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Déjà Vu All Over Again*

Gary A. Munneke

Why talk about the future at all? As a professor I am a *student of change*. But do forecasts about the future matter to the average practitioner. My answer is a resounding *YES!* To understand my attitude, it's important to look at the work of the Futurist Committee of the ABA Law Practice Management Section.

The Committee developed conferences in 1997 and 1999 entitled *Seize the Future: Forecasting and Influencing the Future of the Legal Profession*. The conferences attracted prominent speakers and bar leaders from around the United States, including author Tom Peters, Harvard Business School Professor Gary Hamel, IBM's Vice President for Development, John Landry, and others. I was asked to produce a book reporting on the second *Seize the Future* conference, which goes into more detail on the topics I will address in this article.¹ The '99 national conference also generated several state and regional conferences in Maryland, New York, Oklahoma, Wisconsin and this one in Dallas. It has prompted the ABA to create a special Committee on Research About the Future of the Legal Profession. All these developments have occurred because those who are exposed to information about trends in the profession find the evidence compelling that they cannot simply sit back and wait for the future to happen to them.

As Doris Day sings in the 1956 song, "Que Sera Sera," "whatever will be will be."² I suggest that lawyers in the 21st Century can ill afford a "que sera sera" mentality. If we do not attempt to understand the future and take steps to forge the future we want, we will inherit a future that others choose for us. Society and the legal profession are changing, and lawyers are not immune from the effects of these changes.³

But first, here are some observations on change: Lawyers *hate* change.⁴ Why? The simple answer is that everybody hates change, and we are no different. Lawyers, however, have some particular problems with change. We are trained to look to the past for answers in the form of precedent. Legal reasoning does not always help lawyers to think innovatively (but it should). Lawyers also have difficulty accepting the need for change ("If it ain't broke, don't fix it!"). The price of legacy is complacency. You may recall the scene in the movie *Dr. Zhivago* where Omar Shariff and Julie Christie are sitting in a fine restaurant, while outside the distant sound of an approaching mob grows louder. In the street outside the restaurant, the Czar's mounted troops attack the mob, and in the ensuing mêlée the glass window is shattered,

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illustrating that no one can ignore the coming revolution.⁵ Of the three groups in this tableau, the mob, the troopers and the diners, lawyers for the most part are like the diners whose complacency is shattered by events beyond their control.

In a practical sense, the short-term benefits of implementing change seldom appear to outweigh the costs of implementation, because the cost of capitalizing or investing in change is burdensome. Moreover, the investment of human energy is demanding. There is too much work, too little time. It is easy to ask, "Do I deal with clients OR do I deal with change?" And easier still to say, "I'll get around to it tomorrow."

In order to survive in a period of transformational change, we cannot ignore events around us. We must understand something about trends that fuel change. In one sense, trends are just statistical tendencies, lines on a graph. We know several things about trends: First, trends lie—remember the stock market crash of '29? Second, trends change—remember the stock market crash of '01? Third, more information is better, but the old adage "Garbage in, garbage out" dictates that bad data can never produce sound projections. Subjective anecdotal information is inherently myopic. Fourth, complexity is complicated. In complex systems, a multitude of variables bring about results, rather than a simple straightforward cause. In complex interdependent systems the failure of one part can cause breakdown in others.⁶

The future is not a single pre-destined reality but rather a series of alternative futures. We may not be able to predict the future, but we can influence it. Although we cannot control all the variables, we may be able to control some variables that effect which alternative future comes to pass. We can also position ourselves for likely futures if we take time to think about these issues. In order to succeed in a rapidly changing environment, however, we need to be innovative and adaptable, like the mammals that survived the great extinction of the dinosaurs.

In my *Seize the Future* book, I described a number of twenty-first century trends.

First, **change is pervasive**. Author Tom Peters commented that we are in the midst of a 10,000 year change in human existence, the most fundamental shift in the way we live since our ancestors came off the plains to build houses and grow crops. He asked the participants: "If what I say is true, should you be sitting here in your chairs?" Even if Peters is only partially right, change is a significant element of our lives.⁷

Second, the **dominance of technology**. The Internet now connects providers and consumers around the globe in a

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vast commercial web. In the world of e-commerce, where comparable products and services are easily accessible, both can become commodities. Value creation becomes a challenge to infomediaries, who help consumers navigate the sea of information. Legacy and heritage give way to innovation and solutions. Disintermediation occurs as consumers go directly to products and services without agents and middlemen. The line between information and service is increasingly blurred. Providers bundle their services in order to enhance value and hold customers.⁸

Third, **shifting demographics.** The United States is experiencing geographic migration of populations within its borders, in the form of the so-called sunbelt shift, urbanization and periodic movement of families. For instance, I was born in Iowa, raised in Texas, live in Maryland and work in New York. I consider myself a fairly typical American. The U.S. has also experienced an influx of immigrants from other countries and cultures; more people moved to the United States during the 1990s than during any other decade in its history. These phenomena are creating what has been called a mosaic (as opposed to melting pot) society.

Fourth, **globalization and interconnected economies.** As international commerce becomes more common, local and national economies become interconnected. Products and services will extend beyond geographic political boundaries. In such an environment, legal relationships become intertwined and law practice inevitably becomes cross-jurisdictional. This applies to small and large firms from urban and rural settings.

Fifth, **changing values.** Attitudes and mores of any population will change over time. One of the major shifts in values is an increasing need for autonomy or self-determination. For lawyers and other professional service providers, this means that clients are less willing to accept paternalistic explanations, cede decisions to others, or tolerate poor service. In addition, skepticism has replaced blind acceptance as an approach to news and information.

Sixth, **re-inventing dispute resolution.** The high transaction costs of litigation and cultural aversion to litigation in many societies will fuel the development of alternative models.⁹ These models will be inherently interdisciplinary, inherently non-jurisdictional, and often electronic.¹⁰

Finally, seventh, **deregulation of the professional marketplace.** In an increasingly deregulated marketplace for goods and services, inefficient systems fail. Whether it is the demise of the Soviet bloc or the professional monopoly of lawyers, it is increasingly untenable to prop up aging state monopolies in the face of innovative and more efficient systems. Competition will weed out the non-performers through a process of economic natural selection.

Lawyers need to recognize that this evolving marketplace is not some Orwellian fantasy, but an emerging reality. Assuming that there is some validity in all these trends,

what specifically does this brave new world hold for the evolving practice of law?

Perhaps most significantly, in the new millennium, the client rules. If clients are not satisfied with services they will take their business somewhere else or do it themselves. In Florida, seventy percent of the domestic relations cases are *pro se* on at least one side.¹¹

Lawyers will experience competition on all fronts from both inside and outside the traditional legal profession. Innovative new delivery systems, including e-lawyering services will put pressures on law firms of every kind. Lawyers will find themselves incapable of enforcing restrictions on the right to provide legal and law-related services.¹² As Professor Gary Hamel of Harvard Business School said, for lawyers today, "the threat is not inefficiency, but irrelevancy It is dangerous to assume that the future will continue the same way as the past."¹³

The fallout of the two developments above will be a restructuring of many practice settings: The relationship of lawyers and staff to law firms themselves will become less rigid and institutional. Lawyers will increasingly find themselves practicing in teams with other professionals. The concept of jurisdictional boundaries will continue to erode.¹⁴ An increasing number of legal services providers will incorporate some form of e-lawyering into their practice. With lawyers and clients connected electronically, and legal information including client files accessible from anywhere, lawyers will practice more in virtual offices and less in a physical space. Lawyers will of necessity practice in specialized fields of law, and competent practice will require new skills for all but basic commodity services, as what we think of as general practice becomes less viable in complex modern society.¹⁵ Legal services will become unbundled as lawyers elect to perform discrete segments of legal transactions. Legal fees will be driven by perceived value to consumers and market forces rather than by the going hourly rate.

All of this will mean that we will have to rethink legal education; what was good enough for Langdell in the 1870s may not be good enough for the 21st Century. I'm not sure I agree with the State Bar of Texas Futures Task Force that legal education will become irrelevant,¹⁶ but I believe that it clearly must change. At the same time lawyers will have to examine closely the evolving professional skills and values to determine the fundamental skills and core values that will serve them in the emerging professional services environment.

In no area will this examination of professional values be more important than law practice in cyberspace. Lawyers already engage in e-lawyering in a variety of ways: they utilize websites to provide information resources to clients, to market their practices, to create referral systems with other lawyers and service providers, to take advantage of on-line practice support tools and to create interactive delivery systems.

These applications create a challenge for the old ethics rules. Lawyers are forced to ask: Do the old rules fit the new

(I)n the new millennium, the client rules.

paradigms? Or does the new technology require new rules? The potential e-ethics issues are numerous:

When does a client-lawyer relationship begin? How do on-line relationships impact the unauthorized practice of law, the ability to collect fees, the risk of malpractice, and liability for casual as well as formal advice over the Internet?

What are the limits on communication with prospective clients? What does Section 7 of the Rules of Professional Conduct (*Information About Legal Services*) say about the truthfulness of on-line communications, record keeping, disclaimers, solicitation and such marketing tools as e-newsletters, announcements, push technology and spam?

Does electronic practice present problems for confidentiality and privacy? Rule 1.6 talks about confidentiality involving information about the representation, but it does not clearly set out duties to clients who might be compromised through collecting client information in databases and permanent storage media. E-mail, like fax, produces confidentiality risks of forwarding group messages and inadvertent <enter>. Although encryption technology for document transfer as well as other communications exists, many law firms are lax about using it. How should law firms address these problems? What about the effectiveness of on-line disclaimers that do not meet the test of informed consent?

How do conflicts of interest arise in cyberspace? When a lawyer gives on-line advice, how does she assure that she is not undermining the interests of other current or former clients? Can or should conflicts be imputed to lawyers connected through on-line networks, referral systems or affiliations? Are the rules for consent and waiver the same in cyberspace as they are in the physical world?

Can lawyers and clients collaborate on line? What ethical problems if any do the activities below pose to e-lawyers: Virtual meetings? Document exchange? Filing and access to records? Dispute resolution rooms? Fee splitting?

My own sense is that our current rules will be able to accommodate many of these developments. Some questions, such as the line between information and advice, and the line between contact and solicitation may require some revisions in the rules. The problem is that right now there are few decided cases to guide us, and few certainties. The legal profession must address these issues in order to permit lawyers to practice effectively and professionally in the electronic world.

In conclusion, if lawyers and the bar stick their heads in the sand and ignore the future, they will find themselves marginalized, or worse obsolete, in the emerging professional services landscape. If individual lawyers do not deal with the realities of the current and future marketplace for legal services in their own practices then they will be out of business. We face a paradox between time spent getting better, and time spent looking at the future. The good news is that we live in a world where people are drowning in disputes. There are great opportunities for lawyers. The question for lawyers is whether they can look past legacy to innovate and take advantage of these opportunities?

And what about the title of this article—*Déjà Vu All Over Again*? You may recall those as the immortal woes of Yogi Berra, catcher, manager, philosopher. I remember writing a report for the “National Conference on the Role of the Lawyer in the 1980s.”¹⁷ The Conference Chair deleted my prediction that competition would drive many inefficient large firms out of business. He said that my prognosis was improbable, but within a decade his firm—like countless others—did not exist, and he was working as in-house counsel. Like many lawyers, he chose to stick his head in the sand. Now, twenty years later, I’m still writing about what is happening out there. When I look back in 2020 will it be like Yogi said? *Déjà vu all over again*.

ENDNOTES

* This article is based on a speech presented to the Dallas Bar Association “Futures Conference,” on April 11, 2001.

1. Gary A. Munneke, *SEIZE THE FUTURE: FORECASTING AND INFLUENCING THE FUTURE OF THE LEGAL PROFESSION* (American Bar Association 2000) [hereinafter *SEIZE THE FUTURE*].
2. Jay Livingston and Ray Evans, see <http://www.getmusic.com/artists/amp/Album/965/A245965.html>. The complete lyrics of this classic pop song are available at http://www.schiedung.de/musik/que_sera.html.
3. See Ann L. MacNaughton and Gary A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold?*, scheduled for publication in __ *LOY. L. REV.* __ (2001) [hereinafter MacNaughton and Munneke].
4. Gary A. Munneke, *Why Lawyers Are Afraid of Change*, *LAW TECHNOLOGY NEWS*, October 2000.
5. *SEIZE THE FUTURE*, *supra* note 1, at 45.
6. *Id.*, at 45-47.
7. *Id.*, at 21.
8. Remarks of John Landry in *SEIZE THE FUTURE*, *supra* note 1, at 26-28.
9. See MacNaughton and Munneke, *supra* note 3.
10. *SEIZE THE FUTURE*, *supra* note 1, at 48-66.
11. See Charles F. Robinson, *Stampede to Extinction*, in *SEIZE THE FUTURE*, *supra* note 1, at 133.
12. See, e.g., *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*, No. CIV.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated and remanded* 179 F.3d 956 (5th Cir. 1999) (finding that the “Quecken Family Lawyer” was engaged in the practice of law and enjoining its sale in Texas).
13. Remarks of Gary Hamel in *SEIZE THE FUTURE*, *supra* note 1, at 32-35.
14. See Bruce Green, *Assisting Clients with Interstate Problems: The Need to Bring the Professional Regulation of Lawyers into the 21st Century*. A Report Summarizing the Proceedings of the Symposium on the Multijurisdictional Practice of Law March 10-11, 2000, American Bar Association (2000).
15. *SEIZE THE FUTURE*, *supra* note 1, at 54.
16. See Report of the Futures Task Force, State Bar of Texas (2000).
17. See *REPORT OF THE NATIONAL CONFERENCE ON THE ROLE OF THE LAWYER IN THE 1980s*, American Bar Association (1981). ■