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Creative Destruction and the Legal Services & Legal Education Markets

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Ray Worthy Campbell, *Rethinking Regulation And Innovation in The U.S. Legal Services Market*, 9 **N.Y.U. J.L. & Bus.** 1 (Fall 2012).

Laurel Terry

If you are like me, you have started to notice—more and more frequently—expressions such as "creative destruction," "creative disruption," "disruptive innovation," and "positive disruption." Two recent examples include the TEDxCHANGE 2013 event held in April in Seattle which had the theme of *Positive Disruption* and a January 2013 Harvard Business Review blog entry entitled *Creative Destruction Visits the Legal Profession*. These terms have also appeared in conferences (*see* Panel 1) and talks at places such as Georgetown and Harvard law schools and in blog posts by higher education leaders, legal academics such as Bruce Kobayashi, and legal consultants such as Jordan Furlong (*see* here and here [legal education] and here, here, and here [legal services]). Disruptive innovation has been a prominent theme in the award-winning LawWithoutWalls program, which was founded by Michele DeStefano and Michael Bossone from University of Miami School of Law and in the ReInvent Law Laboratory, which is a creation of Michigan State Professors Dan Katz and Renee Knake.

During the past five years, as I have noticed more and more people using expressions such as "creative destruction," I wondered what class or book I had missed since the speakers all seemed to know much more about this topic than I did. For this reason, I was particularly pleased to read Professor Ray Campbell's new article entitled *Rethinking Regulation and Innovation in The U.S. Legal Services Market* because it provided the historical and theoretical background behind these expressions and because it gave me a new way to think about changes taking place in the legal services and legal education markets.

Some of these changes have been dramatic. Student debt is up and law school applications are down. Some prominent law firms have shrunk or disappeared. There are new providers in the space where lawyers previously were (think Legal Zoom and legal process outsourcing companies such as Pangea, which is now owned by Thomson Reuters, the owner of Westlaw.) In the U.K. and Australia, it is now possible for law firms to have external equity investment and to be publicly traded on stock exchanges. Hedge funds and grocery-plus chains, among others, have now invested in or provide legal services. Other countries are considering whether to adopt a similar approach. Everywhere one turns, there seem to be dramatic changes in, and challenges to, the existing system. What is going on here?

Professor Campbell's article puts these legal services changes in a broader context and provides a framework for thinking about what is happening and how one might respond. The article begins by providing useful information about a theory that first emerged in the business-school setting. As Professor Campbell explains, the theory of "disruptive innovation" was pioneered in the 1990s by Harvard business professor Clayton C. Christensen. Professor Christensen had observed that many well-established successful companies had disappeared. He wanted to learn why and how new firms and technologies drove out of business formerly entrenched incumbents. Christensen discerned a counterintuitive pattern: incumbent companies failed not because they were poorly managed, but precisely because they were well-managed. Incumbent companies that failed had focused on their best customers and wanted to offer better products to those customers. They also pursued those opportunities most likely to have a significant impact on the company's profitability.

As Campbell's article explains, Christensen identified three elements that were part of what he came to call "disruptive innovation." *First,* Christensen distinguished between sustaining technologies, which help make incumbent businesses stronger, and disruptive technologies, which effectively change the rules of the game and reward innovators. Most technological innovations are sustaining technologies, but some are not and change markets. Consumer needs, rather than technology, determine whether an innovation is sustaining or disruptive. (If the incumbent companies can use the innovation to better serve their current customers, then the innovation will be sustaining. If the innovation allows a disruptive innovator to reach new customers that the incumbent business hadn't targeted or if the innovation provides to the incumbent company's existing customers something the incumbent company wasn't itself willing to offer to them, then the innovation is disruptive.) *Second*, Christensen offered insights into the aspects of established firms that prevent them from pursuing disruptive technologies themselves. He concluded that an incumbent company's resources, processes and values (RPV) prevent it from switching to new kinds of products, especially where those products are lower cost and less fully-featured. In other words, incumbent firms do not pursue disruptive innovations because they are inconsistent with the firm's RPV. The *third* element Christensen pointed to was something he called the value chain evolution theory; it explained why innovators tend to migrate upmarket into more valuable niches, ultimately leading to direct competition with, and defeat of, the incumbents.

After setting forth Christensen's "disruptive innovation" theory, Campbell explains how Christensen's later work applied his theories not only to technology, but to business models and processes, which can also disrupt markets. Christensen concluded that his disruptive innovation theory was applicable to three different kinds of "value configurations," noting that businesses find it very difficult to move from one value configuration to another (unless they set up separate units to pursue new opportunities.) The three value configurations were:

1. value chain businesses, which transform inputs into products (or services), similar to what a factory does;
2. solution shop businesses, which solve customer problems with expertise, such as what a lawyer does; and
3. value network businesses, which provide value by linking customers, such as what EBay or an insurance company does.

After setting forth these theories in a detailed but accessible manner, Campbell identifies some lessons that scholars studying legal markets might learn from Christensen's work. Campbell concludes this section with the observation that: "In a world where incumbents cannot implement disruptive change, regulation that excludes entrants from different value configurations excludes not just the potential entrants but the possibility of disruptive change itself."

The next section of Campbell's article examines the existing lawyer regulatory structure to determine the degree to which it limits disruptive change. Campbell concludes that for lawyers who are engaged in the "practice of law," the current U.S. regulatory system locks them in to a solution-shop value configuration, thus limiting their ability to engage in disruptive innovation. He cites as an example the difficulties that ethics rules create for lawyers who want to offer limited scope services (which is sometimes referred to as "unbundling"). Campbell also finds that regulatory barriers such as UPL rules and the availability of private enforcement through class action suits have limited disruptive innovation by nonlawyers. These regulatory barriers have had a strong impact in the individual client hemisphere and a minimal impact in the corporate client hemisphere because that hemisphere has had *defacto* deregulation. Campbell cites three exceptions to the UPL rules that operate in the corporate client hemisphere and that contribute to *defacto* deregulation: the cleansing of what would be UPL by the supervision of the in-house counsel lawyer, the ability to ship work out of U.S. jurisdictions, and the ability of "consultants" to offer law related services that do not claim to be the practice of law.

Campbell finds that short of the barrister function of appearing live in U.S. court proceedings, there appears to be little non-lawyers do not do for U.S. corporations. The final section of Campbell's article is particularly interesting. It examines current innovations in legal services and offers detailed observations about the innovations one might expect in the future in each of the three value configurations.

Although I agree with Campbell that most lawyers currently operate using a "solution-shop" business configuration, I was not completely persuaded by his article that the regulatory system *itself* requires lawyers who are engaged in the "practice of law" to use this "solution shop" model and prohibits them from using a value chain or network business model. This is an important issue because commentators, including Richard Susskind, Campbell himself, and others, have convinced me that, regardless of who provides it, we are likely to see more commoditization (and value chain configurations) in legal services in the future. I also believe we will see a marked if not exponential growth in network configurations. These value configurations have the potential to help solve access to justice problems.

Despite the fact that I was not entirely convinced that the current regulatory system prohibits disruptive innovation, I wholeheartedly agree with Campbell that it is important to consider the impact and wisdom of our current lawyer regulatory system on disruptive innovation, including whether the current system limits the "practice of law" to a solution shop model and the degree to which the current system prevents nonlawyers from using other value configurations to deliver legal services. These are important questions to which Campbell provides thoughtful provocative answers.

In sum, Campbell's article gave me the background and vocabulary to better understand references to "creative destruction" and to participate in the important ongoing dialogue about lawyer regulation and our legal system. I recommend Professor Campbell's "disruptive innovation" article to *all* legal academics regardless of specialty or country—because we all have a stake in this debate.

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