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Trust Darwin: How Tech Will Disrupt, Save the Legal Profession

Big Law leaders need to go to more major league baseball games.

Monica Bay , Law Technology News

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Charles Darwin was right. It's not the strongest, nor the most intelligent, who survive—it's those who can best adapt to change. (Never mind that some people claim Darwin never actually said that.) If ever there was a time when the legal industry needed to pay attention to that advice, it's today. We face profound challenges, and if we don't man (and woman) up, we are all in for some serious hurt. But the flip side of the equation is there has never been a more exciting time to be a legal professional. Because technology changes everything.

FRONT & CENTER: SECURITY

Nothing can destroy an organization faster than a highly visible data breach, hacking, espionage or insider trading. Just watch the news: Sony. Target. Home Depot. JPMorgan Chase. Staples. Snowden. (Just a few.)

For lawyers, it all boils down to this: The American Bar Association's Model Rules of Professional Conduct, adopted in whole or in part by all states except California, include Rule 1.6(c): "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." (California's is even tougher.)

Law firms are often targets of miscreants who understand that lawyers handle highly sensitive client data (litigation, mergers, acquisitions, IPOs, etc.). Firms are vulnerable to just about every type of cybercrime, especially when lawyers travel abroad. (In some cultures, it's considered standard business operating procedures to clone your opponents' devices before negotiations.)

You may assume that Russia, China and now North Korea pose the most dangerous threats, but you may be wrong. It's your own employees, said Judy Selby, partner at Baker & Hostetler. Take the embarrassing case of attorney Matthew Kluger. He made \$37M via insider trading by simply reading matter file labels to identify pending M&As. (He was employed by Cravath, Swaine & Moore; Skadden, Arps, Slate, Meagher & Flom; and Wilson Sonsini Goodrich & Rosati.)

SILVER LINING

Consultant Joel Brenner notes that 17 percent of law firm intrusions are created by insiders: "That's an HR

problem.” But there’s good news: he estimates that 96 percent of firm intrusions are preventable with simple or mid-level controls. But firms must decide “who owns the problem. Everybody thinks it’s someone else’s headache—management, lawyers, IT, HR.”

More good news: Brenner and others see a silver lining— new business, because attorneys are positioned to help both their firms and clients. “The level of sophistication in law firms is all over the map,” and savvy firms that dive into this area may find themselves with new practice areas, he said.

Indeed, quality security has become a differentiator, said Mike Lombardi, president of consultancy Vertigrade Inc. Clients are beginning to insist on annual technology questionnaires and interviews, in the same way that they began to push for alternative fee arrangements a few years ago, he said.

“Newer measures, like two-factor authentication, mobile device management and continuous monitoring, will be part of the de facto standard alongside traditional anti-virus, intrusion prevention and passwords.”

Another clue to the changing turf: “Cyberliability insurers are starting to deny claims, based upon inadequate or incorrectly reported security measures. Law firms will need to evaluate their in-house people, systems and processes, alongside managed security service providers, to determine the best way to bring networks up to the standards that those more discriminating clients are requiring,” Lombardi said.

Selby agrees that clients will become even more demanding. “As aggregators of what often is their clients’ most sensitive data, more and more law firms are being required to demonstrate to their clients that they have implemented adequate cybersecurity practices,” she notes. “Firms that have been slow to recognize the importance of this issue may get a wake-up call when they lose out on engagements because they can’t measure up to client cybersecurity requirements.”

“The game has changed, the perimeters have expanded well beyond the data center; they are now the rest of the world,” concurs Chris Romano, CIO at Ward and Smith. “Up your security spending. That means penetration testing, security training for users, especially lawyers, and a security audit. And do it annually.” Vetting security vendors will be challenging, predicts Lombardi: “Providers will spring up like weeds.”

The bottom line: corporate counsel have “moved from a presumption of competence (and the attendant exemption from scrutiny) to a conventional wisdom that the cobbler’s children have no shoes. If you want our work, you need to be able to protect our data,” said D. Casey Flaherty, a former corporate counsel, now a principal at consultancy Cost Control.

Wow. We haven’t even discussed the Internet of Things. But we must move on.

RENOVATING LAW

It’s old news that clients are fed up with hostage-style lawyering. They want their outside legal teams to recognize the difference between routine “commodity” assignments and bet-the-farm, win-or-die showdowns. They want to participate in decision making, they want transparent billing and they really, really do not want to pay a firm to train its new lawyers.

Traditional Big Law firms have been evaporating like fragile annuals in October. Take, for example, San Francisco (not Silicon Valley). Outright failures and drawn-out merger demises have decimated its legal terrain. Morrison & Foerster (AmLaw 23); Orrick, Herrington & Sutcliffe (30); and Cooley (45) remain highly visible hometown Big Law shops—but can you name many more? Then there’s Sedgwick (136) and Littler Mendelson (63), who have quietly thrived by framing themselves tightly to limited practice areas and embracing technology and effectively streamlined work processes.

It's not like Big Law hasn't had plenty of warning. Academia has been screaming from the sidelines. London's Richard Susskind has made a 20+ year cottage industry out of cautioning Big Law that it must rethink how it operates. He urges firms to differentiate "commodity versus bespoke" work, use technology and bill accordingly—or risk the same fate as the Titanic.

Some firms have embraced alternative fee arrangements, and have created C-suite positions, including Akin Gump Strauss Hauer & Feld, who named Toby Brown Chief Practice Officer and Matthew Beekhuizen, at Greenberg Traurig, who is Chief Pricing Officer. The goal is "a good relationships for years to come, not just a quick win for this month," said Vincent Cordo, global director of client value at Reed Smith.

SHARING PROFITS

Daniel Martin Katz, associate professor at Michigan State University's law school, has been on a worldwide tour that could rival a Rolling Stones itinerary, arguing that technology can save the legal profession. He even figured out a work-around to the arcane American Bar Association restrictions that forbid lawyers to (gasp!) share profits with nonlawyers.

Katz raises two compelling points. First is "the under-investment problem." Equity partners have "different time horizons" than younger lawyers, and often aren't willing to defer compensation to underwrite technology projects—especially those with significant upfront costs and returns far in the future, he said at a Fordham Law School conference. "Partnership is a business model with a serious inherent weakness," he said. At risk is not a company's money, but partners'.

Then there are those pesky "ethics" restrictions about the purity of law. The ABA's Code of Professional Conduct Rule 5.4 forbids firms from accepting financing from nonlawyers. That rule has "stymied competition and stifled innovation," Katz declared. Big Law should create a dual system—that allows for "both legal service provision by partnership" and "technology, process, marketing by a separate entity with outside capital." Fear of the new entity defecting from the firm is solved by a long-term service contract, he said.

Some firms have adopted that concept, or variations. We've seen it at Sedgwick, with its subsidiary, Xerdict Technologies, now 11 years old. Xerdict "develops and delivers collaboration software products, including legal extranets, case management systems, law firm extranets, deal rooms and litigation case management tools," its website notes. (Kenneth Jones, Xerdict's COO, writes LTN's Best Practices column.)

Chair Ralph Baxter famously moved Orrick's back-office operations to West Virginia in 2001, to take advantage of cheaper cost of living—and saved \$6M to \$10M per year. Many firms followed Baxter's lead, especially regarding e-discovery and litigation, an area that has been ripe with new technology, including predictive coding (aka technology assisted review).

Several firms created e-discovery groups located in secondary markets, such as Reed Smith (Pittsburgh) and Wilmer Cutler Pickering Hall and Dorr (Dayton). Then there's John Tredennick's Catalyst Repository Systems, now a stand-alone company, that was incubated at Denver-based Holland & Hart.

Even Howrey, before its flame-out, did one thing very right (even though CEO Robert Ruyak tried to blame it for part of the firm's demise). It created Capital Litigation Support. CIO Brian Conlon (now CIO at McDermott Will & Emery) chronicled the 2004 launch in LTN. It was a state-of-the-art litigation support facility "where we could manage massive document requests, offer comprehensive imaging services [and] provide support for electronic data discovery and databases," he wrote. Based in Falls Church, Va., about 10 miles from the firm's D.C. headquarters, it supported hundreds of temporary employees and handled millions of documents. In its first year, CLS grossed \$4.5 million and was growing.

“It’s dumb that nonlawyers can’t have a financial stake in firms,” said Mark Britton, CEO and president of Seattle-based Avvo, at the 2014 FutureLaw Conference presented by CodeX: The Stanford Center for Legal Informatics. “Lawyers have to be phenomenal practitioners. But we are missing the whole part where we are also businesspeople. Lawyers have no training on business.”

“It’s time to change the rules governing unauthorized practice of law,” said Thomson Reuter’s Joseph Borstein, at the same event. He is global director of Pangea3, which provides legal outsourcing. He cited recent changes in England that allow nonlawyers to be involved in legal shops. “We are going to see U.K. firms eat U.S. firms’ lunch,” he said.

Flaherty has been a strong advocate for corporate counsel. In his prior job, he developed a “tech audit” that he used in beauty contests to evaluate associates’ competency with basic technology, such as sorting a Microsoft Inc. Excel spreadsheet or printing to PDF. The results helped him choose who to hire and the billing rate.

Technology helps law departments handle more volume internally, and send more routine matters to legal process outsourcing and other less-expensive alternative providers, said Flaherty. “Unlike most large law firms, [they] are deliberately designed to take advantage of economies of scale, rather than just scope,” he said. “More and more, law firms will be required to offer cogent, compelling reasons for why they should continue to handle much of the work they’ve traditionally handled. Precedent is not as important as it once was.”

CONCIERGE LAWYERS

CodeX, led by Roland Vogl, has become a hotbed for these debates—and for startups that are designing technology to speed and improve everything from intellectual property (Lex Machina, which maps IP litigation data) to research (Ravel Law, an alternative to traditional legal research technology). In January, CodeX and ALM announced a partnership to develop educational content for LegalTech (New York and West Coast).

CodeX will hold its third annual FutureLaw conference on April 30. Last year’s covered a wide range of issues, from open-source publishing, to rebuilding legal education, to public interest and ethics issues. One panel brought together the new and old guard, to tackle an agenda that is simultaneously cutting-edge and ancient: Can technology break down the wall that prevents 80 percent of Americans from finding (and affording) a lawyer for routine services?

Today, most five-year-olds can maneuver an iPhone. Google, Siri and Cortana have changed how we find information, from WebMD to weather. We buy plane and Yankees tickets, pay bar dues, order clothes and flowers, and we bank—online. So what’s so hard about getting legal advice online?

Historically, few topics more irritated the organized bars than consumer “self-help” law—and lawyer marketing. Bars small and national have fought those two pests as if they were bed bugs at a Ritz-Carlton hotel. But once again—the Internet changes everything.

Competitors Britton and Charley Moore (CEO, Rocket Lawyer) lead two of the many organizations offering both self-help and lawyer-referral services online. Last year, Rocket Lawyer and the ABA agreed to a pilot project designed to provide affordable legal services to individuals and small businesses and simultaneously help lawyers (especially small law firms) establish and build their practices.

Even if the pilot goes nowhere, the partnership is an earthquake. Chris Braun, vice president and general manager of Internet Brands’ legal unit (Nolo and other services) says the deal is “a recognition on the part of the bar that law firms, if they want to succeed, can’t do business development as they’ve done in the past.” The pilot “seems to suggest that the historic paranoia of the organized bar against lawyer marketing

seems to be fading,” he said.

The answer may be to take a lesson from hotels: be a concierge—a true counselor. Stop thinking about billable hours, think long term. Let one assignment organically lead to another. It’s kinda like Chase’s Hallmark-goopy ads about Chase Private Client banking. Establish a real relationship, not just a collection of .06 hour bills. “There is a huge latent demand for legal representation,” said Moore. “But costs must come down. Only by closing the affordability gap will we be able to address the needs of the vast underrepresented legal market,” said Moore. “Paradoxically, there is also a surplus of underutilized lawyers who are eager to serve the small business community and hone their client service skills.”

Jay Mandal, senior director and head of the legal advice business at Rocket Lawyer, spoke at LegalTech West Coast 2014. “Lawyers are under tremendous pressure to demonstrate value commensurate to the billable rates that they charge clients,” he said. For work that involves standard forms, “it makes sense for lawyers to guide clients through affordable online legal services tools. That way, lawyers can be more efficient, and charge for their specialized legal advice, which is valuable to their clients.”

Starting small can be smart. Clients who need only a basic will or an incorporation now may need more complex, sophisticated work down the road. In 10 years, Mandal predicts, “the expertise of lawyers will continue to be valued by clients, but the medium of communication and the lawyers’ reliance on technology will change.” Mobile and tablet technologies are “omnipresent” today, and “will become increasingly important in how lawyers and clients interact,” he said.

Lawyer David Whelan, manager, legal information at the Law Society of Upper Canada in Toronto, was also on the panel. “Technology. Price. Income. Geographic location. Current legal issue. Previous legal issues. All of these will factor into whether clients will use emerging automation tools on commodity work or select a legal professional.”

“The evolution/revolution of how we practice law is a continuing concern—much of it caused by the disruptive force of technology,” said Sharon Nelson, president of Sensei Enterprises Inc. “Some firms cling to what they’ve always done.

The smarter ones scan the horizon for more effective ways to practice and to price legal services in a way that benefits both clients and law firms.”

IT TAKES A TEAM

Big Law leaders should go to more baseball games—it would make them much better leaders. The first lesson they can learn is that everyone on the team contributes to a law firm’s success—not just the white male partners.

In game 7 of the 2014 National League Division Series, bench player Travis Ishikawa hit a three-run walk-off home run sending the San Francisco Giants to the World Series. In December, he signed a one-year, \$1.1M deal—not exactly the same salary range as Giants pitcher Madison Bumgarner, who was the Most Valuable Player of the World Series. But Bumgarner might never have won his trophy without Ishikawa.

The next time you’re at Yankee Stadium, Fenway, or any major league park, look at the field. You will see nine players who are of different colors, ages, salaries, religions, countries, hair preferences and languages. It works. (Granted, you won’t yet see women—but don’t rule out Mo’ne Davis in 2020.)

The embarrassing statistics: There is a 17 percent gap, across the board in legal, between men and women’s salaries. The legal profession has a dismal record of retaining and advancing people of color. And nonlawyer executives are still difficult to find on most firms’ website search tools.

This is not acceptable.

Diversity is good for business. And law *is* a business. In an increasingly global and mobile world, you will fail if you do not capitalize on the talent, perspectives, languages and ideas that come from collaboration with personnel who reflect the complex world we live in. And there is technology that can help you! (Page 74). Follow the lead of Branch Rickey, Jackie Robinson, Roberto Clemente, Joe Torre, Mariano Rivera, Derek Jeter, Joe Maddon—just a few of the baseball leaders who understand that it takes a dynamic, diverse team to succeed. Don't be a Dodo bird. Soar into change, into technology, transparency, equality and success.

—**Monica Bay** has been the editor-in-chief of *Law Technology News* for 17 years in New York, and spent 13 at *The Recorder* in San Francisco. She is retiring from ALM this month, and will be a fellow at Stanford Law's CodeX. Twitter: @monicabay.

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