THE REVOLUTION HAS ALREADY HAPPENED:

A Curmudgeon's Counterpoints

by David Hill

Industry thought leaders John Alber and Richard Susskind both predict that technology will foster radical change in the practice and business of law in the intermediate term: 10 years out. I do so hope they are right. At a fundamental level, those learned gentlemen and I share a common view: I agree that whatever parts of legal work can be automated, should be. I part company with them on what that means, in practical, deliverable terms.

THE END OF LAWYERS?

Those of us who make our living in law and technology can be both grateful to and resentful of Richard Susskind for his book, *The End of Lawyers? Rethinking the Nature of Legal Services*.

We can be grateful because he has guaranteed employment in our field far into the future. We can be resentful because he has also guaranteed that we'll lose those jobs almost as quickly as we land them. Many of us will change jobs more often than we have birthdays. Our employment will be terminated — over and over and over again — because we will fail to meet expectations.

Susskind has raised lawyers' expectations into the stratosphere. He is a brilliant writer and orator, able to convince on paper and in person one of the toughest audiences going: lawyers. Lawyers across North America have been entranced by Susskind's credo of commoditization of legal services through automation.

Law firms' new demands for technical advancement will be, in my view, well beyond anything that is reasonably possible in the foreseeable future.

REGULAR FOLKS, TECHNOLOGY AND THE LAW

I have been engaged in the work that Susskind recommends law firms now undertake for about 25 years. That is, I have worked toward automating the legal process. I have looked at inputs and outputs. I have "atomized" the steps between them. I have planned and executed processes to automate the work of lawyers. I have had some successes. I have also had some failures.

I did this not out of any desire to make lawyers more profitable (although it did). I did it because my own experiences with the law in the late 1970s led me to believe that the average citizen could not cope with, or even easily come to know and understand, the fundamental legal constructs of society.

Regular folks couldn't write their own wills. They couldn't challenge a traffic ticket. They couldn't start their own businesses. Well, yes, they could do those things, but the end results would be different from those produced by skilled professionals armed with information. They consequently took legal risks by taking on those challenges, some of them immense, because the law is so complex and obscure.

To a degree, regular folks are better off today as a result of technology. They can find out about the law more easily and carry out some basic legal tasks, like finding a case report or writing a will. I suspect, however, that this is mostly work that would not have gone to lawyers in any event. And regular folks still take considerable risks.

For example, LegalZoom offers an online, do-it-yourself will drafting service at www.legalzoom.com. However, as Texas attorney Rania Combs succinctly points out on her legal website, www.texaswillsandtrustslaw.com, the hidden risks are high.

CLIENTS ARE (STILL) NOT LAWYERS

My own modest successes and failures in legal automation might simply be put down to lack of intelligence or skill. More important, I have also studied carefully the efforts of others to achieve similar ends, and it is this research that makes me deeply skeptical of Susskind's claims. The smartest people I know in law and technology can't do anything like what Richard Susskind is promising lawyers.

Technology is not a revolution still to come in the legal industry. The revolution came and went in the 1990s, which is why the law office of 2010 looks nothing like its 1990 counterpart. There are no upcoming "killer" technologies — no Windows, no e-mail, no Internet, no PC-on-every-desk, no browser, no spreadsheet, no accounting system, no database. Nor are there legal-specific technologies — document assemblers, transcript managers, case managers, matter managers, conflict checkers — waiting to be invented.

A decade of evolution followed the revolution of the '90s. We equip ourselves today with mature technologies, both general purpose and legal specific. The legal software marketplace, at least, is generally competitive.

Many will be familiar with the example of document assembly. In the law and technology business, document assembly is a mature technology. There is a good selection of products in what appears to be a highly competitive marketplace.

Intelligent legal technologists have turned their considerable talent and attention to the apparently simple notion of capturing what lawyers think when they draft documents. There clearly have been some document assembly successes. Yet, would any of us say that lawyers have been laid off as a result?

There may have been changes in careers, shifts in focus and different approaches to clients. But I would be astounded to learn that any law firm anywhere had eliminated lawyers and replaced them with computers because of document assembly automation.

This is because technology has not made clients into lawyers. They have no better legal judgment, are no more able to evaluate their legal opportunities and risks and are no more capable of being lawyers than they are without their PCs.

The website of Rania Combs, mentioned above, hints at a direction I think much more probable — law practice continued and extended through technology. There is an ancient truism in the legal profession that applies here: The lawyer that represents himself has a fool for a client. Even lawyers recognize the value of the independent, objective, expert legal advisor.

WHICH BRINGS US TO LAW2020™

I have had the privilege of reading an early draft of John Alber's article that precedes mine in this publication. Alber's predictions are both less ambitious and more likely than those put forth by Susskind. Alber accurately describes demands from corporations and governments for better legal services, as well as better delivery models of legal services. My disagreement with Alber is more prosaic. Some of the "new initiatives" he describes are merely a reworking of long-established, or even historical, approaches to the practice of law and billing clients.

AFAS: THE NEW OLD THING

There is great emphasis, both in his piece and in the legal community, on alternative fee arrangements (AFAs). Far from defining a new relationship between clients and law firms, AFAs return to a traditional approach to payment for legal services — formerly known as flat fee, fixed fee or a firm on retainer.

It was only with the introduction of technology in the 1970s that law firms were able to provide a detailed breakdown of services rendered. Clients demanded it: "What am I being charged for? How much time did you spend doing this?"

As recently as the 1980s, clients had firms on a retainer. Typically, corporations, through their in-house counsel, retained one or more firms to represent the corporation. The firm would handle whatever legal work arose, for a fixed annual fee. This approach was considered optimal for all concerned.

Clients are now asking law firms to enter engagements on roughly the same terms. This is a welcome change for lawyers — it frees them from the yoke of the billable hour. It does nothing, though, to change the underlying law firm business model.

Ultimately, AFAs transfer risk. Corporations, in the driver's seat for a year or two, have attempted to shift the risk of the volume of legal work to their law firms. Law firms will agree to do this only so long as it is profitable.

Clients have asked firms to take on more risk. The firms' natural response will be to limit and define the risk. That becomes possible when legal services are again in demand — when competition returns to the marketplace. Clients will perceive that there are "better firms" (and not so good firms), and some will want to hire the best. Those firms will then be able to drop unprofitable AFAs and restore the profitable fee arrangements.

PROFESSIONS AND THE MYTH OF DISRUPTIVE TECHNOLOGIES

Alber also notes that other industries (such as newspapers) have gone through massive change because of technology. This builds on a thought of Susskind's, which is that the legal profession is an anachronism, a holdover of a medieval guild.

My response is that argument misconceives both the business and the profession of law.

Lawyers provide a bundle of services: advice, representation, drafting, legal research, problem-solving, negotiating. Inherent is the lawyer as professional. The legal profession may resemble a guild in some ways, but so, too, do other professions: doctors, dentists, accountants, engineers

and architects, to name a few. Susskind provides no reason that lawyers should be singled out. In fact, who more than doctors has been impacted by technology in the last 50 years?

The professional relationship is founded on trust. The client (or patient or customer) entrusts some important personal interest to the professional: health, legal affairs, finances and so on. He or she entrusts this to the professional because the professional possesses expertise: A specialized skill or ability, generally gained through a combination of personal aptitude, education and experience. In some sense, the professional "knows better" what is good for the client.

These guild-like professions withstood the scythe of *laissez-faire* capitalism that cut down traditional, craft-based guilds in the 1800s. Virtually all Western societies recognized that it was immensely hazardous to allow free market competition in the provision of professional services. Flawed professional service could have catastrophic consequences that might not become apparent until many years later.

Professionals bring specialized abilities to bear on a client's interests and concerns. We exercise professional judgment for our clients' benefit. Professional advice is not simply a decision tree that can be captured and reproduced at will. The work of a lawyer involves, more than anything, furthering the client's interests and values by fitting them within the lawyer's understanding of the law.

It is now said that the requirement of professional qualification may be eliminated because of the impact of technology. It makes me think of a modern doctor's appointment: The patient tells the doctor what he or she is suffering from, based on Internet research. Then the doctor tells the patient what's really wrong.

The fundamental proposition remains the same. Lawyers, like doctors, architects, accountants, dentists and other modern professionals, have the privilege and responsibility of self-governing professions because of the catastrophic impact that errors in legal advice, medical advice, architectural design and dental services can have on the general public. It is only when that becomes irrelevant or unnecessary that one can rationally speak of the end of lawyers.

Technology has not (yet) made people smarter. It has not (yet) given them better legal judgment. When that will come is a question for another decade.

E-DISCOVERY: EVOLUTIONARY, NOT REVOLUTIONARY

In his Law2020 case study, Alber raises the mushroom cloud of modern discovery. I agree wholeheartedly with his analysis. Work that can be done more efficiently by non-lawyers should be.

Again, though, this is not a new development. A similar course of development occurred with respect to paper discovery. In the "old days" of the 1980s, lawyers used to review hard copy documents. Secretaries would prepare lists of those documents, and provide them to the other side. The other side would then ask for copies, which the firm happily provided, billing somebody for the photocopying.

There was an evolution as technology was applied to the process. Lists of documents began to be prepared in databases, rather than word processors. Objective coding was taken up by junior lawyers, then paralegals, then secretaries, then by offsite resources.

Gradually, more and more of the work moved out of the hands of the lawyer; the resources were "right-sized" to make the best use of the technology. This is but a recent example of an evolutionary process common in the history of the legal profession — it was, after all, the lawyers that brandished those quill pens.

IN THE END

Susskind, Alber and I all share a belief in and an enthusiasm for the promise of technology in law practice. We differ only in our assessment of what is likely. It will be most interesting to see how it all turns out. **ILTA**

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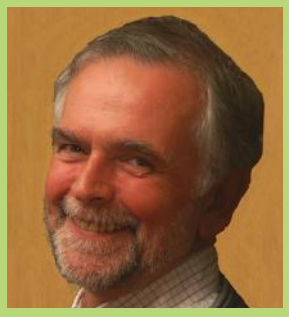

David's dual interests in law and technology have intertwined since law school in Vancouver, BC in the early 1980s. After some years of law practice, he became a technology educator for a local continuing legal education provider. He then worked as a technology consultant, and next as both a lawyer and as the technology director in a large Vancouver firm. He has since moved back to practice, in Labour, Employment and Human Rights law in the City of Vancouver's Law Department, where he is also involved in departmental and city-wide technology initiatives.

David has made numerous presentations about the use of technology in law for organizations such as the Canadian Bar Association, the Canadian Corporate Counsel Association, several law schools and law societies, and at national and international conferences. He is a keen ILTA supporter, and plans to give a presentation at ILTA 2010 (tentatively titled "Is the Sky Really Falling"), as a counterpoint to the notion that technology is about to make lawyers obsolete. He is also a proponent of Free and Open Source Software, and he is investigating ways to use Open Source in practice. David can be reached at david.hill@vancouver.ca.