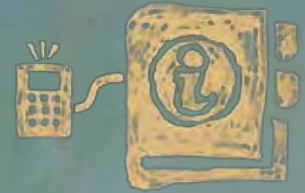




“WE’RE LIVING IN A NEW WORLD FILLED WITH STRUCTURAL CHANGES THAT AREN’T REVERSING. SO IT IS IMPERATIVE THAT WE LEARN HOW TO USE THEM IN ORDER TO BETTER SERVE THE PUBLIC INTEREST.”

— Mitch Kowalski, lawyer, author



THE CHANGING LEGAL PROFESSION: ANTICIPATING THE FUTURE

CHANGE IS UPON US, DRIVEN MAINLY BY THE PUBLIC'S NEED FOR BETTER ACCESS TO LEGAL SERVICES.

Trends such as globalization, technology and pressure to reduce the cost of legal services will increasingly shape the legal landscape. In Ontario, the Law Society has begun to look at Alternative Business Structures (ABS). As part of that work, the ABS Working Group is examining these trends, exploring the ideas of legal futurists and observing developments both at home and abroad. The working group will be assessing the implications of these trends, ideas and developments, including potential regulatory impact, for the Law Society.

This article presents the perspectives of thought leaders in Canada, the United States, and England on how legal services may be provided in the future and the related regulatory challenges.

IN MITCH KOWALSKI'S VIEW, LAWYERS IN THE FUTURE WILL BE more consultants than technicians.

"They'll need far more than legal skills," explains Kowalski, author of the acclaimed 2012 book, *Avoiding Extinction: Reimagining Legal Services for the 21st Century*. "Among other things, they'll need project-management and people-management skills. Lawyers will also need to be comfortable managing a number of different moving parts and different players in order to create solutions for clients."

Many of Kowalski's ideas come not only from studying legal markets across the world, but also from his own eclectic experience in a wide range of legal service roles, ranging from practising law at the Toronto office of global law firm Baker & McKenzie and at one of Toronto's oldest, mid-sized firms, Aylesworth, (which merged with Dickinson Wright PLLC in 2011), to being in-house counsel at the City of Toronto, performing a business role at First Canadian Title and now operating a small solo practice in Toronto.

Kowalski says that lawyers of the near future will serve as "quarterbacks" handing the ball to a variety of players each of whom fulfil discrete tasks for each situation. "The successful 21st-century law firm will use a number of different players and options appropriate for each situation, as opposed to the current approach where the law firm does everything on a file."



Mitch Kowalski at Convocation's live webcast of the Articling Debate, fall 2012

Lawyers will also have to be much more comfortable using technology so that they are not only more mobile, but also more interconnected with clients.

While major law firms all claim that they're very efficient, "if you actually went through their operations with a Lean Six Sigma Black Belt, you'd find a lot of waste and inefficiency.

Smaller firms are better positioned to become efficient and lean, which in turn will allow them to punch above their weight and do work that bigger firms can do,” says Kowalski.

Lawyers also need to be better at running their files, he explains.

“Most lawyers project-manage in their heads instead of mapping out the file step-by-step. A disciplined project management approach allows lawyers to not only rethink how files are run, but also gives lawyers a greater understanding of the actual costs of each file,” Kowalski says. “This approach is critical for pricing and for managing client expectations on process and price.

“There are a lot of things that can be re-engineered.”

RETHINKING LEGAL SERVICES

That’s why Kowalski believes it’s time for the profession to undergo a complete overhaul. The billable hour is “out-dated” since it doesn’t provide lawyers with an incentive to be “efficient” and because, in his view, there is “no connection between time spent on a file and value to the client.”

Similarly, he feels the partnership model is obsolete and exceptionally fragile. “The short-term goals of individual lawyers — such as making as much money as they can this year — do not automatically lead to the long-term viability of a firm.”

“Acting in the long-term interests of the firm actually reduces the amount of money each lawyer takes home in the short term.”

Kowalski prefers a corporate model to a partnership model, where executives and boards of directors think long term, focus on concepts of custodianship, stewardship, responsibility, and accountability and also make long-term investments that are in the interests of the firm as a whole, despite any short-term personal costs. In other words, he believes that “where a partnership is merely the sum of its parts, a corporation can be greater than the sum of its parts.”

Kowalski also points out that the partnership model has no mechanism to allow for outside investment to fund innovations. Any innovation must be funded from within the partnership, creating large short-term costs for existing partners.

According to Kowalski, capital investment is key to funding innovations necessary to drive efficiencies and he points to the United Kingdom as an example to be emulated.

“The *Legal Services Act* opened up the field to non-lawyer ownership in legal service entities, which is driving efficiencies, lowering prices and providing greater access to justice in the UK,” explains Kowalski, who has also lectured in the UK on innovative thinking in the legal profession. “Capital is a big driver of innovation, so if your only source of capital is from your partners, it’s extremely limiting.”

“But if you allow outside investors, you theoretically have

unlimited amounts of capital that can be invested to create processes, purchase technology and even develop new technology that will be beneficial to your firm and to your clients.”

He hopes Canadian law societies will follow the lead of the UK and permit ABSs that allow non-lawyers to manage or co-own law firms in England and Wales.

“It’s all about access to justice,” says Kowalski.

EMBRACING TECHNOLOGY

Kowalski says that technology is another way access to justice can be improved.

California-based LegalZoom — a one-stop online legal shop established by four U.S. attorneys that provides businesses and individuals with routine solicitor work involving incorporations, trademarks and wills and estates — is one initiative that demonstrates how practitioners can improve the efficiency and effectiveness of delivering legal services.

Another example is Michigan State University law professor Daniel Katz, who is designing high-tech tools to help litigation counsel advise clients as to the feasibility of their cases. Katz and his team are working with big data and algorithms so that eventually a lawyer will be able to enter a set of facts into a program — based on a compendium of case law in the United States — and that program will then determine the odds of success.

“It’s probably five years away from going live, but it certainly demonstrates how technology is going to impact how we litigate and negotiate settlements,” says Kowalski.

Current technology already enables lawyers to have virtual offices that are able to reach under-served communities hungry for legal services at affordable rates. “Consider rural areas of the province where older lawyers are retiring. Perhaps a lawyer won’t need to have an office in small-town Ontario as long as he or she has a virtual presence there. Locals can deal with that lawyer through Skype or some other interactive technology and get the same level of service,” says Kowalski.

“We’re living in a new world filled with structural changes that aren’t reversing. So it is imperative that we learn how to use them in order to better serve the public interest.”

At the same time, lawyers will face an increasing presence of non-lawyers offering low-cost online legal services, says Penn State Dickinson School of Law professor Laurel Terry, a scholar in the international regulation of the legal profession.

“There will be a lot of pressure on lawyers to come up with very efficient means to compete and they’re going to need to persuade clients about the value-add of their services, which to me is the training, experience and judgment involved in representation,” she explains, noting that in the future,

clients may initially interact with counsel online from their homes rather than meet in their lawyer's office to begin the preliminary work on their case.

GLOBALIZATION AND OTHER PRESSURES

However, lawyers will also have to be mindful of the dramatic effect of globalization and changing demographics.

Terry points out that Canadian exports and imports of legal services more than doubled between 1995 and 2011. "That means lawyers will need to be prepared to help business clients navigate not just within the bounds of their province or territory, but also help them globally — and that's a skill-set lawyers may not have had in the past."

Lawyers will have to think — and act — globally when representing non-business clients too, she says.

For instance, Terry cites a 2010 Statistics Canada study that predicted that by 2031, between 25 and 28 per cent of the country's population will be foreign-born. The report noted that Canada's foreign-born population was expected to grow at a rate four times faster than the rest of the population, and that by 2031, 46 per cent of Canadians 15 years of age or older will be foreign-born or have at least one non-Canadian born parent.

That demographic shift will bring with it issues not only involving immigration law, but also ancillary issues, such as foreign property or inheritance flowing from wills and estates law.

"Lawyers in the future are much more likely to deal with legal issues arising in other countries for their clients," says Terry, who recently wrote an article on trends in global and Canadian lawyer regulation for the *University of Saskatchewan Law Review*.

"It doesn't mean that every Canadian lawyer will have to become competent in international law. But if they're not, they will need to be able to find an expert who can help their clients on international matters."

Ultimately, lawyers will have to better understand what clients want and need, argues Crispin Passmore, director of strategy at the Legal Services Board (LSB) in London.

"I'm not convinced there's such a thing as the legal services market," he says.

"Consumers want problem avoidance and problem resolution and sometimes legal advice, and it doesn't matter whether it's an individual caught up in a family breakdown; a small business hiring employees, engaged in major finance deal or exporting intellectual property; or a big business doing compliance work, tax management or risk management.

"People want help to either avoid problems happening or when they happen, they want to manage them effectively. So



Penn State Dickinson School of Law professor Laurel Terry, a scholar in the international regulation of the legal profession

it's not really a legal market. It's more of a problem-avoidance/problem-resolution market."

ALTERNATIVE WAYS TO MEET CLIENT NEEDS

In Passmore's view, as competition for the legal services market increases, it will shift from what he refers to as "performance competition," where lawyers try to focus on costs and quality of service to improve what they do, to "disruptive competition," where counsel attempts to meet client needs differently.

"That might find lawyers offering mediation and arbitration instead of traditional legal services," he explains.

Passmore suggests in the future, other players, such as accountancy firms, may provide legal extras, such as compliance work traditionally performed by lawyers, but in this case, run through a corporate software program to which clients would have direct online access.

"It's as much about how can people's needs be met by alternatives to lawyers as it is about lawyers changing what they do," says Passmore, who prior to joining the LSB in May 2009, worked for the UK's Legal Services Commission as executive director of policy and before that, was the first non-lawyer to serve as CEO of the legal aid-type, not-for-profit Coventry Law Centre in the UK.

At the LSB, he is witnessing firsthand how the legal profession is undergoing dramatic change in his jurisdiction.

Created as an independent body under the 2007 *Legal Services Act*, the LSB regulates law firms and has the mandate to modernize the provision of legal services by facilitating the development of ABSs, subject to their own regulatory requirements.

Firms intending to provide certain legal services reserved for legal professionals — but which seek to do so with the involvement of a non-lawyer, and in which either corporate managers or non-lawyers together exercise control, or are entitled to control the exercise of at least 10 per cent of the voting rights in the firm — must be licensed as an ABS in England and Wales.

In Passmore’s view, the shareholding ABS model offers greater opportunity for the delivery of legal services.

PROVIDING CAPITAL AND EXPANDING OFFERINGS

“Profit gets distributed to shareholders rather than to managers whereas in a partnership, the managers and shareholders are one in the same,” Passmore says, echoing Kowalski’s criticism of the partnership model.

“That matters if you imagine a director telling partners they need to push down costs and need to invest X amount of money. What they’re being asked is to take that money out of their income or profits, which doesn’t happen in corporations. Those funds come out of surplus profit after money is distributed to shareholders. With ABSs, you bring capital to the game so that firms with good ideas can raise money to expand quickly.”

Passmore says that some of the first ABSs to arrive in the UK looked like law firms but were able to quickly raise capital to expand their legal offerings on a large scale, such as super-retailer Co-operative Group, which sells food, appliances, insurance, travel and offers banking, pharmacy and legal services in everything from wills and estates, conveyancing and personal injury claims to employment law and, most recently, family law.

If a client cannot afford the legal fees upfront, Co-operative Legal Services Ltd. will provide them a low-cost loan and secure the credit against any future settlement or asset distribution, Passmore explains.

“This allows Co-op to grow the banking and legal services sides of its business, and the company can also cross-sell into other areas, such as its funeral business. The company can offer to probate a will and remind other family members to write one, and provide investment advice for any assets from an estate.”

Co-op relies on its brand to reach existing and potential customers. The same holds true with QualitySolicitors, an

Internet-based alliance of independent UK law firms that, in 2011, formed a national partnership with high-street stationery giant, WHSmith, to set up shop with “Legal Access Points” in over 150 branches across England and Wales, where bookstore customers can enquire about legal services but not receive direct legal services, as is the case with Co-op. (Last year, QualitySolicitors teamed up with LegalZoom to offer online legal services from solicitors in over 400 locations across the UK.)

Co-op and QualitySolicitors are considered ‘Mega ABSs’, which are subject to the same regulatory and disciplinary rules traditional law firms face in protecting the public against such issues as the misappropriation of client funds, transparency in pricing and misrepresentation.

“But what really is different is the ability of ABSs to meet consumer need,” says Passmore.

Further, according to Passmore, “customers don’t care about the ownership structure of legal services providers much like they don’t care who owns a supermarket or garage. They look at the services offered and prices and see whether they’re happy with it.”

He also dismisses concerns that ABSs are purely driven by profit.

“We can overstate the idea that external owners are in it for the money whereas lawyers aren’t. When it comes down to it, lawyers are trying to make a living as well.”

In fact, former Bank of England deputy governor Sir David Clementi headed a commission a decade ago that reviewed the regulatory framework for legal services in England and Wales,



Crispin Passmore, director of strategy at the Legal Services Board (LSB) in London, England

and suggested in his final report in 2004 that lawyers who don't think they're in the legal services business wouldn't be in business for long.

"Lawyers are making decisions the same as any other business, and are doing it to maximize profit, which is best done by meeting consumer demand," says Passmore, who notes that one of the first major entrants into retail legal services was Co-op, which distributes its profits to its members.

ENHANCING ACCESS VIA BROADER CHOICE

He explains that since the LSB became fully active in 2010, when the regulatory regime it operates under was activated by statute, the major issue has been to "strip away the rules that protect lawyers rather than protect clients."

"Our focus has been on how to enhance competition and allow people to come into the legal services market and get away from the idea that regulation should ever dictate business structure."

Passmore believes that giving consumers broader choice can only enhance access to justice.

"Lots of economic theory shows that competitive market growth will lead to new providers offering legal services and therefore giving more people greater access to those services," he explains.

"Competition also drives innovation, which means people getting services in different sorts of ways at better pricing."

For instance, people who don't qualify for legal aid but who nonetheless cannot pay standard legal fees are an untapped market for providers, who, says Passmore, could design affordable services for such consumers.

Clients unhappy with the service they receive from a lawyer at a law firm or an ABS can also file a complaint with the Legal Ombudsman, an office also established by the *Legal Services Act*. "That increases consumer confidence and makes them less scared of lawyers and able to choose one as they would access banking, insurance or other professional services," says Passmore.

Although some jurisdictions around the world are waiting to see how ABSs play out in the UK, legal markets globally are headed in one direction, he believes — and that's toward liberalization.

BENEFITS OF GLOBAL REACH

As a result of technology shrinking geographic distances, legal service providers have more opportunity to expand their reach internationally and serve clients in multiple jurisdictions,



Andrew Fleming, managing partner of Norton Rose Canada LLP in Toronto

according to Andrew Fleming, managing partner of Norton Rose Canada LLP in Toronto.

He says that Montreal-based Ogilvy Renault LLP, where he held the same managing partner role he has now, didn't hesitate when it was presented with an offer to join Norton Rose Fulbright, as the global legal practice will be known as of June 1 when it joins forces with Fulbright & Jaworski LLP of Houston.

"We recognized that some of our clients with whom we had very good relationships and did a lot of work were basically looking outward and Canada and the UK are countries where that is more prevalent than most others," explains Fleming. "We decided that if we wanted to be good lawyers making reasonable amounts of money we could do so by staying in Canada. But if we wanted to reach for the brass ring, we would have to look outward as most of our clients were with the idea that we could provide services globally."

Following the 2011 merger, Norton Rose Canada lawyers now join with their global partners to represent clients in matters beyond Canada's borders as Fleming recently did when he assembled a team to handle the sale of a client's company that had offices in six foreign jurisdictions.

"We can run the deal out of Toronto, but to have the global reach like we have with Norton Rose Group [which has more than 2,900 lawyers in offices on every continent save Antarctica] means we can capture a lot of the value in that transaction very easily," he explains.

"In part, it's embracing technology and all that it can bring to us. But fundamentally, it's about having a group of like-minded professionals around the world with whom we have enough faith to be able to recommend to our best clients that they use them in various parts of the world."

Fleming, who also practises business law, says the profession will have to “embrace an advanced model for the production of legal services,” which includes the extensive use of technology and within that, a sophisticated knowledge-management system.

“If my colleague in Sydney is doing a public-private partnership for a gas plant in Australia, I should be able to access all of the knowledge accumulated and use that in connection with a transaction in Canada.”

Knowledge management, in his opinion, is likely “the largest and most important tool” global firms have at their disposal.

“People don’t hire law firms, they hire lawyers, and want a trusted-advisor relationship with them to solve as many problems as the lawyer can and provide them with access to legal services wherever they do business, which is where we have a tremendous advantage as a global law firm.”

Fleming characterizes London-headquartered Norton Rose’s outward reach internationally as a quasi-genetic attribute.

“I think it’s in the DNA of British culture to be global in perspective and look beyond its shores,” he says. “The UK is reasonably small geographically, yet has managed to grab and hold an incredibly important position in global commerce, with London still the financial capital of the world. And English law firms have all been very strong in former British colonies, such as Hong Kong and Singapore, and now most of them are branching out into the United States, another former colony.”

Fleming says that Norton Rose’s recent inroads into Canada, Australia, South Africa and the U.S. is simply a natural extension of the firm’s business model. Other multinational marriages of major firms in Canada are possible, he thinks, but doubts any large Canadian firms will embrace ABSs.

“The model is pretty straightforward in Canada,” says Fleming. “It’s either based on a partnership or a professional corporation for tax-planning purposes.”

However, he concedes that ABSs could be a future fit for class-action boutiques that typically use settlements from a handful of successful cases to pay for the many more run on a contingency-fee basis.

“That sort of practice might need extra capital.”

The one common driver that will guide firms, regardless of size or practice area, in the future is technology, says Fleming.

“When I started practising law in 1975, I would go to the library, pull out books and search indexes as part of my research. Now, I can go on the Internet, type in three or four words in Google, and I’ve done as much research in 30 seconds that would have taken days to do 10 years ago.”

He adds that Canadians are also becoming empowered in cyberspace. “It’s becoming so much easier for people to protect or enforce their rights by getting a sense of what matters and what can be defended or arbitrated from using the Internet — and that will be a major factor in the future in terms of how legal services will be provided.”

THINKING AS A SERVICE PROVIDER

For lawyers, the future will be filled with various pressures, from clients seeking other options beyond the hourly billing rate to increasing competition from alternative service providers who can use technology to replicate legal services provided by licensed lawyers, says University of Ottawa technology law professor Michael Geist.

Of all those factors, he believes technology can play an important role in improving access to justice already seen through such initiatives as the online compendium of case law, board and tribunal decisions, statutes and regulations developed by the Canadian Legal Information Institute (CanLII), of which Geist serves on the board of directors.

“I also think service providers able to offer more technology-driven, cookie-cutter-style services, such as wills and estates, real-estate transactions, incorporations and contracts, will significantly increase access to legal services because they’ll be able to offer many of those services at lower price points,” says Geist, who holds the Canada Research Chair in Internet and E-Commerce Law at the U of O.

But as Penn State’s Terry points out, the most profound paradigm shift lawyers face in the future is that of being considered service providers.

“The legal profession will not be viewed as a separate, unique profession entitled to its own individual regulations, but will be included in a broader group of service providers that can be regulated together,” she explains, noting that lawyers are already considered service providers under the North American Free Trade Agreement.

“This new paradigm represents a fundamental, seismic shift in the approach towards lawyer regulation, and will affect not only who regulates lawyers but how they are regulated.”



University of Ottawa technology law professor Michael Geist