

'Moneyball for lawyers': How technology will change the practice of law

MICHAEL WILLIAMS, PARTNER, GILBERT + TOBIN

Automation is not what most professionals have in mind when they think of how technology will affect their disciplines. The legal profession is no different. Up until now, technology in law has been a search for greater efficiencies based on the same underlying model of practice. However there are new technologies based on automation that are on the verge of becoming a reality. Think of artificial intelligence (AI), smart appliances and driverless cars.¹ The same impetus to automate routine tasks, behind these technologies, is now coming to legal practice.

Leading legal industry commentator, Professor Susskind, has identified four trends driving change in all professions: the move from bespoke service; the bypassing of traditional gatekeepers; a shift from reactive to a proactive approach to professional work; and the more-for-less challenge.² Lawyers are already grappling with these challenges, but few have settled on a strategy to meet these trends.

The profession has already changed structurally. In-house legal teams are beginning to outnumber lawyers in private firms; virtual courts now take evidence and appearances by video connection every day; online legal business delivery beginning to compete with more traditional forms of service delivery; online document production and storage (eg. Cloud

services) is replacing traditional files; commoditisation of legal services and legal process outsourcing is increasing (eg. use of computerised systems for routine/repetitive tasks); and the introduction of non-traditional legal practice models is bringing new competitive forces into the legal industry.

DRIVERS OF CHANGE

What is driving these changes? Two primary drivers of change from a demand side are from the courts and from clients. The courts are embracing digital practices quickly, with many State Supreme Courts and the Federal Court solely using e-filing. The transition to e-filing, and electronic file histories, is leading to the acceptance of electronic copies as the currency of legal documents. Lawyers are not given a choice not to participate in these innovations. Having sufficient technical competence to interact with the Courts is a requirement for being in practice.

Clients are increasingly digitally savvy and are expecting their lawyers to be using leading technologies. Some clients are even ranking lawyers' performance using technology. A number of clients, including the government, are now requiring proof of technological competence or system certification in tenders. Additionally, clients are expecting more-for-less, thus requiring cost effective service delivery with proof of efficiencies through the implementation of technology. The app and online world has changed client expectations about service delivery, thus increasing the demand on lawyers to be familiar with cutting edge technology. With a trend developing of clients in-sourcing legal work using new technologies, the pressure is put back on lawyers and law firms to adapt, and do it quickly to keep up with the rapid rate of change within the profession.

Lawyers are faced with the commoditisation of legal work if they do not change practices and engage technology in their service delivery. Commoditisation threatens bespoke

services, which are increasingly priced out of the market, and leads to more off-the-shelf pre-packaged services. In the legal market, commoditisation means services being delivered and priced as if they were products – lower cost, smaller margins and fixed cost based pricing.

As technology becomes a new differentiating factor in a crowded market, the capacity to adopt available efficiency leading technology is also becoming critical to the success of legal practice. Alternate legal business providers (such as LegalVision³) are providing repeatable legal services at a low cost, through the use of technology and automated systems. They are ambitious to move from lowest cost work to providing services to small and medium sized businesses. It is no longer enough for private firms to focus on competitors of their size and scale in a market that now has legal business structures that are relying on technology to compete more effectively. Many of the same forces are at work in in-house legal teams, required to deliver more with less resources. A new generation of lawyers (the so called "digital natives") are emerging with different attitudes towards technology and the expectation of technology playing a bigger role in the legal profession.

BIG CHANGES BASED ON DATA

There are much bigger changes already occurring in the legal market around the use of data and technology to create new products and services. One of these is becoming known as "moneyball law", names after the Hollywood film Moneyball in which Brad Pitt played a baseball coach who began to use historical playing data to inform the player draft.

As one of the providers of this style of data intelligence, Lex Machina, claims:

"Moneyball for lawyers is bringing objective rigor to the traditionally subjective practice and business of law. ... While some traditionalist lawyers may resist the application of Legal Analytics to law, those who embrace it, especially



Billy Beane, former baseball player and current minority owner of the Oakland Athletics, was the subject of the movie "moneyball", about an executive who used big data to recruit a championship winning baseball team

*today's early adopters, are likely to gain significant and lasting competitive advantage.*⁴

This practice involves the mining of litigation data otherwise known as “big data” and subsequently revealing insights never before available about Judges, lawyers, parties and patents, culled from millions of pages of IP litigation information. By analysing this “big data”, clients are able to predict and utilise this “objective rigor” to increase their competitive edge within the market. While this technology is embryonic in Australia, it has gained a foothold in the US legal market where it is testing many of the assumptions about measuring success in litigation previously based on anecdote rather than hard data. It is also revealing anomalies in the outcomes of cases based on geography, Court, judge and lawyer which are only possible to identify from data analysis.

Smart contracts are another emerging technology that has significant prospects of changing legal practice. These are software programmed contracts that have defined events that trigger verifiable actions, such as secure financial settlement without an intermediary. The benefit of this mode of contracting is that both parties agree the triggering events and the consequences (i.e. payments) are automatically made. These contracts are being developed to replace many standard forms of contracts, for example: escrow arrangements, shipping, settlement of property transactions, and location based performance.

Smart contracts are being created based on the technology such as “Blockchain”, that is seen as having many applications including to the Internet of Things (IoT). There are predictions that the roles of third parties in settlements and escrow agents will disappear if Blockchain based technologies are widely used in the market. Lawyers in these areas will likely be affected and need to adjust their practices. Anyone doubting the possible impact of Blockchain need only examine the resources being put into the technology by banks and financial services regulators in Australia.

ETHICAL OBLIGATIONS

At the same time there is a need for discussion about how a lawyer's ethical obligations will be impacted by the rise of technology, including autonomous

technologies, in legal practice. There has already been widespread adoption in the US of an ethical obligation for attorneys to understand and use available technology in practice. This begs the question of whether we should formally recognise technology competence in Australia? And how far would such an obligation go?

We could speculate that such obligations would include having systems, training and competence in use of the systems in appropriate cases or assignments. Further questions will arise such as whether technological competence would vary between litigious and non-litigious work. Likewise, how would this technological competence sit with the disparity of technology adoption amongst clients?

Some guidance is emerging on these issues. As far back as 2012 the NSW Office of the Legal Services Commissioner raised the issue of cloud computing, stating that “legal practices should, at least, consider informing their clients that they are using a cloud computing service provider”.⁵ This concern has probably been outstripped by the widespread adoption of cloud technology in industry and increasingly by law firms. Businesses that use cloud are unlikely to be concerned about lawyers using cloud services, as long as security is maintained. In a parallel development, The Law Society of South Australia has recognised technology as a CLE element in its Practice Management and Business Skills components. These skills include: effective use of technology; using an electronic practice management system; implementing and using the electronic library; and operating a litigation support system. This is a positive step in developing a concept of best practice within the emerging area of technologically enhanced legal services.

Anecdotally, legal insurers have found that the costs of paper misadventure is still greater than the risk for electronic documents, which comes as a result of the tighter control permitted by digital document storage. However, whether this will remain the case is yet to be determined. Cyber-security is becoming one of the most serious risks to all businesses, including legal practices. Cyber risks are frequently highest when dealing with a less secure system. Effective liability management for electronic files involves processes that balance access with security, encryption, logging and auditing. Despite

standards of best practice emerging in relation to cyber-security, firms need to have plans in place to respond to cyber threats and protect their documents and information. Witness the impact of the hacking of the files of Panamanian law firm *Mossac Fonseca* and the revelations that a number of high profile US firms have also suffered recent data breaches.⁶

LAW IN THE 10-YEAR HORIZON

Despite the uncertainty of predictions I think we can be confident of a great deal of further change in the direction of automation, even if automation itself is a long way off. There will be greater diversity of legal practices expected in the future, with technology being fundamental to both lowering barriers to entry and being a key differentiator between providers of legal services. The technology that lawyers use is likely to include the adoption of virtual processes inside and out of the Court room, through the use of advanced data analytics, augmented reality displays and virtual Court appearances. In-house and external lawyers will undoubtedly become more and more reliant on technology to practice. With the increase of big data and analytics to unlock documents and information, cyber-security becomes a top priority around legal practices. Similarly, smart contracts entering the mainstream in conjunction with the commoditisation of legal services will lead to the automation of tasks previously carried out by lawyers. Finally, with the increasing use of technology within the profession, lawyers will soon be subject to new technology related mandatory ethical obligations. While there are many challenges, it is also likely to be a very exciting time to practice law and on that opens up competitive opportunities for lawyers who are able to adapt to the new industry environment. **B**

(Endnotes)

- 1 Laws allowing for the on-road trials of driverless cars were introduced in the South Australian parliament in September 2015.
- 2 Richard Susskind, ‘The Future of the Professions: How Technology Will Transform the Work of Human Experts’ (2015).
- 3 Gilbert + Tobin has an investment in LegalVision.
- 4 Lex Machina.
- 5 Office of the Legal Services Commissioner, ‘Cloud computing issues for legal practices’ *Law Society Journal of NSW* (June 2012).
- 6 <http://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504>.