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An independent mind

October 2013

RESTORING A FUTURE FOR LAW

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1. Introduction

The subject of this paper is a big topic, and I shall be driven to make a number of necessary generalisations and simplifications to keep it within sensible bounds. To some, what I say might in parts be thought heretical, but I make no apologies for making the case for the strongest possible legal system, supported by truly effective lawyers.

This paper[1] addresses three themes: (1) What is Law for? (2) What are lawyers for? (3) The Future. The first two questions to my mind provide necessary answers to the fundamental question, What next for Law? For each theme, I suggest a proposition. The substance of the argument here is that both law and lawyers have lost sight of their true purpose and that reconnecting with both is essential to enabling a meaningful and worthwhile future for law.

2. What is Law for?

My approach to answering the question, What is Law for? (or alternatively, What is Law's Purpose?) is to address it as an aspect of the public interest. I suggest that the notion of the public interest[2] has two dimensions. The first is the ***fabric of society*** itself – the State, its security, government, environment, economy, and the rule of law. Law's Purpose here is to create, maintain and protect this fabric. Without it, there is no framework for safe and reliable institutions or interaction among individuals.

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[1] This is a revised and updated version of the keynote speech given at the Futures Conference 2013, held by the College of Law Practice Management at the Chicago-Kent College of Law in Chicago on 4-5 October 2013.

[2] I have analysed the meaning and extent of 'the public interest' in another paper: Mayson (2013) *Legal services regulation and 'the public interest'*, available at www.stephenmayson.com.

The second dimension is the ***legitimate participation of citizens in society***. This too has a number of dimensions, including the right to participate (citizenship, migration and asylum), the ability to do so meaningfully and with dignity (health, sustenance, housing, and education), as well as exclusion for illegitimate purposes (criminality and deportation). Legitimate participation also depends on personal and institutional relationships (such as employment, family, and commerce); and Law's Purpose is to bring structure, predictability and stability to such relationships.

Finally, legitimate participation requires access to justice. Relationships will not always be smooth, and Law's Purpose is to offer enforceability through the laws of contract and tort (and other laws that govern relationships). It is also to secure protection from spurious or unfounded claims as well as against imbalances and abuse of power (perhaps especially by larger institutions and government).

This approach also gives us an answer to the related question, Who is Law for? It is for society and citizens; it is not for lawyers. This suggests that the Law should be as simple, clear and relevant as possible; its complexity and spread into everyday life and business affairs should be limited. It is not surprising on this view that the European Union's attempt in the 1990s to regulate for an acceptable degree of curvature on cucumbers and bananas should be much-ridiculed and then abandoned: such regulation is simply not consistent with Law's Purpose, whose domain is human relationships and interaction, not Nature's production. Of course, Law cannot always be simple and clear, which gives rise to the need for specialist assistance from lawyers. But legislators often seem to forget that complexity should be avoided if Law is to maintain its legitimacy.

> My ***first proposition***, then, is:
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> Governments and lawyers have lost sight of what Law is for.

Unless we re-establish sight of Law's Purpose, the future of Law could be very different to the future we might wish.

3. What are lawyers for?

Working from the proposition that Law's Purpose is to maintain and protect the public interest in the fabric of society and the legitimate participation of citizens in society, then the core purpose of lawyers is to advise and represent citizens and institutions in the working out of Law's Purpose. This core purpose also finds expression in the role of lawyers in creating, supporting, enforcing and challenging legal rights and obligations. In this sense, the practice of law is a real privilege. With that privilege comes responsibilities.

The practice of law requires competence, though not simply *technical competence* in the law. Lawyers also need the *practical competence* and experience to apply the law in context and in accordance with law's own procedures (say, in relation to dispute resolution or various property registrations). They also need *ethical competence* to abide by the expected standards and behaviour of privileged practitioners. Finally, they need *business competence* to run a financially stable, profitable efficient and compliant organisation that provides quality and good-value services to clients.

In exercising this competence, there is an inevitable asymmetry between the lawyer's competence and a client's competence: this difference represents the principal reason that clients consult lawyers as professional specialists. Economists refer to this asymmetry as 'market failure'. It has always struck me that such terminology is unfortunate. The asymmetry is inevitable and necessary; it is surely a positive that specialists know more than their lay clients, rather than a negative and a failure. Either way, the asymmetry gives rise to a need for protection to ensure that this privilege is not abused. I shall return to the nature of regulation in paragraph 4.2 below.

Regulation and protection address the issue of what lawyers *must* do. But there is a difference between what they must do, and what they *actually* do, and often a difference between both what they must and actually do and what they *should* do. In fact, it is now difficult to see any real alignment of the three because lawyers have tended in recent years to do much more than they must do (or probably should do). The principal cause of this misalignment is that there are too many lawyers for the 'must-do lawyer work' available.

As a consequence, lawyers have created an artificial market for their services. It is a market in which they have needed to find or make work to do, by encouraging the spread of law into areas that were not necessary – for example, through over-extensive or intrusive regulation and 'red tape'; in which they have made the law and its practice more complex, and susceptible to unnecessary work (resulting, say, in applications to court or to the pursuit of spurious or low-merit claims); in which lawyers have been employed when others without a legal qualification would have been at least as competent and effective; in which they have adopted a suspect and sub-optimal business model; and in which they have been protected by unnecessary and unreasonable regulatory barriers. I am not referring here just to the actions of practising lawyers: law-makers are as much to blame for the spread and complexity of law – and in the UK, both the increase in tax legislation and the unfortunate rise in satellite litigation on costs and costs recovery are salutary examples.

In all, this false market amounts to a departure from Law's Purpose. Far from protecting clients from the exploitation of the inevitable asymmetry of knowledge and power, it has actually encouraged and condoned an exploitation of the privilege.

This leads me to my ***second proposition***:

Governments, regulators and lawyers have lost sight of what lawyers are for.

Again, unless we re-establish what lawyers are really for, the future of Law will not be as we should wish it.

4. The future: what next for law, lawyers and legal services?

I believe that there is declining demand for the complex, over-lawyered, over-priced and over-protected advice and representation of the past. If we have lost sight of what Law and lawyers are for, a new approach is needed to ensure a decent, meaningful and sustainable future for Law, lawyers and legal services.

However, there are two significant obstacles to this new future: a broken business model of legal practice; and the closely connected issue of inappropriate regulation of legal services and the practice of law.

4.1 The business model

Perhaps the biggest challenge to the future of Law and lawyers is that the traditional business model is fatally flawed[3], and that the future requires a new model which will focus on four aspects of the law business.

4.1.1 Value

The future cannot be built on a business model that charges for time, where revenues and profit are founded on the cost of input rather than the value of output. I recognise that much work has been done recently on this – but interestingly much of it in the name of 'alternative billing'. What a telling expression! Alternative to what? Usually, it seems, as an alternative to the perceived 'proper' or 'right' way of charging, that is, for time. We should not be talking about alternatives; instead, we should just be talking about pricing, where (yes, I accept) time-based charging might well be one of the methods acceptable to clients.

The business model of the future must focus on *creating* value for clients, not through the '*added* value' of peripheral benefits such as client entertainment, education, secondment and the like, but in the very core of creating or releasing value in the advice and representation on the current case or matter, in the current circumstances. This might result from creating an innovative legal solution; it might be the outcome of negotiating a better deal, or securing a better court judgement; it might arise from making the client's personal or business life or relationships easier and less stressful. It might be the consequence of combining different services or products in a multi-talented or multidisciplinary offering that takes the problem away from the client and coordinates an integrated solution with less effort from the client. Value creation might arise in any number of ways, and will differ from client to client – or even from time to time for the same client – but we have to find it.

Value is created through people and their expertise, experience and relationships, through processes and technology, through innovation and different combinations. In the end, it requires deep knowledge of the client and strong connections with them to understand their real needs, and having the flexibility and imagination to deliver a valued and valuable outcome. This is where competitive advantage in the future will ultimately lie. It requires informed answers to the questions, what are we selling, to whom, why, and what is it worth?

[3] I have explored this more fully in Mayson (2010) *Business models in legal services*, available at www.stephenmayson.com.

4.1.2 Resourcing

The future of Law and lawyers cannot be built on the involvement of lawyers in activities that do not need the input of someone who is legally qualified or where there are others (or processes) better suited to the task. There is an insidious consequence of believing that lawyers are the best, or only, resource for all tasks: it is that it downplays and demeans the 'non-lawyer' input, whether that is another person, technology, a process, or management. It is not surprising that there is an 'us and them' divide between lawyers and others, that inefficiencies persist, or that potential remains unrealised, when such an unhelpful and insulting attitude is prevalent.

The business model of the future must have a clear view of how it seeks to create value for its clients, and then resource the firm with the appropriate facilities and technology, people (lawyers and others), and organisational elements of structure, processes, culture, and market profile to do so. It must also encourage and facilitate effective relationships, both inside the firm (to enable people to work well together by sharing knowledge and experience) and outside it (to have the best possible routes to new work, market intelligence, and well-tuned suppliers). The necessary resources do not always need to be internalised in the firm, and both short- and long-term arrangements, as well as using temporary and permanent employment, could result in the best resource mix for the business.

4.1.3 Funding, ownership and structure

A business model that restricts access to capital runs the risk of unhelpfully constraining investment and development. This restriction takes two forms. One is regulatory, and the other is attitudinal; there is also a history in the legal profession where the latter has reinforced the former, and vice versa.

In part, this restriction on 'non-lawyer' ownership and investment in law firms is a further playing out of the insulting and demeaning attitude referred to earlier. It is justified on the grounds that only lawyers can be relied on and trusted to provide high-quality, impartial and ethical advice: 'non-lawyers' would inevitably interfere with this, resulting in detriment to clients. They must therefore be protected by prohibiting 'non-lawyers' from ever being able to contemplate ownership or investment. Such a mass insult to the 99.5% of the population who did not qualify as lawyers is breath-taking[4] – especially since many of the firm's own staff and clients will fall into this 'inherently untrustworthy' group!

The business model of the future must be open to more options for finance, ownership and structure. Funding must be available internally and externally, as debt and equity, from public and private sources, on a short-term and long-term basis. There is in any event a big difference between 'non-lawyers' practising law and owning, funding or running a law firm. It is still possible – likely, even – that attitudinal resistance to further options for financing and ownership will persist. But to have a blanket ban on

[4] I have written elsewhere about this 'forked tongue' of ethical delusion: see www.stephenmayson.com/2012/04/13/external-ownership-and-the-forked-tongue-of-ethics.

them does not meet any public interest test of targeted, risk-based, proportionate or appropriate regulation of business activities.

4.1.4 Rewards

The current model of law practice, still based essentially on the professional partnership, pays out too much money, too quickly, as income, to the wrong people, for doing the wrong things. It makes no meaningful assessment of who has actually created the wealth of the business, reflecting income and capital growth, over any period of time. It is a short-term income extraction model that benefits a select few people disproportionately and inappropriately.

The business model of the future will take a broader view of who should be rewarded, for defined and recognised contributions of very different kinds (think of all the contributors to the value creation described earlier and the sourcing and management of the resources and infrastructure required to do so effectively – and contemplate what proportion of those contributors need to be qualified lawyers). It will draw distinctions – as other businesses do – between short-term and long-term rewards, and between rewards through income and capital.

4.1.5 The new business model

The future's new business model will therefore be very different from the traditional one. It will allow more variety in solutions and structures, and in market position. Such variety will add a premium to management expertise. The new regulatory arrangements under the Legal Services Act 2007 in England & Wales (and largely mirrored in Scotland, too) encourage thinking and innovation in legal practice that is much more closely aligned to the new business model than the old one. The issue of more than 230 licences for alternative business structures (ABSs) in the first two years of 'non-lawyer' ownership has not seen the legal world descend into the chaos of unacceptable quality and unethical behaviour; nor has it resulted in an upsurge – let alone an avalanche – of complaints against these new entities.

The continued resistance to 'external ownership' by some regulators and Bars fascinates me. In some cases, it is a manifestation of the tired plea that "we are a profession, not a business". As far as I can see, if you provide services to someone in return for a fee (a pretty good example of buying and selling), then you are in business. Being in business is not a licence to behave unethically: there are plenty of examples of ethical business. Nor is being in a profession a guarantee of ethical behaviour: sadly, there are too many examples of lawyers engaging in unethical practices and even criminal activities.

So, if unethical lawyers can be disbarred for inappropriate behaviour, why could not any unethical 'non-lawyers' lose their licence to own or invest in a law firm (which is in fact the situation for ABSs)? A blanket ban offers no parity of treatment, no level playing field, and is unfair as well as insulting. The arguments for a barrier on non-lawyer entry do the legal profession no credit. They undermine Law's Purpose and ignore the best

answers to what lawyers are for. They fail the 'smell test', which in this case offers only a spectrum from a faint whiff of being arrogant and patronising to an unpleasant stench of self-interested protectionism. Both represent dangerous territory for the future of Law and lawyers.

4.2 Regulation

This brings me to the second obstacle to the future, and the challenging question of regulation[5].

The fundamental challenge for regulation, as I alluded to earlier, is that we need lawyers, but there is an inevitable imbalance in the lawyer-client relationship. Typically, from the client's perspective, lawyers have knowledge and power, and they charge a lot of money: that is an asymmetry of both information and power in the lawyer-client relationship. Wherever there is an asymmetry, one could argue – on a public interest basis – that clients should be protected in that imbalance.

The four principal areas where clients need protecting are the four Cs:

1) The *choices* about which lawyers they can engage: this is why referral arrangements can be so contentious – they can distort the client's choice of lawyer. Who ought to have the right to make that choice? It should be an informed client. In too many instances, it is not.

2) The *competence* of lawyers needs to be assured where they have knowledge that clients rarely experience, cannot vouch for, and on whose advice they make their own life or business choices. We have to assure competence and deal with those providers who fail to demonstrate or maintain it.

3) We also have to deal with *complaints* in the imbalance in this relationship.

4) Finally, if something goes wrong, and the lawyers behave badly, we have to be able to *compensate* clients.

These are, then, areas where regulation necessarily is required: if someone is providing legal services, those things need to be preserved in the public interest for the benefit both of the public and individual clients. The public interest does, it seems to me, suggest a need to regulate providers. This is not about deregulation; it is not about non-regulation; it is not about light-touch or heavy-touch regulation: it is about regulating the provision of legal services to preserve the public interest and the rights of clients.

Any discussion about regulation does not resolve to a simple, binary decision of regulation or no regulation. It should be more about degrees of regulatory intervention, starting from the proposition that regulation should be a last-resort intervention on behalf of society. Nevertheless, despite this proposition, I have come to the conclusion that all legal services that are provided for reward should be regulated – though this still leaves open the questions of how and by whom.

[5] I have recently set out more extensively my thoughts on the regulation of legal services: see Mayson (2013) *Review of legal services regulatory framework*, available at www.stephenmayson.com.

We can identify four forms of regulation for legal services: the market; accreditation; redress and discipline; and standards. This can result in a framework for legal services regulation which is a particular and healthy mix of rules, values, and markets.

4.2.1 The market

It is important to recognise that markets are regulators, given that they weed out the inappropriate, the ineffective and the weak. Accepting, as I do, that law is a business, it would not be unreasonable to expect the market to play a significant role in regulating providers of legal services. And it does. But then law is not *just* a business.

Achieving Law's Purpose, and relying on lawyers for advice and representation gives rise to the inevitable asymmetry identified in paragraph 3 above, and this requires protection for clients against the possible exploitation of that asymmetry. We cannot therefore rely entirely on the market to regulate legal services. However, this does not mean that the market has *no* role to play. Indeed, if lawyers are as good, necessary and ethical as they claim to be, clients and markets will recognise and value it. This provides a strong argument for allowing a regulatory bias in favour of clients and markets making their own decisions wherever possible without unnecessary barriers and restrictions.

4.2.2 Accreditation

Formal regulation can provide both before-the-event assurance (to stop things going wrong, or at least to reduce the risk) and after-the-event 'insurance' (to put things right if they do go wrong). Typically, before-the-event assurance leads to accreditation of providers in the form of licensing or certification of those judged to be competent (in the case of legal services, usually after a period of legal education and training).

Such before-the-event regulation necessarily creates barriers to entry, and normally imposes costs on the would-be provider that are eventually passed on to the consumer. In many cases, there is also an on-going obligation to maintain competence through continuing professional development, which also imposes additional costs similarly passed on to consumers. The deliberate creation of barriers and costs should lead us to question carefully whether such before-the-event regulation is justified.

My view is that this barrier should only be erected for two purposes. The first is to secure public good benefits. This would include such things as the medical professions' contribution to public and personal health, and auditors' role in underpinning accurate market information about companies quoted on public stockmarkets. For law, the maintenance of an effective justice system is vital, and those who are allowed to litigate and represent in court play a key role in that. Accreditation of rights to conduct litigation and rights of audience in court can therefore be justified on a public good basis.

The second purpose for me would be where after-the-event redress or compensation would be inadequate. This might arise, for example, where a citizen's life, liberty or citizenship is at stake, or where access to medical treatment, housing or education could be compromised. This would similarly lead to a number of instances where before-the-

event accreditation should be preferred – despite the barriers and additional costs that it might give rise to.

In my view, the English notion of reserved legal activities provides too narrow a basis for determining the need for before-the-event accreditation (at least the current selection of reserved activities does, because it does not embrace all circumstances where a public good should be created or where after-the-event redress or compensation would be inadequate[6]). Equally, the US notion of the unauthorised practice of law is to my mind too broad in its scope to offer a targeted regulatory response to securing the public good or risk-based and proportionate protection for clients and the public.

4.2.3 Redress and discipline

After-the-event regulation in legal services is usually targeted at a formal complaints process that dissatisfied clients can use, combined with remedies for redress, compensation or restitution. It also encompasses disciplinary processes against practitioners who are shown to have behaved incompetently or inappropriately, with a range of sanctions available including fines, suspension and, ultimately, exclusion from practice by being placed on a public register of prohibited providers and the withdrawal of any licence to practise.

In light of the asymmetry between legal adviser and client, giving rise to a general need to protect clients from incompetence and exploitation, I would be in favour of all providers of legal advice and representation (at least where they do so for reward) being subject to after-the-event regulation, irrespective of whether or not they are otherwise regulated. This would allow a regulator (or ombudsman) to investigate complaints and offer redress and take disciplinary action as appropriate.

4.2.4 Professional standards and culture

Finally, we should not overlook the powerful effects of culture and socialisation in 'regulating' the behaviour of practitioners. A set of professional standards and ethics that is followed or enforced therefore offers a strong underpinning to legal practice. The articulation of the professional principles in the Legal Service Act 2007 gives us the foundations for such standards and ethics. I would add only two further observations.

First, the absence of a specific principle requiring lawyers and legal services providers to act in the public interest to me represents a significant omission (accountants have such a principle, so why not lawyers?). Too often, I believe, lawyers cling to another principle – that of acting in the best interests of a client – to justify actions and claims that are not, in truth, in either the public interest or even the client's own *enlightened* best interests.

Second, the accepted principles should be applied to all those who provide legal services for reward and not just those who happen to be legally qualified. This is true in the case of ABS licence-holders. And although there is an obligation on those who are not

[6] Cf. Mayson (2013) referred to in footnote 5.

authorised persons not to do anything which interferes with the compliance with professional obligations of those who are, this is a type of negative, not-to obligation rather than a positive must-do one. In this way, we could extend the notion of 'professional' standards and behaviour to all those engaged in the provision of legal services rather than just those who hold a professional legal title or qualification.

4.3 Who should regulate?

Self-regulation is increasingly difficult to justify in the 21st century. That said, I am not in favour of the lay domination of regulatory authorities, either. We need a balance of individuals who understand Law's Purpose as well as the need to balance the public, client and professional interests. In part, this will require a client and consumer perspective; but it also requires insight and understanding of the realities of practising law, including its specific challenges and pressures. This certainly points away from self-regulation, but it does not point straight to lay-only or lay-dominated regulation.

5. Conclusion

The thrust of this paper is that the best future for law requires us to re-establish sight of some fundamentals because, as a society, we are in danger of forgetting what Law is for and what lawyers are for.

We need to reconnect with *Law's Purpose*, and properly pursue the public interest. We need to reconnect with providing *value* to clients, and properly pursue the client interest within the context of the public interest. We need to reconnect with a set of *values*, and properly pursue the professional interest within the context of the public interest and the client interest. In other words, we need to recalibrate the public interest, the client interest, and the professional interest and the relationships among them.

> So my conclusion and ***third proposition*** is:
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> The future of law depends on finding a new and proportionate balance of the public interest, the client interest, and the professional interest.

What I am driving at here is the achievement of Law's Purpose in a business context and with professional integrity – it could be expressed as profitable ethics and ethical profits. As someone who is passionate about the independent, cost-effective and ethical realisation of Law's Purpose, I would encourage all those involved – government, regulators and practitioners – to work towards this new balance.