

Tomorrow's Lawyers

'Everything changes. Nothing remains without change'

– Shakyamuni Buddha

The legal profession that Professor Richard Susskind OBE has been observing since 1981 is 'on the brink of fundamental change'. He predicts that the practice of commercial law in particular, will be almost unrecognisable in 15 years from what it is today. Inevitably, in-house counsel teams are not immune. But with change comes opportunity and, according to Susskind, the importance of the in-house counsel role in the future will be very much self-driven and self-determined. In the following extract from his new book, *Tomorrow's Lawyers*, chapter 7 'The shifting role of in-house lawyers' – published by Oxford University Press, exclusive to ASIAN-MENA COUNSEL – Susskind illustrates how in-house counsel need to change their way of working and provides examples as to how they can adapt and profit from this shifting landscape.

Legal risk management

Most General Counsel (GCs) tell me that their principal job should be that of managing risk; that 'legal risk management' should be the core competence and service of in-house lawyers. They often contrast this with what they actually do, which is fight fires. In-house lawyers are faced, on a daily basis, with a barrage of requests, problems, and questions from across their organisations. And they usually feel they have to respond helpfully. In reality, while some of these inquiries merit serious legal attention, others assuredly do not. The hope of most GCs is that they can organise themselves to become more selective; that they can move from being excessively reactive to being proactive. In other words, their job should be to anticipate problems before they arise. The focus should be on avoiding disputes rather than resolving them.

Legal risk can be managed in many ways, but the emphasis is usually on preventing non-lawyers in businesses from inadvertently exposing their organisations to some kind of liability (such as might

flow from a breach of some regulation or of an agreement). This control of risk can be achieved, for example, by increasing legal awareness, by introducing protocols or procedures, by using standard documents, or by involving lawyers more directly in the affairs of organisations. Legal risk management can also involve the conduct of audits, risk reviews, and health checks to assess, for instance, an organisation's processes for managing regulatory compliance or its preparedness for litigation. There is little question that tomorrow's in-house lawyers will become increasingly systematic and rigorous in their management of risk and will require sophisticated tools and techniques to help them. Strikingly, very few law firms have yet recognised the commercial opportunities here.

Another risk-related trend will be towards the greater sharing of risk between in-house lawyers and law firms. If deals and disputes do not conclude satisfactorily, some General Counsel believe that the law firms involved should suffer some of the down-side, by reducing their fees. With

some justification, law firms retort that this should cut both ways, so that the successful conclusion of a legal project should surely then result in an uplift in fees. No doubt, these debates on fees and risk-sharing will intensify in years to come, as economic pressures increase. New ways of allocating risks will evolve, in attempts to incentivise law firms in different ways. One arresting example of this is when in-house lawyers pay law firms bonuses if they help them avoid litigation.

Knowledge management

The use of standard documents, as said, is a well-established technique for reducing legal risk: non-lawyers and lawyers alike are required to use (and only then with permission) fixed form agreements that have been carefully crafted in anticipation of well known legal problems and pitfalls. Business people can be constrained in their negotiations by imposing the use of agreements with terms and conditions that cannot be altered without sign-off from lawyers.

The actual preparation of these standard documents belongs to the world of

legal knowledge management. This is the process of capturing, nurturing, and sharing the collective know-how and expertise of a group of lawyers. The motive here is to avoid duplication of effort and to build an institutional memory that is superior to the recall of any individuals, no matter how talented. Knowledge management is one of the central jobs of professional support lawyers, a key group of legal specialists who work in major law firms, especially in the UK.

Significantly, in-house legal departments rarely employ knowledge managers and professional support lawyers. There is a paradox and inconsistency here. It would clearly be in the interests of in-house lawyers to secure the efficiencies that knowledge management would bring. By contrast, for law firms that charge by the hour, the incentive to become more efficient through knowledge recycling is less than immediately obvious. Why, then, do in-house lawyers generally hold back from recruiting knowledge managers whereas major law firms have invested heavily? For in-house lawyers, the deterrent seems to be the expense of employing professional support lawyers – it is difficult, I am told, to make the business case to Chief Finance Officers for employing lawyers who do not advise directly on disputes or deals. As for law firms, they know that their clients (in the UK if less so in the US and Canada) expect their external advisers to have substantial bodies of templates and precedents; and knowledge managers are the people who specialise in maintaining this kind of know-how. In summary, most in-house lawyers like the idea of knowledge management but would prefer law firms to pay for it.

This will change. Before long, in-house lawyers will recognise and be able to quantify the benefits that professional support lawyers can bring and will manage to convince their boards that it makes sense to invest in people who will bring savings through IT-enabled legal knowledge sharing (within legal departments and between organisations too).

Expecting more from law firms

Moving away from risk and knowledge management, how will clients select law

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firms in the future? It is often assumed that what differentiates one lawyer or law firm from another is their substantive expertise; that clients will gravitate towards lawyers who seem to know more or appear more deeply expert. However, clients often say that there is little to choose between many good lawyers and good law firms, that they are equally and impressively familiar with black letter law and market practice. What frequently distinguishes law firms, particularly when the work is genuinely bespoke, are the personal relationships that lawyers have with those they advise. (When the work is routine, the interpersonal dimension is of less importance.)

To run a successful legal business in the future, therefore, it will not be sufficient for lawyers to be in possession of fine legal minds. Tomorrow's lawyers will need to acquire various softer skills if they are to win new clients and keep them happy. In-house lawyers of the future will not only be more demanding on costs; they will be more discerning about the relationships they choose to cultivate with external firms. This will place pressures on law firms to make the most of face-to-face interactions and use social networking systems to maintain regular contact.

Already clients respond favourably, for example, to law firms who express ongoing, and even passionate, interest in them. They like to feel that the firms to whom they pay substantial fees are bearing them in mind and have their interests at heart, even when not working together on a particular job. They appreciate those law firms who have clearly devoted their own time to thinking specifically about them and their business and their industry. Clients like to hear, for instance, about a deal that has been done that may be relevant for them.

They appreciate periodic briefings on the trends and developments that may be of direct impact on them. Maintaining this sort of rolling contact does not come naturally to many lawyers and is often trumped by pieces of chargeable work for other clients. This is regrettable because this kind of regular interaction is increasingly vital for the long-term relationships that clients are now deeming important.

A related issue to which young lawyers should be sensitive is the need for law firms to empathise with their clients. General Counsel often observe that their external law firms do not understand their clients, that they have little insight into the daily dynamics and operations of their clients' businesses. It is not that the law firms fail, for instance, to read their clients' annual reports (although some do fall at this hurdle) or that they are ignorant of fundamentals of the sector in which their clients trade. Instead there is a wider worry – that law firms do not take sufficient time to immerse themselves in their clients' environments and get a feel for what it is actually like to work in their businesses. For example, it has been suggested to me that most firms do not grasp, in any given client, the tolerance and appetite for risk, the amount of administration and bureaucracy, the significance and extent and tone of internal communication, and, vitally, the broader strategic and business context of the deals and disputes upon which they advise.

In short, tomorrow's lawyers will need to be more in tune with tomorrow's clients. In contrast, when meeting with their clients today, many partners of law firms are said to broadcast and pontificate instead of listening to what is actually on the minds of those they are serving. In other words,

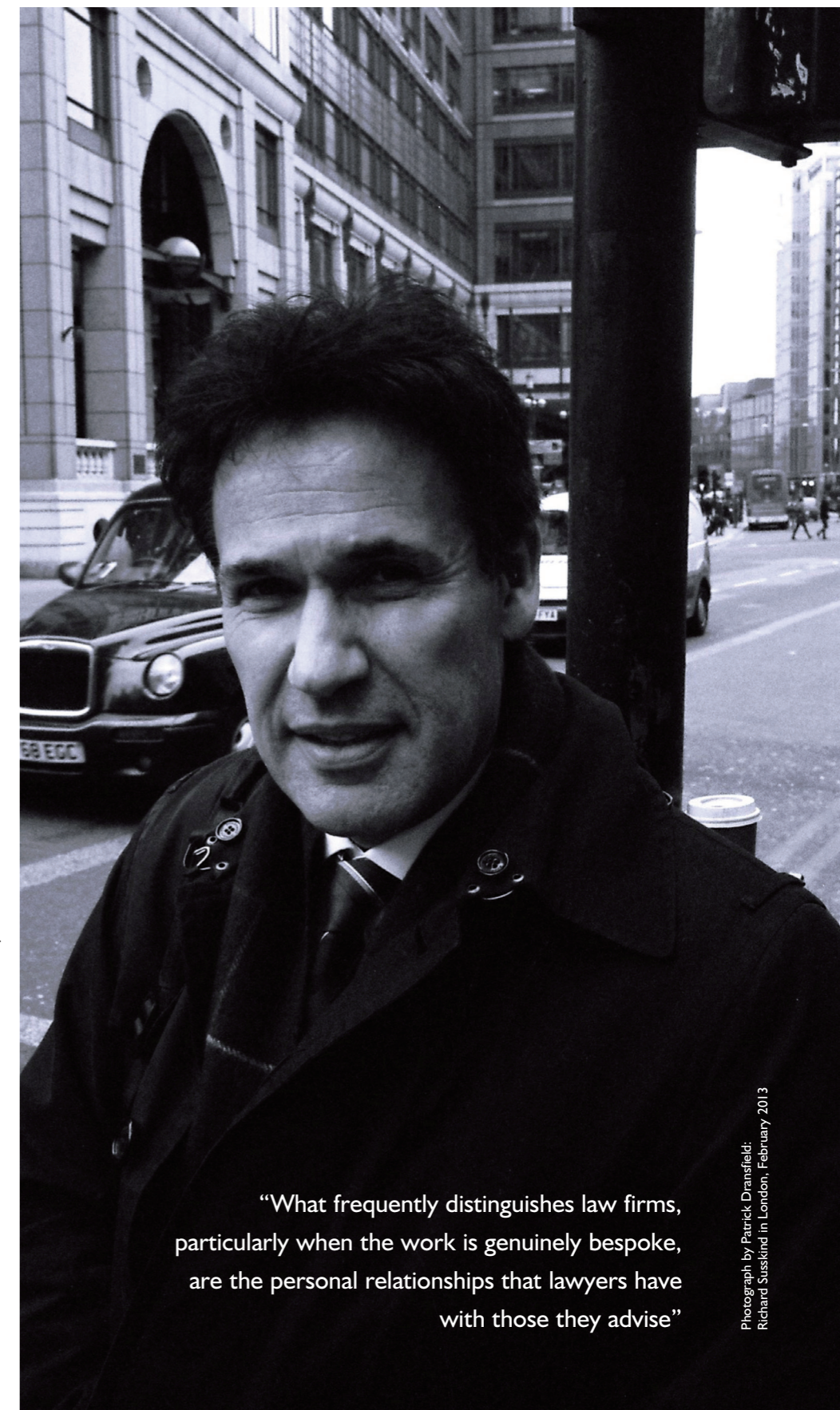
many law firms lack empathy. They fail to put themselves in their clients' shoes and see the business from the clients' perspective. It is often claimed that, because they do not pause to listen, firms cannot distinguish between those occasions when client wants quick, rough, and ready guidance as opposed to detailed and exhaustive legal analysis. This lack of empathy and the inability to listen could be deeply prejudicial to long-term relationships between firms and clients in the future.

The more-for-less challenge

Although legal risk management and knowledge management will be key strategic issues for tomorrow's in-house lawyers and the quality and tone of their relationships with firms will be an important operational concern, the dominant management preoccupation of most General Counsel today is meeting the more-for-less challenge. In 2012, this is what kept most GCs awake at night: how to deliver more legal service to their businesses at less cost?

The low-hanging fruit here is the possibility of driving down the fees of external lawyers. But there is a primal and fundamental tension here: clients and lawyers have very different objectives. When a client phones a law firm and intimates that their business has a problem, it is an unusually virtuous partner who will not hope, deep down, that it is a big problem. For any piece of legal work, the client will invariably pray that their legal requirements are routine and can be disposed of quickly and painlessly, while a law firm will generally hanker after more challenging instructions that might occupy a team with complex work for quite some time.

There are other related tensions arising from the still dominant practice of hourly billing. Most clients do not want to buy the time of experts. They want results, solutions, and practical commercial guidance. They also want certainty and predictability of costs, and not the open-ended commitment of the blank cheque that hourly billing often entails. Generally, hourly billing does not incentivise law firms to give clients what they actually want. Consequently, we will see, in the coming decade, as noted in relation to risk management, more



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sophisticated mechanisms for aligning the incentives of law firms and their clients.

These mechanisms will not be crude and ineffectual alternatives to hourly billing. Generally, these disappoint. Instead, in-house lawyers will come to the view that the cost savings they need cannot be secured simply by pricing differently. Rather, the challenge is to work differently. Some in-house counsel have already arrived at this conclusion and so are wrestling, if but tentatively, with various alternative ways of sourcing legal services.

The underpinning thinking here bears repetition. Historically, legal work has been undertaken either by clients themselves or by their outside law firms. The problem with this is that it is proving too costly for routine and repetitive legal tasks to be discharged within firms and legal departments. And so, different approaches to sourcing such work are now gaining some traction: out-sourcing to third party providers in low cost countries; off-shoring legal work to locations where businesses have already transferred other functions, such as call centres; encouraging law firms to sub-contract to practices in less costly regions; or using contract lawyers who charge about half the price of traditional law firms. These are all instances of what I call the 'efficiency strategy' – cutting the costs of legal service.

Yet another possibility is co-sourcing, which can involve a group of in-house departments coming together and sharing the cost of some common legal service, perhaps by setting up shared services centres. This is an example of what I term the 'collaboration strategy'.

There is no doubt that the in-house community is becoming steadily more interested in these and many other new ways of sourcing legal work.

The collaborative spirit

A different form of co-operation is also emerging – some in-house lawyers are keen to engender a collaborative spirit amongst their external law firms. They speak of their primary law firms as their 'extended family'. The intention here is that firms trust rather than compete with one another; and that their collective energies are directed at supporting the client instead of jockeying for position for the next tranche of work. The result should be a more productive, efficient, and civilised group of lawyers. On this view, the legal capability of an organisation is the combination of the in-house function and its external firms. The lawyers from the firms are expected to work together as a family – not one that is dysfunctional and constantly bickering but one that shares and focuses relentlessly on a larger common purpose: the interest of clients.

This approach to managing external law firms is not yet common. Indeed some GCs are sceptical about inter-firm co-operation. Many banks seem to fall into this camp. They maintain that it is plainly unrealistic to expect their principal external firms to collaborate. Hard-nosed lawyers want a market and not a social club or a family outing. Some in-house lawyers therefore actively encourage their firms to compete strenuously with one another. On this more combative approach, firms are frequently invited to bid against one another, and to demonstrate their supremacy – that they are better, less costly, more efficient, or more innovative than the rest.

Although there are no right answers here, I have seen both schools in action (within and beyond the financial services sector) and predict that the collaboration camp will win out. This approach holds obvious attractions: duplication of effort

can be avoided; asymmetries can be eliminated; energies are more efficiently channelled towards the clients; and working relationships are more amicable. It simply makes sense, for example, from the clients' point of view, for their external firms to coordinate in the provision of training services. Exciting opportunities also emerge such as being able to assemble 'dream teams', made up of the best lawyers, hand-selected from across various firms, and purpose-built for particular deals and disputes. The challenge for those who favour family over feud is to put the incentives in the right place, so that law firms genuinely want to cooperate rather than compete. Half the battle here is for the client to ensure a more or less steady flow of work for firms who are family members. It will make sense on this collaborative approach for participants to embrace social networking technologies. These will bring firms under the one virtual roof and encourage and enable them to work in virtual groups. This could be done using generic services such as *LinkedIn* or legal tools such as *Legal OnRamp*. As in so many other areas of legal practice, the future for in-house lawyers will be digital.

The power and responsibility of in-house lawyers

I often find, somewhat surprisingly, that in-house lawyers betray a lack of self-confidence when contemplating the future. Frequently they ask me if I expect law firms to revert to their old ways of working when the economy picks up. I invariably respond that it is almost entirely up to them, as the customers, to shape the answer to that query. If in-house lawyers do not want reinstatement of bad past habits, they must send that message very clearly to their external advisers. They can be assured that, in the current buyers' market, such a message cannot be ignored.

Most in-house lawyers will concede, in principle, that change is necessary and that they should run a tighter ship and drive a harder bargain with their suppliers, but most also claim that they do not seem to have the time, energy, or competence to introduce efficiency or collaboration solu-

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tions. When I probe more deeply, it transpires that many GCs would prefer off-the-shelf answers developed by law firms. However, and this is something of a vicious circle, there is, as noted, little incentive for law firms themselves to support either the efficiency or the collaboration strategies. Why should law firms destabilise their current businesses with potentially disruptive innovations when clients often seem indifferent and competitors themselves are inactive?

In-house lawyers must also remember that they are likely themselves to come under the microscope within their own organisations. It will not be plausible for them simply to complain *ad infinitum* about law firms' unwillingness to change. As it becomes widely known, for instance, that it is possible to source legal work in different ways, Chief Executives, Chief Finance Officers, and Boards will inevitably ask their General Counsel whether their departments are adapting and exploiting the opportunities afforded by these new ways of working. To help focus in-house lawyers' minds, I express this likely

demand in terms of what I call the 'shareholder test':

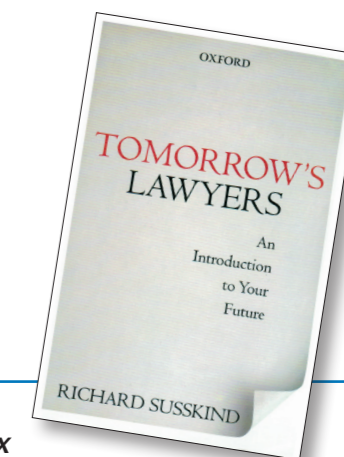
when a costed proposal for the conduct of a deal or dispute is being considered, would a commercially astute shareholder, who was familiar with the growing number of alternative ways of sourcing legal work, consider what is contemplated as representing value for money?

If in-house lawyers allow law firms to return to pre-recession billing and working practices, they will plainly fail the shareholder test. Soon in-house lawyers will have little choice but to overhaul their departments and working practices: the more-for-less pressure will build to an almost intolerable level and they will have to re-calibrate if not re-engineer the way they work internally and how they source external legal services.

In-house lawyers will flourish only if they can add relevant value that cannot be delivered by competing sources of legal service. The genuinely expert and trusted in-house legal adviser, who lives and breathes the business, should always be an invaluable resource, but unless General

Counsel are also prepared to drive the efficiency and collaboration strategies within their own departments and across law firms as well as other providers that serve them, then their future is far from clear. I advise in-house lawyers not to wait until their platform is burning. Now is the time to prepare for the challenge.

They should remember (although many do not seem fully to grasp this) that they have immense purchasing power. Today and for many years to come, for major clients especially, it is likely to be a buyers' market. I struggle to understand why General Counsel have not driven external law firms much harder. The world's leading 100 law firms are sustained very largely by the world's top 1,000 businesses. If and when General Counsel become radically more demanding, they will have it within their power to urge a re-shaping of this top echelon of firms and, in turn, redefine the entire legal marketplace.



Tomorrow's Lawyers by Richard Susskind is available to buy on Amazon:

<http://www.amazon.com/Tomorrows-Lawyers-Introduction-Your-Future/dp/019966806X>

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