
WHERE THE "PUCK" IS GOING – AND WHAT FACULTY SHOULD DO TO HELP STUDENTS GET THERE

JUNE 26, 2016 | JOHN LANDE | 1 COMMENT

At the ABA SDR conference this year, Cynthia Alkon, Noam Ebner, Lydia Nussbaum and I did a session at the Legal Educators Colloquium entitled Preparing Students for the Future of Dispute Resolution: Skating to "Where the Puck Is Going, Not Where It's Been."

The title of our session was based on a quote by hockey star Wayne Gretzky, who said he always tried to skate "to where the puck is going to be, not where it has been."

Analogizing the puck to the legal and dispute resolution fields, this program addressed where we are going and how, as legal educators, we can best prepare our students to "skate" there.

We promised to collect and disseminate ideas from the session and here they are. There were a lot of ideas, so this is a long-ish post – but I think it should be worth your time.

The speakers gave brief presentations about our expectations about the future and most of the session was devoted to group discussion.

Overview

Over the past 10–20 years, we have become used to technological changes. However, far less attention has been dedicated to anticipating broad social changes in the future.

Most of us probably don't spend a lot of time wondering what the future will be like – and what we need to do today to prepare for it.

The status quo bias – our tendency to assume that things will generally stay pretty much the same – might easily affect us. For example, when planning our daily to-do lists, we generally plan to do things assuming that things won't be much different from last week, last month, etc. People have made very embarrassing predictions of the future in general, with one particular subtype are predictions that assume that "everything will stay the same."

Even though the future is hard to predict, change is likely. As a result, we suggest that anticipating change should be more central to how and what we teach. Anticipating change, we might revise our ideas of what is important and what we should be doing and teaching. Change-anticipation is a form of thinking that might be beneficial, at least each time we prepare our syllabus for the coming semester.

We prepare our students for professional work in the legal and DR fields. To what extent do we prepare them to fill the roles we have been familiar with in the past or to provide the services that we view as being currently typical of these fields? And to what extent are we forecasting the future of these fields and preparing students to engage in them as they will be after our students graduate and throughout their professional careers?

As legal and DR educators, are we preparing our students to skate to where their "puck" is going?

Noam's Take

When I consider preparing my students for the future, I have the following futures in mind, all of which involve change from the current state of affairs or existing paradigms:

The right-now future: Conversations held around a physical table will continue to decrease as the default mode for engaging in negotiation and dispute resolution. Professionals need to be proficient in online communication systems ranging from the currently familiar (such as email) to future, emerging technologies.

The 3-5 year future: Online dispute resolution (ODR) systems will be embedded in court systems and in claims systems. Students familiar with this field and the types of platforms it currently uses will be able to find their professional place in this new state of affairs easily. Students who are unprepared will be left behind.

The statistical real-life future of my students: 11.2% of law school graduates do not work as lawyers in their first year out of law school (ABA 2013). 30-50% (or perhaps more, depending on which data you look at) will stop practicing law at some point 2, 5, 10, or 30 years into the future. Students need to be prepared to use the skills we can teach them in a wide variety of contexts, not just in the context of legal or formal ADR practice.

The present-future in which ADR is the mainstream: I suggest that the battle for mainstreaming mediation and other dispute resolution processes has been won, and that we can lose the 'A' in ADR. It might only be there, currently because we ourselves are used to having it there. We were brought up on the uphill-battle narrative, and engaged heavily in

mainstreaming efforts over the course of our careers. And, of course, everybody would rather be David than Goliath.

Still, in terms of skating to where the puck actually is and certainly in terms of where it will be, I think the time has come to stop treating ADR as an uphill battle, recognize that we've won, and move on. Doing so will change much of the tone in which we describe DR's history, current practice and future with our students – and help prepare them for the DR practice they are more likely to encounter.

The post-LawPocalyptic future: There are many reasons why the existing paradigms of legal practice will probably not continue in the future. The practice of law has not yet been fundamentally disrupted by technology and globalization (as, say, publishing has been) – but there are many who anticipate that it will be. Richard Susskind's books *The End of Lawyers* and *The Future of the Professions* offer one picture of what this fundamental shift in the demand for, and offering of, legal services will look like. Organizational practices will change, and lawyers might find themselves engaged in very specific elements of legal processes, as opposed to the full-service model that has always characterized the profession.

In this future, specific expertise is important, but in addition, soft-skills, tech savviness, people skills, conflict skills and problem-solving are going to be our students' bread and butter or their ticket into other jobs. In this future, ADR and ODR, in different forms, are far more prevalent than they are now and perhaps much more prevalent than the 'bespoke' method of lawyering.

This anticipated overall disruption of the legal field – which I call the 'LawPocalypse' – might occur far sooner than we might imagine. I think we would do our students a service by beginning their preparation for it today.

Cynthia's Take

When I started law school, some things seemed beyond change and this limited my view of what lawyers might do. For example, few thought that the Soviet Union would change in any meaningful way beyond maybe allowing a little more emigration. In November of 1989, the wall separating East and West Germany fell. This sparked changes that few could imagine.

For lawyers, new markets opened and a field that had barely existed, rule of law development, took off. These changes swept a group of American lawyers into countries they never imagined visiting, much less living and working in. I was one of those lawyers and saw how

what I learned in law school and practicing law (in truth more my skills from practicing law) helped me to adapt to new jobs, new fields, and to recognize new opportunities.

But are we preparing our law students to be able to cope with or, better yet, seize the opportunities that will come along with the next change that we can't see coming? It is clear that doctrinal law will change which is one good reason to support legal education moving far beyond simply teaching legal doctrine. But what else can or should we be doing to prepare our students for inevitable change?

One telling example of limited views of the future is *Star Trek*. *Star Trek* has consistently done a great job predicting where technology will go. *Star Trek* had communicators decades before the first cell phone. In the early 1990s, *Star Trek, the Next Generation* had what looked suspiciously like iPads. Likewise, I think we as individuals, and as a field, find thinking about changes in technology easier. What snazzy new research tool will be developed? How will electronic discovery or big data change the practice of law?

Star Trek, however, did a much poorer job of predicting how human relationships might change in the future. In the original *Star Trek*, the only woman on the bridge of the *Starship Enterprise* was basically answering the phone (although we all knew Lt. Uhura was capable of so much more). Although *Star Trek* had a hopeful view of a multi-racial future, there was still a tendency to fear aliens and respond with violence as the first course of action. Captain Kirk was not known for his negotiation skills.

I have no doubt that negotiation skills will be something that our students can take with them and adapt to changing environments and opportunities. But I worry that I may be falling into the *Star Trek* trap of teaching about the world I know and not adequately preparing my students for one fact we can count on: the world will keep changing and how lawyers and dispute resolution professionals work will also change.

Lydia's Take

There have been and will continue to be changes in legal norms, the structure of our legal system, and the delivery of legal services. We have already seen the impact of no-fault regimes in family law and I predict there will be additional statutory changes that override traditional common law doctrines and, in some instances, streamline the issues available to dispute.

Relatedly, changes to our legal system such as increasing formalization of law through statutes and regulations and the growing adjudicative role of regulatory agencies have al-

ready, and will continue, to change the venue for dispute resolution and challenge the traditional role of the judiciary as society's locus for resolution of legal disputes.

And, further, the delivery of legal services will continue to change rapidly and, as a consequence, require lawyers to pivot nimbly and adapt their orientation to clients.

I predict that, in a world where technology has enabled people to engage in greater self-navigation (for better or for worse—try googling “what is this skin rash?”), individuals will be able to take themselves further along in addressing their legal needs. This means lawyers may have a more supervisory role with some clients but it may also mean that lawyers' attention will be more directed to those clients who cannot self-navigate and need for bespoke, professional advice—those clients with legal questions that require in-depth expertise or savvy and creative problem-solving skills.

Taken together, the streamlining of legal norms, the decentralization of dispute resolution venues, and the shifting balance of power and responsibility between lawyers and clients will continue to change dispute resolution work of the future. Buckle up!

John's Take

As Yogi Berra allegedly said, it's hard to make predictions, especially about the future. In a sense, each student will encounter a different future, especially given the multiple forces of change and different practice settings.

I interviewed a lawyer in Kansas City who described having formal (but friendly) interactions with a counterpart there with whom he had worked on many cases. He contrasted this with a story about a case he had in a rural area, where he had never worked with his counterpart before but everyone in his office was informal and they spent a long time telling war stories before getting down to business.

This suggests that the future of legal dispute resolution practice may be different in urban and rural areas. The future may be different for different types of cases such as criminal, family, high-end commercial, intellectual property etc.

And there is no one right way to practice for all lawyers and other DR professionals – this varies depends on individuals' values, goals, personalities etc. So, while there will be forces that will affect the future of practice generally, each lawyer will have a different future, including some who do things other than practicing law.

This suggests that law schools should do at least two things to help students prepare for their professional future.

First, law schools should focus on teaching general skills that will be needed in virtually any area of practice. In particular, written and oral communication, legal research, client interviewing and counseling, working with counterpart lawyers, and negotiation should be important for virtually all lawyers.

Second, law schools should help students plan for their own particular futures. Given all the variation in practitioners’ futures and the likelihood that there will be some changes, students will need to identify their own educational needs and continue to learn throughout their careers. So it is particularly important to teach them how to learn to learn most effectively. I elaborate these themes in my [Last Lecture article](#).

The Group’s Ideas

We asked the audience to address three questions and the following is a summary of their responses.

What Changes do You Anticipate in 5–20 Years that May Affect Legal and DR Practice?

Lawyers of the future need to think about preventing problems, e.g., building strong communities and helping prevent today’s conflicts by addressing upstream social justice issues.

Online dispute resolution is just the beginning. Technology may make rules of evidence completely irrelevant, e.g., there will be recording devices everywhere, even in our own brains!?

Automated dispute resolution (artificial intelligence...and robots!) will have a major impact. Big data algorithms will be integrated into legal dispute resolution. Programming A.I. will be the dispute resolution!

The climate will be a “party” in any dispute: food law, tort, property, etc. It will be a third party interest that will have to be addressed as part of any dispute resolution.

Cultural norms will be more varied. Lawyers will not be able to assume that disputants will have as much commonality as they now do.

Lawyers will go back to bespoke lawyering—like learning how to pickle!

How Might These Changes Affect Legal and DR Practice?

Lawyers will use technology to identify “hot spots” and then deploy dispute resolution / prevention resources.

The DR field is cross-professional, thematic, inter-disciplinary. DR skills are not uniquely ours: we have to learn how to work with other professionals. (gasp!)

There will be new legal / DR jobs in artificial intelligence. Lawyers and DR professionals will be needed to construct the new “apps” that people will be using in the future.

Lawyers will have to analyze all the data we will be gathering.

Lawyers will be more involved in conflict management though dispute review boards in various contexts.

There will be renewed pushes to separate DR as a separate field — formalization through licensing — and those efforts will fail.

Lawyers will need to be better counselors, adding value to parties with (legal) disputes.

How Might These Changes Affect Your Teaching and the Skills That You Emphasize?

Society should reform the public school system to help young people develop emotional intelligence and conflict resolution skills.

Faculty should teach that creativity, flexibility, adaptability, and being problem-solvers as the essential skills that lawyers will need in the future.

Faculty should teach students the skills to perform tasks that are NOT provided by the technology, e.g., creativity, empathy, and ability to cross boundaries.

Students will need to develop technological fluency, learning how to assess and master what new technologies are introduced in the future.

Lawyers will work with other professionals so law schools need to offer multi-disciplinary approaches including such things as neuroscience, linguistics, and psychology.

Faculty should engage students around core ethical principles to help them develop the resilience and ethical responsibility they will need when facing the inevitable ethical challenges of the future.

Faculty should help students look at past conflicts to learn how to prepare for conflict in the future.

Instead of welcoming new students to the legal profession, maybe we should welcome students to a profession associated less with practicing law and more with fundamental qualities of being a professional of law and justice such as being a fiduciary and an engaged citizen.

Faculty should encourage students to take on the wider problems that impact their communities and wider society.

Faculty need to be better at counseling students about where there might be new jobs, possibly such as in local government

Law schools will be engaged in life-long education of lawyers as they increasingly practice in unbundled capacities, such as contract employees. These lawyers, in particular, will miss out on the traditional mentoring and apprenticeship that has been a component of the legal profession.

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ONE THOUGHT ON “WHERE THE “PUCK” IS GOING – AND WHAT FACULTY SHOULD DO TO HELP STUDENTS GET THERE”

Jonathan Daugherty

JULY 7, 2016 AT 10:36 AM

The idea of teaching students to look where the puck is going really ought to be implemented throughout all schools, or we really aren't getting very much benefit from them

if we spend years being graded on abacus proficiency, only to begin our formal education on calculator usage once we join the workforce.

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