The Future of the Species

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Lawyers, as a species, are not particularly amenable to change.

I suspect this has been true since—well, probably forever. It was most likely a subject of discussion among the lawyers who were practicing when I was born in 1941.[1] More recently, John W. Reed, Thomas M. Cooley Professor of Law Emeritus at the University of Michigan Law School, spoke on the subject of change during the State Bar of Michigan Annual Meeting Luncheon in 2005. He explained why the tide of change hits lawyers with particular force:

> From the first day of law school, lawyers are trained to think in terms of precedent. On the basis of what *has* been decided, we tell clients what they may do and may not do. We are specialists in the past; we are professional antiquarians.
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> [O]ur role as interpreters of the past lends a certain steadiness, a stability, a calmness to our society that has served us well through expansion and war, prosperity and depression....But I suggest that the rate of change in our world in the early part of the 21st century is so dizzying that it will no longer suffice to apply the methods of the past when it comes to meeting the larger problems of society, and government, and, yes, our profession. Lawyers defend the status quo long after the quo has lost its status. All too often we fit Mort Sahl's definition of a conservative as one who believes that nothing should be done for the first time. Someone said that *stare decisis* is Latin for "we stand by our past mistakes."[2]

Examples of our profession's stubborn resistance to change are everywhere. They're in our writing, where many of us still use clunky *heretofores* and *wherefores* and phrases from a long-dead language. Some lawyers still underline case citations even though underlining is a relic of the typewriter age and we can now italicize citations with a mouse click. As Reed warned us, "A change for the better will be made against you."[3]

Technology, of course, is a perennial problem for lawyers. Our offices are the last refuge for typewriters and Dictaphones. And I can guarantee that the very last people on earth to use BlackBerry phones will be attorneys—and they'll swear you'll have to pry their devices from their cold, dead hands.

Our courts resist change, too. The Internet has been ubiquitous for almost 20 years now, and many courts around our state still don't permit electronic filing or make court records publicly available on their websites. Our nation's Supreme Court is supreme in its resistance to modernity. Alone among the major institutions of government, the Supreme Court shuns television cameras, preserving law's inner temple for its high priests.

Plainly, change isn't easy for lawyers.

What's our problem?

There are two primary reasons, I think, for our reluctance to let go of old practices. First and foremost, lawyers are risk-averse—and change is risk. If the old ways still work, we think, only a fool would opt for new ways. Second, there's our sense of history, our desire to practice law in the same ways John Marshall and Clarence Darrow and Abraham Lincoln practiced law. We want to clothe ourselves with the mantle of our forebears.

From one perspective, both traits—our natural conservatism and sense of belonging to a profession—are admirable. But from another perspective, they have a less desirable cast. Conservatism, in its more extreme forms, is cowardice. (I'm talking here about the temperamental sort of conservatism, not the political one.) And our sense of the law profession's history can turn into a guild mentality, a desire to protect our own from forces that demand change.

But change comes, whether we like it or not. And we do ourselves a disservice if we let risk aversion or our profession's historical roots (or their cousins, fear and self-interest) keep us from figuring out how to serve our clients in a rapidly changing world.

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Tomorrow's Lawyers

To that end, I've found Richard Susskind's *Tomorrow's Lawyers* to be a helpful guide for thinking about the changes currently affecting the legal profession.[4] Susskind is a consultant who has written extensively on this topic in the global context. Although he is based in England, his work concerns the American legal profession as well. *Tomorrow's Lawyers* is written primarily for young lawyers and their teachers, but is full of insights for legal professionals, too. I think it is a must-read for anyone practicing law today.

Susskind begins by telling us, very politely, to get over ourselves:

> The future of legal service is neither Grisham nor Rumpole. Nor is it wigs, wood-panelled courtrooms, leather-bound tomes, or arcane legal jargon. It will not even be the now dominant model of lawyering, which is face-to-face, consultative professional service by advisors who meet clients in their offices, whether glitzy or dusty, and dispense tailored counsel.[5]

Rather, legal services will be increasingly web-based and automated, except for what Susskind calls "bespoke work"—services that must be tailored for each individual client.

Susskind sees three main forces behind these changes: client demand for affordable legal services, which he calls the "more-for-less challenge"; relaxation of rules that prevent nonlawyers from engaging in what has traditionally been seen as legal work, or what Susskind calls "liberalization"; and information technology.

More for less

As to the first factor, we're all familiar with clients' desires for more affordable legal services—and, one hopes, with our own desire to provide more affordable legal services. Susskind observes that middle-income households and small businesses are often priced out of retaining legal counsel, with the result that only the wealthiest and the poorest (those who qualify for legal aid) are able to retain lawyers.

The billable hour is one of the primary culprits here. And Susskind correctly observes that it is more than just a method of billing for our work: "In truth, billing is not simply a way of pricing and billing legal work; it is a mindset in a way of life." Some of our clients share Susskind's suspicion that the billable hour is inherently inefficient: "Hourly billing is an institutionalized disincentive to efficiency. It rewards lawyers who take longer to complete tasks than their more organized colleagues, and it penalizes legal advisors who operate swiftly and efficiently." In many ways, it is out of step with our clients' desires.

Susskind argues persuasively that the days when we can ignore the demands for more affordable legal services are waning. He advises that we will increasingly see alternative fee arrangements, competitive bidding for the opportunity to represent clients, and clients sharing the costs of legal services. On this last point, Susskind argues, for example, that banks "could come together and share the costs of undertaking many of the compliance jobs that they have in common."[6]

The implication, of course, is that firms failing to heed these consumer demands will soon cease to be firms at all.

Liberalization

"Liberalization," as Susskind calls it, is one of the harder forces for lawyers to stomach. We hate the thought of nonspecialists performing some of our work or in-person consultations being replaced with software that autofills forms. But, as Susskind reports, England and Wales have already liberalized rules governing legal businesses, and change is coming across the pond. Indeed, Susskind predicts that clients demanding lower-cost legal services will take note of liberalization in other countries and demand similar changes in the United States.

One of the keys to liberalization (and, thus, to providing better legal services for less) is breaking our work into its component parts—a process Susskind calls "decomposing." For instance, shepherding a lawsuit from complaint to a final ruling from an appellate court involves a host of separate tasks, which Susskind groups as follows: document review, legal research, project management, litigation support, electronic disclosure, strategy, tactics, negotiation, and advocacy. Within these major categories—and even among these major categories—are tasks that can be performed by nonlawyers. Indeed, a task like project management may be performed *better* by a nonlawyer with actual training in project management.

Information technology

Susskind begins his discussion of information technology with Moore's Law—the rule, borne out by recent history, predicting that computers will continue to become more powerful and more affordable:

> A few lawyers have heard of Moore's Law: not a law of the land, but a prediction made in 1965 by Gordon Moore, the man who founded Intel. He projected then that every two years or so the processing power of computers would double, and yet its cost would halve. Sceptics[7] at the time claimed that this trend would last for a few years and no more. [But] it is still going strong and computer scientists and materials scientists say that it is likely to continue unabated for the foreseeable future.[8]

If you have any doubt about Moore's Law, take a look at your iPhone and consider all the appliances you would have needed to perform its functions in 1992—a calculator, watch, phone, Walkman, camera, Rolodex, word processor, and so on.

Although lawyers have taken to online research and dipped our toes in the waters of electronic discovery, we've been reluctant to contemplate the ways in which information technology will fundamentally change dispute resolution. Online hearings and web-based arbitrations are in our future. After all, as Susskind writes, "[i]t is simply inconceivable that information technology will radically alter all corners of our economy and society and yet somehow legal work will be exempt from any change."[9]

We're going to have to do a better job thinking about social media, too. Susskind writes:

> Three years ago, hardly any lawyers had heard of Twitter. Today, more than 300 million people are users. And yet, even with that number of subscribers, I always get the sense that lawyers are waiting for Twitter to take off. In resisting Twitter and other emerging systems, what we are often witnessing is a phenomenon that I

> call "irrational rejectionism"—the dogmatic and visceral dismissal of a technology with which the skeptic has no direct personal experience.[10]

It's not enough just to keep up with new technology. Susskind exhorts us to "innovate, to practise law in ways that we could not have done in the past."[11]

In other words, change is coming, with or without our consent. We may as well figure out whether it affords opportunities to work smarter, to work more efficiently, and to expand the availability of legal services.

Questions—and more questions

One could argue that *Tomorrow's Lawyers* raises more questions than it answers. But I think that's the point. There are no one-size-fits-all answers for the issues Susskind raises. What's important is that we think through these issues systematically. We need to get out of the habit of reacting to change and get into the habit of anticipating it. And claiming to be too busy dealing with the demands of the day to have time to prepare for tomorrow's demands is not an excuse.

To that end, here's another book for your reading list: Thomas L. Friedman and Michael Mandelbaum's *That Used to Be Us: What Went Wrong with America and How It Can Come Back*.[12]

Friedman is a Pulitzer Prize-winning columnist for *The New York Times* and Mandelbaum is the director of American foreign policy at Johns Hopkins University. In *That Used to Be Us*, they discuss what they view as the four major challenges facing America today: globalization, the revolution of information technology, the nation's chronic deficits, and its pattern of energy consumption.

But they also spell out what needs to be done to "rediscover" America's power, and their findings have implications for the legal profession.[13] Although the authors describe lawyers as having nonroutine, highly skilled jobs, they caution that if lawyers continue to work in routine ways, we will soon find ourselves sitting on the sidelines. No one, they remind us, is safe.

Friedman and Mandelbaum believe that lawyers need to do some fundamental restructuring. They remind us that computers allow all of us to create content, and the Internet allows us to send that content to virtually everyone. Much of the work we perform can be done outside of a traditional office setting. These changes mean we need to do more with less and create more for less. They remind us that, unless lawyers understand the new technology that is reshaping every profession, we won't be able to compete. And we'll soon find ourselves outsourced, digitalized, or automated.

They acknowledge that some of our work is nonroutine, highly skilled work that involves critical reasoning. This is what Susskind called "bespoke work." Like Susskind, Friedman and Mandelbaum argue that we need to extrapolate from this nonroutine, highly skilled work if we intend to be successful going forward.

This extrapolation involves building on the nonroutine tasks and trimming the fat off routine tasks. Standardized or repetitive work is already being performed by paralegals or individuals with associate's degrees. Susskind, Friedman, and Mandelbaum are unanimous in urging lawyers to find more ways to outsource routine work.

That leaves the nonroutine work. If you want to keep *that* work, we need to add value. That phrase—adding value—has become so ubiquitous in the business world that it has almost lost all meaning. But it has profound implications for the legal profession. It is easy to think of our work as doing what we have to do to keep our clients' ships afloat. But if we want to remain relevant in the twenty-first century, we have to do more than prevent our clients' ships from capsizing. We have to open new vistas.

Friedman and Mandelbaum acknowledge that some people who do routine work in routine ways may still succeed—for example, the sommelier who can provide customers with what they view as a special experience or the barber who provides an excellent cut and service. But in the very near future, we lawyers may find ourselves unable to make a living—even if we're passionate about the law—if we don't find ways to be more productive and creative. We need to do something special.

Friedman and Mandelbaum note that Nixon Peabody hired a chief innovation officer to help the firm think through the changes facing our profession. Very few of us can afford that kind of expense—which means we need to be our own chief innovation officers. We need to think about what we can provide to our clients that is truly unique, what we can slough off as routine, and what we can expand on to create value.

As Professor Reed observed, lawyers are habituated to deal with the past. With the pace of change in the twenty-first century, we need to shift our focus to the future—and, more importantly, to our *clients'* futures.

It won't be easy. We're all going to have to figure out for ourselves what we can do to create value. And I'm sure you'll find me among those grumbling about "the cloud" and "tweets" and God knows what else.

I reserve the right to be a bit curmudgeonly. But I am hopeful for our future. As lawyers shift from routine work to creative work, we should expand the availability of legal services and, as we do, get better at truly improving our clients' lives. And that, I think, will make for a bright future—for everyone. ■

ENDNOTES

1. I can't prove it was discussed that year, but in 1966 during my senior year of law school, William Ellman wrote in his second President's Page: "The problems that come to the lawyer are so continuous and fraught with new social and economic significance that he must keep up his education to meet the ever renewed skill and dedication the new demands made upon him." Ellman, *The President's Page*, 45 Mich St B J 6 (November 1966).
2. Reed, *They're playing a tango: Address at State Bar of Michigan Annual Meeting Luncheon, September 22, 2004*, 84 Mich B J 17 (September 2005), available at <http://www.michbar.org/journal/pdf/pdf4article928.pdf> (accessed July 23, 2014). I also want to thank Otto Stockmeyer for reminding me that Professor Reed's remarks were included in the *Bar Journal*.
3. *Id.* at 18.
4. Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013).
5. *Id.* at xv.
6. *Id.* at 21.
7. I've kept Susskind's English spelling when quoting his book.
8. *Id.* at 10–11.
9. *Id.* at 11.
10. *Id.* at 12.
11. *Id.* at 13.
12. Friedman & Mandelbaum, *That Used to Be Us: What Went Wrong with America and How It Can Come Back*. (Little, Brown Group, 2011).
13. This is also a book I highly recommend be read by lawyers (and by our leaders on both sides of the aisle).