

# **Professionalism in an Age of Dynamic Change?**

## **Teaching New Skills via Clinical Legal Education**

Professor Tania Leiman

*Flinders University*

In case you are wondering where I come from, the red dot is where my university is (Adelaide South Australia), the green dots are the smaller campuses (across South Australia and the Northern Territory). So we are down the middle and the bottom of Australia, and heading south is the Antarctic. And I come from Kurna Land. I live on country that has been continuously inhabited for more than 65,000 years. And there has been a continuous operation of a legal system for over 65,000 years, and I'm very proud of that. I stand here today as a person who's worn a number of hats. I come from background of legal practice. I've worked for four years as a clinical supervisor in our Flinders Legal Advice Clinic. I am now an education-focused legal academic. I have been the Associate Dean (Teaching & Learning). I am currently the Dean and in that role I sit on Law Society Council - the professional accrediting body of lawyers in my state. I also sit on our Legal Practitioners Education and Admission Council, which is our admitting authority. I'm currently teaching an academic topic. I'm teaching a practical legal training topic, and I'm also involved in continuing education for members of the profession.

First of all, Peter Joy mentioned a number of ways that change is happening in our world. I could talk about many of those. In fact, my area of research is around autonomous vehicles. The books that I've been reading which have been formed much of my thought are there. I've read all of those [as shown on slide], and these books [as shown on next slide] are currently on my table, and I'm working my way through them. I've also been informed by the recent World Bank, The Changing Nature of Work, report from earlier this year, and the work of course, of the World Economic Forum. So this slide from the World Economic Forum re the Fourth Industrial Revolution identifies a number of areas where digital change, or other forms of change are impacting on our society. And I've drilled down now into just looking at justice and the legal infrastructure, and of course there are many areas of change. People like Mike Quindazzi, the International Manager of innovation from the PWC, identifies 30 technologies of the new decades. He's also come up with a nice graphic there about our industry 4.0 framework, particularly in the

context of the Internet of Things, and many of those emerging technologies impacting not only on what lawyers do, but on what all sorts of professionals do.

So we know that there is a lot of change. We know that change is everywhere and we know that it's compounding fast. One change is building on another, is building on another, is building on another, and we don't have to look back very far to realize that our world looks very different than it used to. Professional boundaries are also changing, but we might not agree on what professionalism is. Is it based on an ethical code of conduct? On values that are held by people who call themselves professionals? Is it based on autonomy that professional people have? So I've got a number of questions there. I don't have the answers to those things, and I think we might get different answers depending on who we ask. Perhaps we might look at someone and say their ethical code or their behaviour would mark them out as a professional. We might say of others the fact that they are externally regulated, that they are part of a body or a guild that might make them a professional.

Other responses from surveys that in the work that done by Rachael Hession, whose article I quote, an article from earlier this year, some of her survey respondents said that professionalism is about managing the relationship that you have with clients, and others said that it's about being competent and efficient in the way that you behave if you are a professional. So we may not agree. But perhaps our concept of what professionalism is might be a concept that itself is changing, and I'm going to explore that in a minute. But I just want to pose these questions for you - If our concept of professionalism is changing, then should it? Is the very notion of professionalism an outdated notion? Or is it something that transcends all of the change that's going on? Is professionalism an abstract concept? Or can we taste, touch, see and feel what professionalism looks like? And particularly in my country, where we are dealing with the effects of government royal commissions into banking, into many other areas of traditionally professional work where behaviour has been less than professional) perhaps we are in a crisis of professionalism. Rachael Hession in her article mentions that.

Let's think about some of the things that we might agree on for professionalism. It's probably fairly non-contentious to say that a professional is someone who has core professional/discipline knowledge; that they act with integrity; that they're honest and they're independent. When you unpack that in terms of thinking about what core professional values are, Hession lists a number of those there. When I summarise

what she mentions in her article, it's really only those last two lines and italics that are restricted to lawyers. Everything else could describe any number of professionals. And I note also that list doesn't mention as core components or values of professionalism any of resilience, capability to adapt to change, innovation or entrepreneurship. In the context of the change that's happening, I ask myself, are these just new tools, new business models, new services, new products for lawyers? Which someone like Clayton Christensen might call sustaining change or sustaining innovation, there's always the legal profession to do what they've always done but do it better. Or are these new tools, business models, services, products for others that are in fact disrupting the legal profession? Or is this completely new stuff and we really don't know what we're dealing with? And particularly in my context of thinking about automated vehicles and other forms of automated technology, 'what really is this?' is a question that arises a number of times.

So we could frame those questions in different ways and I've done that there, I won't repeat them now but I find it useful when I ask a question to think how can I reframe that question and what other insights can I learn. Maybe this is just about helping us what we've always done do better. Maybe it's now about enabling others, not lawyers or clients, to respond differently to their legal needs. Or maybe these changes in fact change our very nature of our interaction with law itself. So my question is, professional boundaries are changing, we need to think about what professionalism is, and maybe that whole concept itself is changing. And those new boundaries may need this concept of new professionalism, new or different knowledge and skills. And that for me raises the question about whether you need new values too.

So I want to just touch very briefly on a US case. I'm not from the US, and I confess no expertise with the US system, although my colleague here, Dan, I'm sure will put me right hopefully afterwards if I make a mistake. And I want to say here that I'm using this case study not about legal tech, but about the mindset that this case study can illustrate for us. And I want you to look as we go through this very quickly, for the changing boundaries, the changing behaviour, the changing ethics, may be formal or informal ethics, the changing management of clients, and the changing competencies. So this is a case I'm calling it Mallinckrodt, I forget the full name, I can't read it from here anyway. It is a case about a number of people who had been injured by a pharmaceutical given to children. The essential question in this case was a dispute about discovery, and particularly about a dispute as to a single aspect of the electronically stored information system or ESI production protocol.

The parties disagreed about that protocol. They went to court and the defendant had a proposal about how they were going to conduct electronic discovery. The plaintiffs had another proposal about how they were going to conduct discovery. This case was from August of last year, and when I read this case, I thought to myself, I'm not understanding a word of this judgment. And the reason that I didn't understand a word of the judgment was because it was about things like, a sample of the null set and various other electronic search protocols. I'll extract it here and if you get my notes, you can read it in full later. This is footnote 2 and I thought it was just beautiful, I had to extract it. "The court pauses here for a moment to calm down litigators who are familiar with ESI. (You know who you are.) In life, there are many things to be scared of, but ESI is not something to be scared of. The same is true for all the terms and jargons. Discovery of ESI is still discovery governed by the same Federal Rules of Civil Procedure as all other civil discovery."

Then the footnote goes on to say a good way for attorneys to increase their competency is to review particular educational materials. So I duly followed the link and came to the Seventh Circuit Court Council on eDiscovery and Digital Information. They have a statement of purpose and preparation of principles, which I have read and when I clicked on the phase one report, I come to this principle, which says, "in most cases, the meet and confer process, so the parties from each side who meet and confer, will be aided by participation of an eDiscovery liaison." And then I read on to look at the words that are underlined, "regardless of whether the eDiscovery liaison is an attorney, in house or outside counsel, a third party consultant or an employee of the party, the eDiscovery liaison must do certain things." Note, regardless of whether they're an attorney or not. This case is an example dealing with litigation traditionally regarded very much as the core of legal practices. Discovery is central to the litigation process (where regulatory and ethical obligations apply), but designing and using effective technology aided review protocols require other knowledge and skills, and the persons who are using those skills may not be admitted legal professionals (so the same regulatory and ethical obligations will not apply).

This case forces us to ask: who's the most valuable person involved in this process? Is it the lawyer or is it the person who really is skilled in analysis of data? Usually, as lawyers, we might think that the lawyers are the 'big people' in the room, they're the ones who make the money, and the data analysts over there in the blue circle, and there's a cross over because we're going to use the data analyst to help us with discovery. But we need to rethink that - a number of reports, including from Melbourne University in

2018, the In-house Counsel's Guide to Legal Tech and this map of the Legal AI Landscape, all show the increasing use and importance of data analysis in the law, and is a primer for all of the products.

(I don't like to use the terminology AI here, I think and that's too much of a cover phrase. I'd prefer use mean machine learning or natural language processing rather than AI).

What we are looking at much more now is something different to previously. The big game in town is now electronically stored information, and the people who are really important are the data managers, and those little people over there are the lawyers who use that data for some purposes. This is a change in perspective. It's a change in the way we think about who lawyers are, and what they're doing. I've been informed by a diagram that I encountered first in a presentation from Daniel Martin Katz, and he drew on the work of William T Henderson (Bill Henderson). He drew three concentric circles. The smallest circle in the middle, the legal profession, is in fact shrinking. But the other two circles, legal services industry and legal industry, are getting bigger and bigger. And that's borne out by the sort of information that Peter Joy was relating in his presentation earlier today.

So that brings me to my last point. *If* our world is changing so fast and if we need to think very carefully about what professionalism now is and looks like, and whether or not our notions of professionalism are changing, *then how* do we, in the legal education context, equip learners to survive and thrive? Unlike the US, half of my law students may go into formal legal work, others may go into other things. My students are asking these questions, "What is legal education for after all?" That debate has been going on in the legal academy in Australia for many years, and more broadly, so it could be for any number of these things. And in the context of the fees that are charged for legal education, implicitly that saying to our students, you pay us big money, so that you can get in return something for the money that you are paying: wealth, status and prestige.

But as I talk to my students about these issues, about the intersection between law and emerging technology, increasingly my students are asking me these questions, "Is what you're teaching me now going to help me survive and thrive in the future?" "Can what I do be automated?" "Is what I'm selling as a legal graduate scalable? Or is it just restricted to me interacting one-on-one?" "Am I still employable?" My students are starting to ask those questions. And behind those questions are the unspoken questions.

“Is any of this worth it?” And for some, “Will my knowledge and skills still buy the status and prestige that I thought that I was getting?” In Australia, our legal education curriculum is highly constrained. We have what are known as the Priestley 11 topics, 11 court doctrinal areas that we have to teach, and that are externally accredited. We also have a broad framework that's not compulsory (the Threshold Learning Outcomes or TLOs for Law) but I would suggest that the vast majority of law schools design their courses around this six threshold learning outcomes for law (Knowledge, Ethics & Professional Responsibility, Thinking Skills, Research Skills, Communication & Collaboration, Self Management). And really only the knowledge outcome relates to doctrinal areas of law. More recently, I've also come across the concept of a T-shaped Professional, which I'm sure many of you will be aware of, where we have the deep knowledge, doctrinal knowledge, the legal knowledge, balanced by a number of others of skills and knowledge across the top of the team. As I think about this movement from defined doctrinal areas through to knowledge plus five other key skills, to now a T Shaped Professional and broadening on from that, I ask myself these questions, “Do legal academics have the skills necessarily to effectively equip law students any longer?” “Do I have those skills and what other skills do we need?” And as I look back on my time in clinical education I'm still involved with our Flinders Legal Centre very closely, I'm asking myself, “Are there things that we can learn from clinical legal education as we're going into this new space?”

So very briefly, in the moments that I have left, I wanted to tell you about a very exciting new curriculum that we are rolling out at the beginning of next year, so for us that's March 2020. We have compressed the Priestley 11 doctrinal topics into the minimum that we can, one semester for each of those. We are including three innovation topics that will be skilling up our students explicitly in legal innovation that will be core and compulsory for all students. We are embedding a core topic around Indigenous Peoples, Colonialism and the Law. We are embedding a core internationalization topic, International and Global Legal Perspectives. And we are also embedding exciting traditional and digital clinical legal education: Law in Action and Law in a Digital Age. All of our students now will undertake a compulsory topic called Law in Action, which is very similar to the traditional sorts of legal clinics that we have heard about today, and the Monash clinical guarantee that Jeff Giddings talked about, except that all of our students will do it. They won't have an option because we are committed to the transformative effect of that type of legal education. It doesn't mean that all students will be working on live client clinics. We have a number of those clinics. We also have a compulsory topic called Law in Digital Age for all students - a hands-on

topic where students are working on either proprietary or open-source software, building applications for not-for-profit community partners. We're drawing on our existing learning from our clinical legal education in the traditional context, and bringing it into this new digital age context. What we've learned from this social justice focus is that process and administration is absolutely critical. We've been trialing the law in a digital age topic last semester, and this semester into our second iteration of it. And we've gone through a bit of a journey on it. Students are very excited and then they are encountering having to code, or having to learn how to use a new platform. Last semester, we partnered with neo geologic and used their platform. This semester, we are working on an open-source software. The reason that we've been able to do that is because we've employed a new staff member who comes from 25 years as an IT consultant, including 10 years working here, for major international organizations, went off very skilled, did a law degree, went into legal practice, heard what we were doing, wrote to me and said "I'm interested in getting involved." And we now have employed that person as a clinical teaching specialist, clinical practitioner. The only reason we can do what we're doing is because we have someone who has that deep IT knowledge with the legal skills on top, a really interesting mix. And we're employing others who come from deep professional experience as innovators, as leading commercialization, as leading entrepreneurship, with the legal skills on top, to teach in our innovation area. So it's a different mindset about thinking what is the legal academic, what is the legal professional, what skills do we need to teach our students, and what skills will we need to teach our students.

I've also undergone the formal innovation enterprise training myself. We are equipping all of our staff to go through that, that's a long journey. And it's a confronting one because it takes you right out of your comfort zone. But I've found as I've stepped into that other discipline and undertaken formal innovation training myself, that I've come through to a point where I and the students now are saying "I didn't expect that I would enjoy this, or that I would do this." And all of the learning that we've had as we've watched students go through traditional clinical legal education, we are seeing playing out in this context as well. So as I mentioned today, this is all about learning by doing, some of this were making it up as we go along. We're trying something, we're iterating, we're reflecting on it, we're planning, we're reviewing, we're going back and doing it again and again and again. And in fact the students are having to do that, and reflective practice is critical. So I hope that's just giving you a small taste of what we're very excited to be launching next year. Thank you very much.