company “you will never practice alone.” See www.wealthcounsel.com.

⁶⁸ Lawyers advertise in many traditional ways such as on billboards, in newspapers, in the internet and on television. They also advertise in indirect ways such as joining professional organizations, writing for professional and non-professional journals and newspapers, lecturing for professional and non-professional organizations and joining social clubs.

⁶⁹ Some firms have successfully been operating in this way for years. See, e.g., Daryl Teshima, *The Benefits of Building a Paperless Law Firm Office*, <http://www.lacba.org/lalawyer/tech/comp5-99.html> (going paperless in the late 1990s); see also Richard Keyt, *A Simple Inexpensive Way to Create a Paperless Law Office*, <http://www.keytlaw.com/tech/paperless.htm> (paperless since March 2004). Indeed, there is already software being marketed for the purpose of helping law firms go paperless. See Legal Software Systems, Inc., http://www.legalsoftwaresystems.com/ibz_paperless_law_office.htm.

Nevertheless, the current model for such virtual firms is for the smaller ones, usually solo practitioners.⁷⁰ Whether the solo practitioner will earn as much as a partner in a more traditional law firm depends upon many factors—but usually the very high earning solo practitioner either is “leveraging” or works on a contingent fee arrangement and is successful in doing so. Profitability of law firms varies but a common theme is that firms with the highest associate-to-partner ratios make more than those with lower ratios. Some firms with only one “partner” are highly profitable with income that exceeds that of the average partner of the most profitable AmLaw 100.⁷¹ In any case, as discussed below, large virtual law firms also will develop in the future.

V. WHAT AFFECTS SUPPLY AND DEMAND IN THE LEGAL BUSINESS?

Although, as indicated above, many lawyers do not view themselves as being in a money getting trade, law is a business. It survives only on account of an ability to make a profit.⁷² The level of profit of a law practice, as it does for virtually all business, depends upon gross income and expense.⁷³ Nearly all businesses attempt to increase gross revenues and to minimize expenses in doing so. By and large, law firms are the

⁷⁰ See, e.g., Teshima, *supra* note 69. (Fernandez sought digital solutions when starting a solo practice).; see also Keyt, *supra* note 69. (“For a solo or small firm, it is very easy and relatively inexpensive to create a paperless law office”).

⁷¹ The highest profit per equity partner in an AmLaw 200 firm is \$3,385,000. Law.com, *Profits Per Partner*, http://www.law.com/special/professionals/amlaw/amlaw200/amlaw200_ppp.html. The median salary for a solo practitioner with 20+ years of experience is the only just under \$150,000 (with the top of the middle 50% just breaking over \$203,000). Pay Scale, *Salary Survey for Job: Attorney, Solo Practitioner*, http://www.payscale.com/research/US/Job=attorney,_Solo_Practitioner/Salary. These numbers are only comparable to the lowest of the top 200 firms’ PPP, marked at \$215,000. Law.com, *Profits Per Partner*, http://www.law.com/special/professionals/amlaw/amlaw200/amlaw200_ppp.html. Solo practitioners with less experience barely compare to the AmLaw 200 firms in terms of salary. Compare *id.* with Pay Scale, *Salary Survey for Job: Attorney, Solo Practitioner*, http://www.payscale.com/research/US/Job=attorney,_Solo_Practitioner/Salary. While it seems atypical that a sole practitioner will earn much more than \$3,385,000 per year based on these numbers, it is certainly possible. According to Manta’s online business profile of Richards and Associates, this Erie, Pennsylvania firm has an estimated \$1 - \$2.5 million annual revenue and approximately 5-9 employees total. http://www.manta.com/coms2/dnbcompany_jxvcrb.

⁷² Of course, many legal services are provided not on account of profit such as non-profit legal services organizations. However, that is true of virtually all other businesses. Most home construction companies are in business to make a profit, but some are not. See www.habitat.org.

⁷³ Cutting expenses and boosting income will increase a firm’s profit margin. See Larry Bodine’s LawMarketing Blog, *Is Your Firm’s Profit Margin 40%?*, Sept. 12, 2006, http://pm.typepad.com/professional_marketing_bl/2006/09/is_your_firms_p.html.

same. Although an individual lawyer may choose not to practice in a particular field because it is less satisfying in non-financial terms (e.g., the attorney finds it more stressful or less intellectually challenging or, perhaps, too intellectually challenging) than another,⁷⁴ the law of supply and demand generally determines what is paid for a services of a law firm or lawyer.⁷⁵

The cost of virtually everything (whether logs, refrigerators, automobiles, restaurant food and engineering services) is a function of supply offered and the demand for it.⁷⁶ It seems that the cost of legal services is no different. Of course, some lawyers (and firms) charge much more than others for the same “service,” such as counseling about the law on the takeover of another company. The reason one firm successfully may charge more is the perception that its services are of a higher quality than those of another—that is, it is a different service. That, of course, is why one restaurant in a town may be able to charge considerably more for a steak dinner than another.

A. Supply of Legal Services

Certainly, the supply of legal services has historically been a function of the number of individuals practicing law. Many lawyers do not practice law but engage in other occupations or are retired. Although

⁷⁴ Some attorneys have reduced or abandoned divorce practices on account of what they perceive as higher “stress” than other areas of practice. As a general rule, human beings like to avoid confrontation and some areas of legal practice produce more of that, at least to some attorneys, than other areas do.

⁷⁵ That is true essentially for all “non-regulated” industries. Everyone knows that it is supply and demand that determines the cost of an automobile. There are perceptions of differences of “quality” in automobiles (a Mercedes as opposed to a Yugo, for instance). And there is a perceived difference in the quality of lawyers and law firms. However, just as a perception of “style” or “beauty” affects a buyer’s view of the “worth” of an automobile, a client’s view of his or her lawyer’s ability, caring, dedication and so on affects the client’s view of the worth of the attorney. Almost everyone sees marked differences in the quality of an automobile, but at least some perceive the ability of all lawyers is about the same. Nonetheless, what may be viewed as more experienced or sophisticated users of legal services (e.g., general counsel of a corporation) know the quality of legal services varies widely.

⁷⁶ “Price is derived from the interaction of supply and demand.” *How Supply and Demand Determine Commodities Market Prices*, http://futures.tradingcharts.com/learning/supply_and_demand.html. A balance of supply and demand is the backbone of a market economy. *Economics Basics: Demand and Supply*, <http://www.investopedia.com/university/economics/economics3.asp>.

I will add a personal note here. I can recall three great (to me) epiphanies I have made: the realization that term insurance is nothing but insurance for a fixed period of time (or a term); that when my law school professor was discussing negotiable instruments, he was really referring to a check; and that the price of legal services is determined by supply and demand.

there does not seem to be any studies verifying it, it seems that if the demand for legal services increases and if that causes the cost of such services also to increase, more individuals will become practicing lawyers. For example, first year enrollment in law schools and the number of degrees awarded rose considerably during the period 2001-2007 when lawyer pay increased significantly.⁷⁷ Several factors affect the number of individuals who practice, including the perceived financial and non-financial rewards of being a lawyer and the cost of becoming one.

The supply of U.S. lawyers has grown steadily in the United States (from around 300,000 in 1970 to about 1,200,000 today), which is much faster than the population of America as a whole has grown over that period.⁷⁸ An even greater percentage increase has occurred in the number of non-lawyers (such as paralegals) to deliver what traditionally may be viewed as legal services.⁷⁹ Many other professional groups render services that relate to the law such as tax return preparation, tax advice (such as by certified public accountants), insurance advice and financial advice. There seems to be no generally accepted definition of “practicing law.” In California, for example, certain services, such as document preparation, are provided by non-lawyer firms, by what are called “legal document assistants” or “LDAs.” Although what such non-lawyers may do (without the supervision of an attorney)⁸⁰ is somewhat limited, there is no doubt they are doing tasks that are currently also completed by some lawyers. Trusts and estates services are provided by organizations that are not law firms. Specifically, LDAs may distribute to their customers legal materials that have been published or approved by a lawyer, prepare the customers’ legal documents under the direction of their customers and file the customers’ legal documents in the appropriate court.⁸¹

⁷⁷ Am. Bar Ass’n., *Enrollment and Degrees Awarded: 1963-2008 Academic Years*, <http://www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf>. First year enrollment in 2001-2002 was 45,070, and there were 37,909 degrees awarded that year; in 2007-2008, first year enrollment was 49,082 and there were 43,518 degrees awarded. *Id.*

⁷⁸ The 1970 Census determined the U.S. population to be 203.3 million and the Census Bureau estimates the 2010 U.S. population to be around 309 million. http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/014618.html. For a discussion of the supply of U.S. lawyers, see *supra* note 12 and accompanying text.

⁷⁹ The paralegal profession came into being in 1970. Gary Meluish, *The Paralegal Profession: How Far We Have Come; How Far We Can Go?* Sept. 20, 2008, <http://carolebrunoparalegalsauthor.blogspot.com/2008/09/paralegal-profession-how-far-we-have.html>. While the profession is relatively new, there are over 238,000 paralegals today. *Id.*

⁸⁰ CAL. BUS. & PROF. CODE §6408 (West 2009).

⁸¹ See California Association of Legal Document Assistants website, <http://www.calda.org>.

What might (or might not) be regarded as providing legal services is now provided “on line” through companies such as LegalZoom. Some may regard such a “commodity” or “service” as practicing law without a license. In fact, lawsuits have been brought against LegalZoom contending it is practicing law without a license.⁸² Whether or not it will be determined that such companies are engaged in the unauthorized practice of law,

[as of June 2007, LegalZoom] has transformed the \$225 billion legal market with a service that provides affordability and lack of legalese. From prenuptial agreements to restraining orders, LegalZoom has provided its do-it-yourself service to more than 500,000 clients. A common last will through LegalZoom costs \$69 to draft. A complete incorporation of a business may cost \$500, inclusive of state fees. An attorney usually charges four times that amount.⁸³

LegalZoom now claims to have had over one million customers and, with respect to its wills, 100% customer satisfaction.⁸⁴ LegalZoom has competitors.⁸⁵ “Lawdepot.com, the self-proclaimed ‘leading publisher of online documents’ is one of LegalZoom’s largest competitors.”⁸⁶ “Lawdepot has over 10 years of experience and has been drawing a consumer base for longer than LegalZoom.”⁸⁷ Its market share almost matches that of LegalZoom.⁸⁸ Other apparent competitors that provide document preparation assistance⁸⁹ include Lawyer-

⁸² Posting of nipper to The Invent Blog, *LegalZoom Sued for Unauthorized Practice of Law*, Feb. 9, 2010, <http://inventblog.com/uspto/legalzoom-sued-for-unauthorized-practice-of-law.html>.

⁸³ KoreAm, *Legal Evolution* (Jun. 1, 2007), <http://iamkoream.com/legal-evolution>.

⁸⁴ See FindLaw, *Create a Last Will* (box on the upper right), http://forms.findlaw.com/last-wills_forms.html.

⁸⁵ *Id.*

⁸⁶ J. Christopher Beissel, *Legalzoom*, KnowTheCo.com, Jan. 17, 2009, <http://www.knowtheco.com/index.php?news=31>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Some of this list is from <http://venturebeatprofiles.com/company/profile/legalzoom/competitors>.

Ahead,⁹⁰ Rocket Lawyer,⁹¹ Nolo,⁹² Corporate Filing Solutions Filings Made Easy,⁹³ BusinessRocket.net,⁹⁴ We The People,⁹⁵ and Standard Legal,⁹⁶ and this list is not exhaustive.

Online services, such as Legal Tender, are providing information in Australia about selection of attorneys, fees, etc.⁹⁷ Also, certain “online” companies, such as LegalAdviceLine, now offer legal services at “competitive” prices with “real” lawyers answering state specific questions, all through the Internet (although customers can speak with the lawyer).⁹⁸

Another option has been presented by Robert Shapiro, founder of LegalZoom.com. He has launched ProxiLaw.com, a website designed for use by licensed attorneys, which basically serves as an “invisible member of the attorney’s staff.” The service provides basic services to enable attorneys to attend to their clients’ more complicated needs. ProxiLaw.com is meant to serve as a “cost-effective and time-saving” tool to streamline the day to day practices of law firms. This is an example of how traditional law firms and the internet can interact to foster a better, more efficient, and most cost-effective way of providing legal services to those who need it. (Footnotes omitted.)⁹⁹

ProxiLaw seems to be a type of “outsourcing” for attorneys (where the lawyer is hiring someone else to complete documents or court filings

⁹⁰ LawyerAhead is a Canadian lawyer referral service, basically. It claims that it does not provide legal advice, but is rather a place that provides access to the legal marketplace, <http://www.lawyerahead.ca/>.

⁹¹ Rocket Lawyer is “an easy and low-cost legal help service” according to its website <http://www.rocketlawyer.com/about-rocket-lawyer.aspx>. It claims that its forms are reviewed by attorneys, but its disclaimer states, “RocketLawyer.com™ provides information and software only. This site is not a ‘lawyer referral service’ and does not provide or participate in any legal representation.”

⁹² <http://www.nolo.com/>.

⁹³ <http://www.filingsmadeeasy.com/>.

⁹⁴ <http://www.businessrocket.net/>.

⁹⁵ <http://wethepeopleusa.com/>.

⁹⁶ http://www.standardlegal.com/Merchant2/merchant.mvc?Screen=SFNT&Store_Code=SLcom&AFFIL=zoom.

⁹⁷ See Small Business Support Network (by espet1), *New Online Legal Service to Increase Consumer Choice and Reduce Legal Costs*, June 2009, <http://www.ozsmallbiz.net/media-release-new-online-legal-service>.

⁹⁸ See Legaladvice.com, *National Lawyer Access Service*, <https://www.legaladvice.com/Referrals.aspx>.

⁹⁹ Katherine Crowell, *eLawyering and the Unauthorized Practice of Law*, ILL. BUS. L. J., Feb. 5, 2008, http://iblsjournal.typepad.com/illinois_business_law_soc/2008/02/e-lawyering-and.html.

for the lawyer's clients). However, ProxiLaw is no longer offering its services directly but referring "customers" to LegalZoom.¹⁰⁰

"While most law firms, especially those in large cities, have basic websites outlining the firm's area(s) of expertise, displaying recent press releases, and even giving biographies of the attorneys in order to attract more business, some legal web pages have taken a more interactive approach."¹⁰¹

Attorneys have long offered at least general advice about legal matters through seminars for non-lawyers and through writing. Now lawyers are offering it through the Internet.¹⁰²

It is also appropriate to note that attorneys themselves are offering certain legal services at flat fees.¹⁰³ Also, some companies offer services in reducing the cost of legal fees.¹⁰⁴ Online bidding for legal services is available.¹⁰⁵

B. My Experience with Legal Zoom

I think this is the first professional article I have written that is "personalized." So some personal statements and experiences are scattered in this article. One of these relates to my experience with LegalZoom, a provider of legal forms and, in the view of some, legal services, although it is not a law firm.

For about \$71 (including shipping), I was permitted to "build" a last will and testament, a copy of which is attached as Exhibit A. The service seems to use a document assembly in which questions are asked (apparently using a "decision tree" form of logic) with help text provided to guide the user in building the will. It asked for personal information and then the structure I wanted. I have, with others, built an extensive document assembly system. So I am familiar with the format of questions used in document assembly systems. I found some of the questions used by LegalZoom confusing. Also, I found the advice about using a credit shelter trust (to make efficient use of my estate tax exemption if my spouse survived me) confusing and, in the will itself, the credit shelter trust would take effect only to the extent my spouse made a qualified disclaimer within the meaning of section 2518 of the Internal

¹⁰⁰ See <http://proxilaw.com>.

¹⁰¹ Croswell, *supra* note 99.

¹⁰² For example, go to www.youtube.com and type in "revocable trust."

¹⁰³ See, e.g., Susan Gwinn, *Cost of Legal Services*, <http://gwinnlaw.com/cost.aspx>.

¹⁰⁴ Legal Auditing, <http://www.legalbills.com>.

¹⁰⁵ Jennifer Vaculik, *Bidding by the Bar: Online Auction Sites for Legal Services*, 82 TEX. L. REV. 445 (2003) available at <http://www.allbusiness.com/legal/943122-1.html>; John D. Cotterman, *Internet Bidding for Legal Services*, <http://library.findlaw.com/2003/Aug/1/174616.html>.

Revenue Code of 1986, as amended. Because I have a disabled son, and for other reasons, I wanted the shares for my children (and their descendants) to remain in trust for their lives. In fact, I was offered an option for a testamentary trust with advice that some people want to use such an arrangement until a certain point such as when the child became age 21. I typed in “for life.” I was called by “Seth” at LegalZoom about my answer. He told me I could not have a trust for the life of each of my children. I did not press him about whether I could not do that as a legal matter or whether the LegalZoom system would not accommodate it—I think it was the system. In any case, I said that I wanted a trust because one of my children was disabled. Seth told me I needed a supplemental needs trust and that I would have to engage a lawyer to draft one for me. I told him I did not need a supplemental needs trust. I was surprised when he seemed to accept that. (I never disclosed that I was an attorney.) So I asked if I could choose an age other than 21 and Seth said I could. So I chose age 100, as reflected in Exhibit A. Each reader can determine whether the will I purchased for \$71 was sufficient but I found it lacking in many ways.

The important point is non-law firm companies such as LegalZoom are providing services that historically most likely would have been performed by lawyers even if such services do not constitute the practice of law.

Hence, the number of individuals providing legal services (lawyers and paralegals under the supervision of attorneys) has increased approximately five-fold from 1970 to 2010. In addition, others are providing services, which may not be defined as practicing law. It is difficult to estimate, in terms of the number of individuals (or individual equivalence through services such as LegalZoom) providing legal services, but it seems that as much as six to ten times as many individuals (or individual equivalents) are rendering legal services over that timeframe.

C. Back to the Law of Supply and Demand

As stated above, the cost of legal services is one of supply and demand. If the supply of legal services has increased, and it seems to have increased by at least a factor of five since 1970, the cost of legal services should decline. Yet as stated above, the cost of legal services seems to have risen by a factor of about ten. How can this dilemma of a significant increase in supply be reconciled or explained with a ten-fold increase in price? The answer, of course, is a marked increase in demand for legal services.

D. Demand for Legal Services

It seems there may be four principal factors that have increased the overall demand for legal services: increased quantity of and changes in law and regulations, advertising, globalization, and litigation. There may be other factors as well, such as shifting demographics, changes in science, and changing social views, among others.

1. *Demand Driven by Changes in the Law or Regulation*

Perhaps, the most direct and significant factor in determining the price of legal services is the cost or benefit of complying with the law. For example, an industry that becomes more heavily regulated (e.g., banking in the United States) will demand more in legal services than one that is not.¹⁰⁶ As another example, when airlines operating in the United States were regulated by the federal government, airline businesses had to comply with a myriad of regulations in order to operate, and that required legal services that were no longer needed when the airline industry was largely deregulated under President Jimmy Carter. Similarly, when the federal government substantially deregulated its control of interstate commerce (in large part of trucking) through the Interstate Commerce Commission (ICC), the demand for legal services in dealing with the ICC essentially evaporated.¹⁰⁷ As an additional example, consideration may be given to the enactment of the Tax Reform Act of 1986 which curbed the use of “tax shelters.” The demand for legal services to develop such shelters vastly diminished after the Act passed.

The number of laws and government regulations (federal, state and local) may have vastly increased over the past 40 years.¹⁰⁸ That necessa-

¹⁰⁶ It seems to be a near political certainty that the regulation of the financial services industry in the United States will increase and, perhaps, significantly. See, e.g., Sewell Chan, *Dodd to Unveil a Broad Financial Overhaul Bill*, N.Y. TIMES, Mar. 14, 2010, available at <http://www.nytimes.com/2010/03/14/business/14bank.html?scp=2&sq=christopher%20dodd&st=cse>. This certainly means there will be an increase in demand for legal services in that area of commerce.

¹⁰⁷ The extent to which the government determines to “enforce” an area of law also may greatly affect the demand for legal services in that area. For example, the Reagan administration determined to stop the “rigorous” enforcement of antitrust laws. That reduced the demand for legal services in that field. On the other hand, as the IRS determines to expand “enforcement” of an area of tax law, such as by the promulgation of the reportable transaction rules in 2002, the demand for legal services in that area greatly increased.

¹⁰⁸ It may be surprising that the volume of regulations issued by the federal government reached a new zenith under President George W. Bush. Veronique de Rugy, *Bush’s Regulatory Kiss-Off*, Jan. 2009, <http://reason.com/archives/2008/12/10/bushs-regulatory-kiss-off>. That is not to say it would not have been greater if Al Gore or John Kerry had been elected. Indeed, it seems likely that the volume of regulations will in-

rily will increase the demand for legal services in the areas where such laws and regulations have proliferated, either to ensure compliance to avoid criminal penalties or civil damages or to garner governmental or other benefits such changes offer. As an example, consider the proliferation of domestic asset protection laws. Essentially, unheard of until Alaska adopted its trust act in 1997,¹⁰⁹ at least a dozen states now have similar laws and many individuals have created such trusts and brought business (including significant legal business) to the states that have adopted such legislation.¹¹⁰ Changes in the law may indirectly increase the demand for legal services. The adoption of the generation-skipping transfer tax¹¹¹ not only has created a demand for advice about complying with and minimizing that tax, it seems to have created a demand for the writing of very long term trusts that use the limited GST exemption. Perhaps, the increased demand for such trusts reflects that scarcity (in this case of the amount that can be passed wealth transfer tax free from one generation to the next) increases demand.

Similarly, changes in the “civil” laws (e.g., those relating to inheritance, support obligations, “new” causes of action that develop under the common law or are conferred by statute and other matters where individuals or non-governmental entities have claims against each other), which usually are “regulated,” in effect, by the courts as opposed to the executive branches of government, will generally affect the demand for legal services in a particular area of law.¹¹² For example, the amount of legal services (primarily litigation) demanded to bring legal actions against operators and, in some cases, owners of automobiles involved in accidents greatly diminished as states adopted “no fault” laws.¹¹³ On the other hand, the demand for legal services provided by

crease. One reason is that the Supreme Court of the United States essentially has allowed the executive branch to legislate by issuing regulations. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984).

¹⁰⁹ ALASKA STAT. 34.40.110 (2009).

¹¹⁰ Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2479 (2006) (explaining that a repeal of the rule against perpetuities or “RAP” in several states has led to more trust business in those states, and that states retaining the RAP felt a loss of trust business to the states that repealed the RAP).

¹¹¹ See I.R.C. § 2601 (2000).

¹¹² Ultimately, with rare exception, courts control laws and regulations. However, agencies of the government have the “frontline” responsibility for the promulgation and enforcement of regulations that are an interpretation or application of the law. As a general rule, courts must defer to the agency’s regulations unless arbitrary or capricious. See *Chevron, U.S.A.*, 467 U.S. 837. In addition, courts must defer to the agency’s interpretation of its regulations unless the interpretation is unreasonable. See *Auer v. Robbins*, 519 U.S. 452 (1997).

¹¹³ Research Brief, Rand Institute for Civil Justice, *No-Fault Auto Insurance Unrelated to Accident Rates*, http://www.rand.org/pubs/research_briefs/RB9034/index1.html.

divorce lawyers significantly increased as states began to adopt equitable distribution laws of property between spouses upon divorce.¹¹⁴ Lawsuits involving various forms of discrimination (such as based upon race, religion, national origin, gender, age and disabilities) were largely unknown until legislation was enacted providing civil remedies for such discrimination.

As indicated, there have been similar trends for trusts and estates practice. As the federal estate tax exemption¹¹⁵ has increased, the demand for estate tax planning services has declined. On the other hand, the demand for so-called “Elder Law” services has significantly increased over the past several years as the law has been clarified that individuals can take action to qualify for free or low cost nursing home and other services. Similarly, the enactment of section 2702 of the Internal Revenue Code of 1986, as amended, which statutorily “approved” grantor retained annuity trusts as a potential means to transfer wealth out of the property owner’s estate without significant gift tax, caused a tremendous increase in the number of individuals who used the services of lawyers to allow them to create such trusts.

2. *Demand Affected by Attorney “Advertising”*

There seem to be at least two types of advertising, both of which are used by those providing legal services. One is “competitive” advertising, such as where a car company tries to steer the customer shopping for a new automobile to that company’s vehicle rather than that of another company.¹¹⁶ The second is to create a demand for a product or service, such as airlines attempting to create demand for air travel by showing what a wonderful vacation is available in a place essentially reachable only to the audience by commercial aircraft.

In trusts and estates and other areas of legal practice, advising clients (and potential clients) of opportunities available under the law creates demand for legal services. Also, even if the principal motive of such “advertising” may not be to produce work for the lawyer or law

¹¹⁴ Sarah C. Acker, *All's Fair in Love and Divorce: Why Divorce Attorney's Fees Should Constitute a Dissipation of Marital Assets in Order to Retain Equity in Marital Property Distributions*, 15 AM. U. J. GENDER SOC. POL'Y & L. 147, n.18 (citing BRETT TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* 14 (Patrick McCahill et al. eds., 1994)).

¹¹⁵ There is no true federal estate tax exemption. Rather, there is a credit against the tax that covers the tax on a certain size of taxable estate, which may be viewed as an exemption equivalent. See I.R.C. § 2010 (2000).

¹¹⁶ It is interesting that companies sometimes advertise something they must provide under the law (or face damages) as though it is voluntary and something they are voluntarily providing to their customers, such as certain extended warranties on automobiles. See, e.g., N.Y. GEN. BUS. LAW § 198-b (McKinney 2009).

firm, it does result in an increased demand for legal work.¹¹⁷ Broad media attorney advertising, such as on billboards, in magazines, on television and over the Internet has the two effects. One is the traditional competitive advertising when a law firm attempts to have potential clients hire it rather than another firm. Second, it increases the demand for legal services because it advises members of the public of rights they have and may, whether intended or not, encourage individuals or companies to seek legal remedies where they otherwise would not even if they are aware of their rights or, even if aware of them, would not have taken action.

Advances in technology (such as the development and widespread use of the Internet) have greatly changed advertising in almost all areas of commerce, including the law. Law firms can and do send clients (and others) notifications about changes in the law (sometimes, pinpointed to clients and potential clients most likely to be significantly affected by such changes). Many firms now send newsletters about themselves and changes in the law and related matters by “blast” emails labeled as newsletters, special reports or otherwise, to which the recipient may “unsubscribe.” Hence, the Internet has allowed lawyers, as well as others, more efficient ways to advertise at very low cost.

The increase in information available electronically may in itself have increased the demand for legal services even if not presented by attorneys.

3. *Legal Products Offered by Many, “Invented” by Few*

What probably is not appreciated by various lawyers is that many of the “products” that trusts and estates lawyers advertise and offer to clients (and prospective clients) are developed by very few lawyers who share them with others. For example, tens of thousands of grantor retained income trusts (GRITs) were created after that type of trust was developed by Richard B. Covey in 1984¹¹⁸ before their use was “outlawed” on October 9, 1991 by the adoption of section 2702 of the Internal Revenue Code of 1986, as amended. Similarly, tens of thousands of installment sales to grantor trusts (“ISGTs”) have been completed since

¹¹⁷ The Loeb & Loeb law firm electronically transmitted newsletter states “this may constitute ‘attorney advertising’.” Loeb & Loeb, *Net Worth Family Tax Report*, Vol. 4; No. 3 (“(This publication may constitute ‘Attorney Advertising’ under the New York Rules of Professional Conduct and under the law of other jurisdictions.)”).

¹¹⁸ According to Martin D. Begleiter, *Estate Planning in the Nineties: Friday the Thirteenth, Chapter 12: Jason Goes to Washington –Part II*, 47 DEPAUL L. REV. 1, n. 47 (1997), the GRIT was first introduced as “the Grantor Income Trust For Term of Years”, a “New Planning Opportunity”, in the April 1984 issue of *Practical Drafting* (p. 397-430). It was first called a “grantor retained income trust” in the January 1985 issue (*see* p. 586) and referred to as a GRIT in January 1988 (*see* p. 1338).

their development after the enactment of section 2702. Thousands of practitioners had their clients create so called “spousal remainder trusts,”¹¹⁹ until they were “outlawed” by the enactment of section 672(f). After the enactment of section 2702, which “approved” the use of grantor retained annuity trusts (GRATs), concepts of “rolling” GRATs, “asset splitting” GRATs and other variations of GRATs, including the so-called “SO-GRAT” were developed and used by many lawyers and other advisors to help their clients achieve goals. The so-called irrevocable life insurance trust (ILIT) was developed after the Internal Revenue Service “accepted” the decision of the United States Court of Appeals for the Ninth Circuit in *Crummey v. Commissioner*,¹²⁰ in Revenue Ruling 73-405,¹²¹ and has been very widely used. “Family split-dollar insurance” also was developed and widely used.¹²² In recent years, use of “family limited partnerships” or “FLPs” to help achieve goals of property owners, including changing the nature of what they own so as also to change the value of what they own, has been extremely widespread.¹²³

Although many current estate planning strategies, such as ISGTs, GRATs, ILITs and FLPs, likely will be either become less effective on account of changes in the law or on account of economic or financial changes, other concepts, no doubt, will be developed. From that perspective, that is good news for trusts and estates practitioners. Not only will there continue to be concepts and arrangements to “sell” to clients but these may be more complex than predecessor ones and, therefore, potentially require additional legal services to implement.

4. *Curbing the Use of “Techniques” Others Develop*

The mention of the so-called “SO-GRAT” raises another matter that will affect the ability of lawyers to use techniques developed by others: patenting. A patent was granted by the United States Patent and Trademark Office for the SO-GRAT a technique involving the

¹¹⁹ Gerald H. Weber, Jr., Robert S. Brownson & Kenneth H. Heller, *Income-Shifting Benefits of a Spousal Remainder Trust Enhanced by New Developments*, 12 EST. PLAN. 22 (Jan. 1985).

¹²⁰ 397 F. 2d 82 (9th Cir. 1968).

¹²¹ 1973-2 C.B. 321.

¹²² Although initially “approved” by the IRS in private letter ruling 9636033 (which under section 6110(k)(3) of the Internal Revenue Code of 1986, as amended, cannot be cited or used as precedent), family split dollar arrangements have been approved in Treasury Department regulations, which generally have the force of law. See Treas. Reg. § 1.61-22 (2003).

¹²³ See, e.g., Estate of Shurtz v. Commissioner, T.C. Memo 2010-2.

funding of a GRAT with stock options.¹²⁴ It is understood there has been rigorous enforcement of the patent by those who own it. There are now hundreds of patents pending or granted with respect to arrangements based upon legal concepts.¹²⁵ Unless the federal government eliminates the right to patent them, it seems virtually certain more will be patented. A case pending before the Supreme Court of the United States may curb the ability to seek a patent based upon business methods (for example, hedging an investment) including legal concepts, and legislation has been introduced.¹²⁶ But if patents on legal concepts are permitted to continue to be granted, it likely will reduce the demand for the concepts for two reasons. The first is cost to the client—the patent holder will require a payment to allow the patented idea to be used. The second is the complexity of having to obtain permission to use it, which again is a matter of cost. And as cost increases, demand diminishes, all other things being equal.

It may be difficult to overstate the impact on the legal profession in general and trusts and estates practitioners in particular of patenting legal concepts. Trusts and estates practitioners might look back over the past decade to determine what percentage of their revenues is attributed to ideas that a single lawyer “invented” such as GRITs, ISGTs, rolling GRATs and certain asset protection techniques. For at least some of them, it is likely those arrangements have represented a significant part of their practices. For example, it seems also appropriate to consider the impact on trusts and estates practitioners if A. James Casner had

¹²⁴ See U. S. Patent No. US 6,567,790 at [B1] (filed May 20, 2003), described as “Establishing and Maintaining Grantor Retained Annuity Trusts Funded by Nonqualified Stock Options.”

¹²⁵ See, e.g., U.S. Patent Application No. 20100010838, described as “A System and Method for Maximizing After-Tax Income Using Split Method Charitable Remainder Trusts.”

¹²⁶ *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008), to which the Supreme Court granted certiorari. See <http://www.supremecourt.gov/qp/08-00964qp.pdf>. In reviewing the oral argument before the Supreme Court, it has been written:

In today’s argument, it became clear that the Justices thought little of the argument that Bilski’s claim should be patent-eligible. Bilski’s advocate, J. Michael Jakes, staunchly kept to his position that what should be considered a patent-eligible process be broadly construed, refusing to concede that any method posed as a hypothetical by the Court should be *per se* ineligible. These far-fetched hypothetical methods included methods for teaching antitrust law without putting students to sleep (Justice Breyer), speed-dating (Justice Sotomayor), horse-whispering (Justice Scalia), as well as more concrete examples (“*an estate plan, tax avoidance, how to resist a corporate takeover [or] how to choose a jury,*” by Justice Ginsberg).

(emphasis added). Posting of Kevin E. Noonan to Patent Docs blog, *Supreme Court Bilski Argument*, Nov. 9, 2009, <http://www.patentdocs.org/2009/11/supreme-court-bilski-argument.html>.

patented the idea of using a revocable trust as a substitute for a will as the principal method of transmitting directly owned assets at death.¹²⁷

5. *Effect of Globalization on the Demand for Legal Services*

The world is shrinking. As Thomas Friedman has observed, the world is flat.¹²⁸ Virtually, all industries, including the legal industry, are globalizing; that is, firms are offering legal services in many jurisdictions other than where the law firm has its headquarters or principal headquarters. Businesses that conduct business across state or country lines need advice on a significant number of legal matters, from registering to do business, taxation, employment matters (from requirements for worker compensation to health care to unionization of employee issues), anti-trust rules, import duties and limits, and much more. The expansion of businesses across borders certainly has increased the demand for legal services.

Globalization may also be responsible, at least in part, for outsourcing of legal services to other countries. For example, Microsoft has recently outsourced a significant amount of its United States legal work to lawyers in India.¹²⁹ It is interesting to note that the outsourcing service to Microsoft is not provided by a law firm (US or otherwise).

6. *Demand for Legal Services Affected by Litigation*

Litigation has increased substantially in the United States over the past several decades.¹³⁰ In addition, the cost of such suits has increased in part on account of advances in technology that assist in “managing” a large lawsuit or multiply lawsuits. Almost always, the commencement of a lawsuit and its defense will require the services of a lawyer.

Changes in the law that appear modest in scope may spur more litigation. For example, California has long upheld so-called “in terrorem” clauses in wills, which causes a disinheritance if a beneficiary under the instrument challenges its validity. California just recently amended its law so such a clause is effective only if the person making

¹²⁷ A. James Casner, *Estate Planning – Avoidance of Probate*, 60 COLUM. L. REV. 108 (1960).

¹²⁸ THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (2005).

¹²⁹ See CPA Global, *Microsoft: Outsourcing as a Business Model*, http://www.cpa-global.com/download_centre/case_studies/microsoft_outsourcing_business.

¹³⁰ Legal Process Reform, *Reduce the Large Number of Lawsuits*, http://www.legal-reform-now.org/menu3_3.htm. Note, however, that some contend the number of lawsuits is declining. See Alison De Villiers posting to InjuryBoard.com, *Number of Lawsuits Not on the Rise*, Feb. 15, 2009, <http://cincinnati.injuryboard.com/miscellaneous/number-of-lawsuits-not-on-the-rise.aspx?googleid=255758>.

the challenge did not have a reasonable basis for doing so.¹³¹ It seems certain that will increase the number of “will contests” in that state.

7. *Demand for Legal Services Affected by Changing Demographics*

As indicated above, over the past several years, the area of trusts and estates practice commonly called “Elder Law” has developed. Although there does not appear to be a consensus as to the exact scope of Elder Law, its focus is on legal issues primarily affecting senior citizens and people with disabilities.¹³² It is broader than just representing a senior citizen or planning for the time the client will reach senior citizen status. As with many areas of law, it is a seamless web and covers what may be viewed as traditional estate planning and wealth transfer tax planning as well as assisting individuals in obtaining government benefits that are limited to certain groups (such as those who are disabled or poor) or protecting their or their family’s wealth from government claims that may arise from seeking government financed benefits. To some degree, the growth in Elder Law practice reflects changing demographics in the United States. That area of practice almost certainly will grow as the number of senior citizens continues to grow for the foreseeable future both in absolute number and as a percentage of the entire American population.

The increase in senior citizens also will affect the demand for estate planning services. As age increases (and the inevitability of death is more certainly acknowledged), individuals undertake more estate planning. This general trend likely will continue and will increase the demand for legal services, all other things being equal. But, as recent economic changes in the United States reflect, things are not always equal.

8. *Demand Affected by Changes in Wealth*

As is now well known, the current downturn in the economy has reduced the demand for legal services in general and for trusts and estates services in particular. The economic downturn has affected trusts and estates practices for two principal reasons. First, as wealth is eroded fewer individuals have a need for estate tax planning. Second, individuals are more reluctant to transmit their wealth to others, often a principal component of lifetime wealth transfer planning, and many of them conclude they cannot as comfortably afford such planning. In other

¹³¹ See CAL. PROB. CODE § 21310 et. seq. (West 2009).

¹³² See, e.g., www.naela.org, the website for the National Academy of Elder Law Attorneys.

words, they view estate planning as a type of discretionary spending. Because virtually all estate planning is for the benefit of persons other than the client, there is a natural reluctance to engage in the planning.

9. *What Drives Changes in the Law?*

There has been a steady increase in statutory (including regulatory) law and in case law. Those changes often reflect a shifting of wealth, from increases in taxes to property rights (such as the granting of equitable apportionment of property in divorce). Those changes seem to reflect changes in social attitudes. One is greater protection for consumers, from the passage of the “lemon” automobile laws¹³³ to striking down minimum lawyer fees and attorney advertising. For example, the decision of the Supreme Court in 1975¹³⁴ which declared bar association “minimum” fee schedules as unlawful, as violative of anti-trust laws, likely was a reflection of a greater focus on consumerism. That likely also is the case for the Court’s decision that struck down ethical rules prohibiting lawyer advertising.¹³⁵ Another shift in the law, of great importance in the view of some, occurred in the Court’s decision in *Orr v. Orr*,¹³⁶ which essentially barred gender discrimination. That decision, it may be contended, reflected the growing “freedom” of women in America’s society which, in turn, may be a reflection of women’s greater control over reproduction, a scientific development.

Other changes to the legal profession reflect economic and financial trends in the United States. For example, the current economic downturn in America’s economy has reduced the number of practicing lawyers and the compensation of those who continue to practice, as it has affected virtually every other area of American business. It has increased bankruptcies and counseling by lawyers about financial problems.¹³⁷

Changes effected by regulation and legislation, of course, have a profound and often direct and immediate effect on the demand for legal services. For example, the decision of the states to adopt “no fault” car accident and similar rules significantly reduced those areas of practice. On the other hand, the adoption of equitable division laws for divorcing married couples, sexual and disability anti-discrimination laws, environmental protection laws and new bankruptcy provisions have all increased the amount of legal work sought by clients.

¹³³ See, e.g., N.Y. GEN. BUS. LAW § 198-b (McKinney 2009).

¹³⁴ Goldfarb v. Va. State Bar, 421 U.S. 773 (1975).

¹³⁵ Bates v. State Bar of Ariz, 433 U.S. 350 (1977).

¹³⁶ 440 U.S. 268 (1979).

¹³⁷ Larry Bodine, *Economy to Cause Increase in Litigation in 2010*, Oct. 2009, <http://www.lawmarketing.com/pages/articles.asp?Action=article&ArticleID=944>.

10. *Demand for Legal Services Affected by Changes in Science*

It may seem somewhat strange, but both the supply of and the demand for legal services seems also to be driven, in part, by science. As discussed in more detail below, technology (which is a scientific development) has had and in the future likely will have an even more profound effect on the delivery of legal services. However, it also has had and will continue to have an affect on the demand for legal services. For example, science has extended the average life span in the United States over the past century from about 50 years to about 80 years. That means that adults have a longer time to need legal services. It may also be one of the reasons for the increase in divorce which is a prominent field of legal practice. The development of the birth control pill has allowed women to engage more in business, and the resulting increase of businesses has expanded the need for legal services. Technological advances which have reduced the cost of travel and communication have permitted individuals and businesses greater opportunity to seek legal services. The development of posthumously conceived children has meant there is a new aspect of life which has resulted in a new demand for legal services.¹³⁸ Perhaps, the greatest scientific advance that has affected the demand for legal services is access to information. More than 3 million more “words” of information are now available on Google than all the books in the world combined and access to that information is nearly instantaneous. Individuals and businesses may learn of rights, obligations and defenses in much more cost efficient and time efficient ways, which has increased the demand for certain legal services.

VI. THE ROLE OF TECHNOLOGY IN LEGAL PRACTICE: A PEEK AT THE PAST

Technology has affected the legal profession in many ways. The tremendous growth in the technology business has spurred a tremendous increase for legal services relating to that. Probably, intellectual property practices have grown more than virtually any other over the past decade or so.¹³⁹ Technology also has significantly affected the way legal services are delivered.

¹³⁸ See, e.g., *In re Martin B.*, 17 Misc. 3d 198 (N.Y. Surr. Ct. 2007); Gideon Rothchild, *The Issue of “Issue,”* 42 U. MIAMI HECKERLING INST. ON EST. PLAN. ch. 17 (2008).

¹³⁹ See Am. Bar Ass’n., Working Notes, *Deliberations of the Committee on Research About the Future of the Legal Profession On the Current Status of the Legal Profession*, 42 (Aug. 2001), available at <http://www.abanet.org/lawfutures/report2001/finalreport.pdf>. FindLaw also lists Intellectual Property Law as one of the “hottest” practice groups within the field of law. FindLaw, *Is a career in intellectual property law for you?*, http://www.infirmation.com/articles/one-article.tcl?article_id=2602.

A. Document Preparation

In 1970, the state of the art in the preparation of documents was electric typewriters that had the capacity of allow the typist to make corrections by “back spacing,” striking the same incorrect key and then striking the correct one, rather than disposing of the entire page upon which an error occurred. That was regarded as a significant advance compared to “standard” electric and manual typewriters, which also were in extensive use at the time.

While modern word processing started in the early 1970s, the real “boom” in the industry occurred after 1977 when word processing software was widely available for distribution with the sale of personal computers.¹⁴⁰ The term “word processing” was coined by IBM in the late 1960s. By 1971 it was recognized by *The New York Times* as a “buzz word.” A 1971 *The New York Times* article referred to “the brave new world of Word Processing or W/P.”¹⁴¹ In the late 1980s, word processing software began to take a more “typographic” approach to showcasing data, so that “what you see is what you get,” or WYSIWYG.¹⁴² For Apple computers, MacWrite (released in 1983) was the most popular, whereas Microsoft Word (released in 1984) was the most popular on the IBM PC.¹⁴³

Word processing has become so simple that many lawyers do their own typing, now usually called document production, often starting with a standard form, such as for a will, trust or other document that is used over and over again and modified for the particular circumstance. It is nearly inconceivable that a lawyer today could practice profitably without word processing, regardless of the field in which the attorney practices. In fact, it may soon be inconceivable that a lawyer will be able to practice without preparing documents himself or herself. Indeed, a lawyer likely would be at a significant competitive disadvantage if he or she had to pay a secretary to prepare all documents the lawyer uses. Rather than dictating to a secretary, the lawyer can dictate to a machine that will type the text automatically, or he or she can type the document (typically using a word processing system with forms).¹⁴⁴ In fact, many

¹⁴⁰ Brian Kunde, *A Brief History of Word Processing (Through 1986)*, available at <http://www.stanford.edu/~bkunde/fb-press/articles/wdprhist.html>; see also History of Word Processors, <http://www.cs.umd.edu/class/spring2002/cmsc434-0101/MUIseum/applications/wordhistory.html>.

¹⁴¹ History of Word Processors, <http://www.computernostalgia.net/articles/HistoryofWordProcessors.htm>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See, e.g., Dragon NaturallySpeaking, <http://www.nuance.com/naturallyspeaking/products/default.asp>. It may also be possible to control the cursor on a computer screens by brain waves which might lead to “thought” typing. Jan Kněžík & Martin Drahanský,

lawyers find that typing (or “amending” a form document in word processing) takes less of the lawyer’s time than dictating to a typist. As discussed in more detail below, document assembly is now taking hold and soon will overshadow word processing in many areas of document preparation.

Also, the methods of document production are rapidly changing. Voice to print technology is now available and its use is increasing. In fact, the iPhone now has an application (“app”) that permits the user to dictate messages which can then be sent by email.¹⁴⁵

An important factor about document production is that it has resulted in greater “standardization” of documents. Almost all law firms have “form books” which are imbedded into their word processing machines and are used to do standard documents such as wills, trust agreements, and accounting papers, as well as reports, briefs and memoranda filed with courts or other government offices.

B. Tax Return and Other Reports

In the past, income tax and other returns as well as other reports were prepared manually—that is, they were completed by hand or by manual or electric typewriters. Now most individual income tax returns as well as many estate and gift tax returns (federal, state and local) are prepared “automatically” by computer technology.¹⁴⁶ Other common forms (such as probate petitions) may be accessed via the Internet, “downloaded” and then prepared, in some cases by completing “fields” of information (such as a decedent’s name in the case of a probate petition).

In addition, the computer systems will “automatically” do calculations, such as computing the taxpayer’s taxable income and income tax liability for the year as well as computing the amount due or to be refunded. In fact, this has shifted considerable work from lawyers to commercial (non-lawyer) organizations such as H & R Block and other return preparation firms. Moreover, recently, opportunities to have returns prepared “over the Internet” have expanded such as through the use of TurboTax.

Simple EEG Driven Mouse Cursor Movement, 2007, abstract available at <http://www.springerlink.com/content/b76n8662k4502050>.

¹⁴⁵ The app is “Dragon Dictation” (free app available at <http://itunes.apple.com/us/app/dragon-dictation/id341446764?mt=8>), discussed at posting of Mel Martin to Túaw: The Unofficial Apple Weblog, *Dragon Dictation comes to the iPhone. Wow.*, Dec. 8, 2009, <http://www.tuaw.com/2009/12/08/dragon-dictation-comes-to-the-iphone-wow/>.

¹⁴⁶ See, e.g., <http://www.turbotax.com>.

C. Written Communication

Written communication in 1970 was almost exclusively by postal service mail delivery. The facsimile machine came into general use by lawyers in the mid to late 1980s reducing the time to obtain documents. E (electronic) mail became popular in the late 1990s and early 2000s and now pervades nearly every aspect of life in developed countries and in the practice of law in particular. Email, of course, also permits the virtually instant delivery of legal and other documents. Although, perhaps, not of as great significance as reducing the time of delivery of written communication is that these developments have also reduced the cost of delivery, which at the present time is free.

D. Voice Communication

Voice communication in 1970 was almost exclusively by dial up hard wired telephone, which also was expensive. Portable phones (although with limited range, measured in feet) were regarded at the time as a significant advance. Now there is voice command “dialing.” Cellular and satellite communication telephones are in extensive use, permitting voice communication to and from almost anywhere in the world and at extremely low cost.¹⁴⁷

One other important “advance” in voice communication is the conference call. Individuals may now make calls to several individuals and each may speak to the others. Many law firms now have their own conferencing services where the individuals who are invited to participate are sent an email with the telephone number to call and any access code that will be needed to join the call.

The paper “Rolodex” essentially has disappeared with electronically recorded “contact” information about individuals and companies now substituted. That now also permits automatically “dialing” anyone listed in that “directory” including by voice command.

E. Calendaring Events

Desk top and pocket calendars are largely an item of the past. Almost all lawyers use electronic calendars which are automatically “synched” with their Blackberries, iPhones or similar handheld devices with automatic reminders of events. Often, these events are not inputted directly but are inputted by the receipt of a message from another (such as suggesting a time for a conference call with the ability to “ac-

¹⁴⁷ Satellite phone charges today are approximately the same (even in absolute dollar cost) as long distance calls were in the 1920s. See History: Long Distance Telephone, http://www.cybertelecom.org/notes/long_distance.htm.

cept” the invitation which will cause the event to be electronically placed on the calendar of the person agreeing to participate in the call).

F. Law Libraries

In 1970, virtually all legal research was done using books which contained indices or were digests. Research was done almost exclusively using legal concepts, not facts. Lexis, a key word on context electronic search tool for statutes, case and other law, was a continuation of an experiment organized by the Ohio State Bar in 1967.¹⁴⁸ It was first conceived in 1970, but did not launch publicly until 1973.¹⁴⁹ At the time of its public launch, on April 2, 1973, Lexis offered full-text searching of all Ohio and New York cases.¹⁵⁰ In 1980, Lexis completed its electronic archive of all U.S. federal and state cases.¹⁵¹ The Nexis service, also added in 1980, allowed journalists to search a database of news articles.¹⁵² LexisNexis Communication Center went online in 1994¹⁵³ and began offering the first Web-based service for U.S. legal professionals in September 1997.¹⁵⁴ West Publishing released Westlaw in 1975 and the Westlaw service developed virtually alongside LexisNexis.¹⁵⁵ Such research tools have greatly expanded the accuracy of research and reduced its cost. Today, significant legal and other research is available online without charge including through Google. An extraordinary amount of free information is available from government sites¹⁵⁶ and other sources such as Wikipedia.

Some law libraries maintain books, some of which are in looseleaf format which are manually updated. Hard copy treatises are also maintained by some law firms. State and federal reports (e.g., New York

¹⁴⁸ LexisNexis, <http://en.wikipedia.org/wiki/LexisNexis>. Unfortunately, none of these claims is substantiated with references to outside sources so their veracity is not verified.

¹⁴⁹ *Id.*; LexisNexis, Company History, <http://www.lexisnexis.com/presscenter/mediakit/history.asp>.

¹⁵⁰ LexisNexis, <http://en.wikipedia.org/wiki/LexisNexis>.

¹⁵¹ *Id.*

¹⁵² *Id. but compare* LexisNexis, Company History, <http://www.lexisnexis.com/presscenter/mediakit/history.asp> (“In 1979, a companion news and business-information service was introduced under the Nexis banner. Michie™, founded in the late 1800s and the sole provider of statutes for 35 U.S. states and territories, joined the fold of LexisNexis in 1987.”).

¹⁵³ LexisNexis, <http://en.wikipedia.org/wiki/LexisNexis>.

¹⁵⁴ LexisNexis, Company History, <http://www.lexisnexis.com/presscenter/mediakit/history.asp>.

¹⁵⁵ Erin Carlyle, *Westlaw Rises to Legal Publishing Fame by Selling Free Information*, Apr. 28, 2009, <http://www.citypages.com/2009-04-29/news/westlaw-rises-to-legal-publishing-fame-by-selling-free-information>.

¹⁵⁶ *See, e.g.*, www.irs.gov.

Supplement and Federal Supplement) also are maintained, in part, because some lawyers and other researchers find it easier to page through books, use physical bookmarks, etc.

G. Calculations

In 1970, as today, the effectiveness of many legal strategies, especially those relating to taxation, are based, in part, on calculations, such as the value of the remainder in a charitable remainder trust.¹⁵⁷ Many aspects of estate and trust practice also were and are based on computations, such as in an accounting of the acts of a fiduciary. In the 1970s, these calculations were performed by hand or with the use of a manual calculating machine which essentially did only addition and subtraction or by electric adding machines, some of which also did subtraction, multiplication and division. In the early 1970s, the first handheld calculation machines became available. The cost was considerable (about \$400 per unit). Since then, the ability to perform calculations, including complex financial calculations, are available at extremely low cost.

Moreover, for trusts and estates practitioners, extremely low cost services, such as Brentmark, Number Cruncher, Tiger Tables and others, “automatically” and almost “instantly” not only do the calculations but also do comparisons of estate planning strategies.

H. In Person Meetings

Many lawyers spend hundreds of hours each year communicating with colleagues, clients and government representatives (including judges) in person. Often, more than two people will be at such meetings. That has not changed as much as certain other aspects of practicing law has over the past 40 years, although telephone conference calls have reduced the number of in person meetings that likely otherwise would be held. That may suggest that changes to or a substitution for in person meetings will undergo a greater change over the next decade than will other areas, such as document production.

One advantage of in person meetings is holding the attention of the other person or persons. Certainly, people in a meeting may not concentrate on what is being said or shown. But, today, virtually all lawyers “multi-task” when they are on phone calls including conference calls. That is very difficult to do during an in person meeting although some lawyers try to “sneak a peek” at their Blackberries and iPhones and try not to allow others at the meeting see them do it. Some attorneys have attempted to obtain the benefit of greater attention of colleagues, clients and others without having an in person meeting by using Skype or other

¹⁵⁷ See Treas. Reg. § 1.664-4 (2009).

video technology that permits individuals to see each other and speak over the Internet. However, the use of such technology is not great at this time.

“Screen sharing” also is currently used by some lawyers. It permits more than one person to view the computer screen of another which may display information (such as a case or the page of a document).¹⁵⁸ It also permits more than one lawyer simultaneously to work on the same document where one attorney makes a change and then another makes a different change with each participant seeing the changes as they are made, even though the lawyers are in different locations.

I. Education and Learning

As indicated above, some areas of law change very rapidly. Many lawyers, to sustain their practices and avoid malpractice claims, need to learn of changes in the law in their areas of practice and, perhaps, of equal importance, determine how those changes affect their practices and their clients.

Lawyers, historically, have kept abreast of changes in the law by reading written material and attending educational programs. Virtually, all jurisdictions in the United States have mandatory continuing legal education requirements that also have driven the demand for attorney education. These may be formal presentations (such as at a seminar) or at professional meetings that are not as strictly structured but, for some lawyers, are even more educational in part because they are smaller (tending to cause those present to pay more attention to what is being said) and permit greater “give and take” by those present.

Educational tools have changed over the past 40 years. For example, nearly instant reports of changes in the law are available over the Internet. Some may be transmitted via email by colleagues and others. Some may be by commercial sources, such as the Leimberg Information Services, Inc. Listserv (LISI).¹⁵⁹ Many “lectures” are now available over the Internet both “live” as well as by being “rented.” Some of these are audio only but some have audio and video, often through the Internet. However, these new mediums of communication have not replaced “live” seminars where professionals gather together. Reasons for that may include lack of inertia, the natural tendency of humans to be gregarious, the ability to “network” with other professionals, the opportunity for “give and take” (e.g., to ask questions of others and to increase the chances of getting another to pay more attention to the question presented) and to avoid interruptions that may occur at one’s

¹⁵⁸ See, e.g., Cisco WebEx, <http://www.webex.com/>.

¹⁵⁹ <http://www.leimbergservices.com>.

office. However, as discussed below, it seems likely the nature of seminars will change.

One new medium of education is lawyer listservs, such as the Listserv of the American College of Trust and Estate Counsel (ACTEC) and those of the American Bar Association, among others. Lawyers now can nearly instantly bring developments or insights of which they learn to other colleagues or can query colleagues on virtually any legal question. Often, a complete answer will be offered almost instantly. Even where no response with a complete answer is given, lawyers often offer insights and practical suggestions. This relatively new medium will almost certainly expand and may well “morph” into blogs. The difference between a blog and a listserv is that a listserv is somewhat random in that different questions and comments to questions appear chronologically, not by subject matter. A blog follows the subject matter and lists comments chronologically.

J. Billing Practices

Billing practices have changed over the past four decades in some ways. Although many lawyers have long charged “by the hour,” that was difficult to do with precision because before the widespread use of computers to sort data it was accomplished by hand written time records (also called “diary” or “daynote” entries or “time sheets”) which had to be sorted and filed. Moreover, it was extremely difficult to monitor whether an attorney was contemporaneously completing the time records. In many circumstances, records were inaccurate and incomplete. Advances in computer technology now allow instant checking to see if an attorney has contemporaneously recorded time for work, to record the hours expended for a client or project and to send a bill for services based upon hourly charges without any “human” input.

Hourly billing coupled with those advances in computer technology have made it an efficient way for lawyers to charge. It is relatively easy to determine what the gross revenue of a law firm will be by forecasting the number of hours that will be logged over a fixed timeframe (such as a month or year) and multiplying it by the hourly rate the attorney or other charging person (such as a paralegal) charges for his or her time. Many law firms have “bogeys” or minimum number of expected hours for lawyers to record each year and some pay bonuses to those who achieve certain chargeable hour levels.

Many lawyers charge fixed fees for fixed projects, such as the preparation of a will or other document. Not infrequently, the attorney attempts to estimate the time he or she will spend on the task and then “bids” a fixed price based upon multiplying that time by his or her hourly billing rate. In some cases, the lawyer will make less than his or

her hourly rate and sometimes more. Some lawyers, of course, charge a contingent fee, such as taking a percentage of any recovery or settlement amount. That often occurs in litigation in representing a plaintiff in a lawsuit. In some cases, it may even occur in representing a defendant (with the fee equal to the percentage “saved” compared to the demand—that not infrequently happens with respect to claims made against a taxpayer by the IRS). In some commercial transactions, the lawyer will be paid part of his or her standard hourly rate with a “success” bonus if the transaction “closes.”

K. Litigation and Dispute Resolution

There have been many changes in litigation and dispute resolution over the past 40 years. Document production, delivery and data sorting have changed tremendously. One important “advance” is that searching is now possible by “key” word or phrases. Time management of a case is performed by computers although with significant human input. Computer programs are available to “docket” cases and build in time for submissions, etc. Research available over the Internet (such as through Google) has reduced search time and increased access to information.

Changes in the law also affect litigation. For example, at least three states (Arkansas, North Dakota and Ohio) permit “pre-death” probate.¹⁶⁰ That may or may not reduce the number of “will contests” in those jurisdictions that have enacted such legislation.

Dispute resolution also has changed. Collaborative divorces are now common reducing actual litigation and involving professionals other than lawyers.

At least one state¹⁶¹ has adopted a “loser pays the legal fees of both” rule that any party to litigation can trigger and, in the judgment of at least some lawyers who practice there, has reduced the number of trials and increased the number of settlements.

Most lawyers likely think that there are two areas where they will “forever” have a sole role: resolving new and complex issues and in litigation. However, that claim probably is overstated.

On new and complex issues, the sharing of ideas is so rapid that few if any lawyers can contend that only he or she can provide an appropriate “solution.” For example, the failure of the Congress to prevent the federal estate and generation-skipping transfer taxes from “expiring” for 2010 caught almost all estate planning lawyers by surprise. This did

¹⁶⁰ See Pre-Mortem Probate: Has the time arrived?, <http://www.hklaw.com/File.aspx?id=2723&inline=1>.

¹⁶¹ See ALASKA R. CIV. PROC. 82.

present new and complex issues for lawyers and other advisors. It seems, for example, that lawyers for the first time came to realize that there would be no GST exemption for 2010, which would have a profound effect on estate planning for individuals during that year. Also, it was the first time, apparently, that any attorney realized that property transferred to a trust in 2010 (such as to a trust for a property owner's grandchild) free of GST tax might become subject to that tax during any later year.¹⁶² Not only did lawyers nearly instantly "share" this "new" knowledge with colleagues through mediums such as the AC-TEC Listserv, they also provided each other with guidance and language without charge. Nevertheless, some will contend it shows that the role of "smart" lawyers likely will not end soon.

Also, some lawyers think that only they can prosecute, defend or settle litigation matters. The trend seems otherwise. As detailed in *The End of Lawyers?*, even "on line" dispute resolution is working, in that computer generated settlements are being made although the elimination of trial lawyers seems far off.¹⁶³

L. Technology and the Erosion of the "Monopoly" of Lawyers

Every state, except Arizona, prohibits practicing law without a license to do so. In virtually all jurisdictions, no entity other than a law firm (or an attorney on his or her own) may practice law even if the work the entity (e.g., a bank) provides is performed by a lawyer working for that organization. However, as mentioned elsewhere in this article, other groups (such as Legal Document Assistants in California and tax return preparers) are performing work that certainly involves legal matters. Advertisements by Turbo Tax offer to allow its subscribers to call an "expert" to ask a legal question, such as "are my commuting expenses deductible?" Technology is also eroding the exclusive domain of lawyers to render services that likely otherwise would be performed by an attorney, such as with LegalZoom.

M. The Role of the *American Lawyer*

Until made widely available by the *American Lawyer*, first published in 1979, lawyers had little access to data that permitted them to compare themselves to others.¹⁶⁴ That publication made a significant

¹⁶² See, generally, Jonathan G. Blattmachr, Mitchell M. Gans, Howard M. Zaritsky & Diana S.C. Zeydel, *The Impossible Has Happened: No Estate Tax, No GST Tax, and Carryover Basis for 2010*, J. TAX'N. 68 (February 2010).

¹⁶³ RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* § 6.6 (2008).

¹⁶⁴ Warren Berger, *Cable in the Court! Time Warner Puts Big Money on Steven Brill's New Cable Channel*, N. Y. MAGAZINE, Aug. 12, 1991, at 40, available at <http://books>.

impact in the law. The information it provided is now widely available and has changed the attitude of lawyers. A firm knows how well it is “recruiting” new lawyers to its firm compared to others, how many hours its partners and other workers record compared to others, and how much its partners, associates and other workers earn compared to others.

Among other things, that has produced a new type of competition and has and likely will continue to change several aspects of a firm’s “structure.” For example, for large firms a key ingredient of a firm’s perceived success is “profits per partner.” Firms take action to keep that as high as possible, for example by providing fixed income (salaries) for some partners and reporting only profits per “equity” partner (“PEP”) and ignoring certain expenditures that would erode the profits per partner. It also affects the level at which firms set hourly rates, by comparing it to what its similarly situated firms charge for equity partner time.¹⁶⁵

VII. PUTTING FUTURE CHANGES IN CONTEXT

Before suggesting what changes may occur in the next ten years and how they will affect the practice of law and what practitioners may wish to do in light of those changes, it seems appropriate to put those anticipated changes in context.

It seems that lawyers, as a whole, are not resentful of advances in technology even though they have reduced the work lawyers do. For example, Lexis and West Law have reduced the amount of time lawyers otherwise would have spent in researching the law. Some lawyers have even developed their own databases that can be searched, saving them hundreds of hours of research time. That greatly reduces the time to produce the legal “product.” Yet attorneys seem to relish such increase in efficiency.

Similarly, word processing has vastly reduced the time lawyers spend in reviewing documents. Hence, attorneys do not incur as much time in completing a legal task (whether it is the preparation of a will or

google.com/books?id=E-kCAAAMBAJ&pg=PA41&lpg=PA41&dq=impact+on™he+legal+profession+of+American+Lawyer+magazine&source=bl&ots=8Ha9-qMleI&sig=3B-X8xP9l-M78OEelR8yRtKW-IE&hl=en&ei=2WqQS8LMB0-3lAfAsMn8AQ&sa=X&oi=book_result&ct=result&resnum=2&ved=0CAsQ6AEwATgK#v=onepage&q=&f=false.

¹⁶⁵ Profits per partner seems to be the accepted yardstick by which a firm’s financial prowess is measure. See, e.g., Julie Triedman, *Davis Polk posts 10% profits hike as elite New York trio unveil 2009 financials*, Mar. 15, 2010, <http://www.legalweek.com/legal-week/news/1596413/davis-polk-posts-pep-hike-elite-new-york-trio-reveal-2009-financials>.

a brief) and, therefore, may not charge as much for that specific job as when it took more time to complete.

It seems reasonable to conclude that as more advances in technology occur, which reduce the time an attorney must spend in completing a task, lawyers will be enthusiastically accepting of that. One reason is that continuously doing the same task is not as exciting or as interesting to many lawyers as taking on a new matter. Spending hours searching through books and digests attempting to find the more important precedent is less satisfying for many attorneys than is quickly finding it (through a word search system such as Lexis or West Law or otherwise) and then being able to use it in completing the ultimate legal task (such as advising a client of the answer to a question or preparing a memorandum to be submitted to a court).

One possible difference, if it develops, is when computers advance to the point where they can analyze legal issues. To date, computer systems analyze by using a logic tree methodology—they are “if this, then that” systems. For example, one commercial product claims that it will give specific advice as to appropriate use of certain estate planning strategies for a specific client, such as whether the client should create a charitable remainder trust or a GRAT or whether the client should engage in an installment sale to a grantor trust.¹⁶⁶ For instance, the system asks, in connection with determining if the client is an appropriate candidate for a GRAT, if the client is likely to survive the retained annuity term; if the client will not likely survive, the computer concludes that a GRAT probably is not appropriate for the client as the entire trust likely will be included back in the client’s gross estate tax for federal estate tax purposes, which almost certainly means the GRAT will not achieve the goal of reducing wealth transfer taxes. Of course, many other questions are asked but the “is the client expected to survive the annuity term” one is a “killer” type question. In fact, it seems that using decision tree logic, the computer can be programmed to provide a thoughtful answer to almost any legal issue. But the person doing the programming must know the issue thoroughly, be able to map it out in a decision tree format and implement the program using symbolic logic. What the computer cannot do, today, is learn something new. It cannot “read” the law and understand its ramifications. For example, lack of application in 2010 of Chapter 13 (the generation-skipping transfer tax provisions of the Internal Revenue Code of 1986, as amended) to any generation-skipping transfer has far reaching effects. Unless and until a computer is programmed with what that means, it cannot (at least at this time) determine the effects on its own.

¹⁶⁶ This consists of the Concept Memoranda imbedded into Wealth Transfer Planning. See www.interactivelegal.com.

It seems likely that, within the next ten years, computer systems will be able to engage in much greater “reasoning” and “analysis.” The computer systems, no doubt, will “study” what has been written about certain legal and financial matters, determine what are the most important aspects for clients in particular circumstances and then apply that “knowledge” to the particular facts of a particular client, including the client’s desire to use certain legal approaches and strategies and willingness to accept legal and financial risk. For example, a client who may wish to avoid paying capital gain on inherent profit in an asset has several choices, including creating and funding a charitable remainder trust, engaging in an income tax free exchange or holding the property until death. The system will have been made aware of all viable options and analyze the effects of applying each option to the particular client including considering risk tolerance. Lawyers, at least for the time being, will then work with an individual client to make the final determination of which, if any, of the strategies the client should adopt. In ten years, in fact, computers may be able to “analyze,” essentially on its own, what changes in the law mean such as if the federal gift tax is repealed for one year.

There likely will be more changes in technology in the next ten years than have occurred over the past 40 years. These future changes will have at least as profound an effect on the practice of law as the changes over the past 40 years have had. Many of these changes will not be directed specifically at the practice of law although some will be, just as word processing and Lexis were developments directed at legal practice although that technology (or an equivalent system such as Nexis) spun off to be used in other fields.

VIII. WHAT PRACTITIONERS SHOULD DO TO PREPARE FOR THE FUTURE OF THEIR PRACTICES

A. Determine If You or Your Firm Is Willing to Undertake Planning for Future Practice

Most lawyers have not planned for the future of their practices. As long as the lawyer and firm have adequate work to keep the firm financially sound, little if any thought is given to planning. Even if the lawyer or firm has too little work, little real thought is given to long range planning; rather, the firm “downsizes” or lawyers shift firms or affiliations.

As mentioned above, a rather persuasive case can be made that a law firm, as with any business, should plan both in the short term (e.g., with respect to immediate cash flow needs) and long term.

B. Determine What Goals You Have for Your Practice

Any lawyer or firm (or department) that wishes to consider planning for the future must undertake a somewhat regimented system of planning—that is, undertake systematic planning.

To begin, each such lawyer and firm must first determine the goals for its practice. Because most lawyers maintain their livelihoods from their practices, these goals likely will include maintaining and improving the legal practice while avoiding a reduction in its profitability. Other goals may include practicing in an area with significant intellectual challenges, receiving peer (and client) approval or praise, prominence in the firm and community (“big fish in little pond”), continuity of the firm for others (e.g., younger partners and associates and for clients), independence in practice (that is, in making decisions for and with clients without approval of other lawyers), forcing a sharing of clients, building or maintaining specialization, avoiding stress, reducing or maintaining the time devoted to the practice, being the “stalking horse” for another department (e.g., trusts and estates lawyers representing captains of industry, investment bankers or others from whom other areas of practice, such as the corporate department, wish to represent), doing pro bono or similar work and preventing defections from the firm.

Lawyers must be honest about the relative advantages and disadvantages they and their firms have. Some lawyers do some things better, on a relative scale, than others. Usually, an individual is more successful by sticking to things he or she does well. In other words, each lawyer and each firm must determine its strengths and weaknesses. If it lacks sufficient strengths or has too many weaknesses to achieve its goals, it needs to consider ways to gain strength or shed weakness. The reason for the lack of strength or presence of weakness can vary tremendously. For example, the firm may lack sufficient resources to expand into a field that will help achieve the goals sought (e.g., going into Elder Law), which might require hiring attorneys who have experience and clients in the field. Another example may be to have to eliminate or isolate lawyers in the firm who are disruptive to the methods of effecting change to achieve goals (e.g., individuals who are difficult to deal with or who resist change such as adopting changes in technology). A further example may be to have to eliminate a practice area that is not consistent or compatible with the goals sought (e.g., a department or lawyer who “loses” money or an area of practice that produces conflicts of interest thereby foreclosing certain important representations).¹⁶⁷

¹⁶⁷ As suggested elsewhere in this article, several large law firms have eliminated or reduced their trusts and estates practices. *See supra* notes 31-32 and accompanying text.

Lawyers must decide if they want to maintain, increase or decrease the size and physical locations of their firms. They must also decide if there are areas they wish to maintain or areas they wish to avoid. They have to determine how important maintaining actual personal contact with colleagues and clients will be in the future.

One critical decision is whether the lawyers are committed to the firm or only to themselves. Although many law firms have expanded (by merger or otherwise) over the past 20 years, it may be that the partners who began to effect such growth have not profited in a financial sense.

C. Determine Whether or How Your Practice Can Achieve the Goals Sought

Some areas of practice will not be compatible with the goals sought to be achieved. A lawyer may wish to engage in estate tax planning work but a significant increase in the federal estate tax exemption may eliminate so much need in the market in which the attorney practices that it alone cannot sustain his or her practice. One option may be to change markets (e.g., move to an area with greater wealth) but that would have far-reaching ramifications for the attorneys, their families, their staff and their existing clients. An attorney may wish to engage in “probate” litigation or income tax planning but may not have the skill set to make him or her successful in that area. Factors other than “intelligence” may mean the lawyer will not be sufficiently successful in such a field. That may extend not just to a specific lawyer but to an entire firm (or department).

On the other hand, it may be that changing the way in which the firm operates will help achieve the goals it sets for itself. That may involve additional education of lawyers and staff, the adoption of new procedures (such as state of the art systems such as document assembly), hiring special counsel (who may be able to bring instant legal knowledge to the firm), careful client selection and advertising.

In any case, a firm that wishes to plan must be realistic about whether its practice can achieve its goals and whether it can change its practice to achieve those goals—or to accept other (perhaps, less ambitious) goals. It may need professional help in making those determinations.

D. Understand What Planning Means

“Our plan is to increase partner profits by 50% over the next five years.” The head of a firm who says that at his or her annual firm meeting will receive a standing ovation, without question. But unless he or she explains how it will occur, it may be a meaningless statement. Of

course, setting a goal usually is critical to achieving success (as achieving the goal is success). Nevertheless, the plan will require great detail in how to reach the goal.¹⁶⁸ Will it mean raising billing rates? Will it mean increasing the chargeable and collectible hours by those in the firm who charge for their time? Will it mean increasing the charges for what lawyers call disbursements (such as photocopying, secretarial services, printing and telephone calls) or charging for items (such as the use of a conference room) for which the firm currently does not charge? Will it mean achieving a higher rate of collection (as opposed to “writing off” time)? Will it mean greater leverage of non-partners (upon whose work partners make a profit)? Will it mean lowering costs or changing the method of billing? Or will it mean more than one or all of those or will it be something else? When the decision is made how to achieve the goal (e.g., increasing chargeable hours), how will it be implemented and not just stated? Many will find that a challenging task. It is nearly certain, however, that not accepting the task will mean the goal will not be achieved.

E. Keep Vigilant of Changes in the Your Legal Marketplace

If the estate tax exemption increases significantly, many estate planning lawyers will find a significantly diminished areas of that practice. For example, before the enactment of EGTRRA,¹⁶⁹ approximately 100,000 United States Estate (and Generation-Skipping Transfer) Tax Returns (Forms 706) were filed each year. With a federal estate tax exemption of \$3.5 million, it is estimated only 14,000 returns (of which approximately 7,000 would result in estate tax being due) would be annually filed. Hence, it is likely that a law firm whose practice in significant part involved the preparation of Forms 706 and representing the personal representatives of the estates in any audits of such returns likely will experience a significant decrease in work in that area. It seems appropriate to be aware of that and make plans to cope with that change. Similarly, because the number of individuals who will need (or who are willing to pay for) estate and gift tax planning work has declined as the estate tax exemption has increased and almost certainly will further decline if the estate tax exemption increases even more than it has, many lawyers who render estate tax planning and related services have experienced and likely will continue to experience a drop off in such business. They too probably should plan in order to maintain profitable practices.

¹⁶⁸ “If you don’t know where you are going, you might wind up someplace else.” Yogi Berra, http://www.brainyquote.com/quotes/authors/y/yogi_berra_2.html.

¹⁶⁹ Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001).

On the other hand, it seems likely that the “graying” of America will produce a significant demand in Elder Law practice. Unlike the likely rapid decrease in estate tax planning and administration work that a significant decrease in the estate tax exemption would produce, an increase in demand for Elder Law work likely may be more gradual but could more than offset, over time, the loss of business in the estate tax planning and administration area.

F. Keep Vigilant in Marketing Opportunities

Producing and controlling “business” has long been a key factor in success of a lawyer or law firm. As explained above, marketing (or advertising) legal services certainly can increase the demand for the services of a lawyer or law firm. It seems nearly certain that many changes, perhaps at an accelerating pace, in the law relating to tax and property rights will occur over the next several years. These changes in the law provide opportunities for lawyer work. For example, the “elimination” of the federal estate and generation-skipping transfer taxes for 2010 provides an opportunity to “market” alternative disposition strategies for individuals. Because there have been several proposals to “toughen” the estate and gift tax rules, counseling clients before those changes are adopted about an appropriate way of disposing of wealth without significant wealth transfer tax also provides an opportunity for legal work. In addition, it seems reasonable to conclude that any significant changes to the estate, gift or generation-skipping transfer tax systems will be a “relief” act for estate planning lawyers, whether those changes foreclose current planning opportunities or open new ones.

For example, the adoption of “portability,” under which the surviving spouse would succeed to any unused estate tax exemption of the spouse dying first provides an opportunity to undertake the drafting of new documents to transmit wealth at death. It will require estate planning lawyers to counsel about “balancing” various aspects of planning, from simplicity (e.g., bequeathing the estate of the spouse dying first to the survivor) to opportunities for asset protection (e.g., using a trust) and for income tax reduction (e.g., using a discretionary trust for the surviving spouse, descendants and, perhaps, others, such as charity so taxable income can be shifted to those in the lowest effective income tax brackets).

Even in the absence of such changes in the law, there are opportunities for marketing beneficial concepts to clients now available. For example, the Supercharged Credit Shelter TrustSM essentially provides benefits similar to, and actually exceeds the benefits of, what statutorily

adopted portability would produce.¹⁷⁰ Another option, perhaps not as frequently mentioned and employed for clients as the arrangement would suggest, is family split-dollar insurance.¹⁷¹ A third is a split-purchase trust SM which in some cases would be preferable for a particular client than would be a qualified personal residence trust.¹⁷²

Lawyers should adopt methods to keep abreast of such developments and ways to use them for their clients (and, thereby, for their practices).

G. Ensure Consistent and Up to Date Education

Knowledge is power¹⁷³ and I think power is money. Hence, I conclude knowledge is money. Rather than have each attorney's or department's education (on developments in the law and developments in practice) be haphazard, each lawyer and firm needs to adopt a systematized method of providing education and learning of developments in the law. That education, as indicated, is more than being advised of changes in the law. It should include learning how each change affects the lawyer's and the firm's practice and how it opens or forecloses opportunities in practice.

H. Develop an Interactive Website to Drive Clients to Your Practice

The amount of commerce, including the selection of legal service related providers (from lawyers to LegalZoom), now effected through the Internet has grown enormously and will continue to grow for the reasonably foreseeable future. Whether the client or prospective client is "big" or "little," almost all have or soon will turn to the Internet for the selection of legal service providers. Driving clients and prospective clients to a lawyer's, department's or firm's website is critically important in maintaining a "competitive" advantage for most.

Of course, thousands upon thousands of lawyers and firms have websites. Those that get the most "attention" are those that are not just

¹⁷⁰ Mitchell M. Gans, Jonathan G. Blattmachr, & Diana S.C. Zeydel, *Supercharged Credit Shelter Trust*SM, 21 PROB. & PROP 52., (July/August 2007); see Mitchell M. Gans, Jonathan G. Blattmachr, & Diana S. C. Zeydel, *Supercharged Credit Shelter Trust*SM, 2006, http://www.interactivelegal.com/docs/alerts/SuperCharged_Credit_Shelter_Trust.pdf.

¹⁷¹ See I.R.S. Priv. Ltr. Rul. 9636033 (Sept. 6, 1996). Treas. Reg. § 1.61-22(b)(3) (2003) sets forth rules to determine whether a "family" split-dollar arrangement is governed by the rules of that regulatory section (which is what may be viewed as a traditional split-dollar arrangement) or Treas. Reg. § 1.7872-15 (2003) (which is a loan arrangement) applies to the split-dollar arrangement.

¹⁷² Jonathan G. Blattmachr, *Split Purchase Trusts*SM vs. *Qualified Personal Residence Trusts*, 138 TR. & EST. 2, 56 (Feb. 1999).

¹⁷³ Sir Francis Bacon, *Religious Meditations, Of Heresies* (1597).

advertisements for the attorney or firm but provide information that is important to their clients and prospective clients. Although that may be “giving away” certain information about certain matters (e.g., how a qualified personal residence trust “works”), it seems important to offer that because others have done so (and more will). In addition, lawyers and their firms should consider having video presentations on their websites—after all, they are there for free at www.youtube.com.

It seems likely that firms will actually develop interactive websites where the client can ask questions and receive a “computerized” response or can answer questions about certain estate planning matters and receive a “computerized” response. For example, firms will pose the following “Learn if you are likely to be a candidate for using a revocable trust.” If the client clicks on that “button,” a series of questions will be represented. The law firm’s software will analyze the client’s responses and then advise the client whether he or she is an appropriate candidate for the strategy and state why. Presumably, there will be an offer to meet with the client or prospective client to “formalize” the conclusion and to implement the strategy if that is what the client (or prospective client) wishes to do.

A website also can make the lawyer’s practice more efficient. For example, a website should allow a client or prospective client to enter information that will help the lawyer analyze the person’s situation and, therefore, legal needs. This will reduce the time the lawyer needs to spend asking mundane questions, such as “What is your date of birth” and also may prevent the attorney from asking questions such as “Are any of your children minors?”

I. Develop an Electronic Newsletter that Drives “Subscribers” to Your Website

Many law firms now publish newsletters “on line.” Lawyers, in general, have used their own “client” lists in sending the newsletters. However, it is nearly certain that these “educational” newsletters eventually will be sent to individuals and institutions from “lists” put together by others, such as banks, trust companies and insurance carriers. Firms that are not ready to exploit these advertising opportunities may not obtain as much business as they otherwise could.

J. Be Prepared for and Consider Using “Outsourcing”

Outsourcing jobs to workers in other countries has expanded at an extraordinary pace. As mentioned above, U.S. companies are now outsourcing legal work to lawyers in other countries where the legal services are less expensive. Although many claim that a “foreign” lawyer cannot adequately represent American companies and individuals,

rather sophisticated users of legal services seem to be concluding otherwise.¹⁷⁴ In fact, it seems that outsourcing legal work to legal service providers (whether or not lawyers under the rules of their home countries) may provide a way for companies to avoid the unauthorized practice of law statutes of the various states. Law firms that ignore this trend likely will be less competitive on pricing.

K. Changes in Government “Mandated” Health Care

There has just been a significant change of the regulation and provision of health care services in America. The new law limits the ability of health insurance companies to deny coverage on account of an existing condition. Certainly, some individuals will claim they have been denied coverage on account of such a condition and likely will seek legal representation to enforce their rights to the coverage. Also, the health care changes include more reporting to the federal government and additional taxes. Without question, individuals and companies will seek legal counsel with respect to such reporting and taxation. Future changes to health care, which is the largest industry in the United States, are certain to occur, spurring a further need for legal services in that area.

This will provide opportunities for attorneys who gain expertise and experience in this developing area of the law. It may fit “neatly” into a trusts and estates practice generally or an Elder Law practice in particular.

L. Keep Current on Billing and Charging Practices

There are few areas of commerce where the consumer does not have to pay “upfront” or simultaneously with the delivery of the goods or services. Yet many lawyers and law firms “trust” their clients to pay. Some lawyers charge retainers which reduce the risk of being “stiffed” for payment. It seems likely that there will be a trend toward more immediate payment to the extent the fee is contingent.

Practitioners must also be aware of “bidding contests.” They occur today and they have occurred in the past where, for example, a family is hiring legal counsel to help administer the estate of a family member. Now such bidding can occur by email from the family to law firms in the area or by creating bidding right on the Internet, much like Ebay allows bidding. Perhaps, more than anything, such bidding will result in greater competition, drive down charges for the legal services sought

¹⁷⁴ Alex Aldridge, *Microsoft outsources legal work to India with CPA Global deal*, Feb. 18, 2010, <http://www.legalweek.com/legal-week/news/1592244/microsoft-outsources-legal-india-cpa-global-deal>. “The lawyers are based in CPA’s offices in Gurgaon, near Delhi.” *Id.*

and necessarily require that lawyers be just about as efficient as possible in the delivery of the legal services (such as by the use of non-lawyers, by outsourcing to service providers in other countries and by computer).

M. Develop Greater Standardization in Practice

Although many lawyers have “standardized” will and trust forms and other form books that are on word processing systems in their offices and even though some have developed their own or have purchased commercial document assembly systems, law firms need to consider greater standardization, such as with engagement letters, transmission letters and frequently filed court forms (such as probate petitions).

If competition in a practice area builds, having workers (such as associates and paralegals) become expert in certain specific areas of the lawyer’s practice (such as conversion of certain retirement plans and traditional individual retirement accounts (“IRAs”) to Roth IRAs),¹⁷⁵ as opposed to having all associates and paralegals become expert in all areas, may produce efficiencies in the delivery of legal services.

However, probably the greatest efficiency will come through the expanded use of computer systems. There is little doubt that such systems may be used to determine litigation strategies and tactics, to recommend and implement estate planning and Elder Law strategies, recommend terms of and prepare prenuptial agreements and the like.

N. Consider the Realistic Needs for Actual Office Space

Many lawyers now do considerable work at home (often in a home office). It seems likely that as visual communication improves (such as with Skype) more work will be done at places other than the firm’s office, with in person meetings becoming limited to important client and staff matters where another form of communication is not efficient, keeping in mind the in person meeting likely will be more expensive for the law firm or the client, or both. Even firm provided education likely will be provided over the Internet and not in the firm’s offices.

That suggests that law firms must be cautious in entering long term office space. Brobeck, Phleger & Harrison, a large renowned west coast firm, went out of business, at least in part it seems, because it had more office space than it needed. It did a projection of future space needs and those needs did not develop.¹⁷⁶

¹⁷⁵ See I.R.C. § 408A (2000).

¹⁷⁶ Daniel Gross, *The Dot-Firm’s Dot-Bomb: How a leading West Coast law firm killed itself*, SLATE MAGAZINE, Jan. 31, 2003, <http://www.slate.com/id/2077953/>.

O. Develop Ways to Stop Defection

It is understood that Mudge Rose Guthrie & Alexander, a renowned New York law firm, headed by Richard M. Nixon, until his election as President of the United States, folded on account of defections to another firm.¹⁷⁷ That likely is the reason many firms fold. It is a vicious cycle: a profitable department departs, leaving the firm with the unnecessary space, personnel and other expenses that are impossible immediately to eliminate. Hence, profitability declines, triggering others to leave. It can happen almost overnight. As mentioned above, few attorneys typically act like a Musketeer (“all for one, one for all”) and will depart when it is in his or her perceived better interest, typically a financial one. That makes it extremely difficult for a law firm to engage in law firm planning because its “players” may depart and replacing them, even if possible, will take considerable time and, perhaps, expense.

A law firm that wishes to engage in serious long term planning needs to face and adopt methods to retard defection. That may include a moral pledge not to leave, having a truly open and responsive grievance procedure for partners (and associates), and providing financial rewards for not defecting (or extracting a financial cost for defecting). Facing defection as a serious issue in long range planning is critical—but virtually no firms have done so.

P. Develop Data Sharing Deal Flow

Some attorneys use checklists or similar systems to ensure that all tasks for a project are complete. Some do not. Checklists certainly reduce the risk of missing an important step in completing a project and may speed the completion process. Lawyers need to systemize them, make them “smart” and interactive. Indeed, lawyers need to use data sharing systems that allow clients to determine where their projects stand without having to incur the expense of calling a lawyer. For example, a client should be able to determine the status of where his or her installment sale to a grantor trust stands. Obviously, access to the client’s project must be secure. Some firms already have such deal flow cites. It is something attorneys need to consider promptly.

For example, consider the “everyday” task of having a client execute a revocable trust. The interactive checklist, accessible both by those within the firm working on the matter as well as by the client, might post that the client needs to determine who will become the successor trustee of the trust if the client becomes incompetent. The checklist also would prompt action (by sending emails) once a task has been

¹⁷⁷ Christina Pretto, *Mudge Rose lawyers join Whitman Breed*, 314 BOND BUYER, Iss. 29759, Oct. 19, 1995, <http://www.highbeam.com/doc/1G1-17541766.html>.

completed. For example, it would post who is responsible for having the document executed when it is complete, who is responsible for funding the trust and may have “warnings” such as listing “retirement plan” as an asset but stating “DO NOT TRANSFER TO THE TRUST.”

A sample checklist for an installment sale to a grantor trust is attached as Exhibit B. It could and should be made interactive and accessible electronically.

Q. Decide on Your Business Model

One important aspect of successful legal practice in the future will be a conscious decision on the law firm’s business model. Many firms simply develop their model of practice by driving market forces (e.g., having many individuals engage the firm for Elder Law work), intuition or desire to engage in a particular area of practice. There have been and likely will continue to be several different models.

1. *Internal Leverage Model*

As indicated above, many of the AmLaw 200 law firms “make money” by offering services of associate attorneys and paralegals, whose costs are “marked up” to make profits for the partners. The most profitable firms, in general, have the greatest leverage (that is the greatest number of non-partner charging persons within the firm to partners). Many Wall Street firms maintain leverage of greater than three to one.¹⁷⁸ This “leverage” model may or may not work well in a particular marketplace. In theory, higher leverage should mean partners serve more as managers of their legal services workers than as legal service providers themselves. But, in practice, that does not always seem the case. In fact, in many departments the partners record more chargeable hours than do associates or paralegals. The reason is the perception of partners that the most critical ingredient in their success (usually, measured by compensation) is more directly related to the partners’ “billa-

¹⁷⁸ The 25 most leveraged AmLaw100 firms have leverage rates ranging from 4.96 to 8.49 while the least leveraged firms in the AmLaw100 list have rates ranging from 3.55 to 1.89. Adamsmithesq.com, *The Great De-Leveraging*, Dec. 10, 2009, http://www.adamsmithesq.com/archives/2009/03/the_great_de-leveraging.html (For a full list of all AmLaw100 firms by leverage ratio, see Susan Beck, *Past the Tipping Point*, THE AM. LAWYER, Jan. 1, 2009, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202426909972&hbxlogin=1>.) Leverage tends to be higher in larger firms than smaller firms. NALP, *Law Firm Leverage Drops to Levels Last Seen 10 Years Ago*, Dec. 18, 2007, <http://www.nalp.org/lawfirmleveragedrops>. While high leverage was once seen as a “basic tenet of profitability,” high turnover rate and increasing salaries can hurt profit margins for highly leveraged firms. Susan Beck, *Past the Tipping Point*, THE AM. LAWYER, Jan. 1, 2009, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202426909972&hbxlogin=1>.

ble” hours (that is, how “hard” a partner appears to work, measured by such billable hours) than any other factor.

However, a rational case can be made that partners in firms built on the leverage model should be charging fewer billable hours and spending more hours on management, financial and marketing (business development) matters. The reason is that such a model only will be financially effective if there is adequate chargeable and collectible work for the non-partners (e.g., associates and paralegals) to do. Usually, for example, the firm may attempt to collect each year approximately three times the salary of the associate or paralegal. For example, if the associate is paid \$100,000 a year and the firm expects to be able to collect on 1,500 hours of the associate’s time during the year, it may seek to charge \$200 per hour for that lawyer’s time so the firm receives \$300,000 for that associate’s work for the year (\$200 per hour for 1,500 hours). Cost will vary from firm to firm and from market to market, but the associate’s overhead cost (e.g., secretary, office space, bar dues, and health, life and malpractice insurance coverage) may also be \$100,000. Hence, the associate costs the firm \$200,000 a year but if the firm does collect \$300,000 on that lawyer’s work for the year, the firm nets \$100,000 on his or her efforts. If each partner has one such associate, each such partner (on average) will make an additional \$100,000 per year than if the associate were not employed by the firm.

Based upon that, it seems obvious that, if instead of one such associate per partner there were three such associates, each partner at the firm would make not an additional \$100,000 a year but \$300,000 per year. However, greater numbers of workers, at least in theory, should result in the partners having to do more marketing (to attract the business for the associates to do) and more time in management, including attaching associate lawyers. In most firms using the leverage model, there is a growth in administrative staff—for example, to handle human resources, insurance, compensation, vacation and many other administrative matters. That is a cost and must be considered in determining the viability of the internal leverage model.

The internal leverage model can backfire for a law firm if it does not generate sufficient business for which it can charge associate and paralegal time (or efforts) or does not “manage” its legal staff to complete the work and, if time spent is a factor or the factor in determining charges for work, making sure the time is correctly recorded. It cannot instantly increase and decrease its hourly-charging work force as the flow of business wanes and waxes. That suggests that the leverage model for a firm or department should be based on concerted business efforts, including determining the areas of practice that will experience an increase, decrease or produce a consistent level of work.

2. External Leverage Model

Although not widely used, it is possible for a firm to use an “external” leverage model—that is, one that uses independent contract status lawyers and paralegals as the need arises. Putting aside the question of whether these “outside” lawyers and paralegals will be treated as employees for certain tax purposes, the model draws on lawyers on a part-time or “as needed” basis. There appear to be advantages and disadvantages of such a model.

One of the benefits is that the firm does not incur all of the costs that are usually associated with full time workers. If the independent lawyer (an “outside associate”) is not assigned work to do, then he or she is not paid. The amount of office space and administrative support needed by such an outside associate (or paralegal) almost certainly will be reduced (as the outside associates will likely work from home or will share a work space while physically present at the firm). Potential complications (some of which are emotional) in “discharging” such an independent worker may be significantly reduced.

There are, of course, detriments of such an external leverage model. For instance, the independent worker may not be able or willing to take on the work as assigned. Also, there may be a lack of continuity of workers which, of course, is more likely to happen if it is a long term project (which, for an individual estate planning client, may include work over a considerable period of time, starting with “basic” estate planning documents and then “advancing” into other matters, such as a trust or a section 529 plan for grandchildren, and more “complicated” matters, such as an installment sale to a grantor trust). There may also be less supervision of the outside worker which may affect both the quality and timing of work performed by such person. In addition, the client must approve of the outside attorney working on his or her matter. There might also be conflict of interest issues, thereby adding another ethical concern.¹⁷⁹

However, this “outside” or external leverage model has worked for decades for firms using “special counsel.” It should be noted, nevertheless, that these outside counsel lawyers usually are much more experienced, often work in very discrete areas and may be academics.

¹⁷⁹ MODEL RULES OF PROF'L CONDUCT R. 1.6 (a) provides, “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” While consultation within a firm is probably deemed within the implied authorization to carry out representation, the involvement of outside counsel is not likely included in that implied consent. Therefore, an attorney cannot allow an outside attorney to work on a client's matter without the client's informed consent.

Nevertheless, the “pool” of available outside “counsel” likely will be expanding as more experienced internal lawyers wish to work part-time¹⁸⁰ (such as while raising children) and as many are laid off on account of lack of legal workflow at their firms.

Historically, both the internal and external leverage models have worked well where there is adequate work for the non-partner workers and where their efforts can be charged by the hour or the equivalent. The equivalent to the by-the-hour method of billing is simply one where the law firm quotes essentially a fixed fee for a specific project but can reasonably estimate the time that the work will take. In some cases, of course, the firm will make less than its standard hourly charges and sometimes more.

A reasonable argument can be made that more external leveraging will be used by outsourcing legal work to lawyers in other countries, such as India, where English is the most common language and the basic legal system is the English common law. Lawyers likely can be engaged for specific projects without creating an employment arrangement and without providing the benefits (such as health care insurance) an American firm might have to provide even to an “outside” American lawyer. The lawyers in such developing countries are likely to work for lower salaries, meaning a “mark up” of what they are paid may produce a much larger profit for the U.S. law firm that uses their services and, also, may allow such an American to “underbid” its U.S. competitor firms.

3. *Software Leverage Model*

It seems there likely will be the capacity for a law firm to effect leverage with computer software. Assuming the software can “simulate” certain lawyer tasks, it likely can do it more inexpensively than even an “outsourced” lawyer in India. Computer systems today can analyze whether a specific individual likely is a candidate for a charitable remainder trust, charitable lead trust, a qualified personal residence trust, a split-purchase trustSM (as opposed to a qualified personal residence trust), a family limited partnership, a grantor retained annuity trust and more. In addition, document assembly systems are available to draft the documents to implement many chosen strategies including those just listed in a matter of minutes, although some “customization,” such as naming guardians for minor children and other fiduciaries, al-

¹⁸⁰ Piper Lowell, *Acceptance Growing for Part Time Lawyers*, PHILADELPHIA BUS. J., Jul. 16, 2004, <http://www.bizjournals.com/philadelphia/stories/2004/07/19/focus2.html>. Although the legal profession has notoriously rejected the part time work model (with only about 1 in 25 attorneys working part time, as compared to 1 in 8 in the general workforce), the number of part time attorneys nationwide is slowly increasing. *See id.*

most always is required but with only minutes of additional time needed to effect that customization.

Similarly, software will analyze the basic effects of implementing certain estate planning strategies such as creating a grantor retained annuity trust or a personal residence trust. In the near future, a broad array of estate planning recommendations will be produced by computer software and the effects of an estate plan illustrated using Monte Carlo analysis.¹⁸¹ Systems will be developed to implement an appropriate administration of a decedent's estate including analyzing whether the estate qualifies for certain tax options (such as deferral of estate tax relating to a closely held business interest pursuant to section 6166 or valuation of real estate at its "special" use and whether exercising that option appears appropriate). It will also recommend litigation strategies and tactics. This type of computer capacity will do several things. First, it will reduce certain outsourcing to overseas lawyers, as the computer, as mentioned above, will do its work less expensively than any lawyer somewhere in the world. Second, it likely also will reduce the leverage of non-partner workers to partners. Third, it will tend to reduce the cost of delivering services and, perhaps, reduce perceived distinctions in quality of one lawyer or law firm to another. In other words, it may not just standardize the delivery of certain legal products as "packaged" products, but convert them into merely being "commoditized" products, as suggested in *The End of Lawyers*.¹⁸²

4. Tailored Product Practice

Although it seems highly likely that certain legal products, such as wills, trusts and recommendations to reduce the risk of post-death litigation among inheritors, will become packaged if not commoditized, it seems extremely likely that, for the foreseeable future, many legal services will continue to be "tailored" for the specific circumstances of the client. Many of these involve finding unique legal issues. For example, under the modified carryover basis rules of section 1022 of the Internal Revenue Code of 1986, as amended, inherited assets present new issues or at least issues that may be treated in a different manner than they were under the original carryover basis rules of now repealed section

¹⁸¹ See, e.g., Jonathan Blattmachr & Diana Zeydel, *Evaluating the Potential Success of a GRAT Against Competing Strategies to Transfer Wealth*, 47 TAX MGMT. MEMORANDUM, No. 2, Jan. 23, 2006, available at <http://www2.gtlaw.com/pub/articles/2006/zeydeld06a.pdf>, based in part on such a Monte Carlo analysis.

¹⁸² RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* ch. 2 (2008).

1023, such as the treatment of so-called “negative basis property.”¹⁸³ However, when a legal issue or matter will affect a sufficient number of clients, information, including the “solutions” to the problems or opportunities these present, will be made available, often without any charge, by those whose skills produce the “best” tailor-made results.¹⁸⁴ When, if ever, such “sharing” of observations and advice will no longer be provided “for free” on listserves, etc. is hard to determine. It may be that some lawyers who develop unique ideas that are beneficial will not readily share them although, for several reasons, they have not be able to keep them proprietary for an extended period.¹⁸⁵ These lawyers, who develop unique ideas, may be prone to attempt to patent them. In any case, it seems these lawyers may be a special resource for a law firm, attempting to develop and maintain a unique “branding” for the firm to gain and maintain business while other lawyers in the firm are more “implementers” of legal products.

5. *LegalZoom Model for Law Firms*

As mentioned above, LegalZoom and its competitors offer legal forms and, perhaps, what may be viewed as also offering legal services. It seems nearly certain that law firms will adopt some of the “systems” that such companies offer. For example, clients and prospective clients, as indicated above, will be able to enter the firm’s website and be provided information (either for free or for a price) relating to services the firm provides. The client will be able to download certain information about his or her particular situation (e.g., family, wealth, health, goals, and tolerance for cost, financial and legal risk) and the “products” the client wants—either generally (reduce estate taxes) or specially (create a qualified personal residence trust). The law firm then can review and analyze the information and the items “ordered” by the client, meet in person, telephonically, electronically or virtually¹⁸⁶ and then implement

¹⁸³ “Negative basis property” is the term used to describe an asset which has an income tax basis that is lower than the indebtedness against the property. *See Crane v. Commissioner*, 331 U.S. 1 (1947).

¹⁸⁴ The ACTEC Listserv has provided lawyers with a tremendous amount of information about the ramifications of the “expiration” of the federal estate and generation-skipping transfer taxes and the carryover basis rules for certain inherited property for those who die in 2010. Some observations shared on that listserv seem extraordinarily insightful. Moreover, Fellows of ACTEC daily pose questions about legal issues for clients which often are answered by other Fellows.

¹⁸⁵ One inhibitor is that any claim to a “proprietary” income tax concept makes it a Reportable Transaction (which must be disclosed by the taxpayer to the Internal Revenue Service or subject the taxpayer to penalties). *See* Treas. Reg. § 1.6011-4(b)(3) (2007). Also, it may be fair to observe that “the walls have ears” as to legal ideas.

¹⁸⁶ Virtual meetings will become common in the future. Individuals will “appear” to each other as though they are in the same space (e.g., home or office). This technology

what the client decides he or she wants. Time for production of the documents will be reduced although, on account of the “step transaction” doctrine or other doctrines, there may continue to be delays in implementation. For example, if a client determines to use a funded revocable trust, a software system will assist with changing ownership to the trust. It will occur through Internet “directions” to the entities involved (e.g., brokerage firms, banks, government offices where title to property is maintained).

As indicated above, it seems likely that certain services will be packaged. To what degree that will be offered without charge is uncertain. Most lawyers likely will resist allowing clients (and prospective clients) to provide significant “do it yourself” options. One reason relates to liability: if a lawyer allows a client to use his or her own forms and the client suffers damage, the lawyer might be sued for malpractice although if there is no charge it seems the attorney should not be liable. Second, the lawyer will want to be paid.

6. *Contingent Fee Models*

It should also be mentioned that where the firm’s fee is based upon a contingency (such as a percentage of recovery in a litigation), the amount of “capital” the firm must have invested may be considerably more than that of a firm that charges by the hour. As reflected in the movie “A Civil Action”, contingent fee litigation can bring a firm “down.” Certainly, especially careful planning is required for a firm that works for contingent fees.

7. *Historic Models*

Lawyers may choose to use their existing model of practice, typically a solo practice or a firm having greater attributes of office sharing or ones of a true partnership with profit sharing among its members. New or different issues relating to matters such as cost sharing for websites, computer software systems (for example, for legal research access, document production and “smart” artificially intelligent systems), marketing, office space, and personnel no doubt will arise. The greater use of technology and changes in fee structure from by-the-hour to by-the-job will likely drive the resolution of such issues.

R. Legal Firm Fee Structure

It seems quite likely that trends in how lawyers charge for services will change and likely will gravitate from by-the-hour to by-the-job bill-

will be available either by three dimension (3D) systems or projecting images in three dimensions.

ing. It appears that a trend toward by-the-job billing is a natural result of two factors. First, the more widespread use of computer software to deliver legal services will reduce the dependence and emphasis on the time it takes to complete a task—rather, the emphasis will be on knowledge as to what to implement. Also, law firms may have substantial investment in such systems and attempting to recover that cost under a by-the-hour billing does not seem like an efficient business model—in fact, the more these “smart” systems are used, the less time it will take to implement the legal work; the more time a task takes, the less likely it is dependent on advanced software systems. Second, it appears competition, at least in some fields, will increase: if some lawyers in the field charge by-the-job, it may be difficult for their competitors to charge by-the-hour especially if the prospective clients perceive more financial risk in such an arrangement or a higher charge and do not perceive there will be an extraordinary difference in the product each lawyer produces.

IX. MY FORECAST FOR LEGAL PRACTICE CHANGES IN THE NEXT DECADE

- * The equivalent of Wikipedia will develop in the law. This will function as a superblog for lawyers and will provide nearly instant information about thoughts on legal developments and planning and implementation of strategies.
- * In person meetings will diminish and be substituted by video and then virtual meetings in part because full immersion audio visual virtual reality will be developed. Although it will be used initially for recreation, it will soon be adopted by businesses, including law firms, on account of gaining efficiencies and reducing costs.
- * The need for office space by law firms will be reduced with more lawyers (and others employed by law firms) working from other places such as from home or from a vacation spot.
- * Computers will evolve to have the same basic power as human brains and be able to better mimic human thought.
- * Computers will take over many tasks from driving automobiles to preparing meals, providing more time for work and recreation.
- * More individuals will retire and planning for their retirement (and especially retirement plans) will become increasingly important.
- * Typing will nearly disappear and be substituted with verbal and thought input.¹⁸⁷

¹⁸⁷ “The NeuroPhone, developed by Dartmouth College researchers, uses signals detected by a wireless EEG headset from Emotiv to select and dial an iPhone contact just by thinking of the person. . . .” <http://www.kurzweilai.net/email/newsRedirect.html?newsID=11993&m=56145>.

- * Paper books, newspapers and magazines (including legal periodicals) will essentially disappear.
- * Broadband Internet access will become available almost everywhere, facilitating working outside of traditional law offices.
- * Computers will be capable of many new multiple functions, including accurately accessing all information about a topic (such as a rule of law) without the current overload (such as one million or more “hits” when searching something on Google) and perform basic legal research.
- * Computers will be used to analyze certain client information, make recommendations and “draft” documents (through “intelligent” document assembly systems).
- * Government benefits and shifting of wealth will increase and the life expectancies of those living in developed countries, both on average and maximum age (now essentially age 100 years for most), will increase (in part by nanotechnology), producing an increase in demand for legal services which will be met, in an ever growing measure, by computer software.
- * Law offices will become almost entirely paperless and legal documents, including wills, will be stored electronically only.
- * States or the federal government will pass the equivalent of the English Legal Services Act, under which new business structures (other than law firms) may provide legal services.¹⁸⁸

X. WHERE I PART COMPANY WITH RICHARD SUSSKIND

Any lawyer concerned (or who should be concerned) about his or her practice should read Richard Susskind’s book *The End of Lawyers?* It is a thorough, thoughtful and thought provoking work. He makes many statements, which he acknowledges many lawyers will reject or will be offended by, with which I agree. For example, he states:

- [I]t is instructive to unpack the notion of legal expertise. . .many lawyers exaggerate the extent to which their performance depends on deep expertise.*** We should subject it to scrutiny and analysis. . .knowledge is being paraded as expertise and yet analysis shows it to be capable of being reduced to routine tasks in whole or part. . .
- Lawyers often overstate the extent to which the content of their work is creative, strategic, and novel.*** If [Thomas] Edison allowed that [only one percent] of his work was in-

¹⁸⁸ See Ministry of Justice, *Legal Services Act 2007*, <http://www.justice.gov.uk/publications/legalservicesbill.htm>. “The Legal Services Act sets out the framework for reform, which include setting up a Legal Services Board and an Office for Legal Complaints and enabling legal services to be provided under new business structures.” *Id.*

spiration, I wonder about the possibility of lawyers' claims that most corporate work (to take an example) involves a higher level of creativity.

- [O]n analysis, many tax problems can be reduced, effectively, to a large decision tree of a structured body of rules, so that a computer system would be especially well suited to solving what otherwise might seem to be an insoluble challenge for the non-expert.

I largely agree with those statements and his conclusion about how technology and the information “explosion” will tremendously affect the delivery of legal services and how lawyers and law firms must evolve. I do not agree with what I take as an implied future result: that the number of lawyers may soon diminish. I believe that the demand for legal services will continue to increase. In fact, I think the demand for legal services is much greater than it appears—the only reason for the limit on the demand is the cost. Certainly, the use of outsourcing and computers may take over tasks that American lawyers currently undertake but the need for lawyers will remain for the foreseeable future, in my view anyway. The demand will remain but the form of delivery will change.

XI. CONCLUSIONS

Forecasting the future is difficult. However, some trends relating to the practice of law seem to be likely to happen. It appears that the law will not soon become less complex and it is likely that it will become more complicated. The price of legal services, as with virtually all other items for sale, is determined by supply and demand. An increase in the complexity of the law suggests a continuing increase in the cost of legal services because it will result in a greater demand for such services (to comply with the law or to extract benefits it provides).

However, demand for delivery of services from “human” lawyers may decline on account of the availability of services provided by computer systems and non-lawyers (such as LDAs in California). Document assembly systems will replace more of the drafting by humans; integrated software systems will make recommendations for legal action by clients and strategies for lawyers to implement; clients will be able to download information from attorneys which will reduce the time to make recommendations and implement strategies; computers will assist in dispute resolution; fewer law firms will have significant office space; fees will tend toward being determined by-the-job rather than by-the-hour; in person meetings will be reduced with more “virtual” meetings over the Internet with visual “appearances;” a greater demand for legal services will develop for older Americans.

It appears that the delivery of legal services has become more efficient on account of technological advances over the past 40 years—from word processing, to computerized research, to instant written communication and delivery of documents (which is the main medium by which legal services are rendered other than representations to government agencies, including courts, and in face-to-face negotiations). It is certain this trend toward greater efficiency will continue over the next ten years. It also will result in less physical space used by law firms and the more widespread development of truly paperless offices.

However, the ultimate role of the lawyer in counseling individuals (and companies) will not disappear during that timeframe. Nevertheless, lawyers (and many others) cannot fall behind the change curve.