

The legal profession's Kodak moment?

- Part 2

In the previous article, we reviewed the path of Kodak in the face of disruptive changes that may shed some light on the challenges of the legal profession today and touched on the forces reshaping the legal service industry. In this survey, we take a look at some of the changes taking place and propose three reminders of how we should approach the changes ahead.

Today the legal service value chain, composed mostly of law firms and in-house counsel, wrings its hands in the midst of 'more-for-less' pressures on budget, alternative billing models, search for solutions in legal process outsourcing (LPOs) and IT systems to tackle a deluge of information in a world with increasing and more complex compliance risks. Despite all this effort, clients remain frustrated, lawyers feel unappreciated, and the legal service supply chain's contemplation to add value is still found wanting, except for concluding an occasional bet-the-farm case or transaction. Even when lawyers can deliver substantial values in structuring M&A deals or battling in courts, lawyering is still largely viewed as table stakes in transactions rather than being connected to strategic business. And then when the deals are settled, signed and completed, this category of business strategy, whether inorganic growth or a manifestation of a strategic confrontation, more often than not lives or dies by success in integration, and the matter binders become mere trophies on lawyers' bookshelves. Legal process management as a bridge between lawyering and business strategy remains an anomaly.

We all know that an ounce of prevention is worth more than a pound of remedy. Allowance may be made for some advocates whose inner legal eagles soar and who live and die by clients' crises when their hourly rates and their associates' hours also serve as a badge of honour. To be fair, there is, and probably always will be, crises that require urgent legal support where cost efficiency may be the last concern of the client and fixing the problems takes priority over root cause analysis, preventive solutions and related legal process management, if these are even considerations. Yet much work lies ahead for the legal service value chain to work with clients to play 'money-ball' so that both feel aligned on decisions based on the right mix of effective information and a considered time frame for risk management. To achieve this, the gears of the legal function must work closely with, and, as it ought to, be pulled by the gears of the client's organisation. This will be the efficacy that will add granularities to the directions to the efficiency innovations and improvements offered by the more innovative legal

service providers, and complement the solutions to answer complaints about the legal services industry.

Efficacy and efficiency are intertwined in the sense that the latter enables the legal function to devote more and 'upgrade' in order to address bigger and more strategic business problems and opportunities, i.e. to accomplish more of the former. At the same time, efficacy will also help illuminate the choices that the legal functions

should prioritise in terms of efficiency improvements.

As the majority of legal services are funded and delivered in the commercial sector, it may behoove legal service providers to lift our heads from billable work to pay attention to developments

oriented to furthering clients' needs in the non-profit and public sectors of legal services. Innovations that are seen later as disruptive usually originate from the 'periphery' of an industry.

Historically, just as in-house lawyers were perceived as less on the cutting edge of law than their peers in law firms, lawyers in the public and non-profit sectors may also be seen as following a different 'drumbeat'.



However, it is precisely sectors like these that are driving innovation. An example is the Center for Computer-Assisted Legal Instruction (CALI), which has been helping legal aid organisations like LawHelp.org to provide interactive guidance, videos and other self-help tools and expert systems such as document assembly, navigating users through regulatory regimes and providing assistance in completing impenetrable legal forms that would otherwise be very difficult for non-expert lawyers, let alone non-lawyers. In the commercial space, players like LegalZoom come to mind, and both platforms lead to live legal consultation.

So far, lawyers and law students participate in these efforts mostly in the role of technical legal experts alongside software engineers. To accelerate the movement, in 2014, CALI reported release of an online access to justice (A2J) author software to help lawyers themselves to generate the tools in turn to support the needs of legal aid. This product has been analogised to TurboTax for any legal process.¹ Now, CALI is rolling out courses to law schools to teach students to code these tools, creating a triple-win for students, law schools and A2J and public services.

At this point, some readers may ask ‘can lawyers achieve all this or is this what we have signed up for when we come out of law school?’ In short, we can. Not all of us may learn how to code decision trees and crawlers to find and organise answers to legal inquiries, but we can no doubt branch out of our comfort zones to appreciate, though not necessarily master, aspects of our clients’ operational details, strengths, weaknesses, opportunities and risks. Healthcare professionals who work

in parts of the world where resources are scarce and people are in need of care provide plenty of examples. They have been adopting both technological and innovative ways of solving problems in the face of necessity, and driven to put together a bigger picture from mosaics to enable preventive care.

And then some lawyers may still feel that this talk is mostly hype as the essential legal profession has not changed for centuries. This debate over ‘legal exceptionalism’ is still raging, but it suffices to recall a couple of smart remarks from some smart folks. One may be able to drive a car by looking only at one’s rearview mirror,² until the road starts to turn and split. At that point, as Paul Lippe said in his blog, “we won’t know for sure which the right metaphor is until it’s all over. If I were running a firm for the long run, I would think the sensible analogue is in fact climate change—the risk of being wrong by doing too little is much greater than the risk of being wrong by doing too much.”³

A few principles

The author would be remiss not to mention a few points that the participants in driving the new normal in legal services should keep in mind:

Disruptive forces – Technology should neither be merely disruptive nor leave people behind.

Current generations of lawyers should:

- Acknowledge the shift of part the scope of legal work from human intelligence to machines and focus on how to partner in a value chain with more artificial intelligence (AI) and expert systems

that can leverage what we do best: being creative, conceptual and compassionate with respect to our clients

- Maintain a mind frame to approach solutions or even better prevention of problems without automatically going through a thicket of complex legal maneuvers
- Find commercially feasible ways to team up with experts, as some legal departments and law firms are starting to do, in data analysis, software engineering, process management and strategic business planning
- Invest in recruiting and developing more talents who are equipped with skills beyond reading laws and cases⁴

In turn, this will provide the initial wave of legal minds to train the AI to help us to solve more issues more efficiently and help us to address challenges that we have yet to imagine.

If we distinguish between efficacy and efficiency of legal tasks, indications from most other professions suggest that the latter will be increasingly the domain of computers today and emerging AI. While the former may yet remain domain of humans, the footsteps of the geometric ascent of AI learning capability serves as a reminder for us carbon-based, bespoke types not to forget to ask why in everything we, our clients and surrounding value net are doing.

Reason for existence – It is not for lawyers to profit from the misfortunes of clients any more than doctors from the illness of their patients.⁵

The legal profession has come a long way in its compensation level – from the levels in the 1960s recalled by the author’s seniors to the level when Cravath led others to double the salaries of its associates in 1986, followed by a few more years of escalation to the 6-digit starting salary in Big Law in the 1990s and even today.

Of course there is economic basis for this growth, with multiple increases in international trade and value created by technology advances and applications. The ‘peace dividends’ from Pax Americana and again from the ‘end’ of the Cold War also

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contributed. However, we also hear complaints about churn and divergence of the interest of the lawyers from the interest of the clients, industries and society as a whole. Not every lawyer and every firm can reach the rarified financial status and be considered as peers of the financiers whose profits are not limited by the number of hours in a day multiplied by the size of the timekeepers.

As honesty demands, whether one is in the business of selling hours or an in-house counsel managing the legal supply chain, most lawyers in commerce benefit from this latest unprecedented cycle of credit creation. However, we also need to take stock in the aftermath of the great deleveraging in 2008 and the ensuing ‘lost decade’. While some may still await the melody of “Happy Days are Here Again”, lawyers are increasingly exploring how to change the way we work to live in comparably happy days.

The advice that what is good for the client is good for the firm is evermore true today. The practice of law in the colonial era in the US may illustrate an ideal model of practice - where the practice of law was freshly free from being the tool of a monarchical regime and aristocrats, and learned persons helped others to resolve issues at state, community and personal levels. These ‘lawyers’ were educated in the liberal arts traditions, many versed in economics, arts and the sciences, comfortable in their station in life, with their practices driven equally by the well-being of their clients and communities.

Of course, the profession has moved on to become commercial and specialised, but there is something to be said about Renaissance men (and the few women back then) in the field of law.

While many clients are trapped by short-term measurement under today’s financial accounting that sees only cost cutting and ignores cost avoidance, the world is taking capitalism and business to the next level. An example is the integrated reporting movement. Just as national economies are moving from the century-old invention of GDP measurement to addressing more complex and sustainable wellbeing of the societies, companies are being



Photo: Patrick Dransfield

challenged to measure performance in not only financial and manufacturing capital, but also other forms of capital, such as human, intellectual, natural and social. This means that businesses need to integrate their functions to work across silos to achieve performance measured in both the longer and shorter term. The legal function and related supply chain will be no exception to demands in the 21st century.

Equally important is to work with clients to better quantify the value from preventive measures. However, whether it is preventive or remedial, here too we should keep our eyes on efficacy as well as efficiency in our offerings. Here are a few examples: in IPR protection – focussing on activities and business impact of an anti-counterfeit program over time rather than merely investigations, raids, and even less effective recourse in courts in certain jurisdictions; in compliance – managing FCPA risks with realistic reference to whether and how to shift from problematic basis for current business cases to more sustainable ones which may often return a business back to a virtuous cycle; and in basic debt collection – building an operating contract monitoring system as well as maintaining robust credit analysis to avoid futile collection actions rather than relying on lowest-cost resources to enforce claims. Although the insurance industry is among those facing disruptive forces in the form of a changing playing field in data acquisition, perhaps we can learn how actuarial science, with the right data at the right time,

enhances pricing of problems and valuation of cost avoidance.

On pricing, some lawyers may think this is all about the billing game, but it is long settled that alternative billing delivers only so much ‘value’. Instead we should reinvent our profession as any industry would because it makes sense for the whole value net and supply chain, driven by efficacy for clients.

With malice to none – In other words, don’t let bad cases make bad law, especially at the early phase of change adoption curve. The heart of the reform is to satisfy unmet needs and not to dis-intermediate a few lawyers who have lost their way or are stuck in ways tried and true for centuries. We should start from the demand end of legal services and ascent the virtuous cycles of the ‘reformed’ legal function by:

- Managing risks and speaking in data rather than merely word-smithing on papers and producing documents and policies
- Identifying vital interests of the business as well as for the key functions and aligning them with the interest of the business’ value net
- Negotiating the risks and opportunities across all angles of the value net – owners, customers, suppliers, employees, communities, industry, environment and natural resources and over the longer and shorter term
- Delivering efficacy that addresses the

underlying purposes of clients as well as continuously improving efficiency of legal tasks

While capturing values is an important part of business strategy, in order to capture value, one must first create, or even better, help clients to create value. Legal process outsourcing (LPO) is only an early example of the value creation in the exploration to go to market in legal services. Like many business process outsourcing (BPO) enterprises, blue oceans in LPO may eventually turn into red oceans where competition will be bloody. While on one hand some clients have successfully organised, and others followed demand of secondment and contract lawyers, many efficiency tools such as alternative fee arrangements and contract management remain undersubscribed, indicating that the industry is still in the early adoption phase of change. Nevertheless the organising principle remains to satisfy unmet needs beyond outsourcing.

On the topic of clients' demands, we need to recall that customers may not always know what is best for them. Even Kodak's initial tests for the ever-present mini-lab (remember one-hour photofinishing?) was not embraced by early focus groups. The Apple brand represents a better story of product development and

design that has set itself apart from the more common marketing and consumer research, with numerous products that create their own categories and are emulated by industry after industry.

Again, what does this have to do with the legal services industry?

Much of the legal profession's plight comes from the disconnect between clients and lawyers, i.e., many lawyers don't fully appreciate the client's business and operations, and some clients manage the legal function as a black box, to be thrown at certain 'legal' problems without integrating this function into the whole as mission critical functions. The result often becomes marginalisation of what is potentially an integrating force and relegation to a cost centre tasked to deliver more for less.

The way out of this state of affairs is to switch on our efficacy mind-frame, which will enable the legal function to ascent the virtuous cycle and constantly interact with the voice of customers. Having a handle on the demand signals will naturally drive the legal service value chain to adjust and reorganise. Think about the business lawyers transmitting the torque of the demand side gears to the ones that are supplying and supporting us. To get to this stage, the legal gears must first engage with the wheels of the client's organisation and

actively working with clients' risks, and opportunities will go hand in hand with improving our efficiency.

Reformed lawyers will branch out across disciplines to know the clients' business and gain access to data to be truly authoritative in speaking as the clients' counsel and conscience. That means balancing the views of the stakeholders in the client's value net, working across functions and silos to manage both the short and the long view. It will also help to embrace tools that address our day-to-day operational requirements to free up time and mental space to maintain focus on efficacy that is our profession's inheritance and highest reason for existence. The legal function is as strategic and value-generating as it is remedial and defensive.

Finally, in today's main legal service organisations, the law firms, a few leaders manage to look up from their busy schedules and are trying to persuade their peers to change the way the system works. However, even those who appreciate the rationale, and perhaps the urgency, to change find it difficult to persuade their partners, and we are still in the early part of the proverbial adoption curve where the early majority has yet to sign on. As we wake up every day to fight another fire, let's remember that despite the fact that the profession is between a rock and a hard place, pain is inevitable, but suffering is optional. What matters is what we do with the time given to us: hopefully helping clients to achieve efficacy and efficiency.

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Footnotes:

1. This serves as a reminder that in 1989, the author participated as the U.S. foreign tax credit expert to help business consulting code writers to develop a foreign tax credit software. Over the years components of expert systems like this one had gone through the standardization-systemization-packaging-commoditization pathway to serve as building blocks to software like TurboTax. Of course, pioneers like Professor Susskind was one of the first to explore these type of expert systems such as a 1988 software to help navigate the Latent Damage Act on when a claimant may be time barred from bringing certain actions. The system reduces a case research time from hours to minutes through a series of questions that is based on a massive decision tree with over two million potential paths. Recently Professor Bill Henderson reported in September 2014 that Plexus, a "new law" law firm in Australia, released a new legal product that purports to apply artificial intelligence to determine whether a proposed trade promotion or advertisement is in compliance with applicable law.
2. Actually Steve Jobs has been reported once to have said that we cannot drive a car by only looking at the rearview mirror.
3. Legal Blog, 6 October 2014.
4. Incidentally this may help to solve the hand wringing problems of some law schools in addressing the criticism that they are not turning out graduates capable to serving the industry, and help find more uses for the 2nd & 3rd year curriculum in the case of the U.S.
5. The author proposes this as a corollary from a comment in the introduction in Richard Susskind's book, *End of Lawyers?*, "the law is not there to provide a livelihood for lawyers any more than illness prevails in order to offer a living for doctors."