

Book Review

TOMORROW'S LAWYERS

An Introduction to Your Future*

by Richard Susskind

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1 There is a generation of lawyers in practice today who started practising law before the word-processor (now obsolete), the telefax (becoming obsolete) and the e-mail. They remember the slow, expensive and fading thermal paper copying machines; the carbon paper; and the “Local Urgent Mail”. They now meet and deal with lawyers born in the digital age, whom Marc Prensky described as “Digital Natives”.¹ The rest are “Digital Immigrants”. The old ways of doing things have changed and the old ways of learning, Prensky contends, are gone. Digital Natives are used to the instantaneity of hypertext, are networked most of their lives, are used to receiving information really quickly and love “multi-tasking”.

2 Technology, thus, has been the single factor that has vastly altered the shape of commerce in modern times, and that in turn has altered legal practice. However, in the case of the latter, many other aspects are also changing in common law jurisdictions around the world. Taking stock today with the view of planning for the future is not just a matter of solving complications that might have been caused by technology, for if that were the case, solutions would eventually be found. The changing shape of legal practice is not merely a complicated matter. It is a complex one. Richard Susskind's book was written “to provide tomorrow's lawyers and legal educators with an accessible account of the pressing issues that currently face the legal profession and the justice system”. It was written in the context of legal practice in the UK but similar issues arise also in America.²

3 The broad areas in which Susskind discusses the legal profession may be best considered in the light of the situation in America where the financial crisis in 2008 had a severe impact on the legal profession. The general picture since, up to 2013, has been one of downsizing,

* Oxford University Press, 2013.

1 Marc Prensky, “Digital Natives, Digital Immigrants” (2001) 9 *On the Horizon*.

2 See Michael H Trotter, *Declining Prospects: How Extraordinary Competition and Compensation are Changing America's Law Firms* (CreateSpace, 2012).

the laying off of non-partners and general staff, although partner profitability remained largely stable. This has led to serious examinations of the way law is practised there, especially in the large firms.³ Steven Harper, a Digital Immigrant, recalls his ideals that attracted him to the practice of law: “I saw it as a prestigious profession whose practitioners enjoyed personally satisfying careers in which they provided others with counsel, advice, judgment, and a unique set of skills.”⁴ Harper believes that due to the corporatisation of legal practice and the rise of the billable hour (that followed *Goldfarb v Virginia State Bar*),⁵ law firms, especially the large ones, began to see the allure of leveraging on billable hours by employing more non-partners. Harper cites the example of Cadwalader, Wickersham & Taft LLP. It was ranked 54th in total revenues in 1995 when it had 75 equity partners out of 268 lawyers, with the partners earning an average of US\$500,000. In 2005 the total number of lawyers increased to 500 but that of the equity partners remained at 75 and the average partner profits rose to US\$2.5m. After the financial crisis, partner profitability remained high only because leveraging was reduced. The non-partners became the casualties. Harper says that “[w]ith every recession, the billable hour takes another public relations hit ... yet it survives”. The resulting income inequality among American lawyers may be attributable to the billable hour in a second way. If the multiplier cannot be increased further, the only way is to stretch the hour. That means longer work hours and fewer leisure ones. These contribute to the complex reasons many lawyers find their job unfulfilling.⁶

4 Like evolution, the present is not the end. Legal practice has changed tremendously in the past 30 years mainly because of the billable hour and technology. In *Tomorrow's Lawyers*, Susskind believes that the changes to come will reshape practice even more. He believes that three factors will lead the charge of change. The first is concerned with the challenge facing general counsel, namely, how can they deliver more legal services to their businesses at lower cost? Secondly, the liberalisation of legal services away from the traditional sources and methods; and thirdly, the new generation of information technology (“IT”) will alter the way law is taught and practised.

5 In the first, Susskind identifies the management of risk as the primary responsibility of a general counsel. This is a broad area of responsibility and includes increasing awareness of the law and legal matters, introducing protocols, audit reviews and risk assessments, and

3 See Michael H Trotter, *Declining Prospects: How Extraordinary Competition and Compensation are Changing America's Law Firms* (CreateSpace, 2012).

4 Steven J Harper, *The Lawyer Bubble* (Basic Books, 2013).

5 421 US 773 (1975).

6 See Steven J Harper, *The Lawyer Bubble* (Basic Books, 2013) at p 57.

generally, making sure that the members of the company do not inadvertently expose the organisation to legal liability. He sees the reluctance to engage knowledge managers as inconsistent with the general counsel's discharge of his responsibility. This is because the use of standard documents is an established form of reducing legal risks and standard documents belong in the realm of knowledge management. Having discussed this with many general counsel, Susskind concludes that it is not that they are averse to the idea of knowledge management – they just prefer the law firms to pay for it.

6 In a previous book, Susskind wrote that senior in-house counsel complain that law firms do not generally understand their clients' businesses and are "especially poor in listening to their clients and empathising with their position".⁷ On the other hand, Trotter notes that "private lawyers have increasingly become narrow specialists dancing to the tune of the corporate counsel who control their destiny".⁸ The ones identified by Trotter are probably exceptions (not contemplated by Susskind) because it is difficult to see how one can claim to be a specialist without knowing the business in question – unless he belongs to the academic species. The situation Susskind seems to have in mind may be connected to the leveraging of junior lawyers to work on the matters of the partner's large corporate clients. If that is so, then big may not necessarily be good.⁹ More and more young lawyers in America are driven to specialise early in their career because specialisation increases their leverage and is a way of justifying higher legal costs to the clients.¹⁰

7 The lawyer who understands his client's business will naturally be more likely to render sounder advice more quickly than one who does not. However, a general counsel who hopes to deliver better legal service will want to trim the costs of private lawyers. Fundamentally, there is a problem here which Susskind sees very clearly. When a client calls his lawyer, he hopes that the problem he has is a small one and can be dealt with quickly and inexpensively; the lawyer, on the other hand, will be hoping that the problem is a big one. Thus the "more-for-less" strategies may be working in opposite directions. Reducing the legal fees of private lawyers is usually the main strategy for general counsel, while improving the standard of in-house lawyers is another. However, Susskind recommends a more ambitious alternative strategy. He

7 Richard Susskind, *The End of Lawyers* (Oxford University Press, 2008) at p 91.

8 Michael H Trotter, *Declining Prospects: How Extraordinary Competition and Compensation are Changing America's Law Firms* (CreateSpace, 2012) at p 49.

9 He expands on this point thus: "[L]aw firms do not take sufficient time to immerse themselves in their clients' environments and get a feel for what it is actually like to work in their businesses.": Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013) at p 67.

10 Michael H Trotter, *Declining Prospects: How Extraordinary Competition and Compensation are Changing America's Law Firms* (CreateSpace, 2012) at p 42.

suggests that general counsel should start from scratch, ignore the current resources and carry out an in-depth study of the legal needs analysis of his business organisation. When that has been done, he can then consider what and where he can obtain the resources to satisfy the organisation's legal needs.

8 The legal profession in the UK is known for being conservative, defined in the sense of a respect for tradition and precedent. This approach has established consistency and predictability in law and the practice of it. Susskind hints that the changes in the past decade may have generated a momentum that will only roll out even more changes. Liberalisation of the profession is likely to be the main engine of change in this regard. This is a complex issue. As there are now "new opportunities for offering legal services in new, less costly, more client-friendly ways", how law is taught and how a lawyer is trained will also have to change.¹¹ Susskind believes that liberalisation might also entice the "Big 4" accounting firms to return to the legal market. Against the trend in America, where the billable hour has been endorsed as the lodestar for calculating legal fees, Susskind thinks that the future will see fewer expensive lawyers, the abandoning of the billable hour – all in aid of meeting the 'more-for less' challenge.¹²

9 The third driver of change is IT. Its rise has been exponential and, at this rate, the next 25 years may arrive in five. Furthermore, the pace of change is also increased by how new technology is used. "Users are becoming providers", Susskind notes, "Readers are authors. Recipients are now participants". There is now a relentless connectivity which links clients to lawyers and lawyers to each other. Online facilities for e-learning may see growth in an area that not many may welcome – the informed client. Patients who surf the net sometimes appear more knowledgeable than their doctors. There is much in the law that now appears online for the client to lap up. Online legal forum may see open discussions of a client's legal problems and the solutions offered. The electronic legal marketplace may be just a few clicks away. Will the standard legal documents appear online in some wiki-legal mart? Susskind does not only hope so but he is of the view that it will be so. In a 2011 report, the Oxford Internet Institute established that 73% of the UK population uses the internet.¹³

11 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013) at p 8.

12 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013) at p 8. *Cf Perdue v Kenny A* 559 US 542 130 (2010). The Supreme Court struck out all extra claims for fees leaving only those calculated by the lodestar method.

13 Oxford Internet Survey 2011 Report, *Next Generation Users: The Internet in Britain*.

10 If legal services can be delivered online in respect of basic procedural and substantive issues, law firms will be freed to advise on more complicated and complex matters. Basic legal advice online is only one aspect of future legal services. Online media opens up possibilities of “Online Dispute Resolution” (“ODR”) – e-mediation and e-negotiation – for resolving disputes. Traditional courts may also change once IT makes virtual courts plausible, with litigants, legal advisers and judges all connected online in the same proceedings. There may be weaker resistance to having judges from other jurisdictions hearing cases that local judges may not: for example, where there is a dispute requiring very specialised knowledge (in patent cases), or to avoid any hint of bias or prejudice in a particular case. However, Susskind sees a small problem in virtual courts and ODR. A trial should be in a publicly accessible forum, but when proceedings go online, how would the public observe it?

11 Susskind sees major problems for large firms with bad attitude. The future will not present forgiving and tolerant clients. Overcharging poses yet another grave danger especially if large firms leverage without providing value. Clients are not willing to pay big money for inexperienced junior lawyers. However, the greater point of alarm is that Susskind does not see much future for the small to medium firms, unless they have a demonstrable niche practice. On the other hand, if more and more information, including specialised information, is obtainable online, and knowledge is well managed, there may be a proliferation of small niche firms that have a balanced ratio of experienced and junior lawyers, all with the necessary expertise, all conversant with the client's business and all working hard to deliver value work and not just billable hours. Furthermore, the client only deals with a small team of lawyers in most situations – they are not interested in the rest of the firm, whatever the number of lawyers might be. On Susskind's analysis, the future will have room for only large and liberalised firms and small commando units.¹⁴

12 Given what has been surveyed thus far, the young lawyer (in America and Britain) might ask, even if incredulously: is this the end of lawyers? Susskind does not think so. He repeats some of the optimism he left in his previous book and introduces fresh hopes for lawyers of the future – all likely to be Digital Natives.¹⁵ The new species of lawyers will include specialists who are (not necessarily from a large firm) trusted by their clients and who Susskind describes as “intelligent, creative, innovative lawyers who can fashion and articulate new solutions and strategies for clients who have complex or high-value legal

14 See Adrian Ryans, “When Companies Underestimate Low-cost Rivals” *McKinsey Quarterly* (June 2010).

15 Richard Susskind, *The End of Lawyers* (Oxford University Press, 2008).

challenges”. He is aware that present-day lawyers will protest on the ground that that is what they do now. Susskind thinks that their clients would beg to differ.

13 As legal services turn online, there will also be a career for lawyers who might not have reached the status of the trusted legal adviser described in the preceding paragraph, but who have skills in “modern techniques of standardisation and computerisation” and can provide legal technical and technological support.¹⁶ There is thus room for a true legal technologist – a person qualified in both law and IT where presently, such people are either IT specialists who have found their way into the legal world of courts and lawyers when designing bespoke systems for them, or lawyers who are IT geeks tinkering with IT on the side.

14 The legal knowledge engineer of the future will be required to organise the vast quantity of complex legal material, and the job is not just of developing legal standards and procedures, and organising and representing legal knowledge and legal analysis “because it is more taxing to create a system that can solve many problems than to find an answer to a specific issue”.¹⁷

15 Lawyers may find themselves having to diversify to stay in business, and this may lead them into the multidisciplinary path that soaks in work as strategists, management consultants and market experts. Susskind sees this as inevitable; further, he says that:¹⁸

... if commercial lawyers want to be strategy consultants, if corporate lawyers aspire to be deal brokers, and if family lawyers wish to be psychologists – and I strongly support this diversification – then this must be supported by comprehensive and rigorous training that they undertake willingly.

16 Other opportunities include working as lawyers and advisers in ODR, legal project managers (who allocate the legal resources to the work required so that the client gets a seamless legal service package), legal management consultants and legal risk managers who will develop the “sophisticated range of processes, methodologies, techniques, or systems to help their clients identify, assess, quantify, hedge, monitor,

16 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013) at p 110.

17 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013) at p 111.

18 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013) at p 113.

and control the plethora of risks that confront them”¹⁹ Susskind believes that this service is most urgently required and long overdue.

17 In America and Britain, there are legal leasing companies that provide a home for lawyers who do not want a fixed employment or who only wish to work from time to time or on fixed projects. Axiom, a legal leasing company in America, is probably the best known. For lawyers who want flexibility in their lives (or just a life), legal leasing companies may be their haven.

18 *Tomorrow's Lawyers* has demonstrated that the legal landscape has not only changed drastically in the past decade, if not the past 30 years; it will continue to change at an exponential rate. As Britain has found, some of the changes have arisen from across the Atlantic and in that sense, change descended on it. Properly warned, those in the legal service may wish to heed the storm warnings and act accordingly. Organising and planning the way ahead for the individual lawyer and the profession as a whole is not just a complicated matter. It is exceedingly complex because of the diversity of needs from the clients as well as the lawyers. It also requires consideration and implementation of legal training. What should the law schools be teaching? Pressure will be on the teaching schools to keep up to date. The students entering law school today will all be Digital Natives. Brian Tamanaha²⁰ quotes this from William Prosser:²¹

There is no law school, no matter how distinguished its reputation, that has not numbered on its faculty some such men as these ... The tragedy is that [owing to tenure] nothing much can be done about it ... All over the country there are many sad and wretched law schools in which the unhappy selections of some long-forgotten dean linger on year after year, too feeble, too useless, and insignificant ever to receive an offer from another school, too satisfied ever to leave, and safe where they are until the age of seventy. Few die, and none resign.

19 Susskind fears that law schools today are training the lawyers to be 20th century lawyers, not 21st century ones. What does that mean? He still believes that contract, tort, constitutional law and legal method are essential curricula, but he hopes that law schools will conduct courses that will equip young lawyers to perform the kind of legal work that he discusses in his book. Law schools cannot do that without training or finding teachers who can do so. There will be a great deal of adaptation and experimentation in the next decade or so because

19 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press, 2013) at p 118.

20 Brian Tamanaha, *Failing Law Schools* (University of Chicago Press, 2012).

21 William Prosser, "Lighthouse No Good" (1948) 1 J Legal Educ 257 at 259.

Susskind is calling for the training of skills and expertise that have not yet become established.

20 On the other hand, the training of lawyers in the traditional way is probably past. Many law graduates in America are not able to find jobs, at least in traditional legal practice. Tamanaha reports that in 2009, from 30 law schools only 50% found jobs as lawyers. 2010 was even worse for law graduates.²²

21 If Susskind is reasonably accurate with his predictions, one question remains for Digital Immigrants – how can they contribute in the age of Twitter? This is a serious question for them, and, in a sense, also for the Digital Natives because the policies and structure of the legal profession are presently shaped by the hands of Digital Immigrants.

22 Susskind's book presents a dark and dour future for the traditional legal practice model. It "is not simply unsustainable, it is already broken". Yet for the profession as a whole, his book is sparking with optimism. The future is not all about lawyers who tweet more than they read. Old-fashioned intellectuals may still have room to swing an idea or two.

22 Brian Tamanaha, *Failing Law Schools* (University of Chicago Press, 2012) at p 114.

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