

## BOOK REVIEW

# THE KNOWLEDGE GUILD: THE LEGAL PROFESSION IN AN AGE OF TECHNOLOGICAL CHANGE

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THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES. By Richard Susskind. 2008. New York: The Oxford University Press. 303 pp. \$25.00.

### ABSTRACT

*In The End of Lawyers? Rethinking the Nature of Legal Services, Richard Susskind predicts that lawyers will suffer the fate of other guild-members—the artisans and craftsman of an earlier age—who saw their livelihoods wiped out by the potent mix of technological advancement and market forces that is modernity. He argues that the commoditization of legal services will make much traditional legal work unnecessary, dramatically reducing the demand for the one-on-one client service that has sustained the growth of the legal profession. This Review challenges Susskind’s assumption that the work of lawyers is analogous to the work of the mechanical craftsmen of previous eras and questions his failure to consider the political and legal factors that support the traditional legal profession. Susskind offers no evidence to support his claim that greater automation of legal work will result in less demand for human legal services. In fact, the evidence suggests that productivity increases in knowledge industries increase demand for those knowledge goods. And Susskind never discusses professional considerations such as malpractice, conflicts of interest, and confidentiality that serve to reify the traditional order and limit the transformative power of technological change.*

The Great Recession brought unprecedented dislocation to the legal profession. In March 2009, the *New York Times* reported that a “wave of layoffs ha[d] crashed upon the legal industry,” citing Bureau of Labor Statistics data showing thousands of legal jobs lost as the recession lingered.<sup>1</sup> By the end of the year, according to the blog *Law Shucks*, more than twelve thousand people

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<sup>1</sup> Michael J. de la Merced, *The Legal Profession Feels the Pain of the Recession*, N.Y. TIMES, March 26, 2009, at F2, available at <http://www.nytimes.com/2009/03/26/business/26law.html>.

had been laid off from major law firms, including at least 4,600 attorneys.<sup>2</sup> Hiring of law students to lucrative summer positions slowed to a trickle, while many new lawyers already in the pipeline had their start dates deferred by a year or more. Several large firms, including Thacher, Proffitt & Wood; Thelen Reid & Priest; and Heller Ehrman, simply closed up shop, their lawyers left scrambling to find empty chairs before the music stopped.<sup>3</sup> Previous recessions in the early 1990s and early 2000s had caused job losses, but this was a new level of devastation.

Into this maelstrom British legal scholar Richard Susskind dropped his book *The End of Lawyers? Rethinking the Nature of Legal Services*.<sup>4</sup> Susskind had written an earlier book, *The Future of Law*, in which he detailed the ways in which technology was changing the legal profession.<sup>5</sup> He followed that up with a collection of essays titled *Transforming the Law: Essays on Technology, Justice and the Legal Marketplace*, that touched on many of the same themes of technological upheaval.<sup>6</sup> The new book is a sequel, but also much more; it is a bold prediction that lawyers will suffer the fate of other guild-members—the artisans and craftsman of an earlier age—who saw their livelihoods wiped out by the potent mix of technological advancement and market forces that is modernity. It created a stir, with a prepublication online dialog hosted by the *Times* of London drawing reaction from the co-chief of DLA Piper and the general counsels of Barclay's and Cisco Systems, among other legal luminaries.<sup>7</sup> Susskind also found audiences on this side of the Atlantic, with speaking engagements that included a turn at Harvard's Berkman Center for Internet & Society and the keynote address at the 2009 American Bar Association Techshow.

Susskind's book seems timely. The anxiety caused by the recession led to widespread navel-gazing in both the legal profession and the legal academy. For years, lawyers had been hearing dire warnings about the outsourcing of legal services to India,<sup>8</sup> and it was starting to seem obvious that the old ways of

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<sup>2</sup> *The Year in Law Firm Layoffs*, LAW SHUCKS (Jan. 3, 2010), <http://lawshucks.com/2010/01/the-year-in-law-firm-layoffs-2009/>.

<sup>3</sup> Caryn Tamber, *Riding Out the Downturn: Even for Big Firms, the Soft Market Could Turn into a Shakeout*, DAILY RECORD (Maryland), June 8, 2009, at 9B, available at [http://findarticles.com/p/articles/mi\\_qn4183/is\\_20090608/ai\\_n31966323/](http://findarticles.com/p/articles/mi_qn4183/is_20090608/ai_n31966323/).

<sup>4</sup> See generally RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2008).

<sup>5</sup> See generally RICHARD SUSSKIND, *THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY* (1996).

<sup>6</sup> See generally RICHARD SUSSKIND, *TRANSFORMING THE LAW: ESSAYS ON TECHNOLOGY, JUSTICE AND THE LEGAL MARKETPLACE* (2000).

<sup>7</sup> Frances Gibb, *Will Lawyers Exist in 100 Years? Join the Debate*, TIMES (London), Oct. 23, 2007, at 1 (Features), available at [http://www.timesonline.co.uk/tol/system/topicRoot/The\\_End\\_of\\_Lawyers/](http://www.timesonline.co.uk/tol/system/topicRoot/The_End_of_Lawyers/) (scroll down to "Other Views").

<sup>8</sup> See Heather Timmons, *Due Diligence from Afar*, N.Y. TIMES, Aug. 5, 2010, at B1, available at <http://query.nytimes.com/gst/fullpage.html?res=980CE3D6123EF936A3575BC0A9669D8B63>; David Lat & Elie Mystal, *Outsourcing: What Indian Firms Have Planned for the Future of Biglaw*, ABOVE THE LAW (June 9, 2009), <http://abovethelaw.com/2009/06/out-sourcing-what-indian-firms-have-planned-for-the-future-of-biglaw/>; Jonathan D. Glater, *Even Law Firms Join the Trend to Outsourcing*, N.Y. TIMES, Jan. 13, 2006, C7, available at <http://www.nytimes.com/2006/01/13/business/13law.html>.

doing business—with large, heavily leveraged law firms racking up billable hours and paying junior associates more than federal judges—could not survive in a new world of enforced austerity. A variety of articles have appeared in legal journals over the last year and a half predicting fundamental changes for the legal profession and for the legal academy.<sup>9</sup> The time appears ripe for a lucid and forward-thinking account of what the next generation of lawyers can expect from their careers.

Unfortunately, that is not what Susskind has delivered. His book is so enamored with technology that it ignores the economic, political, and, indeed, legal factors that operate to stifle change and preserve the status quo. If we are on the verge of an “end of lawyers,” Susskind has not explained why.

### I. THE SUSSKIND MODEL OF LEGAL EVOLUTION

Susskind’s principal thesis is that the provision of legal services either is or will become “commoditized,” in the same way that goods once produced by craftsmen have become commoditized, and this will demolish the legal profession as we know it. At the center of his argument is his model of how legal services evolve to a state of commoditization. He contends that legal work is proceeding through an evolution of five stages: *bespoke*, *standardized*, *systematized*, *packaged*, and *commoditized*.<sup>10</sup> *Bespoke* legal work involves “traditional, hand-crafted, one-to-one consultative professional service.”<sup>11</sup> This is the classic representation of the lawyer’s craft: a client walks into a lawyer’s office, describes a particular problem needing legal assistance, and the lawyer creates a legal product for that client from scratch. *Standardized* legal work involves the creation of efficiencies derived from bespoke work.<sup>12</sup> Lawyers create templates, cannibalize documents, and reuse previous work product, but still within the context of providing particularized service to specific clients. *Systemization* simply takes the next step, using technology to automate aspects of office work, such as creating a document from a computerized checklist.<sup>13</sup> The systematization Susskind has in mind here is for internal use by the lawyers, and so does not significantly change the actual delivery of legal work product to the client.

These first three stages of evolution seem unremarkable. Any lawyer familiar with a modern law practice does these things. They have become widespread, and have not brought on any radical change in the legal profession.

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<sup>9</sup> See, e.g., Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 *FORDHAM L. REV.* 2137, 2138-39 (2010); Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 *J. LEGAL EDUC.* 598, 599 (2010); Erin J. Cox, *An Economic Crisis Is a Terrible Thing to Waste: Reforming the Business of Law for a Sustainable and Competitive Future*, 57 *UCLA L. REV.* 511, 511 (2009).

<sup>10</sup> SUSSKIND, *supra* note 4, at 29.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 29-30.

<sup>13</sup> *Id.* at 30.

The number of licensed attorneys and the income of attorneys have only grown over the last few decades of rapid technological advancement.<sup>14</sup>

The profound changes Susskind envisions would flow from the last two evolutionary steps: first to packaged legal services and finally to commoditization. *Packaged legal services* are essentially just systematized legal services, but, instead of being used internally, they are provided to clients so that the clients can complete the work themselves.<sup>15</sup> An example Susskind gives is of a firm providing a client an electronic document assembly program that would allow the client to generate its own employment contracts.<sup>16</sup> Packaged services are offered to specific clients for a fee or through a license. That is fundamentally how they differ from commoditized legal services. A legal commodity is “an electronic or online legal package or offering that is perceived as a commonplace, a raw material that can be sourced from one of various suppliers.”<sup>17</sup> In other words, legal commodities are offered on a generic basis to anyone who cares to purchase them, just like toothpaste or lawnmowers. Susskind cites “material found on legal websites” (Lexis and Westlaw perhaps?) as legal commodities.<sup>18</sup>

The evolution through these last two stages would be significant, if it occurred on a large scale, because it would indicate that legal services are going through the same modernizing meat grinder that eliminated the need for milliners, wheelwrights, and colliers. In Susskind’s view of the future, a few highly skilled practitioners will retain the role of “expert trusted adviser,”<sup>19</sup> but most lawyers will fill a far more fungible role—working within large organizations to create and support the online distribution of large quantities of standardized and commoditized legal services.<sup>20</sup> Notwithstanding the title of Susskind’s book, he is not actually predicting the end of lawyers. Rather, he is predicting the end of most legal work as we know it, with most lawyers assuming a new role closer to that of information technician than attorney and counselor.

## II. REALITY, OR MERELY THEORY?

One glaring problem with Susskind’s thesis is the lack of actual examples of successfully commoditized legal services. Susskind offers two “case studies” to show the progression through stages four and five—through packaged and commoditized legal services. Unfortunately, neither is particularly convincing.

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<sup>14</sup> See Richard L. Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?* 102 NW. U. L. REV. 1827, 1853-55 (2008) (describing relationship between technological trends and the development of the modern law firm); Andrew Bruck & Andrew Canter, *Supply, Demand, and the Changing Economics of Large Law Firms*, 60 STAN. L. REV. 2087, 2088-89 (2008).

<sup>15</sup> SUSSKIND, *supra* note 4, at 31.

<sup>16</sup> *Id.* at 31.

<sup>17</sup> *Id.* at 31-32.

<sup>18</sup> *Id.* at 32.

<sup>19</sup> *Id.* at 271.

<sup>20</sup> *Id.* at 271-72.

The first example of potential commoditization is Susskind's own lectures.<sup>21</sup> Susskind charges a fee for his speaking engagements. But he could also offer the same lectures by webcast on a subscription basis to anyone who chose to buy them. He could make lots of money that way, but would also be subject to market pressures from anyone else who could offer comparable web lectures at lower prices. Commoditization!

Of course, the reason Susskind could package and commoditize his lectures is that . . . they are all exactly the same. It makes no difference who the audience is, they get the same lecture. No judgment calls need to be made about whether this is the right lecture, at the right time, for the right people, to accomplish some end. And there is nothing that the audience needs to do on the other end of the lecture to derive value from it. His lectures are really no different from any other static source of information.

Static legal information has been commoditized for years. Generalized legal knowledge has long been widely available online through Westlaw, LexisNexis, FindLaw, and other services. Even many sample legal documents are already widely available through form books and other practice guides. For that matter, businesses that have used attorneys more than a handful of times already have documents they could cannibalize to create new work product. They could have a team of in-house legal specialists whose job is to take the product supplied by legal providers and use it to do legal work in-house. Because the firm would be doing its own work, there would be no requirement that these people be licensed attorneys, although they would need much of the specialized knowledge that attorneys have. They could have gotten that knowledge through ways other than graduation from law school followed by bar passage followed by experience. They could, therefore, cost less than licensed attorneys. If that happened on a wide scale, it could spell dramatic changes in the demand for traditional legal services (although not quite the end of lawyers).

This has not happened, though, and I think the reason is that specialization is efficient. Even with the technological shortcuts widely available, legal work remains relatively labor-intensive. Most businesses do not want to employ large numbers of people whose job is to do that kind of work. They want to employ people who contribute directly to the output of the business. They would prefer to hire specialists to address particular legal issues as needed. When businesses have litigation, they hire a firm to do litigation. When they need to do the legal work required to finance a new project, they hire a firm with expertise in that kind of work. When they have to prosecute a patent, they hire a firm to do it. The commoditization of static legal information has not changed the nature of legal work in any profound way.

So Susskind's lectures are, to put it gently, an inapposite "case study" of legal commoditization. Fine. Let us look for better examples of the commoditization of legal work. Susskind's second case study is tax work.<sup>22</sup> This one comes closer to the mark. He describes the Abacus corporate tax compliance system developed by Arthur Andersen and licensed to corporations to allow

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<sup>21</sup> *Id.* at 53.

<sup>22</sup> *Id.* at 54.

them to calculate their own corporate tax liability in-house.<sup>23</sup> This service has not been commoditized, yet, because there is no competition in the market among generic corporate tax compliance services. Deloitte purchased Abacus in the wake of Andersen's collapse and licenses it to corporations. This is an example of packaged legal services in Susskind's construct, not of commoditized legal services.<sup>24</sup> In the area of personal taxation, however, commoditization has occurred, with market leader TurboTax competing with rivals, including Microsoft and other companies, to provide generic tax preparation software. (Susskind does not mention these; perhaps they are not widely used in England.)

But tax compliance is still not a particularly good example. We have known for decades that much tax compliance work does not need expert legal guidance. Tax preparation is not even considered the practice of law in the United States.<sup>25</sup> Accountants took over the bulk of tax compliance work long ago, and H&R Block in effect commoditized routine personal tax return preparation beginning in the 1950s. Technological rivals like TurboTax have hurt H&R Block much more than lawyers.

Other examples might have served Susskind better. A variety of services already allow people to create basic legal documents online. LegalZoom, for example, is an online service allowing people to create wills, draft incorporation documents, and do other basic legal documentation through an online interface at a set price.<sup>26</sup> Susskind does not mention these services, perhaps because they are not widely used in the corporate world, which is really Susskind's target. In the section of his book on dispute resolution, he does briefly discuss a service called Cybersettle, which has become the most successful attempt at online dispute resolution (ODR).<sup>27</sup> Cybersettle is an online double-blind bidding system, in which the parties to a dispute submit three different amounts of money for their demands or offers. The program alerts them if their numbers overlap, at which point a live person can step in to help finalize a settlement. Cybersettle's biggest client, by far, is New York City, which uses it to help resolve personal injury claims against the city. The New York City Comptroller reports that the service has helped reduce the city's backlog of claims from 77,000 to 10,000.<sup>28</sup>

Cybersettle would appear to be a functional example of a commoditized legal service. In a sense, it is, although not in the way Susskind seems to imagine. This is an area in which I have some expertise, having taught a course on civil litigation in New York for a number of years. The reality is that Cybersettle is used only for small cases—those worth about \$50,000 or less. New York City is inundated with these sorts of small claims, and it just does

<sup>23</sup> *Id.* at 54-55.

<sup>24</sup> *Id.* at 55.

<sup>25</sup> See Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney-Accountant Tax Turf War*, 36 ST. MARY'S L.J. 1, 17-23 (2004) (analyzing state case law holding that preparation of tax returns does not constitute the practice of law).

<sup>26</sup> See, e.g., LEGAL ZOOM, <http://www.legalzoom.com> (last visited Jan. 8, 2011).

<sup>27</sup> SUSSKIND, *supra* note 4, at 220.

<sup>28</sup> See Douglas S. Malan, *A Numbers Game: Online Settlement Negotiations Drive Greenwich Business*, CONN. L. TRIB., Jan. 25, 2010, at 1, available at <http://www.ctlawtrib-une.com/getarticle.aspx?id=36164>.

not have the resources to litigate them.<sup>29</sup> The city needs to free itself of claims that are not worth the cost of defending. So it has an incentive to settle small claims quickly. The problem is, New York City is an enormous bureaucracy, and it can be very difficult to get someone to sign off on a settlement. Claims tend to pile up, because no one wants to be responsible for making the decision to pay them. Cybersettle helps because it provides cover for the city to settle. But it does not change anything about the litigation or the attorneys' relationship. Claimants' attorneys tell me they still work out a settlement number with the city's attorneys first, and then they plug that number into Cybersettle. The program itself is just an add-on. Human attorneys do everything that really matters, and depend on their relationships and judgment. Cybersettle is a form of commoditization, albeit one that has very limited applicability.

Most of the other examples Susskind dwells upon are better understood as examples of packaging. For instance, he cites the "Blue Flag" service developed by Linklaters.<sup>30</sup> Blue Flag is an online guide to regulatory compliance and other financial matters that Linklaters offers to its clients. Susskind suggests that services like Blue Flag offer a substitute for some of what lawyers do, and may thus cut them out of the supply chain.<sup>31</sup> As of now, however, these sorts of online offerings have not resulted in significant changes in the way Linklaters or other law firms do their business. Blue Flag is an add-on. Like other firms creating online services, Linklaters offers the service to its existing clients, not to the market at large. And the service is limited to static information. Through this online portal, the firm provides its clients its raw expertise, but not situation-specific guidance on its application or the work-product that would result.<sup>32</sup>

Transformative change in the legal profession will come with widespread commoditization of actual legal guidance, as opposed to static information or rote processing. It will come when and if an individual or firm needing an answer to a legal problem can log into a service, input a set of facts, and press a button to get an opinion on how to proceed, and then press another button to create the necessary documentation. It is theoretically possible that a computer program could offer sophisticated and nuanced legal advice on situation-specific matters, and that an online service could provide that advice at a price much lower than individual lawyers could. This is what Susskind seems to have in mind when he talks about a future in which citizens turn to the Internet for legal guidance, "[w]hether through primitive FAQs (frequently asked questions) or artificial intelligence-based, diagnostic expert systems."<sup>33</sup>

True artificial intelligence, capable of mimicking the work a human would do, is still far from our technological grasp. Susskind does not offer concrete examples of these kinds of commoditization of legal guidance because they do not yet exist. Susskind's real reason for thinking the end of lawyers is near is

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<sup>29</sup> See Allen R. Myerson, *Soaring Liability Payments Burdening New York*, N.Y. TIMES, June 29, 1992, at B1, available at <http://www.nytimes.com/1992/06/29/nyregion/soaring-liability-payments-burdening-new-york.html>.

<sup>30</sup> SUSSKIND, *supra* note 4, at 103.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> *Id.* at 242.

his faith in technological progress and his belief that the legal profession is a craft guild subject to the same evolutionary forces as other craft guilds. He sees it as inevitable that the technological problems will be solved and that lawyers will then see their guild-based profession swallowed up just like previous mechanical craft guilds were demolished by the Industrial Revolution.

I am willing to stipulate that the technological problems can be solved to the extent that relatively sophisticated, interactive, specific online legal guidance will one day be available through a transparent market. Will that really spell the end of the legal profession as we know it? I am still not sure.

Susskind's thesis depends on two analogies: lawyers to mechanical craftsmen, and knowledge and information to tangible goods.<sup>34</sup> These analogies may not hold, for two reasons. First, the "guild" of lawyers is supported by a superstructure of regulatory and legal protections that no other guild in history has had. Second, we cannot be certain that technological innovation will have the same impact on knowledge-based industries like law that industrial innovation had on the mechanical crafts.

### III. POLITICS, LAW, AND . . . DID I MENTION POLITICS?

Guild behavior is a form of rent-seeking. Guilds use legal restrictions on the right to ply their trades to limit competition and prop up prices. Bar associations are legal guilds that limit competition through licensure backed by legal proscriptions on the unauthorized practice of law.<sup>35</sup>

The craft guilds to which Susskind analogizes the legal profession have lost their legal protections.<sup>36</sup> Lawyers have not, for one very simple reason: Most of the people in a position to do something about restrictions on the practice of law are themselves lawyers. All judges and a majority of state and federal legislators are lawyers. They have all profited well from the rent-seeking of the legal profession and have little motivation to eliminate it.

Susskind's vision of the future does not directly implicate the licensing regime that protects lawyers. In the world he imagines, lawyers will provide commoditized legal services, with clients using the information provided to them to create their own legal work product. Lawyers will create templates, checklists and sample documents, provide in-depth legal research and analysis, and even construct interactive guidance and document creation programs, all of which will be available online for a fee. Those in need of legal product will buy this information and then do the work themselves, much of it through automated systems.

What Susskind ignores is the set of legal limits on the practice of law that exists within this regulatory structure. Consider a scenario involving the kind of commoditized legal work Susskind seems to have in mind. Assume a developer needs to know whether a particular project meets applicable zoning regu-

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<sup>34</sup> See *id.* at 4.

<sup>35</sup> For an exegesis on the analogy between modern lawyers and pre-industrial craft guilds, see Richard A. Posner, *The Material Basis of Jurisprudence*, 69 *IND. L.J.* 1, 7-10, 14-16 (1993).

<sup>36</sup> See SUSSKIND, *supra* note 4, at 4 (using Mercer's Company as example of a disenfranchised guild).

lations. A law firm creates an automated program that allows the developer to respond to a series of questions about the location, the nature of the project, and other relevant factors. The program gives the developer an analysis of the zoning implications of the project and concludes that a variance is needed. With a few more clicks, the program even creates the documentation necessary for the variance application, along with instructions for how to file the application.

One initial problem is with the unauthorized practice of law. LegalZoom, the closest extant analog to the automated legal providers in Susskind's brave new world, is currently embroiled in litigation in a number of jurisdictions over precisely this issue.<sup>37</sup> To say the least, this is a slippery area of regulation, with different states employing different standards for what constitutes the practice of law, and many states offering no clear guidance at all.<sup>38</sup> LegalZoom has tried to avoid the problem by claiming that it is not providing legal advice.<sup>39</sup> This is a tenuous position at best, and what Susskind has in mind goes even further, with automated programs providing situation-specific legal advice. There is little chance that the bar associations, backed by the courts, will abandon their rules on licensure, which almost certainly cover that kind of situation-specific legal advice.<sup>40</sup> So automated programs like my zoning example will have to have real lawyers standing behind them, and will have to find a way to meet the licensing requirements in any state where their online clients sit.

Let us just assume for the time being that any hurdles involving the unlicensed practice of law can be overcome, and that the zoning program I just described could be offered on a generic basis to clients in any state. A developer uses the program to create the documentation required to seek his zoning variance. What happens next? If the developer is lucky, the zoning board will approve the variance without objection and without asking any difficult follow-up questions. In many cases, however, the process will not proceed that smoothly. Questions will arise. Someone will challenge the variance. The developer will have to respond, and will need legal advice to do so.

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<sup>37</sup> See G.M. Filisko, *Does Connecticut Hate the Net?: State Is Battleground for Online Legal Services*, 95 A.B.A. J., Apr. 2010, at 31-33 (2010) (describing investigation by Connecticut Department of Consumer Protection into LegalZoom); Harry Styron, *Legalzoom .Com Sued in Missouri Class Action: Maybe Now We'll Find Out What the Practice of Law Really Is*, OZARKS LAW & ECONOMY (Feb. 21, 2010), <http://styronblog.com/?s=legalzoom>; *Legal Zoom Is Alleged to Be Violating North Carolina's Ethic Statute Governing the Unauthorized Practice of Law*, THE GREATEST AM. LAW. (July 24, 2009), [http://greatestamericanlawyer.typepad.cpm/greatest\\_american\\_lawyer/2009/07/legal-zoom-is-alleged-to-be-violating-north-carolinas-ethic-statute-governing-the-unauthorized-practice-of-law.html](http://greatestamericanlawyer.typepad.cpm/greatest_american_lawyer/2009/07/legal-zoom-is-alleged-to-be-violating-north-carolinas-ethic-statute-governing-the-unauthorized-practice-of-law.html).

<sup>38</sup> See John Gibeaut, *Another Try: ABA Task Force Takes a Shot at Defining the Practice of Law*, A.B.A. J., Dec. 2002, at 18.

<sup>39</sup> See *Disclaimer*, LEGAL ZOOM, [www.LegalZoom.com/disclaimer-popup.html](http://www.LegalZoom.com/disclaimer-popup.html) (last visited Jan. 8, 2011) ("LegalZoom is not a law firm, and the employees of LegalZoom are not acting as your attorney. LegalZoom's legal document service is not a substitute for the advice of an attorney.").

<sup>40</sup> See Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 161-62 (1999) ("[A]t least since the 1930s, bar opinions in a variety of different contexts have asserted that furnishing more than generalized legal information can create an attorney-client relationship between the lawyer and the questioner. The historical record also reflects that the regulatory responses to such conduct have often been prompted by technological advances.").

Will the developer go back to the automated program for more automated legal advice? How likely is that to work? Anyone who has ever dealt with online services is aware of how frustrating it can be to get even straightforward questions answered through an automated program. This is why even the most sophisticated technology companies, like Apple, rely heavily on human technical support, in the form of chats or twenty-four-hours-a-day call centers. Perhaps Susskind envisions a world in which artificial intelligence has advanced so far that automated systems will be able to respond as effectively as humans can to complex questions. That day seems a long way away.

What seems more realistic in the near-to-medium term is that the law firm that developed the zoning program could offer chats or phone support, just like other providers of Internet goods and services currently offer.<sup>41</sup> It would have to employ lawyers for that task to avoid problems with the unauthorized practice of law. Protected by the guild system, any one-to-one advice on legal matters will have to be done by licensed attorneys. In theory, however, the firm could achieve great economies of scale, and could even outsource that work to (cheaper) lawyers in foreign countries (India) who have either JDs or LL.M. degrees from American law schools and have passed a bar exam in the relevant state.<sup>42</sup> This would still mean much less high-paying work for American lawyers, right?

There are other significant hurdles here that Susskind never addresses. The hurdles take the shape of legal and ethical rules involving malpractice, confidentiality, and conflicts of interest. And when I say he never addresses them, I mean that literally. *He never mentions them at all.* There are no index entries in the book for malpractice, confidentiality, or conflicts. That is a monumental oversight. Although concerns about malpractice, confidentiality, and conflicts might not entirely doom the commoditization thesis, they almost certainly will play a very significant, and very restricting, role in the actual commoditization of actual legal work. Here are a few ways these concerns could impact the automation of legal services.

#### A. *Malpractice*

Defending and paying malpractice claims can be a very expensive proposition, even with malpractice insurance. Assume in my developer/zoning example that someone challenges the variance and the developer goes back to the provider of the online zoning program for follow-up advice. A call-center lawyer gives advice to the developer that turns out to be faulty in some significant way. The provider of the automated zoning program will be liable on any

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<sup>41</sup> Susskind might have something like this role in mind when he talks about a category of lawyers he calls “the enhanced practitioner,” whose function is to “support[ ] the delivery of standardized, systematized, and (when in-house) packaged legal service.” Susskind, *supra* note 4, at 271.

<sup>42</sup> See Brian Miller, *The Ethical Implications of Legal Outsourcing*, 32 J. LEGAL PROF. 259, 262 (2008) (“Legal service providers in India are more than capable of handling the sophisticated legal work that is sent to them from U.S. law firms. Many of these providers’ employees have LL.M.s from the best law schools in America.”). There are also some indications that the shortage of job prospects in the United States is pushing western lawyers to seek their fortunes in India with legal outsourcing firms. See Timmons, *supra* note 8.

resulting malpractice claim, giving the provider powerful incentives to avoid malpractice liability.

This puts the provider in a situation not so different from the position of any manufacturer of consumer goods. If a product injures a consumer, the manufacturer is liable. But whereas a manufacturer of goods can standardize the manufacturing process to minimize the likelihood of injuries, the provider of online legal services must depend on the judgment and acumen of the individual lawyers serving in the call-service role. That means the provider will need competent attorneys manning the call-centers and chat rooms.

As a result, competent attorneys will be in demand, and the cost of their services will rise (even if they are located in India). Compensation structures will have to be worked out to pay for attorneys' work. One way or another, clients will have to foot the bill. This could happen through flat rates included in the cost of the automated service, or it could be on an hourly basis. Pressure will grow to charge on an hourly basis for the same reason that law firms have always charged on an hourly basis: they do not know at the start of the representation how much work will be involved.

### B. Confidentiality

Susskind's automated legal world is built on a foundation of immense trust. Clients, many of whom will have very sensitive legal issues, will have to type their problems into generic computer programs and wait for these programs to spit back anonymous advice. This is not like buying products online, or even like doing online banking. With online banking, there is a risk of straight theft. Someone who gets access to my online bank account can steal my money. That is not an attractive prospect, but it is also relatively easy to insure against. The bank, backed by the federal government, can simply guaranty me against that kind of loss. As long as I get my money back, I really do not care that much.

The information I must disclose to get effective legal advice is not insurable in that way. If I have sensitive business information and my competitors get access to it, I may suffer losses that are not compensable in any practicable way. If I am going to disclose important information, I want up-front guarantees that it will not be revealed to third parties.

One way that confidentiality concerns are addressed is through the attorney-client privilege. The nascent law in this area suggests the attorney-client privilege can arise from a purely online relationship, as long as the client is seeking legal guidance.<sup>43</sup> Let us assume the attorney-client privilege arises whenever an attorney-client relationship arises, and that an attorney-client relationship arises whenever a client receives situation-specific legal guidance through an online portal.<sup>44</sup> This would give clients confidence that their online disclosures would not be used against them in future civil or criminal litigation. As I suggested, though, concerns about sensitive information go beyond the

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<sup>43</sup> See Richard L. Marcus, *The Electronic Lawyer*, 58 DEPAUL L. REV. 263, 295-98 (2009) (analyzing case law on attorney-client privilege for online representation).

<sup>44</sup> See Katy Ellen Dedy, *Cyberadvice: The Ethical Implications of Giving Professional Advice over the Internet*, 14 GEO. J. LEGAL ETHICS 891, 898-99 (2001).

litigation context. Often, the mere disclosure of confidential information poses an unacceptable risk.

Confidential information might be disclosed in a variety of ways. There is an obvious risk of breaches of confidentiality in the online system itself. We know that Internet security is not perfect, even for the United States government and technology behemoths such as Google.<sup>45</sup> Systems can be hacked, data can be left unprotected accidentally, and glitches of all kinds can occur. Law firms currently use e-mail and other technological platforms that are vulnerable to data loss in all these ways, yet clients still entrust sensitive information to them. These facts suggest that confidentiality concerns rooted in technological vulnerability might prove relatively unimportant.

Potentially of greater significance is the risk of disclosure through human failings. When clients deal with law firms in the traditional way, they develop relationships with human beings. These relationships yield trust—or they do not last. It is the trust that clients have in their lawyers that leads them to divulge sensitive information. One human being gets to know another human being, and comes to believe the latter will protect confidences now and into the future.

When I type my information into an automated program, I have no idea who will have access to it. I am making a leap of faith that it will be protected and will not end up in the possession of someone untrustworthy. Assuming clients were confident in the technological security of the program, they would still likely hesitate to enter sensitive information in a generic program accessible to unknown individuals on the other end, some of whom might not even be in America and subject to American law.

The confidentiality problem remains even at the stage of speaking with the “customer service lawyer” on a chat or through a call center. Yes, it would be relatively straightforward to make the credentials of that lawyer accessible online, and that would at least provide some assurance that the individual is an actual lawyer covered by ethics rules requiring confidentiality. However, the personal relationship essential to trust will not exist—at least not unless the client and the lawyer build a personal relationship similar to the ones clients and lawyers have traditionally built. The problem is that the degree of interaction required to achieve this deep a relationship limits the economies of scale that can be achieved, resulting in a system for providing legal services that looks an awful lot like what we have now.

### C. *Conflicts of Interest*

The ethical rules governing lawyers include severe restrictions on the ability of a lawyer or a law firm to give legal advice to multiple parties who have or may have interests adverse to one another.<sup>46</sup> These restrictions do not end

<sup>45</sup> See John F. Burns, *British Ruling Makes Hacker's Extradition to U.S. More Likely*, N.Y. TIMES INT'L., Aug. 1, 2009, at A6, available at <http://www.nytimes.com/2009/08/01/world/europe/01britain.html> (describing a case against a Briton who hacked U.S. military computers); Andrew Jacobs & Miguel Helft, *Google May End Venture in China Over Censorship*, N.Y. TIMES, Jan. 13, 2010, at A1, available at <http://www.nytimes.com/2010/01/13/world/asia/13beijing.html>.

<sup>46</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2003).

when the representation ends, because of the potential for a lawyer to retain confidential information that could be used against former clients. Absent dramatic changes in the regulation of legal services, providers of automated legal services will be lawyers subject to ethical rules, including the rules governing conflicts of interests.<sup>47</sup> They will be barred from representing clients who are adverse to current or former clients just as any other lawyer would.

Because of the conflicts rules, providers of automated legal services will have to keep extensive records of their clients and of the matters they handle on behalf of their clients. Before accepting any new work, they will have to run the extensive conflicts checks that law firms currently run before taking on new clients and new matters. This is a significant limitation. Conflicts problems regularly hinder the mergers of bricks-and-mortar law firms.<sup>48</sup> In the same way, the inevitable existence of conflicts will hinder the development of the generic, widely available online legal services that Susskind envisions.

#### IV. INNOVATION, INDUSTRIAL AND TECHNOLOGICAL

None of this is to say that technology will have no impact on the legal profession. Susskind is certainly correct that technological innovations will change legal practice in important ways. Some kinds of traditional legal work will dry up. Lawyers will no longer bill by the hour to draft routine legal documents such as basic wills and incorporation documents; automated programs like LegalZoom will perform such services. This has already started to happen. Its real effect on the legal profession is likely to be relatively small, however. For most people who use these kinds of low-end legal services, the choice is rarely between paying an expensive attorney for customized service and purchasing a generic online service. The choice is between purchasing a generic online service and foregoing legal assistance entirely.

The legal website Lawyers.com, a part of the technological revolution with which Susskind is enamored, reports that a recent Harris Interactive survey showed that only thirty-five percent of Americans have wills.<sup>49</sup> That leaves millions of people who should probably have a will, but who were never going to pay an attorney to prepare one. These are the people likely to opt for online will preparation. People who have a lot of money at stake also have the money to pay for particularized legal guidance. These are the people who paid for estate guidance before LegalZoom was a gleam in anyone's eye, and they are unlikely to trust their legacies to a software program anytime soon. In large

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<sup>47</sup> See Ohio Bd. of Comm'rs on Grievances and Discipline, Ethics Op. 99-9, (1999) (requiring that online representation "must be free from conflicts of interest."). Accordingly, the Board advised that the client intake form must elicit information so that a traditional conflicts check can be performed. *Id.*

<sup>48</sup> Nat Slavin, *Examining the Downside of Merger Madness*, CORP. LEGAL TIMES, Aug. 2002, at 4 ("The greatest hurdle [merging] firms face is conflicts of interest . . . . It can take years for firms to sort out who represents whom, and more importantly, who *has* represented whom. Ultimately, this process can kill a merger either before it happens or after consummation.") (emphasis omitted).

<sup>49</sup> See *Lawyers.com Survey Reveals Drop in Estate Planning*, LAWYERS.COM (Feb. 25, 2010), <http://www.lawyers.com/understand-your-legal-issue/press-room/2010-Will-Survey-Press-Release.html>.

measure, then, commoditization might create and satisfy a new demand for legal services without cutting much into the work of existing lawyers.

At the higher end of the legal services spectrum, technology might very well result in standardization of the type represented by Linklaters' Blue Flag system. Law firms can increase productivity and save clients money by providing licensed, automated legal services backed by the firm's professionals. That makes sense, and avoids the problems of malpractice, confidentiality, and conflicts that will hinder the growth of truly commoditized legal services. That and other technological developments could well allow fewer lawyers to do the same amount of legal work. For example, one of the main technological innovations Susskind dwells upon is data sharing, along with its more sophisticated cousin, knowledge sharing. His idea is that technology will increasingly conjoin lawyer and client. One example he points to is the "deal-room."<sup>50</sup> A deal room is not what it sounds like. It is simply an online repository of information that is accessible by both attorney and client. The law firm creates a secure space online that houses all the documents for a particular transaction or lawsuit. Clients can enter the deal room electronically to monitor work, retrieve and modify documents, and communicate with their lawyers, giving clients greater control over the legal product they are buying.

I think we can all agree that there is room for productivity gains from these kinds of technological advances. Firms that employ them should be able to provide the same quantity of legal services to their clients using fewer attorneys, and at lower cost. There is nothing particularly revolutionary in this. Productivity gains like these occur in every industry and profession as a result of technological innovation. If history is any guide, they do not spell the end of lawyers. Past technological developments have coincided with—and arguably made possible—the rapid evolution toward the large-scale legal practice that Susskind believes is now endangered.<sup>51</sup>

To date, technological change has not put lawyers out of work in the way it has put other types of craftsmen out of work. The reason is that the output of lawyers is different from the output of the mechanical craftsmen who saw their livelihoods wiped out by modernization. The output of lawyers is a stew of intangibles consisting of expertise, judgment, process skills, and the like. These "knowledge goods" are different from tangible goods. Take a tangible good that used to be made by craftsmen and is now mass-produced—say, bread. We all eat bread. We used to eat bread made by bakers, organized into guilds, like London's Worshipful Company of Bakers. Now we eat bread made by multinational corporations using modern means of production. Improvements in efficiency have given us an enormous variety of breads to choose from, and they are available at low prices from an enormous variety of retail outlets.

All of that choice is wonderful, but there is a limit to my ability as a bread consumer to take advantage of it. I can only eat so much bread, and I have no need to or interest in storing large quantities of bread. After I eat my bread, my need for bread is satisfied until the next time I want some bread. Knowledge

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<sup>50</sup> SUSSKIND, *supra* note 4, at 40-41.

<sup>51</sup> See Marcus, *supra* note 14, at 1853.

goods do not work that way. Knowledge goods are not perishable. They do not require the maintenance of physical inventories. More importantly, my use of knowledge goods does not necessarily satiate my need for knowledge goods. In fact, it often works the other direction. The more I know, the more I might need to know.

The commoditization of legal knowledge could actually *increase* the demand for legal services. For example, one of LegalZoom's products is a simple online incorporation program. For a fee, anyone can input information to create basic incorporation documents. No lawyer is necessary to start up a simple corporation. On the one hand, this service makes unnecessary a type of legal work that was almost exclusively the province of lawyers just a decade ago, and so this is an example of how technological commoditization could eat into the demand for one kind of customized legal work. On the other hand, the commoditization of incorporation could also create new demands for customized legal work. The widespread availability of a simple incorporation process will likely lead to the creation of more corporations.<sup>52</sup> Corporations are legal creations. They exist solely in the imagination of the law. Everything they do happens within a complex web of legal and regulatory rules. They literally cannot function without legal guidance. More corporations means more need for legal services.

Cybersettle might be an even more-concrete example of commoditization increasing traditional work for lawyers. Cybersettle benefits New York City because the city needs to dispose quickly of small claims that are not worth defending. In that way, it is good for the city. It is also good for the claimants' attorneys, who are typically working on a contingent fee and mostly want a quick payout without consuming time and money in litigation. Cybersettle's value thus lies in its capacity to shorten the time to settlement for a certain type of dispute that was going to settle anyway. In that way, it creates efficiency.

That efficiency, however, will not necessarily reduce the work for attorneys. If Cybersettle makes it easier to get a quick settlement against New York City for low-level claims, it might actually increase the number of claims filed against the city. One plaintiff's attorney I spoke with recently told me that he now takes claims that he previously would have considered too small to be worth his time. With litigation against the city becoming a more attractive

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<sup>52</sup> It is impossible to demonstrate empirically that the presence of LegalZoom and other online incorporation services increases the number of incorporations. It is clear, however, that the number of incorporations grew rapidly in the years following LegalZoom's launch in 2001. For example, in California, about seventy thousand for-profit business and professional corporations were filed in 2001. *2002 Annual Report*, INT'L ASS'N OF COMMERCIAL ADM'R, 14, <http://www.iaca.org/node/80> (follow "2002 Annual Report" hyperlink). By 2007, that number had jumped to almost ninety-five thousand. *2007 Annual Report of California*, INT'L ASS'N OF COMMERCIAL ADM'R, <http://www.iaca.org/node/80> (follow "2007 Annual Report" hyperlink, then select "United States" and "California" and click "Display Report"). Macroeconomic forces undoubtedly played the largest role in that trend (the number of incorporations dropped back to about seventy-one thousand in the recession year of 2009). *2009 Annual Report of California*, INT'L ASS'N OF COMMERCIAL ADM'R, <http://www.iaca.org/node/80> (follow "2009 Annual Report" hyperlink, then select "United States" and "California" and click "Display Report"). But easy online incorporation surely did not hurt.

option, both claimants and their attorneys might be more willing to bring smaller claims. Like other online legal services, Cybersettle could actually create a market for certain kinds of legal work that had not been satisfied before.

That technological advances could increase the amount of traditional work available to attorneys should not come as a total surprise. Macroeconomic data suggest that efficiency gains in knowledge-based industries do not have the same effect that efficiency gains have in “hard” industries. As a result of efficiency gains, we need many fewer manufacturing workers now than we used to need. Between 2000 and 2008, the number of workers employed in manufacturing in the United States dropped from almost twenty million to just under sixteen million—roughly a twenty percent decline.<sup>53</sup> This happened even though the gross domestic product attributed to manufacturing increased from \$1.4 trillion to \$1.57 trillion in inflation-adjusted dollars.<sup>54</sup> We produced more, with fewer workers.

The trends are very different in knowledge-based industries. The period from 2000 to 2008 saw dramatic changes in information technology, including all the technological developments Susskind reports. Yet over that period, the number of workers in professional and business services increased from 13.6 million to 15.5 million.<sup>55</sup> The gross domestic product attributed to professional services of all kinds increased over that period, as well, with professional, scientific, and technical services increasing from \$675 billion to \$974 billion in chained 2000 dollars.<sup>56</sup> Developments in information technology seem to have resulted in more information industry workers producing ever more information.

Of course, lawyers might be different from other knowledge-based workers. Maybe lawyers are particularly susceptible to job losses from efficiency gains. Even if that were the case, though, the productivity gains Susskind predicts would not result in the end of lawyers. At most, they suggest that the demand for lawyers might not keep pace with the demand for legal services. The real question for lawyers is whether the demand for legal services will grow fast enough to support the lawyers now in the profession and soon to enter the profession, given the productivity gains on the putative horizon.

If only we knew the answer to that question. Alas, we do not, and we cannot. Still, it seems highly unlikely that demand for legal services will not grow. There is an old saying: no food, one problem; much food, many problems. Much of the world’s population struggles to find enough food. We have plenty of food. We also have plenty of automobiles, plenty of amusement parks, plenty of joint venture agreements, and plenty of heart bypass surgeries. With this increasing societal complexity comes increasing problems. In a cul-

<sup>53</sup> *The 2010 Statistical Abstract*, U.S. CENSUS BUREAU (2010), <http://www.census.gov/compendia/statab/2010/2010edition.html> (follow “Section 12: Labor Force, Employment, and Earnings” hyperlink, then scroll down to Table 607) [hereinafter *2010 Statistical Abstract*, Table 607].

<sup>54</sup> *The 2010 Statistical Abstract*, U.S. CENSUS BUREAU (2010), <http://www.census.gov/compendia/statab/2010/2010edition.html> (follow “Section 13: Income, Expenditures, Poverty, and Wealth” hyperlink, then scroll down to Table 654) [hereinafter *2010 Statistical Abstract*, Table 654].

<sup>55</sup> *The 2010 Statistical Abstract*, Table 607, *supra* note 53.

<sup>56</sup> *The 2010 Statistical Abstract*, Table 654, *supra* note 54.

ture as heterogeneous as ours, these problems must be resolved by resort to legal rules. Unless we face some kind of structural societal collapse, demand for legal services will continue to grow.

Calling his book *The End of Lawyers?* is a provocative gesture; Susskind can be forgiven for seeking to provoke. Provocation sells, and he wants his book to be read and talked about like any author does. I get that. And to be fair, Susskind makes clear that he does not truly believe the end of lawyers is imminent. But he really, truly, does believe that technology will shift the paradigm in ways that will make legal practice nearly unrecognizable. This book, unfortunately, does not come close to supporting that case. At most, the book makes the case that technology is and will increasingly improve the productivity of lawyers, and will allow for the commodization of certain kinds of routine legal services—those that are not especially complex, do not require ongoing follow-through, and do not involve the disclosure of highly sensitive or confidential information. Whether those developments will actually result in a significant decline in the need for individualized lawyer-client relationships is an open question, and one Susskind has not really attempted to answer.