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LEGAL PROFESSIONALISM IN THE INFORMATION AGE

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Abstract

Although networked information technologies are transforming the ways that legal professionals do business, the future of legal practice is likely to remain secure in the information age. Less certain, however, is the future of the prevailing status quo within the legal professions as market forces pressure them into adapting to new ways. Evidence of this change is found in the narrowing of the strip of blue water between lawyers and the increasingly professionalized and expanding paralegal community.

¹[Page 50] It was the well known American jurist Louis Brandeis, who, over a century ago, perceptively observed that legal work was "limited by time and space" because lawyers were dependent upon local transport, postal services and contemporary communications technologies. If we take Brandeis's observation just one step further, were those technologies to change, then so will the nature and rate of lawyers' work. British academic Richard Susskind was therefore absolutely right when he wrote that information technology will, and is, radically changing legal practice and the structure of law

firms². Of course, technology has already radically changed the way that legal practice is organized because the typewriter, the telegraph, the telephone, the dictating machine, telex and the fax have each successively transformed the division of labor within both the practice of law and also the various legal processes. But what is markedly different about information technology (IT) today is that it enables information to flow across global networks and it is shaping law and legal practice in two distinctly different ways. Firstly, it is changing the way that legal practice is taking place and, in so doing is changing the nature of legal professionalism. Secondly, it is transforming offending behaviors that require new types of responses

¹ Article based upon closing keynote speech to the 26th Annual Conference, American Association for Paralegal Educators (AAfPE), Baltimore, USA, 27th Oct., 2007.

² Susskind R. (1998) *The Future of Law*, Oxford: OUP.

from the legal professions. I will discuss today the impacts of both sets of change upon legal professionalism.

Legal professionalism in the information age

In his response to Susskind's comments, Philip Leith³ argued that information technology alone is not a panacea to the troubles of legal practice and that a more holistic approach is needed. I agree with both authors in that, yes, IT is not the all-encompassing solution to the problems of legal practitioners ... and ... yes, they have got to wise up to the new demands and opportunities that are emerging. But I think that there exists fairly strong evidence to show that practitioners have already 'woken up' and are 'smelling the coffee'. What they haven't tended to do yet, however, is to fully consider these changes, particularly those [Page 51] involving the convergence of communications and information technologies, when forming their strategic plans. Whilst I would venture to suggest that the future of Law is safe, I would also venture to suggest that the future of the legal professions in its current form is not?

At this point we need to rewind history to consider the nature of the pressures that have led law firms to introduce technology. During the

past thirty years, law, legal practice and legal professionalism have undergone progressive changes. Changes that have responded to demands for law firms to increase their operational efficiency, make working practices more economic and make their organizational structures more effective. Not only has there been the growth of an advice culture within society - the UK for example, saw a five-fold increase in the numbers of people seeking (mainly legal) advice from the early 1970s to the 1990s. But, there has also been an overall increase in the volume and complexity of law. Crudely expressed, we now have more or less the same amount of laws as in the past, but the pages they now cover in the books have more than doubled. Also related to these trends is the ever-increasing pervasiveness of law because lawyers, legal administrators and judges are becoming more entrepreneurial and innovative in designing and re-designing institutions and procedures. So, Law is now more plural and decentralized than it ever was as it comes from multiple sources with more and more rules and standards being applied by more participants to more varied situations. Legal work has simultaneously become more costly, yet none-the-less desired!

Not surprisingly, these trends in law and practice have contributed during the past two or three decades to a multiple increase in the number of

³ See Leith, P. (2001) 'IT and the Future of Law', *ILEX Journal*, February.

lawyers entering the professions and a greater increase in the number of law graduates. There are now record numbers of lawyers on the bar rolls and the population of paralegals is expected to expand considerably. But I would also offer the view that in this increasingly litigious society, successive generations have greater understanding of law than their predecessors and therefore much higher expectations of those who practice it. These supply and demand trends have exerted considerable pressures upon legal firms to adapt in a business-like way to modern market forces in order to survive - with several knock-on effects for the legal professions. At an organizational level, for example, the rationalization of firms into large "mega-law" firms has both reduced the number of self-employed legal professionals and also shifted lawyers away from general practice towards legal specialization. Consequently, the traditional "trustee" relationship between the lawyer and client has been superseded by a relationship in which lawyers are no longer seen to provide a legal service in the traditional sense, but are now broadly perceived as conducting legal business with the client. Technology will continue to play an important role in enabling law firms to respond to external pressures.

My own research into the use of information technology by UK

lawyers uncovered a range of diverse and far-reaching, impacts⁴. Globalised impacts that are, therefore, reflected in the practice of US law firms. Broadly speaking, IT has had three main levels of impact. At an administrative level, it has enabled existing functions to be carried out more efficiently; for example, supplementing the back office function and replacing dictated letters and file keeping. At a managerial level, IT assists legal firms in improving their operational efficiency through better case handling and billing. IT also provides practice managers with the all-important performance indicators. At a professional level, legal IT databases such as Lexis/Nexis and Westlaw help lawyers to become more informed by the law itself - some of which is IT law. Having said that, the use of IT by legal professionals was found to vary across the different areas of law. The lawyers who most used IT were located in IP and IT law and also commercial law, whereas those lawyers who used computers the least tended to be located in the more traditional client-based areas of crime and family law. These fundamental differences of usage remain today, although just about all

⁴ Wall, D.S. (2000) 'The New Electric Lawyer and Legal Practice in the Information Age', pp. 109-124 (Chapter 5) in Akdeniz, Y., Walker, C.P. and Wall, D.S. (eds) (2000) *The Internet, Law and Society*, London: Longman.

legal professionals now use IT for communications.

Importantly, the research revealed a remarkably optimistic overall picture of the law firms and their legal professionals embracing IT [Page 52] much more with enthusiasm than cynicism. However, further investigation found that much of this enthusiasm was driven by the competition engendered by corporate clients' increasing expectations that their lawyers should have robust IT systems in place. Consequently, the larger law firms tend to view their information technology as a potent symbol of their corporate virility. Of course, a clear danger in the race to get onboard with the latest IT is that law firms can easily under-estimate the amount of effort and resources required to commission new IT systems. In the late 1990s, for example, it was not unknown for large quantities of un-boxed and out-of-date computers to be discarded by law firms because they had not provided enough IT training for their staff. A brief follow-up of my original UK research contacts two years ago found that the (once) offending firms are now providing sufficient basic training, plus more – which is being further enhanced by an overall improvement of societal levels of IT literacy.

We are currently witnessing the legal professions in a state of transition, but arguably a state of permanent transition in which they

have to continually and quickly adapt to rapid shifts in the market for legal advice. As modern lawyers increasingly become more engaged in conducting legal business with clients, remarkably little of their role involves the substance of law. This move away from the traditional, generalist conceptualization of legal professionalism not only illustrates the degree to which the lawyer's role has become rationalized, but it has also created a gap in the labor market that is being filled by the less costly paralegal. It is a process of change that can best be understood in terms of the continual process of deskilling and re-skilling that sociologists tell us is present in all forms of organisations involving work⁵. Applied to law firms, the deskilling argument goes like this. In order to make firms more efficient, economic and effective, wages have to be kept low by 'degrading' work – by dividing jobs into their component tasks and then automating them. It is not, therefore, surprising that the secretarial role, once the mainstay of the law firm, is disappearing as new forms of IT and managerial practices enable other legal workers, including lawyers, to absorb the tasks. Consequently, once commonplace, it is relatively rare today for legal practitioners to have their own personal secretary⁶. But

⁵ See Braverman, H. (1976) *Labor and Monopoly Capital*, New York: Monthly Review Press.

⁶ The annual Robson Rhodes IT surveys charts the decline in secretarial ratios.

this deskilling hypothesis is not wholly destructive because the process of automating work tasks also generates demands for new skills - most visibly, IT support and IT managers. IT also transforms existing roles, for example, any remaining secretarial roles are rapidly being morphed into administrative posts, personal assistants or paralegals. This process is unlikely to stop because all newly qualified lawyers (and paralegals for that matter) are expected to possess some generic IT skills. Furthermore, their own roles are also being 'specialized'.

Taking the deskilling and reskilling hypothesis further, new networked information technologies are also providing the public with greater access to legal information. With the possible exceptions of law practiced in 'emergencies', such as criminal or family law, clients are now tending to seek out legal services with a more pre-formed, even informed, view of what those services can achieve for them. Simply put, the majority of those with access to the internet will have previously 'Googled' their problem, and many will actually have sought out more substantive information on the relevant areas of law. As the use of the internet becomes more common place then it is highly conceivable that potentially cheaper and more effective forms of legal services will be offered to clients with independent and interactive personal access to legal information and

advice. It is quite conceivable that in the near future, consumers with legal problems will be able to seek advice and also the resolution of legal problems without ever directly consulting a lawyer – see for example, the increasing popularity of online alternative dispute resolution. Moreover, if a personal consultation does take place, then both client and legal adviser may never meet face-to-face during the course of their dealings. The implications of this development are quite profound because even our currently changing notions of legal professionalism will soon be outdated as more of the professions' mythical legal knowledge becomes publicly available and software is [Page 53] developed to undertake simple legal procedures. In the future, legal practice will likely relocate in areas of law which require even greater specialist legal knowledge.

The cybercrime problem and the legal professional

A growing demand for specialist legal knowledge is that which relates to the cybercrimes that crawl out of the dark side of networked technologies. Although many so-called cybercrimes are actually traditional forms of crime that can now take place through networks on a global scale, there are some that are entirely new and which require new legal strategies to resolve them. Most of the recent literature on cybercrimes will outline these new behaviors and if you will forgive this

shameless plug please check out chapters 3-7 of my own book *Cybercrime: The Transformation of Crime in the Information Age* (Polity, 2007). In short, networked technologies have deskilled and reskilled the criminal process in the same way as they are doing to legal practice and related forms of organization. A graphic example of this change is to ask why should criminals still go to the effort of committing a dangerous \$40million bank robbery when they can much more easily commit 40 million \$1 scams from the comfort of their own homes – or indeed someone else’s! Please note that this is a hypothetical example and do not try this at home – either yours or someone else’s!

A very poignant example of the challenge of true cybercrimes is found in Identity theft. Most of us will have some experience of ‘phishing’ because we at some time we all have received bogus emails purporting to be from our banks and which encourage us to log onto convincing, but fake, websites to allegedly ‘reaffirm’ the personal information they hold about us. When responding we often and unsuspectingly give away valuable personal information about ourselves that can subsequently be used to defraud us. As recipients of phishing emails have gradually become wise to the scams, phishing has evolved into ‘SMiShing’ with offenders sending out computer-generated SMS (cell phone) texts to encourage recipients either to log

onto a fake www site, or to call a number purporting to be their bank security department. Even more recently, SMiShing has evolved into vishing which uses VoIP (voice over internet protocol) to send out the messages. The main challenges that phishing poses are that the offences are individually minor and tend only to be serious in their aggregate - indeed the theft of data is not an offence in all jurisdictions. It is also the case that until a fraud takes place using the stolen information, then the only form of legal prevention available are sub-criminal anti-spamming laws. Even when a fraud does take place (usually credit card misuse or unauthorized account take-over) then the police may be reluctant to investigate the case because the losses may be too small, or the problem may be global rather than local, or the local police may think that it is the province of the banks, or the banks may prefer no police contact in order to keep the knowledge of the scams out of the public domain. Identity theft therefore creates a range of fairly new important issues for both law enforcement and lawyers representing victims, especially when a defrauded individual wishes to restore their financial (or moral) reputation to what it once was.

Conclusions

I think that it is safe to say that the future of law and legal practice is fairly secure; however, I also think that the current status quo within the legal professions is less safe. On the

one hand, the various reports of the demise of the legal professions are greatly exaggerated, simply because the professions respond quite aggressively to change, as they have always done, by adapting to prevailing market forces. On the other hand, we are already seeing the increased professionalization of the rapidly growing and increasingly prosperous 250,000+ strong US paralegal community with its representative and support organisations such as the National Association of Legal Assistants (NALA), National Federation of Paralegal Associations (NFPA), the International Paralegal Management Association and, of course, the American Association for Paralegal Education (AAAFPE). Whilst the American Bar Association's Standing Committee on Paralegals stands watch over paralegals to ensure that they only perform "specifically delegated substantive legal work for which a lawyer is responsible"⁷, in practice, how much blue water remains today between the time-sheeted salaried lawyer and the paralegal? Will IT continue to narrow that strip of blue water, if not bridge it completely? Whilst I predict that the configuration of the professions may not remain in precisely their current form, it is certainly the case that in the future

individuals called lawyers, with specialist legal knowledge of substantive law and its process will continue to advise their clients in one way or another. It is this 'another' way that the law firms need to be focusing upon.

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Note about the author

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⁷ American Bar Association, Standing Committee on Legal Assistants. Available from
<<http://www.abanet.org/legalservices/paralegals> (accessed on 26th February, 2008).