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Item Type	Preprint
Authors	Trachimovsky, Seymour
Publisher	[EthicsCentre CA]
Rights	With permission of the license/copyright holder
Download date	2026-11-14 05:47:21
Link to Item	http://hdl.handle.net/20.500.12424/183000

The End of Lawyers? (That'll be the day)

Seymour Trachimovsky

In one of my eight previous lives as General Counsel of DuPont Canada Inc, I was responsible for adapting the so called "DuPont Legal Model" to the Canadian legal environment, specifically the interface between our in house group and outside counsel. The model had been conceived by parent company attorneys in response to rapidly rising litigation costs stateside. Litigation was not out of control in Canada to the extent it was in the US but certain features of the model were nonetheless readily transferable to the domestic legal scene. Though the Web was in its infancy and IT, compared to the world of 2009, in a primitive state, it was perfectly clear even then and even to an unsophisticated user that the future doubtlessly lay in these evolving tools. As the champion of the DuPont Legal Model in Canada I was regularly invited to speak on its merits and, accordingly, was invited to address the Canadian Corporate Counsel Association conference held in Calgary in 1996 and stressed that very point.

Unbeknownst to me, at approximately the same time, someone else, in this case a highly sophisticated user, Richard Susskind, was developing and expanding upon exactly that thesis in his book entitled The Future of Law. As he puts it in his latest book, *The End of Lawyers?*, we were witnessing a change in the "information substructure" in society, what he describes as no less than a fourth stage in human evolution from orality to script to print and now "into a world where communication is enabled by information technology." A more complete listing it seems to me should have included the telegraph and later the telephone but that does not detract from his point that what we are witnessing today is of a pace with the invention by humans of language itself, alphabets and the printing press.

Susskind can get carried away with himself in expounding on the virtues of IT and this is just one hyperbolic instance among many. The relative significance of recent advances in IT and other advances sure to come as compared to, say, the printing press remains to be debated by generations of future historians. With that reservation, however, it is undoubtedly the case that the world of legal practice, among many other professions and vocations, has indeed changed radically and substantially for the better thanks to the array of tools, once thought inconceivable, now available to serve our needs directly at our fingertips.

But this is too modest a thesis for Susskind. The title of the book readers will immediately note is followed by a question mark which suggests that "the end of lawyers" is merely a rhetorical device. But the truth is Susskind's claim is indeed far more extravagant. He is serious:

> In general terms, and to answer the question posed in the title of this book, I do not therefore anticipate (in the next twenty or thirty years at least) that there will be no lawyers. I expect instead that there will be significantly fewer lawyers providing traditional consultative advisory service…

And what about after thirty years one might ask? Before considering the merits of this proposition it will be useful to review Susskind's approach and the path to his conclusion. Susskind, it should be noted, is an independent advisor to law and other professional firms. His credentials are impeccable as you might expect and he holds a doctorate in computers and law from Oxford. His thesis seems largely based on work performed for clients in the UK. However, he clearly has US experience and doesn't go out of his way to distinguish US practice from UK practice. He makes no reference to Canadian practice. Main point, he apparently considers lawyers wherever they are located as Luddites, fearful and hostile to IT, who actively resist adaptation.

Central to his thesis is the coming "commoditization" of legal services, the movement away from "bespoke" (British speak for "custom") legal services through standardized, systematized, packaged and finally commoditized legal services. In Susskind's view the demand and justification for genuinely custom work will diminish over time. Client pressures, for the most part large corporate clients, will force legal services in the direction of commoditization though a diminished market for unique custom services will, he concedes, survive. The future will bring "disintermediation" to the extent commoditized legal services are required. Which is to say, lawyer-gatekeepers will be swept out of the way, no longer standing between clients and their access to legal solutions.

Susskind devotes several chapters to a discussion of the wide variety of IT tools and methodologies which have evolved rapidly over the last decade culminating in so called "Web 2.0" systems. He regards the Internet as a technology infrastructure that supports three main utilities: e-mail, the Web and on-line communities, the last in particular known as Web 2.0 and one which "gives rise to 'fundamental' (a word Susskind uses liberally throughout his tract) new ways for us to interact and collaborate with one another." Susskind is particularly enthusiastic about the potential of online community which he in turn subdivides into four categories: communicating; producing and collaborating; networking and community-building; and trading and exchanging. It is indeed undoubtedly the case that the opportunity to reach out in real time to anyone anywhere on a subject of mutual interest has been a priceless advance for mankind.

Susskind identifies a number of “disruptive legal technologies”, an allusion to the well known theories of Harvard Professor Clayton Christensen whom he credits. Christensen’s thesis is that good companies fail because they are too late to recognize the impact of disruptive technologies on their product offerings. It is well known that many innovations, particularly in the field of IT, are developed by outsiders unburdened by conventional wisdoms. Established companies whose financial processes demand quantification of market sizes and financial returns before investing are paralyzed when faced with disruptive technologies due to the absence of data. Susskind extends this point of view to law firms: “Accordingly, firms run by conservative characters will tend not to invest in disruptive technologies.” Among the disruptive technologies that Susskind indentifies are automated document assembly systems, instant messaging, social networking systems, online auctions and e-learning including PowerPoint (!)

If you’re going to make a case that virtually an entire profession, one which is and has always been intimately connected with power at economic, political and social levels, one which dates back at least to Roman times and has thrived for several millennia, is going to wither and die, you best be prepared to make a convincing case. You need to marshal quantitative data showing trends in legal practice and diffusion of IT in law offices and you need qualitative data describing the processes involved in providing legal advice, communicating with clients and how those processes have changed over time. Susskind draws a blank in both respects. His thesis is especially unsatisfying in the latter respect; the practice of law hovers somewhere above the book but the nature of the practice is strangely absent from the narrative. Indeed, it would take very little to convert this book from “The End of Lawyers?” to “The End of Accountants?” or “The End of Plumbers?” Take your pick. There is no necessary connection with legal practice. In large measure the book is little more than an inventory of IT methodologies and practices that are adaptable to any type of profession or vocation. And in any event, with due respect to Susskind, these have in fact been and are continuing to be wholeheartedly and widely embraced by the legal profession.

Susskind perceives a lot of routine in the practice of law, especially among in-house counsel, and which he predicts will gradually become the domain of non-professional or quasi-professional workers. In this respect his prediction is about two or three decades too late. No substantial law firm, full service or boutique, can survive without a staff of skilled paralegal specialists and the trend in this direction has been ongoing since IT was little more than a typewriter and a Gestetner duplicating machine. Concurrently with this trend, demand for legal services and lawyers has continued to increase, the occasional economic downturn notwithstanding. Even during recessions it’s been more a matter of law firms shifting their practice portfolios with demand accordingly shifting to different specialties.

Further, recurrent activities are not symmetrical with routine activities. For example, Susskind references M&A due diligence as a “routine” activity. Woe to any acquirer which falls into that trap and many do. It is exactly because acquiring companies have often treated due diligence as a lesser activity that they find themselves a year or two following the closing enmeshed in crushing liability claims of customers that had not been flushed out between the date of the agreement and the closing date.

What destroys Susskind’s credibility beyond repair is his evident failure to appreciate that in law it takes two to tango. There is always another party whose interest is opposed, whether the subject is a contract, a will or, it goes without saying, litigation. Law is not practiced in a vacuum. It is not merely a profession devoted to preparing standard forms or completing blanks in precedents. And though he pays lip service to the phenomenon, there is little appreciation of the huge volume of indecipherable legislation and regulation that is promulgated every day of every week of the year. His proposal to deal with this through regular PDA alerts is absurd. There would be so many alerts that the average practitioner would be vibrating like Shakira performing Hips Don’t Lie. In light of this, if anything in Susskind’s thesis can be given short shrift it is his prognostication that demand for “bespoke” or customized services will be in secular decline. Given modern trends in legislative and regulatory drafting, in particular the use of “creative ambiguity” as it’s been called, demand for custom services will only increase.

The practice of law involves the creation, application, interpretation, resolution and enforcement of legal rights and obligations involving two or more parties. The tools now available on the Web have made legal practice enormously easier and more rewarding for practitioners and will go a long way to educate consumers to everyone’s benefit in the long run. But there is no chance that expert systems and Facebook will replace a skilled experienced lawyer applying his or her best legal judgment to a confusing farrago of facts. The End of Lawyers will come only when the End of the Oldest Profession is upon us and last I looked the latter was still thriving its fortunes, if anything, significantly aided by the Web.