

When in Doubt, Opt for Change: A Career Philosophy for a Profession Undergoing Disruption

By

John C. Buckley
General Counsel & Chief Compliance Officer
PPMS
10710 Sikes Place, Suite 300
Charlotte, NC 28277

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The Profession

The legal profession in most western countries, if not world-wide, has found itself defined by particularized educational standards, examination processes, formal or informal apprenticeship expectations, and relatively strict registration and licensing requirements (and of course in recent years, substantial fees along the way). It is a rigorous path, marked by relatively high attrition rates, that generally rewards low deviation from precise, detailed standards of performance and behavior. The people who have survived and been honed by these rigors have emerged as highly evolved professionals suited for the legal environment.

But what does it mean to be ‘Professional’ really? In the 1981 landmark business book *Theory Z*, the author William G. Ouchi contrasted American business professionals to their Japanese counterparts, noting that in the US, there was an interchangeability to managers, who could easily be unplugged from one organization, and plugged into another, and with minimal orientation function effectively; that interchangeability wasn’t present in the more specific-relationship driven model of a Japanese business. In the US we refer to this standard response to a typical situation as being a “professional.”¹

In the law, we have not only engrained our profession with the practice of standard responses to standard situations, but we have reduced many of these standards to writing and mandated them in procedure. Any deviations can result in rebuke, sanction, and even professional disgrace. Despite being a profession that can advocate strongly for substantive change in our business activities, our political environment, and our society at large, we are not a profession that suffers non-substantive procedural changes very well. We emphasize tradition, and the trappings of tradition more than any other profession.

So what of our collective professional future? Where should we drive it; where is it being driven? According to Thomas Morgan, “[l]aw is a derivative profession; we are not in control of our professional future.”² He explains:

¹ Ouchi, William G., *Theory Z* (1981) at 51 (“Managers who do not know one another personally depend upon others to be ‘professional,’ that is, to respond in standard ways to problems”).

² Thomas D. Morgan, *Educating Lawyers for the Future Legal Profession*, 30 Okla. City U. L. Rev. 537 (2005).

“what I mean by describing law as a derivative profession is the same thing economists mean when they say that the demand for golf balls is derived from – i.e., dependent on – the public’s interest in playing golf. Unlike in the movies, it is not true in golf or in law that “if you build it, they will come.” While there is an interchange between lawyer and client, for most lawyers, most of the time, professional activity is dictated by what their clients want and need, not by how the lawyers themselves would prefer to spend their time.”³

As a derivative profession, we tend to be opportunistic at best in our approach to creativity and driving change for the profession. Particularly litigators take what they are handed and create what they can from the situation they are given, but there’s not much latitude to alter tradition, let alone drive change. This inability to freely drive the intellect and creative juices where they would want to go frustrates some to leave the profession, not bitterly or in defeat, but taking the tools they learned and applying them in non-legal contexts.

The Change

There is change that is gradual, measured, deliberate, structured, meted out over time; then there is change that is unexpected, far-reaching, abrupt, dislocating, and disruptive. The same change can affect different recipients differently. Those who are complacent often find significant changes to be dislocating, while those have a sense of urgency can adapt their pace more easily, and flow with even significant changes.

The Disruption

While some would characterize the legal profession as being on the precipice of huge disruptive technological change, others would say that urgent but deliberate change is well under way, and has been for some time. Older members of the bar still recall when the first computer terminals made their way into a carrel tucked away in some corner of a county bar, or law school library; the possibility of every attorney having the *opportunity* to possess a computer, let alone having it as an obligatory tool, was futuristic.⁴

³ Thomas D. Morgan, *Educating Lawyers for the Future Legal Profession*, 30 Okla. City U. L. Rev. 537 (2005) [citing ABA Comm’n on Professionalism, “... In the Spirit of Public Service:” A Blueprint for the Rekindling of Lawyer Professionalism 10-11 (1986), quoting Professor Eliot Freidson, a member of the Commission and the much-repeated theme of the film *Field of Dreams* (1989) which conveyed the notion that if the movie’s hero would build a baseball field, baseball fans would materialize and attend games there].

⁴ William B. Spong, Jr., “The Legal Profession: A Look Into the Future” (1979) at 19. Popular Media. Paper 86.

There is some sense that lawyers, as a profession, are more subject to self-delusion and perhaps therefore, disruption “because lawyers excel at a skill that can become their undoing: dismissing or reframing adverse precedent that fails to suit the position they want to take.”⁵ So it is with technological changes as well.

Technology

Since well before Mary Shelley authored *Frankenstein*, technological advance in popular culture had always been viewed with apprehension if not outright fear. The legal profession has not been exempt from such apprehensions, and there is widespread recognition that “[t]he pace of technological change is unlikely to slow in the years to come.”⁶ More than 35 years ago legal scholars were expressing their angst over computerized technological advances of the day:

“The role of the lawyer has always been a personal one between a client with a human problem and a lawyer contending for a human solution. On the one hand we cannot sit back and let the technological revolution pass us by. However, on the other hand we cannot permit a mechanized revolution make us lose one of our most cherished attributes, our humanity. Using mechanical devices to solve human problems is desirable. We must not, however make the fatal mistake of allowing mechanical devices force us to make mechanical decisions.”⁷

But in fact, these mechanical decisions, made at low cost, are exactly what clients wanted, and so exactly what lawyers through their law firms sought to provide. It continues to recur with each incremental increase and improvement of technology that “[p]ressure to control costs, in turn, may lead to an increased use of technology.”⁸ Much as there is a symbiotic relationship between hardware’s speeds and software’s complexities so there is between large scale far flung law firms and the technologies that support their cost effectiveness. “Globalization, together with the resulting increased size of major firms, and the technological advancements of the past decades,

http://scholarship.law.wm.edu/popular_media/86 (“The use of computers for research purposes, already part of the operation of many large city firms and bar organizations, will become standard equipment for most lawyers. There will be increasing specialization by lawyers and possibly the development of nationwide law firms.”)

⁵ Steven J. Harper, *The Lawyer Bubble: A Profession in Crisis* (2013) at 133.

⁶ Robert Stein, *The Future of the Legal Profession*, 91 *Minn. L. Rev.* 1, 9 (2006), available at http://scholarship.law.umn.edu/faculty_articles/430.

⁷ J. Clay Smith, Jr., “The Future of the Legal Profession” (1981). *Selected Speeches*. Paper 47. http://dh.howard.edu/jcs_speeches/47

⁸ Thomas D. Morgan, *Educating Lawyers for the Future Legal Profession*, 30 *Okla. City U. L. Rev.* 537 (2005).

have made competition in the legal market increase exponentially.”⁹ What is interesting in more recent years has been the beginnings of reversal of some aspects of this technology and scale relationship. Robert Stein predicted this possibility a decade ago when he asked “[w]ill the new technologies level the playing field so that solo and small firm practitioners will have the same practice resources presently available primarily in large firm settings?”¹⁰

If this new trajectory, toward completely capable solo and small firms empowered by technology resources takes hold, is the next step more and more legal work supplemented by these same technologies but “done by other specialized professions?”¹¹ And if we continue on that arc is the ultimate destination one in which a ‘client’ simply accesses the technology directly, from some artificial intelligence? In fact, some, including Quintin Johnstone, have suggested that in the last 10 years we are seeing evidence of more frequent reliance on technology by non-lawyers in legal settings:

“A unique type of legal "service provider" is the individual person who acts pro se, providing his or her own legal services. Pro se legal services recently have become far more frequent in some important fields of law, particularly in cases before the courts. Some individuals act pro se because they are unable to pay for needed legal services and are unaware of legal aid or pro bono help, or such help is not available to them. Many other individuals acting pro se can afford to pay legal service providers, but represent themselves to save money or, occasionally, because they believe they can do a better job than the legal service providers they would hire.”¹²

Moreover others have suggested “[t]here will be 10 to 40 percent fewer lawyers in the next decade than there are today [2012], a trend that will effect mostly solos and small firms.”¹³ In actual fact, as of 2016 there are 1,315,561 lawyers in the US.¹⁴ That’s up from 1,300,705 in 2015¹⁵ and up

⁹ Michael A. Cardozo, *The Future Of The Legal Profession: The New York City Corporation Counsel’s Perspective On The Challenges And Opportunities Ahead*, 39 HOFSTRA Law Rev. 795, 800 (2011).

¹⁰ Robert Stein, *The Future of the Legal Profession*, 91 Minn. L. Rev. 1, 9 (2006), available at http://scholarship.law.umn.edu/faculty_articles/430.

¹¹ Robert Stein, *The Future of the Legal Profession*, 91 Minn. L. Rev. 1, 9 (2006), available at http://scholarship.law.umn.edu/faculty_articles/430.

¹² Johnstone, Quintin, "An Overview of the Legal Profession in the United States, How That Profession Recently Has Been Changing, and Its Future Prospects" (2008) at 744-45. Faculty Scholarship Series. Paper 1888. http://digitalcommons.law.yale.edu/fss_papers/1888

¹³ Rachel Zahorsky, *The Future of Law: Dark Clouds or Silver Linings?* (2012) [Prediction attributed to Fairfield, Connecticut-based attorney Fred Ury]. Available at http://jay.law.ou.edu/faculty/jmaute/lawyring_21st_century/Spring%202012%20files/TheFutureofLaw_DarkClouds.pdf.

¹⁴ American Bar Association, 2016 National Lawyer Population Survey

¹⁵ American Bar Association, 2015 National Lawyer Population Survey

3.75% from 1,268,011¹⁶ in 2012. There are another 5 years before the predicted decade ends, and it is possible that the 3.75% growth trend could go negative to achieve 10% fewer lawyers by the end of the decade, but it seems very unlikely.

A lawyer's ability to tell clients in a particular situation what they can expect from the law has been our profession's monopoly for many years, but now that is, or will be, freely available on the Internet. "The future for lawyers will depend on how much value lawyers can add to what will be readily available to clients."¹⁷ One of the first places that value proposition may be comprehensively challenged is through the option of pro se representation.

As lawyers we have probably repeated the joke that a lawyer who represents himself has an idiot for a client. I heard this one early in my law school career, but most recently I have heard it repeated from non-lawyers who no doubt have been advised, through humor,¹⁸ by lawyers suggesting that these non-lawyers should probably not represent themselves in some matter. One can only imagine how long, or how short, it will be until artificial intelligence will educate its client through humor.

Artificial Intelligence

Artificial Intelligence ("AI") represents a potentially different type of technological advance. AI proposes to go beyond the tool role for technology, and produce systems that "will have to possess human-like reasoning capabilities."¹⁹ However we would not expect an AI to possess human-like emotions or emotional sensibilities – but many a client would assert these can be hard to find in an attorney as well. In the beginning at least, the AI is likely to function to assist an attorney, and may eventually do the work of non-lawyers, or other lawyers, but probably not the client facing lawyer:

"Researchers who develop new information technologies describe a future with intelligent computerized legal assistants that can scour databases and outline arguments in place of

¹⁶ ABA Market Research Department

¹⁷ Frederic Ury, Atticus Finch And The Future Of The Legal Profession, 18 So.WstrnJ.Intl.Law 225 (2011)

¹⁸ David Butler, Disreali: Portrait of a Romantic (1980) ("I am never more serious than when I appear to be joking" attributed to Benjamin Disraeli).

¹⁹ Cary G. Debessonnet and George R. Cross, Artificial Intelligence Application in the Law: CCLIPS, a Computer Program That Processes Legal Information, An, 1 Berkeley Tech. L.J. 329 (1986). Available at: <http://scholarship.law.berkeley.edu/btlj/vol1/iss2/2>

low-level associates, as well as sophisticated software agents that can negotiate contracts without the direct involvement of attorneys.”²⁰

A critical watershed will occur when the AI comes in-house, working under the license and malpractice insurance of the in-house attorney, and replaces outside law firms. For those attorneys who are complacent, they may ask: will AI help us better analyze the ‘reasonable man’ standard for torts? The more abstract the concept, of course, probably the longer time needed to get there. For those attorneys who feel a sense of urgency, they may recognize the practical applications to more granular questions, like AI advising clients what the moving target of ‘reasonable security’ in electronic commerce under FTC rules will likely consist of at any given future date?²¹ This is an example of a practical, valuable looking-forward consideration, but of a type not often posed to outside counsel.

The Long-Term

“A just machine to make big decisions, Programmed by fellows with compassion and vision”²² – Donald Fagen.

Let us assume that the amount of work that exists to be done is infinite. AI can initially do all of the "simple" work, but the definition of what is "simple" expands as AI evolves. Eventually, as AI progresses, the work that lies beyond "simple" (the work that requires the greater skill, talent, knowledge, or insightfulness of lawyers) may require greater cognitive faculties than the vast majority of humans are able to supply. That is the end-game. But is this level of AI at hand, or generations away.

Science writers do have a tendency to mis-predict the speed with which innovation reaches us. We are all still waiting for our flying cars. Admittedly a comedy, 1989’s *Back to the Future II*, had aggressive expectations for 2015: Home Fusion Reactors, the ever-underachieving Flying Cars,

²⁰ Johnathan Jenkins, What Can Information Technology Do For Law? 21 Harv. J. Law & Tech 2 Sp. 2008 at 593 [citing Kevin Ashley, Case-Based Reasoning, in *Information Technology And Lawyers*, at 23, and Edwina L. Rissland, Kevin D. Ashley & R.P. Loui, *AI and Law: A Fruitful Synergy*, 150 *Artificial Intelligence* 1, 15 (2003) (speculating on future legal applications of artificial intelligence)].

²¹ Travis D. Breaux and David L. Baumer, Legally “Reasonable” Security Requirements: A 10-year FTC Retrospective, *Journal Computers and Security*, Volume 30 Issue 4, June, 2011 Pages 178-193.

²² "I.G.Y. (What a Beautiful World)" is a song written and performed by American songwriter, singer and musician Donald Fagen.

Self-tying Shoes, and Hoverboards (that actually hover).²³ Not to suggest that they overshoot everything though: the predicted HoverCams, which we actually call drones are everywhere in business and industry now.

But 1957-58's International Geophysical Year that Donald Fagen made fun of in his 1982 hit single I.G.Y. (What a Beautiful World) was serious when they predicted under-ocean rail travel between Paris and New York by 1976. A 32 mile tunnel under the English Channel was completed in 1994, and I don't want to undervalue the enormity of that achievement. In fact, just the opposite. The effort required to achieve innovation is always greater than expected. Innovators are over-optimists, and they need to be. But things are often more complicated than they seem at the beginning.

Changes will come and the adaptive will survive, and the others won't. In 2011 Forbes listed 5 brands that it predicted would no longer exist in 2015: Kodak, the US Postal Service, Sears, RIM (maker of Blackberry),²⁴ and Netflix. Netflix stands out as the brand that has surprised Forbes. Though others remain, their value as a brand has clearly diminished in the intervening years. I predict that many brands in the law will fall by the way, but some will find a way to adapt and change their model, and not only survive, but improve.

Nearer Term

We all have a sense that “[f]uture lawyers will have to be simultaneously more specialized and more capable of responding to change than were earlier generations.”²⁵ While the profession may educate its members about changes, and may attempt to influence policy around the edges of change, we, as professionals, prepare to get to where the profession is going as individuals. Individually, we define the future of the profession, its success, or its failure.

The first thing to understand about the future of the law, is that it is not monolithic. There will be winners and there will be losers. How did Netflix survive. They changed themselves faster than the market they were in.²⁶ Sears didn't change as fast as Amazon. Kodak didn't change as fast as Shutterfly. RIM couldn't keep up with Apple or Google's Android. A key takeaway distinction

²³ “15 things Back to the Future told us we'd have by 2015” Radio Times, (2015) available at <http://www.radiotimes.com/news/2014-08-16/15-things-back-to-the-future-told-us-wed-have-by-2015>

²⁴ I highly recommend Jacquie McNish and Sean Silcoff's *Losing the Signal: The Untold Story Behind the Extraordinary Rise and Spectacular Fall of BlackBerry* (2015) for the proposition that poor business practices can thwart even the most innovative of technological advances.

²⁵ Thomas D. Morgan, *Educating Lawyers for the Future Legal Profession*, 30 Okla. City U. L. Rev. 537 (2005).

²⁶ “Netflix: from DVD rental to Global Internet TV” available at <http://cloudnames.com/en/blog/how-netflix-transformed-from-dvd-rental-to-global-internet-tv/>

for lawyers, that is a real difference, is that we are all a one-person start-up²⁷ business. We move this profession as individuals, not as law firms, not as law departments, and not as legal services providers.

The Career Philosophy

How should we prepare? Is there some great lock-step that all attorneys should take to prepare for the disruptive impact of technology to our profession? I think not. Instead I am encouraged by the individual actions attorneys are taking to prepare themselves individually for where our profession is going, wherever that may be.

There is not one right career philosophy. Each of us needs to find an approach that fits us. Some will choose well, and some, possibly most, will not. But those that choose well will define the future of the legal profession.

One approach I advocate, and which I have employed, I have labelled: *When in Doubt, Opt for Change*. It seems particularly applicable at a time when the legal profession is facing technological disruption.²⁸ What distinguishes this career philosophy from other more prevalent approaches? Concisely, when people encounter a decision point, they have choices – usually two. If one choice is clearly better than the other, almost all people choose the better choice. The *Opt for Change* philosophy is no different.

When it's not clear which choice is better, most people gather as much information as possible before a decision needs to be made, until one choice is clearly the best. In some cases, after gathering the information available, it's still not clear which choice makes the best sense. When faced with this ambiguity, most people simply choose the *status quo*, and stay with what they are doing. They do NOT *Opt for Change*.

Anecdotal

Although my story is anecdotal, I think it illustrates the effect of the application of this philosophy. At the start of my career I adopted the *Opt for Change* philosophy. I consciously chose to push myself out of the status quo comfort zone. When I was in doubt about which choice was best, I

²⁷ Reid Hoffman and Ben Cosnocha, *The Start-Up of You: Adapt to the Future, Invest in Yourself, and Transform Your Career* (2012) is highly recommended.

²⁸ See McGinnis & Pearce, *The Great Disruption: How Machine Intelligence Will Transform The Role Of Lawyers In The Delivery Of Legal Services*, 82 *Fordham L.Rev.* 3041 (2014), available at <http://ssrn.com/abstract=2436937> (“the legal profession faces a great disruption.”)

elected to opt for change rather than inaction. Some people derogatorily called me, and others of my ilk, job-hoppers. In retrospect, it is plain to see why.

My first job out of college was as a Safety Engineer within the US Department of Defense. In less than six months I was an Air Pollution Control Engineer for the Commonwealth of Pennsylvania, and six months later I transferred to become a Stack Test Engineer. Then six months later I was a Jr. Engineer in the Steam Production department for a power company in North Carolina, and within 9 months I was head of the Air Quality group in the Fossil Production Department of that company. Some 24 months later I was head of the Solid Waste & Environmental Auditing group in the Nuclear Department, and 18 months after that I was in law school. Many of these were opportunities that others probably would have passed over because they weren't obviously better than where I was.

Despite the frequent warnings I received that I would become un-employable, just the opposite happened. I worked full-time over the holiday break during my 1L year, and despite attending an inexpensive and not-so-well regarded public law school, I worked all summer with a DC law firm. I came back to South Carolina and worked part-time for one of the most highly-regarded law firms in the state in the fall, then full-time over the holidays back in Charlotte, and then part-time doing research for a professor in the spring of my 2L year. Then I split my 2L summer between two law firms, and I taught 1L's legal writing and research during my 3L year. Then I took a fellowship in DC, but it didn't start until after Labor Day, so I worked for a law firm as a temporary attorney after passing the North Carolina bar.

My grades were good, but not stellar, and I was not on law review. These opportunities came to me for one reason: experience. Or should I say 'experiences' emphasizing the plurality. There is a maxim that 20 years' of experience with one organization is really just 1 year of experience repeated 20 times. One of the great benefits of 'job-hopping' is that a person can maximize their individual potential by constantly stepping out of their comfort zone into new learning environments. The benefit to employers of hiring so-called job-hoppers is that they can cross pollinate organizations, conveying lessons-learned effectively, beyond what can be garnered from a professional conference (not to derogate professional conferences). But perhaps the greatest benefit of job-hoppers is to their profession because they have become practiced at the art of change, and making change successful.

Many of us have heard the adage that "[i]t is not the strongest of the species that survives, nor the most intelligent, but rather the one most adaptable to change."²⁹ Similarly in a profession, those

²⁹ Although often erroneously attributed to British naturalist Charles Darwin, and at least once to prominent lawyer Clarence Darrow, versions of this statement probably have their origins tied to a Louisiana State University business professor named Leon C. Megginson who presented his own interpretation of the central idea outlined in Darwin's "On the Origin of Species" in a 1963 presentation and in a 1964 article in the journal "Petroleum Management." See <http://quoteinvestigator.com/2014/05/04/adapt/>

professionals who are adaptable will be most likely to survive. But how do we teach adaptability? How do we learn it? I suggest that we learn adaptive skills by pushing ourselves frequently out of our comfort zones. It doesn't make sense to do this at every turn. But when a turn off presents itself, and neither road is a clear path to the best future, we can at least gain the benefit of learning to be adaptive by turning off the road we are on, the road we know, the road we have already travelled. The truth is, learning to be adaptive, teaches us we can always backtrack to that road if the need arises.

There are those who will be accused of making “a bold prediction that lawyers will suffer the fate of other guild-members—the artisans and craftsman of an earlier age—who saw their livelihoods wiped out by the potent mix of technological advancement and market forces that is modernity.”³⁰ But I would counter that those wood craftsmen who later thrived, did so by adapting their mechanical and 3D-thinking skills to become, individually, auto-mechanics, electrical repairmen, and the like. “The future for lawyers could be prosperous or disastrous.”³¹ I tend to agree with those who “predict that lawyers who are unwilling to change ... will, in the coming decade,³² struggle to survive. Meanwhile, those who embrace new technologies and novel ways of sourcing legal work are likely to trade successfully for many years.”³³

Our profession survives by individual lawyers evolving. Those that survive will define the future of the profession. The more lawyers who can learn to be adaptive, the more who will survive.

Leadership of the Profession

What can the leaders of our profession do? Well they cannot stave off the future. And they cannot bury their heads in the sand. “Leaders have to put their followers first.”³⁴ The pace of change necessary for survival for some lawyers must be permitted. Leaders can reduce those barriers. Tradition cannot be allowed to slow those lawyers who want to move faster, to change faster, to adapt faster. When the leaders of our profession make decisions, they should make them with encouragement of individual lawyer adaptation in mind.

³⁰ Paul F. Kirgis, *The Knowledge Guild: The Legal Profession In An Age Of Technological Change*, 11 Nev.LawJ.184 Fall (2010).

³¹ Richard Suskind, *The End of Lawyers?: Rethinking the Nature of Legal Services* (2008) at 269.

³² I think these impacts will play out over a longer period than a decade; in fact, it has been almost a decade since Suskind's book was published.

³³ Richard Suskind, *The End of Lawyers?: Rethinking the Nature of Legal Services* (2008) at 269.

³⁴ Angel M. Swindell Nix, *Jobportunity: Your Career GPS* at 21 (2013)