

**FOUR QUESTIONS AT THE INTERSECTION
OF THE LEGAL PROFESSION AND
TECHNOLOGY, FOR BOTH EVANGELISTS
AND SKEPTICS**

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INTRODUCTION

The pace of change in the legal profession as a result of technology is accelerating. Since the introduction of electronic data base research in the 1980s to today, where artificial intelligence is beginning to take on those search functions, the legal profession seems poised for dramatic change, in not just the way lawyers practice their craft, but also who (or what) is doing the hardest and

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most creative work in the industry: will it be done by lawyers, by computer engineers, by computers themselves, some combination thereof, or an entirely different set of actors altogether? At the same time that the legal profession is facing challenges to its monopoly on the delivery of legal services, law school enrollments have declined precipitously, and new lawyer job prospects have dimmed.¹ And all this is occurring at a time when the majority of low- and middle-income Americans face their legal problems without a lawyer, mostly because they cannot afford one.² The encroachment of technology into the practice of law offers both an opportunity and a threat and more and more entities are exploring “sharing economy”-style models for the delivery of legal services.³

The introduction of the new technologies in the practice of law holds out the possibility that innovations in the delivery of services might help close the justice gap: the difference between the need for legal services, their affordability, and their availability. The individuals who are able to figure out a way to harness technology to bring legal assistance to the millions of Americans who cannot presently afford them, or who are unaware of how to access them, or even know they have a legal problem, may just find their talents and services are in high demand and can gain satisfying careers—and find viable economic opportunities—working with others to help solve their legal problems.

It has been said that in crisis, there is often opportunity. How the legal profession navigates the current crisis in the legal profession as it relates to the gap in access to justice, low job

¹ For a discussion of the current state of the legal profession and how law schools can prepare law students for this changing environment, see Michele R. Pistone and Michael B. Horn, *Disrupting Law School: How Disruptive Innovation will Revolutionize the Legal World*, CLAYTON CHRISTENSEN INSTITUTE FOR DISRUPTIVE INNOVATION, available at <http://www.christenseninstitute.org/wp-content/uploads/2016/03/Disrupting-law-school.pdf> (last visited April 28, 2016).

² Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531 (2013). See also, LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW-INCOME AMERICANS 13 (September 2009)(synthesizing latest studies to show that one in five low-income Americans faced their legal problems without a lawyer) available at <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGaInAmerica2009.authcheckdam.pdf>.

³ For a discussion of sharing economy models in the delivery of legal services,, see Raymond H. Brescia, *Uber for Lawyers: the Transformative Potential of a Sharing Economy Approach to the Delivery of Legal Services*, 64 BUFFALO L. REV. 746, at 759-766 (2016) (hereinafter “Brescia, *Uber for Lawyers*”).

satisfaction within the profession, a reduction in the number of people going to law school, and diminished job prospects once individuals graduate law school will help define the profession, and perhaps society itself, for generations.

As technology connects the world in new and exciting ways; as economic inequality deepens; as climate change becomes more dramatic; as the interconnectedness of ideas, things, nations, peoples, and cultures becomes thicker: the world becomes both more understandable and more complex at the same time. We learn about police-community relations across the country in real time, while we share images and videos of natural and man-made disasters from across the world instantaneously. The digital revolution means not just that we have a better understanding of the world but also that many seek tools to bring about justice throughout it. While the world seems to be shrinking in so many ways, the ability to make change has become harder. The levers of power are embedded in ever more complicated systems, systems which need to be understood, deciphered, translated, and navigated. The complexity of the systems of change require experts knowledgeable about how they function. The legal profession is well suited to help individuals and communities operate those levers, protecting rights, advancing social change, ensuring justice.

At a time when lawyers could be more in demand than ever, the legal profession appears to be in crisis. Job satisfaction is low.⁴ Job prospects for newer attorneys have dimmed, while millions go without the assistance of a lawyer. The profession is threatened by new ventures seeking to harness technology in ways that helps them capture some of the market for legal services. And the profession is unclear about how to deal with the threat posed by technology. Does the provision of legal assistance through technology spell the end of lawyers, or can lawyers embrace technology to accomplish some of the essential benefits lawyers bring to society? Can technology help spread those benefits more broadly than they are being spread today, reaching more of the community, closing the justice gap?

With these thoughts in mind, this Essay attempts to pose four thought questions that help illuminate some of the key issues that

⁴ For a meta-analysis of lawyer job satisfaction studies, see Jerome M. Organ, *What Do We Know about the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 U. ST. THOMAS L.J. 225 (2011).

the legal profession will need to address to begin to come to grips with the implications of the infiltration of technology into the provision of legal services. These questions are really metaphors, a way of looking at the state of things that can help us think about contexts not necessarily directly related to the provision of legal services, but might be helpful nonetheless in helping the profession think about, address, and adapt to the changes that are most certainly afoot.

I. THE STATE OF THE LEGAL PROFESSION IN THE EARLY 21ST CENTURY.

What are some of the changes facing the profession? To borrow another metaphor, Harvard's Clayton Christensen would say the legal profession is in the midst of disruption.⁵ New ways of delivering legal services, aided by technology, are changing the practice of law. Technology is both making the lawyer's job easier and making her able to handle more work in less time. Machine learning, artificial intelligence, and sophisticated document management software is accelerating and systematizing the lawyer's functions. They are also making it easier to outsource, offshore and "decompose" the work so that it can be managed by non-lawyers and overseas technicians, as well as computers, all of which enable the delivery of services at a fraction of the cost of how such services might be delivered through more "traditional" methods.⁶ Most dramatically, the internet and mobile technologies are transforming the matchmaking function between lawyers and clients. Companies like LegalZoom and Avvo are delivering a continuum of services—from brief advice and assistance, to full legal services—through a web-based portal that marries broad-based advertising to a wide network of providers.⁷ By offering somewhat limited, mostly pre-packaged, and largely commoditized services, these companies are delivering services at a fraction of the cost to consumers of traditional, "bespoke"

⁵ CLAYTON M. CHRISTENSEN, *THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL* (1997).

⁶ For a discussion of some of these changes to the practice of law, see RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* 43-44 (2008).

⁷ For a discussion of some of these new providers, see Brescia, *Uber for Lawyers*, *supra* note 3, at 759.

providers of services, and doing so at volume. Technology, when taken as a whole, is thus making the delivery of services easier, less expensive, more affordable, and more accessible.

The advances made possible by technology have sometimes made the delivery of traditional services easier, more efficient and more effective. Some technologies are simply making lawyers' lives easier, and, hopefully, that results in cost savings for clients. Such technologies Christensen would call "sustaining" technologies. These technologies include Westlaw and Lexis services and other programs and algorithms that make the lawyer more efficient.⁸

At the same time, the internet and mobile technologies that are facilitating the delivery of less expensive services directly to consumers are resulting in true "disruptive" innovation, as opposed to mere sustaining innovation. These technologies can lead to a transformative shift in the ways in which legal services are delivered. The services provided are less intensive, less tailored, and perhaps less sophisticated. They are rarely customized to the particular needs of a specific individual client. They are also less expensive. But are such services delivered in a competent fashion? The four questions posed below ultimately help us think through how to answer one critical question: does technology hold out the promise that lawyers can deliver competent services to more people at a cost that most can afford? They are by no means the only questions the legal profession and the larger community needs to answer while trying to understand the proper role of technology in the delivery of legal services, but they are a start, and can lead to more and deeper inquiry.

II. THE FOUR QUESTIONS, FOR TECHNOLOGY EVANGELISTS AND SKEPTICS ALIKE.

A. *What if the Invention of Email had Preceded the Invention of the Telephone?*

This question is a bit of a trifle, but it can spur critical thinking about the state of technology in the delivery of legal services. What if one could send email before one could speak directly to someone anywhere in the world, in real time?⁹ Imagine the sense of wonder

⁸ See *Disruptive Innovation*, CLAYTON CHRISTENSEN, <http://www.claytonchristensen.com/key-concepts/> (last visited April 27, 2016).

⁹ I am grateful to Daniel L. Greenberg, Esq., for this original question, who uses it to mock our reliance on email for things that could be resolved more easily over the phone, but it serves a different purpose here.

upon the invention of the telephone. We would likely have the same reaction as those who first used the telephone after using the telegraph for forty years in the 19th century. Conversations could be two-sided. One could sense tone, anxiety, fear, elation, concern, humor. Unlike email communications, which can leave a lot to the imagination and send unintended sentiments by a poorly phrased or poorly thought through joke, live communication through the telephone is a much better representation of our true intent in our communications and can lead to empathy and understanding in ways that email communications never can.

Why is this little thought experiment helpful for understanding the impact of technology on the delivery of legal services? Because we have technologies already in our midst that can assist in the delivery of legal services if such technologies are used in creative and effective ways. Lawyers can use the internet, video conferencing, and search capacities to delivery efficient and competent services.¹⁰ We have the technological capacity to bring lawyers closer to their clients, to put the history of legal information at the fingertips of lawyers, and to disseminate information about the law and legal rights and interests to a wide swath of the public. Lawyers can use the internet and mobile technologies to communicate effectively, research efficiently, and share information about the law in a way that puts the law at the fingertips of everyone with a smart phone or with access to the internet. Lawyers can help demystify the law and explain it in clear and effective ways so that individuals in the community can understand their rights and adopt strategies that can protect them. With the capacity to make legal information widely available, lawyers can help potential clients avoid legal problems. It is not unlike the way the telephone can facilitate direct communication so as to assist the parties to a conversation avoid not just miscommunication itself but also the larger problems such miscommunication can generate. Indeed, legal information, provided at a critical time, can prevent small problems from

¹⁰ According to the rules of professional conduct for lawyers, “competent” representation is the threshold for ethic representation, set forth in the very first rule. American Bar Association, *Model Rules of Prof'l Conduct*, Rule 1.1 (2013) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”) available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

becoming larger, intractable ones.

The technology exists today—and many lawyers are taking advantage of it—to make the law and legal information easier to access at a time when it can be most useful to the general public: i.e., in a way that helps them avoid larger problems. Of course, the information has to be timely, salient, clear, and actionable. When such information is available in such a way that it helps individuals understand their rights and resolve issues before they become problems, a critical access to justice goal is met: when a problem can be avoided, there is no need for the lawyer in the first place. Such information may help avoid problems altogether, which begs the question: what is a lawyer for? And that leads us to the next question.

B. How Does One Sell a Power Drill?

There is an old story in business school circles about the president of a power tool company holding a meeting with his senior staff. He asks them how they should try to market a power drill. The leaders of the company talk about the power of the drill, the battery life, etc. The president retorts, no. When marketing a power drill, one sells the hole, not the drill.¹¹ As Harvard Business School's Theodore Levitt puts it, "People don't want to buy a quarter-inch drill. They want a quarter-inch hole."¹²

Conversations about the impact of technology on the delivery of legal services seem to focus on the impact of technology on lawyer job prospects. But can that really be the point of a discussion about the legal needs of people who cannot, at present, afford an attorney? Perhaps the focus should center around what the lawyer can provide the client, or, more importantly, what the client wants when he or she needs a lawyer? Most of the time, what a lawyer can provide is information, guidance, and assistance in protecting rights. That is the essential function of the lawyer. If what the client wants is the hole and not the drill, then the key question when we discuss the impact of technology on the delivery of legal services is whether the client can have his or her rights protected by technology-enabled legal services. The point of the legal system is not to provide lawyers with job opportunities, but, rather, to

¹¹ One source for this story is BRUCE LARSON, FAITH FOR THE JOURNEY 32 (1986), though it is standard fare in many basic marketing classes and textbooks.

¹² Quoted in Clayton M. Christensen, *et al.*, *Marketing Malpractice: The Cause and the Cure*, HARV. BUS. REV. Dec. 2005 at 1.

ensure that the rights and interests of the citizenry are adequately protected in the law. That should be the focus of any inquiry into the role of technology in assisting in the provision of legal services to consumers and clients. Of course, that begs the question whether technology-enabled legal services are a substitute for competent legal services, but the point of this exercise is to understand the key questions that should inform any discussion of the role of technology in the delivery of legal services. The focus of the inquiry should be on whether technology can assist the providers of services in delivering competent services that protect rights to the fullest extent of the law. Of course, the present system, with the overwhelming majority of low- and middle-income individuals facing their legal problems without a lawyer, cannot meet this test. Thus, some experimentation with technology-enabled services, or really any innovation, is necessary if such experimentation can help improve access to justice, which should be a central goal of the legal profession.

C. Why Do People Purchase Milkshakes for Their Morning Commutes?

In a famous study, the previously mentioned Clayton Christensen set out to analyze why customers of a fast food chain were purchasing milkshakes, often in the morning. It turns out that those customers had long morning drives into work and the milkshakes accomplished several things for those commuters. The milkshakes could be consumed easily with one hand (to facilitate driving with the other), kept work attire clean (because of the no mess straws), were filling (and could fight off hunger through the morning), and helped to combat boredom during the drive (because they could be consumed in small sips that took work to draw the thick liquid through the straw).¹³

This somewhat trivial anecdote helps us focus again on the consumer of a product. Christensen implores us to place ourselves in the shoes of our clients to try to understand the job a consumer is trying to accomplish by purchasing a product and what is the best way to get that job done. This lens is helpful in understanding the role of technology in the delivery of legal services. It again draws our attention to what the client/consumer wants and what

¹³ Carmen Nobel, *Clay Christensen's Milkshake Marketing*, HARV. BUS. SCH. WORKING KNOWLEDGE, 1 (Feb. 14, 2011) available at <http://hbswk.hbs.edu/item/clay-christensens-milkshake-marketing>.

is the best way to satisfy his or her needs. As with the anecdote about the power drill, we should look to the job a client wants done and determine what is the best, most efficient, and most effective way to get that job done. In many instances, it is the protection of client rights and interests. If the client can receive services that are enhanced by technology, made more efficient and less costly, these are wins for the client. Many of the technologies emerging in the market for legal services are designed to help lawyers deliver services more efficiently, and in less time. Given the fee structure under which most lawyers operate, time is money. If a service takes less time, it should cost the consumer less money. If one turns one's attention to the job the client wants done, and if technology can help lawyers protect a client's interests in less time and for less money, then it is a clear benefit for the client.

D. What if We Could Photograph the French Cavalry from the Battle of Waterloo?

The final question is somewhat whimsical, but also deadly serious. What if one could take a photograph of the French cavalry at the Battle of Waterloo?¹⁴ The French cuirassiers made up a portion of Napoleon's cavalry at his last battle. Such horsemen must have been a sight to behold. They had gleaming steel breastplates, bright jackets, and silver helmets with horse hair plumes flowing from the crown. Cavalry of the Napoleonic era were the shock troops of the time, able to exploit weaknesses in the opponents' lines and turn the tide in a battle.

Despite the fact that the camera had not been invented during Napoleon's life, photographs do exist of Napoleonic-era cavalry. It's just that those photographs of the French cavalry are from WWI. In other words, despite one hundred years of advances in the ways in which armies could kill each other—think about the introduction of barbed wire, trenches, mustard gas, long-range artillery hurling explosive shells for miles, and, of course, the machine gun—the French cavalry had failed to adapt to meet those changes. The shock troops of 1815, that struck fear in the hearts of opposing armies, just became larger, clearer targets for

¹⁴ Dan Carlin's "Blueprint for Armageddon" series from his podcast "Hardcore History" sparked this question. DAN CARLIN, *HARDCORE HISTORY*, available at <http://www.dancarlin.com/hardcore-history-series/>

the machine gunners hiding behind barbed wire and nestled in trenches. And they were slaughtered.

What does this discussion have to do with technology and the delivery of legal services? Of course, I do not suggest that lawyers are in danger of dying at the hands of legal technology. But, the cavalry in WWI approached their job in the 20th century with the tools of the 19th. Similarly, the legal profession is approaching the 21st century with the tools of the 20th (if not the 19th). While no one is getting slaughtered, lawyers who fail to adapt to advances in technology and the ways in which it can make their jobs easier, can help deliver effective services in an efficient and more affordable way, and can secure client rights in a competent manner, are in danger of being left behind.

III. REFORMULATING THE QUESTIONS: LAWYERS RACING WITH TECHNOLOGY.

While these questions as currently posed are a bit cheeky, we can reformulate the questions in new ways, ways that are more incisive and help chart a course toward assisting the legal profession to understand how technology can aid in the provision of legal services, to make them more accessible and affordable, more efficient, and as effective as more traditional services. Thus, the questions, as reformulated, ask the following: (1) do we have technology in place that can help serve the client better than he or she is being served today; 2) can we assess the problem the client is trying to solve from the client's perspective and satisfy his or her needs; 3) can we deploy technology effectively to meet those needs in a competent fashion; and 4) are we prepared to embrace 21st century innovations that can help satisfy the needs of more clients, more effectively and more efficiently?

In their 2014 book, *The Second Machine Age: Work, Progress and Prosperity in a time of Brilliant Technologies*, authors Erik Brynjolfsson and Andrew McAfee¹⁵ posit that we are at a time of dramatic change and exponential growth in the impact that technology will have on life, work, happiness, prosperity, and inequality. Many functions previously performed by humans can be carried out more efficiently and effectively by computers. Those who are able to harness technology to improve their ability to perform functions critical to the economy will flourish in a period

¹⁵ ERIK BRYNJOLFSSON & ANDREW MCAFEE, *THE SECOND MACHINE AGE: WORK, PROGRESS AND PROSPERITY IN A TIME OF BRILLIANT TECHNOLOGIES* (2014).

of unequal abundance, where smaller numbers of people may receive outsized benefits of this abundance. For these authors, the ideal position for a worker is to race “with machines” and not against them, to find a way have computers complement the work of lawyers and to incorporate technology in the service he or she can provide to augment the impact of that service, make it more accessible, and make it more affordable.¹⁶ One can easily apply this approach to the context of the delivery of legal services, and many are already doing so. In this context, technology can improve access and affordability, efficiency and effectiveness.

The trick will be to answer the four questions. Do we have technology in place that can help serve the client better than he or she is being served today? What is the problem the client is trying to solve and what is the best, most effective, most accessible, and competent way to satisfy his or her need? Can technology assist in that effort to meet that need in a competent fashion? And, finally, are we prepared to “run with the machines” and embrace 21st century innovations that can help deliver competent services to more people, more effectively and more efficiently?

CONCLUSION

In this Essay, I have attempted to frame some of the key questions that face both the legal technology evangelists as well as the skeptics. The evangelists must show that technology can deliver better services to the clients in a manner that is less expensive, more efficient and at least as effective and as competent as a lawyer acting without new technological supports. In some way, this is a bit of a false premise. Any lawyer who is eschewing technology altogether and rooting through paper copies of Shepards', spending hours (at client expense) attempting to determine the status of a case is probably committing malpractice. Similarly, some of the tasks undertaken in complex litigation, where massive “e-discovery” searches draw in documents that run millions of pages in length, simply cannot be done without technology. Thus, few lawyers today practice without the assistance of technology in many forms, from email, to scanners, to electronic database research and, of course, Google. Nevertheless, the evangelists must show that the next level

¹⁶ *Id.* at 186.

technologies—machine learning, big data, sharing economy approaches like LegalZoom—can deliver services in a competent manner, one that fills the quarter-inch hole the client wants filled.

For the skeptics, they must defend the unacceptable current state of affairs, i.e., that an overwhelming majority of low- and middle-income Americans face their legal problems without a lawyer. That, or they must come up with a solution for solving the justice gap, one that does not suffer from the delusion that the federal government, state governments and philanthropy will somehow dedicate billions of dollars in new funding to underwrite a massive increase in the availability of free or affordable legal services to all of those who cannot presently afford them. Short of such an unlikely influx of funding, the skeptics must show that there are other ways to deliver affordable and effective legal services to all who cannot afford such services at present.

An honest approach to these key questions will help the legal profession identify the ways that technology can help lawyers run with the innovations that can deliver not just accessible and affordable services, but also competent ones. Such services can help close the justice gap and protect client rights and interests while providing meaningful and dignified work for members of the profession. In these ways, such services can sustain the core function of the profession: protecting the interests of the clients and the broader societal interest in meaningful and broad—if not complete—access to justice.

