LEGAL PROFESSIONALISM IN THE TWENTY-FIRST CENTURY: GOVERNMENT LAWYERS AS ACCIDENTAL INNOVATORS

Ronalda Murphy, Malliha Wilson & TaiaWong*

INTRODUCTION

The legal profession is at a crossroads. Globalization, economic pressures and the relentless pace of technological change are altering the way in which legal services are delivered. Simultaneously, the crisis over access to justice for the average litigant – neither rich nor poor – imperils the rule of law project more generally. Traditional concepts of legal practice and the legal professional must adapt or risk irrelevance. For many lawyers – professionals for whom work constitutes their personal identity – the prospect of fundamental change is understandably daunting. In our view, however, it need not be disturbing. We do not need to start from scratch; innovative solutions are perhaps closer than we think. This paper discusses how the delivery of legal services is evolving as a result of globalization and technological developments. We then explore the impact of these changes on the professional status of lawyers, and how the legal community articulates its concerns about the impact of such changes on what it means to be a lawyer. We argue that, surprisingly, it is government lawyers who may represent the vanguard on this issue and offer reassurance to the legal profession more generally. This reassurance, if it can be provided, is of course accidental; no one thinks of civil practice with the government as a radical choice or futuristic by nature. And it isn't. But government civil lawyers have to develop a unique skill-set, and internalize a conception of their client that may provide a model for practice and civility in the radically changing legal profession as a whole. If that is indeed the case, then responding and adapting to today's transformative pressures may in fact be easier done, than said. But first, the problem defined.

The Traditional Professionalism Paradigm

Legal professionalism entails duties and service toward others and is comprised of a number of collective ethical aspirations, including collegiality, service to the public good and integrity. It is a manifestation of the belief that the legal profession exists to

---

* By Malliha Wilson - Assistant Deputy Attorney General, Legal Services Division, Ontario Ministry of the Attorney General; Ronalda Murphy - Counsel, Ministry of the Attorney General and Associate Professor, Schulich School of Law, Dalhousie University; and Taia Wong - Counsel, Ministry of the Attorney General. The views expressed in this article are those of the authors alone and do not necessarily reflect the position of the Ontario government.

further the cause of justice and promote the rule of law.[1] Historically, the word "profession" was associated with occupations that "combined public avowals of high purpose with dedication to service and selflessness."[2] Professionals were people whose livelihoods were dedicated to serving people and communities.[3] These occupations were more than a means of subsistence; they embodied a calling to a greater satisfaction than the pursuit of profit.

The paradigm of legal professionalism determines whether lawyer conduct is legitimate, and gives lawyers the exclusive privilege of providing legal services and autonomy in regulating their profession.[4] The notion of legal professionalism arose in the late nineteenth century in response to growing concerns that the more "entrepreneurial" aspects of law were eroding the profession's reputation.[5] Professionalism is based on an understanding between the profession and society, in which the profession agrees to act for the good of clients and society in exchange for autonomy and self-regulatory powers.[6] Informational asymmetry, altruism and autonomy – each of which distinguished a profession from a business – made this bargain both necessary and possible.[7]

Paradigms live and die[8] and various factors are changing the way legal services are delivered. Legal services are expensive and unattainable for many; technology is ubiquitous and accessible - anyone can Google how to draft a will, the expected award of child support, or participate in debates about sentencing law. Clients are tending toward in-house counsel whose expenditures they control, as opposed to deferring to bills presented by external legal fees. Clients are also seeking to secure more legal service at less cost and are increasingly scouring their legal work for tasks that can be unbundled and outsourced to low-cost providers.[9] The

---

[1] Law Society of Upper Canada, Role Statement (1994), cited in Madam Justice Rosalie Abella, "Professionalism Revisited" (Opening Address to the Law Society of Upper Canada Benchers' Retreat, 14 October 1999) [unpublished] [Justice Abella].

[2] J Furlong, "Professionalism Revived: Diagnosing the Failure of Professionalism among Lawyers and Finding a Cure," online: The Law Society of Upper Canada <http://www.lsuc.on.ca/media/tenth_colloquium_furlong.pdf>, cited in M Wilson, T Wong & K Hille, "Professionalism and the Public Interest" (2011) 38 Advocates' Q 1 at 3 [Furlong].

[3] Furlong, *supra* note 2 at 2.

[4] R Pearce, "The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar" (1995) 70 NYUL Rev 1229 at 1231 [Pearce].

[5] *Ibid* at 1231.

[6] *Ibid* at 1231.

[7] *Ibid* at 1238.

[8] Thomas Kuhn, The Structure of Scientific Revolutions (Chicago: University of Chicago Press, 1962).

[9] B Burk & D McGowan, "Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy" [2011] Colum Bus L Rev 1 at 66 [Burk & McGowan].

Honourable Justice Cromwell raised such concerns in his recent Viscount Bennett lecture:

> Is there a problem with access to civil and family justice? My answer, and the answer of every commentator that I know of, is "yes." Is the problem serious? Again, I believe the answer is "yes." By nearly any standard, our current situation falls far short of providing access to the knowledge, resources and services that allow people to deal effectively with civil and family legal matters. There is a mountain of evidence to support this view.[10]

The legal community is worried about external pressures, and in this article we join those commentators who are asking: what impact will changes wrought by globalization, technological developments and economic pressures have on the traditional concept of legal professionalism?

The evolution of legal services into the 21st century

Lawyers have produced legal information primarily in one way: by advising clients in one-to-one relationships. In his book, *The End of Lawyers?*, Richard Susskind argues that the delivery of legal services is evolving from 'bespoke' legal services, that is "traditional, hand-crafted, one-to-one consultative professional service, highly tailored for the specific needs of particular clients", along a spectrum that includes standardized, systematized and packaged legal services, toward the commoditization of legal services.[11] The move from customized or bespoke advice toward the sale of legal commodities[12] is largely being enabled by existing and emerging information technologies, as companies figure out how to unbundle and systemize legal advice and services.[13]

(A) The onward march of technology

Relentless technological change is transforming the nature of the legal profession in several ways. The rapid adoption of new technology is changing the delivery of legal services by routinizing and commodifying certain legal transactions. Advances in technology could also potentially lead to the democratization of legal practice by reducing informational asymmetry between lawyers and clients – a key condition to

---

[10] The Honourable Thomas Cromwell, "Access to Justice: The Way Forward" (2012) 63 UNBLJ 138 at 39.

[11] R Susskind, *The End of Lawyers?* (London: Oxford University Press, 2010) at 28 [Susskind].

[12] Susskind defines legal commodities as a commonplace electronic or online legal offering that can be sourced from one of various suppliers, *ibid* at 32.

[13] L Ribstein, "The Death of Big Law" [2010] Wis L Rev 749 at 780 [Ribstein].

lawyers' status as professionals. The legal profession's exclusive claim to the mastery of esoteric knowledge is arguably being diminished by, for example, the standardization of legal documents and the process of hiring legal counsel.[14]

Susskind identifies several 'disruptive' legal technologies – "technologies... that do not simply support or sustain the way a business or sector operates; but instead fundamentally challenge or overhaul such a business or sector" that are transforming the delivery of legal services.[15] These disruptive legal technologies include: automated document assembly, relentless connectivity, electronic legal marketplace, e-learning, online legal guidance, legal open-sourcing, closed legal communities, workflow and project management, and embedded legal knowledge.[16] It is commonplace for medical patients to do their own Internet research before consulting their doctors. Likewise in law, especially family law, clients come in the door after they have done their own investigation into the law and are quite prepared to challenge the costs associated with securing legal advice. Susskind argues that disruptive technologies will to some extent displace conventional lawyers by challenging the traditional, one-to-one consultative, advisory service that has characterized the legal profession for decades.[17]

(B) The unbundling and outsourcing of legal services

Clients and law firms alike have also begun to use some non-lawyers for certain legal services.[18] Outsourcing, for example, is quickly becoming a part of mainstream legal practice. Starting in 2008, the economic downturn caused more clients and law firms to send more legal work offshore.[19]

The kinds of legal work being sent offshore are varied and changing rapidly. One recent U.S. study indicates that in general, approximately 15 per cent of legal process outsourcing professionals were performing work equivalent to a junior lawyer, and approximately 85 per cent were performing work equivalent to that of a paralegal or administrative support professional.[20]

---

[14] M Harner, "The Value of 'Thinking Like a Lawyer" (2011) 70 Md L Rev 390 at 406.

[15] Susskind, *supra* note 11 at 99.

[16] *Ibid* at 100-144.

[17] *Ibid* at 144.

[18] Burk & McGowan *supra* note 10 at 82.

[19] M Dolan & J Thickett, "The Financial Crisis: How Can Corporate Legal Departments and Law Firms Manage the Aftermath?" Andrew's Fin Crisis Litig Rep, 25 November 2008, cited in C Robertson, "A Collaborative Model of Offshore Legal Outsourcing" (2011) 43 Ariz St LJ 125 at 131[Robertson].

[20] Robertson, *ibid* at 132.

Foreign lawyers are also starting to perform more complex legal work such as research support, which includes cross-jurisdictional surveys of state and local statutory regimes, as well as helping to write briefs and analyses of statutory and case law, citation checking, document drafting and preparing drafts of patent applications.[21] To be sure, legal outsourcing currently focuses on the routine end of legal work, such as risk management, contract review and patent searches, rather than the sophisticated transactional work that has been the traditional law firm's comparative advantage.[22] However, law firms have always sought out this classic type of legal work in order to keep their coffers filled, and so they have become more vulnerable to competition from commodity suppliers.[23] \

(C) The emergence of a legal information market

The traditional manner in which legal services are provided is therefore changing as lawyers "lose their monopoly over the law" and are faced with increased competition from organizations that provide similar services.[24] Law firms are being pressured by a variety of forces, including more knowledgeable and savvy clients, new legal technologies and a more competitive international market for legal services.[25] At the less expensive end of the legal services market, small law firms and sole practitioners are being taxed by expensive legal software and other similar technologies.[26] Still, "many middle class consumers still cannot afford the legal advice that would otherwise enable them to cope with increasing regulatory complexity."[27] Indeed, Justice Cromwell noted in his 2011 Viscount Bennett lecture that, in both Canada and the United States, this problem is now acute with respect to access to civil law advice.[28]

These developments are spurring the growth of new markets for legal services – a 'legal information market' in which legal information is sold in the marketplace rather than conveyed through advice by, and to, a specific person.[29]

---

[21] *Ibid* at 133.

[22] Ribstein, *supra* note 13 at 766.

[23] *Ibid* at 766.

[24] B Kobayashi & L Ribstein, "Law's Information Revolution" (2011) 53 Ariz L Rev 1169 at 1171 [Kobayashi & Ribstein].

[25] *Ibid* at 1171.

[26] *Ibid*.

[27] Gillian Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System" (2000) 98 Mich L Rev 953, cited in Kobayashi & Ribstein *supra* note 24 at 1171.

[28] Justice Cromwell, *supra* note 10.

[29] Kobayashi & Ribstein, *supra* note 24 at 1174.

These information markets have strengthened since the advent of the web and increasingly sophisticated search engines.[30]

This new legal information market enables clients to unpackage the services that large law firms currently offer, and purchase a variety of products and services from several providers.[31] As clients become increasingly knowledgeable about the legal products and services available, this unbundling is likely to become more common.[32]

(D) The rise of in-house counsel

As corporations bring more legal work in-house, external counsel may have to focus on narrow specialties while corporate lawyers become responsible for making strategic business judgments that intersect with the law.[33] Although corporations are unlikely to give all of their legal work to in-house counsel, their ability to internally manufacture rather than buy legal advice will continue to strain the traditional law firm model.[34] Legal work is "therefore increasingly becoming a job description within another business rather than a distinct line of business."[35]

Rising litigation costs and law firm fees could also impel clients to bring legal work inside, with the result that "legal-type work would then diffuse throughout a corporate client, blurring the distinctions between professional lawyers and non-lawyers whose subject matter of work includes dealing with legal topics."[36]

(E) Adaptations by government lawyers

What does this have to do with government lawyers? First, many of Susskind's 'disruptive technologies' (e.g. e-learning, online legal guidance, connectivity, automated document assembly) more or less describe the kinds of technologies that the Legal Services Division (responsible for civil law) in the Ministry of the Attorney General of Ontario has already adopted, and uses in a routine manner. The

---

[30] *Ibid*.

[31] Gina Passarella, "Law Firms Feel Pressure from New Breed of Competitors," The Legal Intelligencer (October 26, 2010), cited in Kobayashi & Ribstein *supra* note 24 at 1220.

[32] Kobayashi & Ribstein, *supra* note 24 at 1220.

[33] Ribstein, *supra* note 13 at 798.

[34] *Ibid* at 798.

[35] *Ibid*.

[36] *Ibid* at 768.

Legal Services Division employs a technology-based knowledge management system to communicate and facilitate the transfer of knowledge throughout the organization. It has developed an online portal through which knowledge is secured, managed and transferred to support legal services in all Ministries. The portal houses three central document libraries for legal documents, legal opinions and professional development materials. The Ministry of the Attorney General also hosts online learning modules, which staff can participate in at their convenience. Government lawyers are of course also relentlessly connected through the use of blackberries and a 'virtual private network' (VPN).

In addition, and more interestingly, government lawyers are part of the consummate in-house law firm – one in which legal advice and services are unbundled and systemized every day. The government client is like no other and, to properly serve it, government lawyers have become adept at explaining the law in a way that is clear, accessible and cogent, whether in the form of an oral briefing, an email, factum, or opinion. The Legal Services Division in the Ministry of the Attorney General also fields multi-disciplinary teams of experts in response to crises and as part of long-term planning for complex files and departments. This approach draws on wells of expertise across government, and ensures that the legal advice being provided is not only competent, thorough and sound, but also innovative, creative and responsive to the needs of our rapidly evolving state. Government lawyers have deep knowledge and, simultaneously, a culture of movement. Lawyers work in many ministries and develop cross-ministerial expertise and the ability to work in many different legal environments. The result is a fluid, flexible and forward-thinking organization.

Impact on the professionalism paradigm

For many legal organizations, lawyer-client relationships are becoming less continuous, and lawyers are practicing in less familial environments as legal organizations expand to become more competitive and profitable.[37] This is the outcome of the trend toward the "law-as-business" model, in which lawyers in law firms are under tremendous pressure to bill unreachable hours, to generate business and to compete unyieldingly. Many have queried: does an increasingly bottom-line oriented legal culture overshadow lawyers' commitment to professional responsibility? As the practice of law is increasingly organized around a business-based model that is geared toward maximizing profit, it will on some occasions push toward the margins of ethical propriety.[38] Are our professional ideals robust enough to enable lawyers to overcome these ethical constraints? And will the rapid pace of

[37] K Fortin, "Reviving the Lawyer's Role as Servant Leader: The Professional Paradigm and a Lawyer's Ethical Obligation to Inform Clients About Alternative Dispute Resolution" (2009) 22 Geo J Legal Ethics 589 at 595 [Fortin].

[38] *Ibid* at 596.

technological innovation, and the resultant commoditization of legal services, cause a shift away from the professionalism paradigm? Are we seeing the end of professional privilege as non-lawyers (for example self-represented litigants) are increasingly able to practice law?[39]

We have set out clear evidence of a shift toward treating law as a commodity, with firms increasingly run like businesses in which legal services are broken down into component pieces and outsourced and non-lawyers provide some legal services. As noted, these changes have reduced informational asymmetry between lawyer and client, such that legal services have started to look like other goods and services that do not require particular expertise on the part of a client in order to evaluate them.[40] The traditional method of legal service delivery, in which lawyers advise clients in one-to-one relationships, has given rise over the decades to an elaborate system of professional regulation designed to ensure lawyers' integrity and competence. Some scholars argue that the breakdown of the traditional legal services model in favour of a new framework in which legal commodities are sold, reduces the need for professional regulation; it does so by diminishing consumers' need to rely on a lawyer-client agency relationship and by substituting market discipline for the regulation of lawyer conduct.[41] They argue that this is part of a broader move in society generally, "from trust to verification: providing information to consumers and leaving it to them to engage in independent verification of the quality and veracity of the services in question. This model is premised on a market of information, rather than a set of relationships with trusted advisors."[42] These scholars further argue that the new legal information market taking hold of the profession "significantly reduces the need for reputational capital that helps ensure the integrity of advice rendered in one-to-one advisory relationships."[43]

These developments may have the effect of eroding lawyers' distinct professional status. Some commentators therefore argue that, as the boundaries between legal services and other commercial services dissipates, lawyers "need to accept that their status as professionals is of decreasing relevance to their success in meeting the demands of their 'customers.'"[44] Understandably, however, many lawyers are wary of commoditizing legal services, because it drives down the price

---

[39] R Posner, Overcoming Law (Cambridge: Harvard College, 1995), cited in R Pearce *supra* note 4 at 1260.

[40] Pearce, *supra* note 4 at 1267.

[41] Kobayashi & Ribstein, *supra* note 24 at 1185.

[42] R Vischer, "Trust and the Global Law Firm: Are Relationships of Trust Still Central to the Corporate Legal Services Market?" (2010). U of St. Thomas Legal Studies Research Paper No. 10-19 at 16 [Vischer], online: SSRN < http://ssrn.com/abstract=1666973>.

[43] Kobayashi & Ribstein, *supra* note 24 at 1219.

[44] Vischer, *supra* note 42 at 11.

of certain legal services, and perhaps more importantly, is perceived to devalue the practice of law.[45] Many marvel at the gap between why they chose to become lawyers and what they are doing on a day-to-day (and it is increasingly a '24-7' job) basis. Indeed, lawyers who see their work as an art fight the idea that they are offering a mere commodity.

(A) Impact on professional attributes of trust and loyalty

Globalization and economic pressures are pushing law firms and clients alike to reduce costs and pursue greater efficiencies, but how might those efficiencies affect the nature of the lawyer-client relationship? By blurring the distinction between the lawyer-client relationship and any other service provider/consumer transactions, will these pressures have the effect of "marginalizing the lawyer's role as a personal trusted advisor and normalizing the conception of the lawyer as a mere technician?"[46] Some commentators argue that trust may lose its place as a constitutive element of the lawyer-client relationship, as the relationship itself becomes "less personal, more distant and more fungible."[47] The question is therefore whether the depth of trust that once characterized the lawyer-client relationship is still a viable and relevant aspiration for lawyers today.

As the provision of legal services stretches across oceans, the lawyer-client relationship, and its concomitant traits of trust and loyalty, also becomes attenuated. The greater distances, and the use of subcontractors in some cases, means that there is a less personal connection between the lawyer and the client. Trust cannot thrive in circumstances of such diminished intimacy.[48] In addition, when legal services are provided in a global context, lawyers and clients may lack a shared background in cultural norms and values in which trust is often rooted.[49] A lack of trust could cause clients to engage lawyers for their technical competence on particular tasks, rather than relying on them for a wider advisory role in the manner of the traditional lawyer-client relationship.[50]

The disaggregation of legal services is also eroding the traditional concept of the lawyer-client relationship. But can relationships really be disaggregated? Traditionally in lawyer-client relationships, clients have trusted in the relationship itself, rather than trusting that a discrete task will be performed competently.

---

[45] Susskind, *supra* note 11 at 33.

[46] Vischer, *supra* note 42 at 1.

[47] *Ibid* at 1.

[48] *Ibid* at 12.

[49] *Ibid* .

[50] *Ibid* at 13.

However, this requires a relationship of sufficient depth so as to engender confidence and respect. To the extent that a matter is divided up among a firm and outside providers, those relationships of trust could suffer.[51]

In addition, the rise of in-house counsel as discussed above has allowed companies to unbundle their needs and distribute work among many firms. This trend is also displacing the traditional concept of a client having a decades-long relationship with a primary firm tasked with all of the company's legal needs.[52] But as a lawyer's experience with, and therefore its knowledge of, a client narrows, so to does the lawyer's ability to be a trusted advisor engaged in the stewardship of the client's well-being. The result is that the lawyer is limited to being a technician who works on discrete projects.[53] As the personal connection between lawyer and client frays, and with it the attendant bonds of trust, many lawyers have increasingly struggled to find meaning in their work. Clients too have sometimes come to discover that "technicians work efficiently until a problem calls for counsel that is not strictly technical."[54] As one commentator puts it: "If we lose even the fiction of trust, what does that mean for the legal profession's conception of itself? And what implications might a change in that self-conception have for the client, the public and the lawyer himself?"[55]

Some commentators suggest that the realities of practicing law today have become increasingly incongruent with the idealism that attracted many students to the profession in the first place.[56] As evidence of this dissonance, these scholars highlight the growing sentiment among lawyers that their desire to be engaged in a meaningful, life-long endeavour can no longer be satisfied by their professional work.[57] They attribute this professional identity crisis to the "cognitive dissonance of being governed as professionals but acting as technicians or business people."[58]

---

[51] *Ibid* at 15.

[52] Susskind, *supra* note 11 at 28.

[53] David Maister, Charles Green & Robert Galford, The Trusted Advisor (New York: Free Press, 2000) and Vischer, *supra* note 42 at 16.

[54] *Ibid* at 3.

[55] *Ibid* at 5.

[56] Gavin MacKenzie, "The Valentine's Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession" in (1995) 33 Alta L Rev 859 at 860, cited in Wilson, Wong & Hille, *supra* note 2 at 1.

[57] A T Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession (Cambridge: Harvard University Press, 1993) at 3, cited in MacKenzie, *supra* note 56 at 861.

[58] Fortin, *supra* note 37 at 591.

As the changing nature of the lawyer's role hinders the development of trust and loyalty between the lawyer and his or her client, we are at risk of losing much of what distinguishes us as lawyers.[59] We also become at risk of losing the sense that we are involved in a vocation that entails more than technical competence. For many lawyers, this notion of professionalism, and its constitutive elements of trust and loyalty, is the reason why many of us became lawyers in the first place. [60] The legal profession's rhetoric and self-conception therefore matter: they are not quaint, archaic ideals, but rather duties and obligations that are integral to the practice of law.

(B) Impact on ethical conduct

Ethical practice and conduct is also a key component of professionalism. As lawyers, we are responsible for our own personal ethics, but we also share a collective responsibility to ensure that our profession as a whole carries out its duties properly and ethically.[61] Indeed, our ability to self-regulate is premised on the understanding that the profession will exercise its self-regulatory powers in the public interest. If we neglect that obligation, we compromise the independence of the profession and the public interest that it is meant to serve.[62]

And so how might an increasingly competitive environment amongst professionals impact ethical decisions? Some commentators argue that it has compromised lawyers' independent judgment in counselling clients and increased the allure of acquiescing to a client's perspective of unchecked optimism, such as in the Enron scandal, where the requisite separation between lawyer and client disappeared.[63] They note that in an increasingly competitive environment, some lawyers may take the view that the most expedient strategy is to readily adopt the client's perspective and become as inexpensive as possible.[64] However, such acquiescence hinders lawyers from exercising an important function of the legal profession: "advising of limits grounded in social norms beyond which the client's pursuit of self-interest will not be permitted."[65] As generating business and

[59]Vischer, *supra* note 42 at 7.

[60] Justice Abella, *supra* note 1.

[61] Chief Justice of Ontario Advisory Committee on Professionalism, "Elements of Professionalism," online: The Law Society of Upper Canada <http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf> at 2, cited in Wilson, Wong & Hille, *supra* note 2 at 6 [Elements of Professionalism].

[62] American Bar Association, "Model Rules of Professional Conduct" (Preamble), cited in "Elements of Professionalism" *supra* note 61 at 3.

[63]R Vischer, Legal Advice as Moral Perspective (2006) 19 Geo J Legal Ethics 225 at 241 [R Vischer].

[64] J Coffee, "What Caused Enron? A Capsule Social and Economic History of the 1990s" (2004) 89 Cornell L Rev 269, cited in R Vischer, *supra* note 63 at 241.

[65] R Vischer, *supra* note 63 at 242.

maximizing profit become more important to lawyers' careers, their independent professional judgment becomes vulnerable to clients who would try to compel lawyers to take unethical actions on their behalf. Indeed, "the business mantra that 'the customer is always right' is not ethically applicable to the law, and is a potentially disastrous marching order for the lawyer."[66]

(C) Impact on civility

And what of the seeming decline in civility? All lawyers have a responsibility toward the administration of justice, and as officers of the court, they have a duty to act with integrity and with civility.[67] As legal organizations become more bottom-line oriented, the civility of the profession suffers. Some commentators assert that the worst damage is done invisibly within a legal organization, where collegiality becomes secondary to financial return and new lawyers are "inducted into a business rather than a mystery."[68] They attribute the decline in the tone of the professionalism to its increasing commercialization.

Civility requires particular care in a professional environment that has become increasingly commercialized and in which, as one academic has noted, "clients who once sought lawyers of stature, reputation and credibility, increasingly give their litigation work to 'the screamers'."[69] Ours is a celebrity culture, but we all know the best lawyer is not necessarily the best known lawyer. The question is this: how do we foster these norms of collegiality and civility and ensure that they are not mere "rhetorical flourishes",[70] but rather a duty that is integral to the practice of law?[71]

Importantly, collegiality requires a willingness on the part of experienced lawyers to mentor those who are less experienced in the practice of law. In addition to sharing substantive and practical legal knowledge, senior lawyers must exemplify professional ideals, such as civility, by delivering an ongoing seminar on professionalism in the daily conduct of their practice.[72] Like all great seminars, the

---

[66] Fortin, *supra* note 37 at 607.

[67] Elements of Professionalism, *supra* note 61 at 7.

[68] S Linowitz & M Mayer, The Betrayed Profession: Lawyering at the End of the Twentieth Century (New York: C Scribner's Sons, 1994) at 32, cited in Fortin, *supra* note 37 at 606.

[69] Anonymous, "A Litigator's Lament" [1993] American Lawyer 79 at 80-81; cited in MacKenzie, *supra* note 56 at 864.

[70] Justice Abella, *supra* note 1.

[71] We are mindful of the charge that the historic collegiality with which civility is often associated is also connected to discrimination, intolerance for diversity and elitism: Alice Woolley, "Does Civility Matter?" (2008) 46 Osgoode Hall LJ 175 at 183.

[72] Furlong, *supra* note 2 at 12.

constant questioning and discussion is of far greater importance than answering the particular question or resolving any given dilemma. It is a culture of inquiry about ethics that has to be nurtured, not the cheat sheet application of them.

The Court of Appeal for Ontario has stated that "civility within the legal system not only holds the profession together, but also contributes to the continuation of a just society."[73] This may strike new lawyers as far-fetched, even archaic. But it is not; it is the part of the practice of law that invites the label "honourable".[74] If we lose honour, we risk the entire enterprise. There are also institutional benefits to civility. Conduct that may be characterized as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully and efficiently, in turn delaying or even denying justice. Uncivil behaviour in the courtroom, for example, "diminishes the public's respect for the court and for the administration of justice and thereby undermines the legitimacy of the results of the adjudication."[75]

It is a fundamental tenet of the law that justice should not only be done, but should "manifestly and undoubtedly be seen to be done", and civility is a crucial aspect of the appearance of justice.[76] There is nothing superficial about this substantive requirement. Transparent operation of legal authority is the precondition to a democratic society: "The sine qua non of the justice system is that there be an unqualified perception of its fairness in the eyes of the public."[77] Civility amongst those entrusted with the administration of justice is central to its effectiveness and to the public's confidence in that system. Civility within the legal system ensures that matters before the court are resolved in an orderly way, and helps preserve the role of counsel in the justice system as an honourable one.[78]

---

[73] *R. v Felderhof* (2003), 68 OR (3d) 481 (CA) at para 84 [*Felderhof*].

[74] Honour has other manifestations in law. See for example, Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, which held the Crown must act with honour in its relationship aboriginal peoples and may not engage in sharp dealing or run roughshod over Aboriginal interests that are the subject of negotiation or litigation.

[75] *Felderhof*, *supra* note 73 at 83.

[76] *The King v Sussex Justices*, ex parte McCarthy, [1924] 1 K.B. 256, cited in Mr. Justice Paul Perell, "The Civil Law of Civility," online: The Law Society of Upper Canada <http://www.lsuc.on.ca/media/tenth_colloquium_perell.pdf> at 1.

[77] *MacDonald Estate v Martin*, [1990] 3 SCR 1235, at 1256, quoting O'Dea v O'Dea (1987), 68 Nfld & PEIR 67 (Nfld Unif Fam Ct), aff'd Nfld CA, June 6, 1988 (unreported); see also Everingham v Ontario, (1992) 8 OR (3d) 121 (Ont Ct J (Gen Div) Div Ct) at para 34.

[78] The Advocates' Society, "Principles of Civility for Advocates," online: The Advocates' Society <http://www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf>, cited in Wilson, Wong & Hille, *supra* note 2 at 5.

(D) Impact on government lawyers

How might globalization, economic pressures and the resultant changing nature of legal services delivery affect government lawyers? At first glance, it may seem that government lawyers might be immune from these pressures, given that they seemingly have a captive client.[79] But technological innovation, globalization and economic pressures are spurring changes in all sectors, and stakeholders in the justice system are not immune from the rapid change of pace. The Supreme Court of Canada, for example, recently decided in Canada (AG) v TeleZone Inc that access to justice requires that people who claim to be injured by government action be permitted to pursue "whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity."[80] In following an approach it deemed practical and pragmatic, the Court held that a plaintiff who seeks to sue the federal Crown for damages as a result of administrative action does not need to first proceed by way of judicial review in the Federal Court. As courts adapt and respond to changing needs, so too should government lawyers, so that their employer can creatively and effectively respond to changes wrought by technological advancement, the borderless marketplace and economic uncertainty.[81]

Nor are government lawyers cloistered from the changing self-conception of the profession as a whole. Government lawyers practicing civil law in Ontario occupy a distinct position in the administration of justice that stems from their role as counsel for the Attorney General. Their unique role has fuelled the debate on whether government lawyers are or should be subject to additional ethical and professional duties beyond those of their private counterparts. This debate will only intensify as the entire legal profession struggles with the attenuation of professional ideals and attributes that have traditionally defined the lawyer-client relationship.[82]

To date, the internal debate amongst the profession on whether and how to staunch this tide of change has failed to account for the myriad ways in which we can look to government lawyers for insights about how to adapt and thrive in a changing legal profession. Government practice is about the public of Ontario. As a result, government lawyers adhere to a rigorous peer review and approvals process that is undergirded by notions of democratic accountability. Government lawyers work in

---

[79] Contrary to popular belief, government lawyers do not have captive clients: they have, on many occasions, had to demonstrate that they – and not private sector counsel – are able to provide the most competent legal services in a given transaction.

[80] *Canada (AG) v TeleZone Inc*, 2010 SCC 62 at paras 18-19.

[81] Wilson, Wong & Hille, *supra* note 2 at 9.

[82] For differing views on this issue see, for example, A Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law," (2010) 33 Dalhousie L.J. 1 and Wilson, Wong & Hille, *supra* note 2.

service of a most important client: the Crown, with its attendant commitments to the public interest and the people of Ontario.

Moreover, there is a great deal of accountability as to how staff in government are treated. The government has workplace discrimination and harassment policies, online learning modules on accessibility and discrimination, and, perhaps most importantly, the Ministry of the Attorney General has fostered a norm of professionalism and civility amongst its lawyers. The government is also dedicated to diversity and inclusion. While this is the future for many other employers of legal talent,[83] in government it is the present. Because of the unique situation of having a singular and complex client (the Crown), government lawyers may be ahead of the curve in maintaining their sense of professional identity without reference to the traditionally dominant model of legal service delivery.

CONCLUSION

As competitive pressures and a new global economic reality take hold of the legal profession, lawyers have come to face a corrosive charge, namely that lawyers have forsaken their professional roots and now see law as a job rather than a calling. If this charge is well-founded,[84] it may be because of an underlying absence of agreement about what professionalism is or requires. This disconnect may have arisen because the legal community has come to rely on "the myth of professionalism by immersion"[85] and the naive but mistaken notion that a new lawyer will acquire the deeply held values of our profession simply by engaging in the practice of law and by keeping the company of other lawyers. However, by neglecting our obligation to train new lawyers in these values, lawyers who look for a sense of purpose and meaning in their work within the ethic of professionalism are unable to do so and consequently drift further from the founding ideals of our profession.[86] Therefore,

---

[83] This point was also made recently by Professor David B Wilkins, and Professor Lester Kissel, Vice Dean for Global Initiatives on the Legal Profession and Faculty Advisor for the Program on the Legal Profession and Center on Lawyers and the Professional Services Industry, Harvard Law School in the Genest Lecture, at Osgoode Hall Law School on February 8, 2012 in "Globalization Lawyers And Emerging Economies: Legal Practice, Legal Education, and the Paradox of Professional Distinctiveness" (powerpoint presentation on file with the authors). Wilkins also noted the emerging trend in the private sector toward files being project-managed. This is a normal feature in government practice for significant or complex files.

[84] For a discussion of this concern among young lawyers in the United States context, see D Wilkins, "Rethinking The Public-Private Distinction In Legal Ethics: The Case Of "Substitute" Attorneys General" [2010] Mich St L Rev 423 at 460-1.

[85] Furlong, *supra* note 2 at 10.

[86] The relationship between the lawyer's desire for meaningful work and the special status accorded the profession is made by Professor David Wilkins in a recent speech "Globalization, Lawyers, And The Rule Of Law: Private practice and Public Values in the Global Market for Corporate Legal Services" World Justice Forum, Barcelona June 21, 2011 (on file with the authors) at p 8:

rather than simply sending new lawyers into a law office or courtroom in the hope that they will somehow imbibe the values of our profession, we are obligated to mentor and train new lawyers in the spirit of professionalism, so that it is practiced as the rule rather than the exception.[87]

This kind of attitudinal and behavioural change requires, and can only be borne of, a cultural shift among leaders responsible for implementing such change and the lawyers who will ultimately carry it out. Will lawyers help refine our professional rhetoric to ensure that the ideals that define our profession are not simply desirable adornments, but rather duties that are central to the manner in which we carry out our work? Or will lawyers continue to be swept along in the tide of technological and market change? This is a twenty-first century conversation that all lawyers need to join and shape.[88] We think locating that discussion within the context of government lawyers yields surprising insights. We can adapt even if we find the prospect of such change daunting, and even if we don't notice that some of us already have.

> For if corporate law practice is simply a business just like any other, then there is no reason why it should be given any special deference or legitimacy – or that it should hold any special appeal to bright young people around the world seeking to begin a career that connects their lives to a broader public purpose. And it is precisely the claim that law is a public profession imbued with an ethic of public service connected to the fundamental values of the rule of law that has attracted so many talented people to become lawyers – and has been the reason why governments and the public have traditionally given lawyers a privileged position in many societies.

[87] Furlong, *supra* note 2 at 10.

[88] Wilkins, *supra* note 85 at 461 notes: "Public and private roles are arguably more inextricably intertwined than they have been at any other time in the profession's history. [...] [I]t does seem necessary to move away from the current understanding that tends to separate public and private interests into distinct and largely insular camps."