

# Reimagining Lawyering in a World on Fire:

What Judges Need to Know About the Legal Services Market in the New Normal

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# May You Live in Interesting Times!

- These are truly unprecedented times, with three related crises
  - A global health crisis;
  - A global economic crisis;
  - And increasingly global calls for sustainability and Social Justice
- All three have exposed deep structural challenges that, as Harvard Business and University Professor Rebecca Henderson argues in an important new book, have already set “the world on fire,” and will last long after the current sense of urgency has faded
  - Globalization of economic activity – and the important movement of that activity to the Global South and East
  - The rise in the speed and sophistication of information technology and the “digital transformation” of all areas of economic, political, and social life
  - The “blurring together” of traditional categories of organization and thought
- And all these challenges have major implications for the legal profession – and therefore for appellate judges who both depend upon and regulate lawyers

# In this New World, Law and Lawyers Will Be More Important than Ever

- Consider all the new legal work created by the COVID crisis
  - New laws, programs, and redesigned institutions (e.g., government stimulus measures, contact tracing, online courts)
  - New or revamped corporate policies and practices (e.g., employment, online work, supply chains, data privacy and security)
  - New focus for corporate governance (e.g., balancing shareholder value with stakeholder interests and sustainability)
  - A tidal wave of reorganization (e.g., bankruptcy and restructuring, strategic acquisitions)
  - Renewed emphasis on public-private partnerships (e.g., healthcare, pharmaceuticals, education)
  - The proliferation of global compacts, indicators, and mandates (UN Global Compact, sustainability audits, “Modern Slavery” mandates in the UK and California)
- All of these issues will land on the desks of appellate courts!

## But These Issues Also Challenge Traditional Understandings of Lawyering

- Lawyers will be critical in understanding the new laws, regulations and institutions that will be created in the wake of the pandemic
- And yet law will only be a part – and often not the most important part – in addressing these issues
- We therefore need lawyers who understand that they need to provide more than just a “legal” service. They need to be a part – but only a part – of creating solutions to complex problems that extend far beyond law
- This will require that we equip lawyers with new skills, and new sensibilities

# And Yet, Not Everything Will – Or Should Change

- Law – at least for the foreseeable future – remains a human capital business
  - Notwithstanding all of the advances in technology, the legal profession consists of “elevator assets”
  - These “assets” continue to need to be educated, recruited, developed, and managed
- At the same time, tradition and stability have never been more important, for lawyers, clients, and the society in which we live
  - Law and lawyering linked to fundamental goods that will never be deregulated completely
  - Both people and institutions make long term investments that are difficult to change
- The future of legal work will be shaped by the interplay between these forces of continuity and change

# How This Balance is Struck will Critically Affect the Courts

- Judges are charged with protecting the vital link between law, democracy, sovereignty and legitimacy
- As a result, you have a critical stake in how changes in the market for legal services are likely to affect:
  - The core values underlying the rule of law
  - The responsibility for ensuring access to justice
  - The willingness of lawyers to serve as leaders in both government and civil society
- This means that judges must be conscious of the ways that legal practice has evolved since they practiced law – and how recent events are likely to turbocharge these changes in the coming years

# The Legal Profession Circa 2019

- From solo practitioners to professional organizations
  - Law firms and legal departments – but also government law offices, non-profits, and even plaintiff’s firms
  - Yet the regulatory system is unprepared for a world where institutional incentives are now as – or more – important than professional ones
- From homogeneity to diversity
  - Majority of law students are women, with a growing percentage of other diverse students
  - And yet the profession’s remains dominated by white straight men, particularly at top levels
- From oligopoly to competitive markets
  - Including sharp rise in “alternative” providers, including legal tech and the Big 4
  - And yet there is little systematic attention about how to integrate this new “ecosystem” of providers into the profession’s framework
- From artisanal craft to profit driven business
  - Increasingly sophisticated clients with more access to information demanding greater transparency from lawyers
  - And yet we do not have an understanding of “market professionalism” to govern this new reality
- From local control to “glocal” complexity
  - Domestic legal markets increasingly shaped by global markets and foreign investment, but local institutions and culture remain critical
  - And yet we continue to maintain a licensing system that assumes that “states” are the defining locus of legal practice, while talking about THE legal profession as if it were a single undifferentiated whole

# The Increasing Focus on the Intersection of Law, Sustainability and Social Justice Will Only Heighten these tensions

- In 1970, Milton Friedman famously declared: “The social responsibility of business is to increase its profits”
- Although few companies strictly adhered to this famous aphorism, for half a century few CEOs – and even fewer investors and academics – disputed the underlying premise that management’s primary duty was to maximize shareholder value
- And given the growing power of private corporations, this assumption had dramatic consequences for individuals and society

# From Shareholders to Stakeholders to Sustainability

- Even before the current crisis, this taken for granted presumption was being challenged
  - In 2018 BlackRock, the world's largest asset manager, declared that it would look beyond the bottom line to invest in businesses that “contribute to society”
  - The Business Roundtable followed by amending its definition of the “purpose” of a corporation to include duties to all of the companies “stakeholders,” including customers, employees, suppliers, communities
  - In January 2020, BlackRock issues a second letter that it would immediately stop investing in companies that present a “high sustainability-related risk”
- By highlighting deep structural inequalities in everything from health care to employment COVID will only accelerate this trend
  - July 2020, the World Economic Forum calls for a “great reset of capitalism in the wake of the pandemic”

# From Sustainability to Social Justice

- Since the death of George Floyd and Breonna Taylor, it is now clear that racial and social justice must be a part of this broader sustainability agenda
- Global Companies are putting real resources behind this commitment
  - Statements and Symbols: Banning the Confederate Flag
  - But companies are now going further, with companies like Google, Apple, Microsoft, and PayPal pledging billions toward Funding Racial Justice Organizations, creating Hiring and Supplier Diversity programs, and even sustainability investing such as Google's Parent Company Alphabet's \$7B "sustainability bond,"
  - Even major investors are getting on board, with Goldman Sachs and the UK's Legal & General Investment Management pledging not to support IPOs with all male boards, or to vote against directors of FTSE 100 and S&P 500 if no black, Asian, or ethnic minority directors)

# These Changes Will Have Real Consequences for Lawyers and Courts

- It is easy to dismiss these statements as window dressing at best, and at worst a subterfuge for managerial self-interest
- But from the perspective of the legal profession and the courts, it is also clear that there are real consequences
  - April 2021, Netherlands court orders Shell to cut emissions 45% by 2030 based on representations in its voluntary sustainability report
  - June 2021, three “environmentalists” elected to the Exxon Board, backed by Blackrock, Vanguard, and other major institutional investors
  - August 2021, the Chair of the SEC signaled that it was likely to follow the example of many European regulators and require disclosure related to climate change and sustainability
  - And with growing legal and investor pressure for gender diversity on boards and billions pledged by companies to expand opportunities for disadvantaged groups, it is clear that social justice is now a core part of the sustainability agenda
- In my extensive conversations with CEOs and Boards, I do not know a single company that is not focused intently on these issue
- And all of this is landing on the desks of lawyers

# And Generational Change Will Accentuate These Trends

- Amidst all the chaos of 2020, the first GenZ's graduated from college
- Millennials and Gen Z already make up 38% of the workforce, and will be over 50% in a little more than a decade
  - On the one hand, they are, as my colleague John Palfrey wrote back in 2008, “Born Digital”
  - At the same time, they are increasingly seeking “meaning” and “purpose”
- The Pandemic and the protests will only heighten these dual commitments
- Especially important for lawyers, where recruitment and retention depends upon legitimacy and credibility
- This generation will be shaped by these events the way my parents' generation was shaped by WWII and the Great Depression
- And like that “Greatest Generation” I believe that you are destined for great things
- But only if we ensure that law schools prepare students to meet these challenges

# The Challenge: The Paradox of Professional Distinctiveness

- The legal profession will inevitably be shaped by what is happening in the world around us
- But the more the market is seen as driving legal practice and education, the more questions that will be raised about the profession's autonomy and distinctiveness
- Norms of independence, craft, public service, and commitment to the rule of law have been central to the identity, prestige, power, and attractiveness of legal careers in many countries
- The loss of these threatens recruitment, replacement, regulation – and perhaps most importantly, professional satisfaction

# Making Sustainable Lawyers

- If the legal profession hopes to continue to attract talented women and men, it must demonstrate legal work provides meaning and a sustainable integration of the professional and the personal
- This means that law schools must not only teach law students the “core competencies” of their own disciplines, but also the “complementary competencies” – financial literacy, a basic understanding of information technology, cross cultural fluency – that will allow them to contribute to solving the multiplicity of urgent problems at the intersection of law, business, technology, public policy and morality
- And these lawyers must in turn bring this knowledge to bear to help judges adjudicate legal cases and controversies that implicate these broader concerns

# And We Will Have Accomplish this in the New Normal of Hybrid Work

- In 2019, I had to convince lawyers that technology was going to have a major effect on their practice -- now we are all living our lives on Zoom!
- And no one thinks that we will go back to the old ways of working
- And this is just the beginning
- But while this new world has many advantages, as we are all discovering, we will have to find new ways to build community and collaboration online – and even more to avoid burn out (it's not working from home, its sleeping at work!)

# Toward a New Partnership

- To accomplish these goals will take a new partnership in which lawyers, academics, policymakers and judges work together to understand the profound changes taking place, and to craft wise policy that helps support the best of these changes, while preserving the legal system's core values
- Which is why I am so honored to have the opportunity to discuss these issues with our terrific panel – and with all of you!