Good evening, all protocols being observed, can I say to the Chief Justice, the distinguished guests, and the ladies and gentlemen present tonight what a privilege it is to be here today? I am most grateful to the hosts who invited me, the Caribbean Court of Justice, the Judicial Education Institute, and the Law Association of Trinidad and Tobago for the opportunity to address you tonight.

From this first slide you will have noticed that the top right hand person is a medieval lawyer, probably a notary from the Netherlands, you never know but, certainly, a medieval lawyer.

What about the bottom right of the slide, that's more problematic. These are notaries and they clearly have a sense of humour. They are Dutch notaries and they've just had their livelihoods challenged by the fact that in the Netherlands supermarkets are now offering notarial services online, and their response is to say, "Well, all right, we'll start selling sausages," which I thought was the right attitude to the problem. We will revert to it later.

My second slide should have read, "Welcome from Scotland." This is greetings from one Commonwealth country to another. I am happy to say that my country is still part of the UK, because of a referendum that took place recently [Laughter]. But as you can see Scots lawyers are all online. We live in remote parts of the country, you can imagine they are all islands, as in the Caribbean, and we all sit there with our computers that we link together. But the legal world in Scotland has not always been as modern as that.

Slide 2 is the old Parliament Hall, the place where Scotland’s first Parliament, sat before the Union in 1707. Today Parliament Hall is the venue for a great deal of walking about by lawyers. I once asked counsel, "Why do you walk up and down this hall with your clients or the instructing solicitors all of the time?" And the answer was, "Well, if you walk up and down with your client, nobody else can hear you, so privilege and confidentiality is protected. If you stand there, people can listen." Anyway, this next slide [slide 3] is what Robert Louis Stevenson had to say about the Parliament House walk.¹

"This is the Salle des pas perdus of the Scottish Bar. Here, by a ferocious custom, idle youths must promenade from ten till two. From end to end, singly or in pairs or trios, the gowns and wigs go back and forward. Through a hum of talk and footfalls, the piping tones of a Macer announce a fresh cause and call upon the names of those concerned. Intelligent men have been walking here daily for ten or twenty years without a rag of business or a shilling of reward. In the process of time, they may perhaps be made the Sheriff-Substitute and Fountain of Justice at Lerwick or Tobermory. There is nothing required, you would say, but a little patience and a taste for exercise and bad air. To breathe dust and bombazine, to feed the mind on cackling gossip, to hear three parts of a case and drink a glass of sherry, to long with indescribable longings for the hour when a man may slip out of his travesty and devote himself to golf for the rest of the afternoon, and to do this day by day and year after year, may seem so small a thing to the inexperienced! But those who have made the experiment are of a different way of thinking, and count it the most arduous form of idleness."

Well, that was in the days when there wasn't much work at the Scottish Bar, but things have changed, although they will tell you things are getting more competitive again. But traditions die hard in Scotland, as in other legal Bars.

Just to show that lawyers can be found everywhere, I took this photograph a month ago when I was with an EU delegation on Legal Aid to China. On the left is a Chinese Legal Aid office, very impressive. They have a national network of them; thousands of them. There is one Legal Aid Centre in China within an hour of every member of the population in China. Pretty impressive for a programme that only started 12 years ago. Anywhere you go in China you can ring one number, 12348, it is up there on the slide, and you get through to a Legal Aid Centre. I will come back to that later. On the right of the slide is the equally interesting aspect of the photograph; that's where the notaries are. But you could go to Georgia and find notaries there also. So we lawyers can be found everywhere thriving, but what is the future?

The health warning contained in this lecture may not be true for your profession, but it is true for many branches of the legal profession around the world, not just for Europe, not just for the UK, but for Australia, for Canada, for America. Kronman, who was the Dean of Harvard Law School, wrote a book called The Lost Lawyer ² which is about a crisis in the American legal profession. His message is that the profession now stands in danger of losing its soul. Gerald Hanlon, not quite so distinguished but still a respected author said, "For the first time in 50 years or more, a real battle is being fought to determine who is in control of professions and professionals. I refer to this struggle as a crisis in professionalism."

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² Anthony Kronman, The Lost Lawyer (Belknap Press, 1995)
And down at the bottom of slide 6, is a well-established book on the Legal Profession in England and Wales, *The Ethics and Conduct of Lawyers in England and Wales* which states, "The future of professionalism in England and Wales is uncertain." The authors wrote that in 2008. It is even more uncertain now. Well, labelling the problem, that's the easy bit. The critics all say there is a crisis. What they don't agree on is what the crisis is.

So, Richard Susskind, who is perhaps the leading guru of the future of the legal profession, says, ‘The market is going to drive out outdated lawyers,’ and we will revert to how that will happen later in the lecture. But there is another school of thought that says the crisis is due to the fact that we are all professionals now. The days when hairdressers and dance instructors were occupations and we were professionals, they are gone. Everybody now has a college education; everyone has standards. We are all professionals. Now, the problem is with that, as Gilbert and Sullivan said, "When everybody is somebody, then nobody is anybody." So the question posed on the next slide is whether professions are really different from occupations. If we are different from occupations, why? Just because we are more snobby? Have we got ideas above our station, or is it something that's really different about us? Next, is there an over-supply of lawyers: that's always an interesting debate. How many lawyers is too many?

You can put five lawyers in a room and you will get 20 opinions on that particular question.

A loss of independence. More and more lawyers nowadays are employed by other people, either by other lawyers as the firms get bigger, or by becoming in-house lawyers, or as in Australia and England and Wales, lawyers are going to start working for alternative business structures – non-lawyers owning law firms. So we will be working for a hedge fund or a supermarket. And what will they want you to do? They will want you to focus on the bottom line. They are less likely to want you to focus on professional standards, because that gets in the way. So there's a threat to independence in such working arrangements.

Context is important for defining the crisis. The American legal profession has had repeated Commissions in the last 40 years on the decline of professionalism. Always worried about the same thing, the common question, are lawyers too concerned with the bottom line. Have we lost what it is to be a professional? Curiously, in recent times a different answer has come from an interesting perspective, the American ethicists, the legal ethicists, the people who care about morals and ethics have responded by saying, 'stop all this nonsense about worrying about lawyers making money. Lawyers have always been entrepreneurial. Lawyers have always made money. That's not the issue. It's whether business ethics or lawyer's ethics are any different.' And they say, ‘Look what's happened to businesses, they are becoming more ethical. They are having more corporate social responsibility.’ Why do we sneer at businesspeople? Business people can be very ethical, say the American ethicists. And so they want to say there really isn't

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3 The Gondoliers
a difference between being a lawyer, a businessman and a professional, because this, they say, is a false dichotomy. There is a lot of truth in that argument. Of course, it is a false dichotomy. You have got to earn money to survive. Lawyers who don't charge anything and are not paid by anybody are not going to survive for long. It is perfectly reasonable for lawyers to make a living, but not to think that the world owes them a living. The question is whether lawyers have become too fixated on making a living. I am afraid I am not convinced by the American ethicists, so I apologise to any business people in the audience. I am sure you are very moral but there are unfortunately, in many of the other parts of the world, very ruthless business people – including supermarkets who can be quite ruthless, at least, in my country, when put under pressure. As this slide shows supermarkets have coincided with a dramatic decline in independent service providers – in this case butchers.

What then is professionalism? I think the contrast between lawyers and plumbers can be helpful here. You could say they are both quite alike – both have a college education, both have to pay a lot of money for their education, both have standards, both have practical training and they both deal with society's dirty work. Many of their members are moral people. So what's the difference between a lawyer and a plumber? Well, I think there is a difference and it is not to do with ethics, necessarily. I hope both groups are ethical. It is due to the fact that we expect more from the legal professional. We actually expect professionals to have regulatory standards which we don't necessarily expect of plumbers. (It depends on what community and what society you are in, and about how heavily regulated plumbers are.) Our lawyers in the UK have to guarantee the ethics of their competitors. There aren't many plumbers who have to guarantee the ethics of their competitors. If one lawyer in the UK steals money from a client, all the other lawyers have to chip in to pay for it, so you are underwriting the honesty of your colleagues - it’s an interesting concept. We also expect pro bono work from lawyers. You don't expect pro bono work from plumbers. It would be nice to get it, but there is no ethical requirement. So, I think that there is a difference between lawyers and plumbers, although it is an interesting debate to have with your law students when you get into that discussion about what the difference is.

What is professionalism? Well, many writers have said it is the altruistic aspects; the “other-facing” aspects of the profession. The provision of expertise for the help of others. The access to the legal system that we offer. The service ethic that we offer, and the public protection, which includes ethical codes, core values, complaints ombudsmen or commissions, client security or guarantee funds.4 But actually, there is another side to professionalism. It's the side which the profession itself often focuses on, which is the status, the rewards, the restraints on competition that they expect - that includes the profession’s monopolies - and finally the expectation of autonomy. Thus traditionally, lawyers and

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4 The system I talked about where we underwrite the integrity of our competitors, and if money is stolen from a client, then all the rest of the lawyers pay for it.
other professionals have regarded themselves as having a higher status as expecting reasonable rewards, some measure of protection against out-and-out competition, whether in bans on fee advertising and protection in the sense of self-regulation, in return for delivering on the left-hand side of the diagram in the slide. As you can see I am now operating with a contractual model, or rather a neo-contractual model since the model is more dynamic than the traditional social contract model. 5 Oddly enough I do believe that governments see professionalism in this way. Historically it is rare for representatives of the profession and the government to sit down together to thrash out the terms of such a concord -- although it has happened once or twice -- saying ‘This is the contract. You get this for that.’ It did happen once when William Pitt was fighting one of the French wars and he needed extra taxes. He had negotiations with the lawyers and the lawyers said, "You can't tax us more," and he said, "Yes, I can," and then he went on and said, "Well, I will tell you what, I will give you a special status, I will give you a monopoly over conveyancing." So that is how the conveyancing monopoly was created in England and Wales, it was to pay for the French war. But the point is it was a contract, it was a deal.

Now, what does the State think of this contract? Well, in many jurisdictions nowadays, the State has come to believe that there has been a collective failure on the profession's part to deliver its side of the bargain. Self-regulation has too often, in those countries, become a vehicle for market control, for anti-competitive practices and the stifling of innovation. So the response of numerous governments -- and I am talking about the last 30 years -- has been to weigh into the contract I have outlined for you and to start interfering with the right-hand side of the equation to reduce the benefits that the profession gets and expects, and to increase the requirements and the obligations on the left-hand side. It is a renegotiation of the contract that has been going on. Professionalism is being re-negotiated by governments, competition authorities and consumer movements all pushing for the profession to deliver more on their side of the “contract”

Status. Lawyers have objected to the renegotiation that's been going on. They said, "You are undermining our status.” One of the interesting things about that is that lawyers often worry about their status in many jurisdictions and say, "We're losing ground to other professions." Yet, actually, if you look at public opinion studies it is not true; lawyers remain as respected as a profession as they always have been. They haven't actually lost much status. The irony is it's the lawyers that keep telling all these anti-lawyer jokes. I don't know if anti-lawyer jokes have reached here, but they certainly spread around lots of other parts of the world, and it was the lawyers who told them. The lawyers would say, 'Have you heard the one about the laboratory scientists and the rats? They've stopped using rats to experiment on. They are using lawyers.' ‘Why?’ Answer: ‘(1) Because rats are more intelligent than lawyers (2) you

can get fond of rats and (3) there are some things a rat won't do.’  

[Laughter] Who tells these stories? There are three books I know of on anti-lawyer jokes -- and they are written by lawyers. We love these jokes. Actually, our status hasn't gone down at all if you read the public opinion polls, but they still worry about it.

**Public protection.** We offered over time: ethical codes, core values, complaint systems, client indemnity insurance and client security funds. The State said, ‘that's not enough.’ What the State has asked for is greater liability to third parties, stronger fiduciary duties and compensation to clients for providing inadequate professional services. Now, I know I haven't asked whether you have the concept of inadequate professional services, you probably don't want it as lawyers, but I will tell you what it is. In the UK, if you are a practising lawyer you are required by law to deliver an adequate professional service, a service that a reasonable professional in that part of Scotland or England, in that area of legal practice, would deliver. And if you don't, a client can complain to an independent commission -- and I served on it, so we were independent. They would complain to us and they would say, "My lawyer let me down. He didn't deliver an adequate professional service." We would investigate it, and if we came to the conclusion that they hadn't delivered an adequate professional service, then -- and this cost the client nothing -- the lawyer could be made to do the work again for nothing, to pay for another lawyer to do it, or to pay compensation for negligence of up to £20,000. In England it is £30,000. This is a way to allow consumers to redress the “information asymmetry” or power imbalance between the lawyer and the client in terms of knowledge and experience without having to sue lawyers in court, without having to find a lawyer to sue another lawyer and without having to find the funds to do it.

We have been running IPS for 30 years and the legal profession has not collapsed. Before you wonder, have they all gone bankrupt? No, they haven't. There are many weaknesses of the system; I know because I have tried to operate it. But the idea is a good one, and so that's one of the ways the State has tried to up the ante -- tried to build up public protection -- because there is an information asymmetry between lawyers and clients. That's why clients come to us. We are the experts, we know all the information. If we don't, why on earth are they paying us? But if that's the case, then they are potentially vulnerable to the mistakes or worse of bad or poor lawyers. That's why you have to have a complaints system that's prepared to even up the odds without being biased, which I hope it isn’t.

**Access.** The professional obligation to provide access was access to the courts as well as access in the sense of access to the legal profession. Now, that meant that the profession should have been doing more to support diversity in the profession in the way of gender and ethnicity, and more access to the lower income than we were doing. From the slide of England and Wales, you can see that if you project on from 2009, we are pretty near 50/50 in terms of solicitors in England and Wales, male/female. Race and ethnic diversity are not far off the population average, but it’s much harder for those from ethnic
minority backgrounds to get into practices that are elite practices; the high spending legal practices.

Here, in this slide, are the Scottish statistics, the key lines to look at are the red lines, which is the percentage of females in practice, and the green line is the percentage of males in practice, and you see the two lines are converging and in about a year's time we will have 50/50 male/female in the whole profession. I am not talking about entry to the profession. We have been running at 75 per cent women entering the profession for many years now, as have England and Wales, Australia and America. What we are talking about here is practising lawyers.

However, what does it all mean when it comes to partnerships? There it is a very interesting story. Look at what's happened. The proportion of men who are becoming partners is gradually declining, but as we get more and more women in the profession, they are not increasing proportionately as partners in the profession. Now, partly that is because they don't want to be, but partly it is also because we haven't solved the problem of the glass ceiling or work life balance.

What about access for the population? Ignore the red and the blue bars other than to say the red and the blue bars is where the lawyers are, mainly in large urban areas. Where's the population? That's the green bar. Well, you see, there are far more lawyers in the big cities, but as you go down, it just varies. And then you get to accessible rural areas, lots of population, and not many lawyers. So it looks like we have got a bit of an access problem in Scotland. Remember we are quite geographically spread in Scotland. England and Wales is not that different either when you look at it. What we know from research is that we need to be devoting our energies as lawyers into the front line services. We need to be building the fence at the top of the cliff, not running the expensive ambulance at the bottom of the cliff, when frankly far too much has gone wrong for us to make the difference we want, if you want another illustration.

What we found when we did needs analysis research was that those with short-term money problems could be threatened with eviction. If you did nothing, it affected your work, you were threatened with dismissal, your relationships came under strain, family breakdown, physical and mental health problems. It was a cascade effect. If you don't attack social problems at an early stage, they just get worse. What you need to do as a lawyer is you need to get the advice in early to stop the cascade effect. So early intervention is the message that's gone around the world, and it came from Hazel Genn's research⁶ -- some of you have met Hazel -- research in the year 2000, and then I did a piece with her in Scotland. These studies have now been replicated around the world with very similar results.⁷ And the result is always early intervention is the answer.

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⁶ H Genn, Paths to Justice (Hart publishing, 1999).
⁷ Pascoe Pleasance et al, Paths to Justice (Nuffield Foundation) http://www.nuffieldfoundation.org/sites/default/files/files/PTJ%20Roadmap%20NUFFIELD%20Published.pdf
Where do people go when they have a problem, a serious problem, a justifiable problem? And this slide shows where they go. Actually, lawyers are not doing badly. In this survey normally they come about third in terms of sources of help. Most peculiarly, from my point of view, these are all civil problems and look how high up the police are; it is very interesting. Around the world people with civil problems go to the police. I have never found out what the police do with them, which is what we need to find out. But, actually, it's not an irrational strategy. If you are having trouble with your neighbour or an abusive partner you go to the police. The police may be able to sort it out. It is not totally irrational, but it is interesting how many civil problems are going to the police and other bodies, but not the lawyers. Yet ideally we need the lawyers to get in early. Now, the lawyers will respond by saying, "Well, it depends on how many resources you are putting into Legal Aid." Well, as we can see from this slide - this is what is happening in Europe - if you combine the legal aid payments with the payments on the courts and on prosecutors, lowest of all are Moldova, Georgia, and Albania. They spend six Euros per head on all three heads. Down at the bottom you have the highest spenders e.g. Switzerland, Luxembourg and two-thirds of the way to the top you have England and Scotland. If we just looked at Legal Aid, by the way, it would be different. Scotland and England would be way at the top as the big spenders, but that's just Legal Aid. To get a clearer picture you need to look at the overall spend on the courts and on prosecution. This slide shows what a variation in spend exists in Europe. So, of course, there is a variation in access because different jurisdictions are putting different amounts of money into the system. So variations in access are not entirely the fault of the lawyers.

Like many other jurisdictions, Legal Aid budgets are being cut because of austerity, and so this puts more pressure on the profession to do pro bono work and to find creative ways of dealing with this. The Dutch have had to make the same level of cuts as the English and Welsh but have chosen a far more interesting way of approaching the problem. For too many jurisdictions all they do is cut the fees of lawyers, the eligibility limits for clients or they cut the scope of the Legal Aid programme. That is not the answer. The Dutch answer is technology as we will see. In Scotland we have used another answer. This slide depicts the very North of Scotland. What we are doing is trying to join up legal services. We have joined up the Citizen's Advice Bureaux, which are spread around the Highlands, and we put a central office in Inverness, which is there (indicating). It is manned by lawyers who are employed by the Legal Aid Board, and they take telephone calls from the CABs and legal offices from all around the Highlands. And the CABs say, ‘We have got this legal problem, do you want to handle it?’ They ring up a private lawyer and they say, ‘Do you want the work?’ And the private lawyer listens and says, ‘No, I don't want that work, it is too complex,’ or they say, ‘Yes, I'd like that work,’ and it gets sent to them. So the cases that the private profession doesn't want to do are dealt with by the Legal Aid lawyers, but the other ones are dealt with by the private profession. So here you have got a partnership between the Citizen's
Bureaux, the salaried lawyers who are working with the Legal Aid Board and the private professionals. This is joined-up legal services and I think it's the way forward; it's been tried in Australia and it's been tried in different parts of America and Canada.

**Reasonable rewards.** Lawyers have always been sensitive about their rewards. Interestingly enough this is one of the areas where the State has not been active around the world. The governments have not stepped in very much; they don't regulate hourly rates. They do regulate Legal Aid rates as part of the austerity drive, but that actually is not the answer. The lawyers have even managed to avoid government attention over the rates of private fee which they charge by claiming to have independent audits of their fees. Unfortunately, it turned out when we did the research that the independent audits weren't quite as independent as we would like. So, that hasn't always worked. Nevertheless, governments have not attacked or not been able to do much on the reasonable rewards element of professionalism, you will be pleased to hear.

**De-regulation.** Here governments have been much more active. They want more competition, by and large, whether you are in Australia, America, Britain, it's more competition. It is the competition authorities that have been driving us, and it is the same in Europe. So they've gone for de-regulation. They've reduced the profession's control of entry to the profession, which produces more lawyers. They allow much more advertising; competitive, comparative advertising. You are allowed to say, “I'm better than that lawyer”, “I am a specialist in this area of law”, “I am a cheaper lawyer” or “I'm the best lawyer,” as long as you can prove it; that's the sting in the tail. If you say, “I am the best conveyancer in this part of Scotland,” you have to prove it. I am on the committee that investigates whether you are the best. So I can tell you, it is actually quite hard.

*Alternative Business Structures* are a product of the drive for de-regulation. This is what I warned you about a few minutes ago. That's when we bring in, or we allow, non-lawyers to own law firms in England and Wales, in Australia. In Scotland we resisted it for a bit and we are now only allowing them to own 49 per cent of lawyers' firms, which might stop supermarkets being interested in our firms, hopefully. I am not a fan of alternative business structures because, as I said, I think they are going to drive ethics and ethical standards down.

Now, I may be entirely wrong about this, in which case I will apologize to the hedge funds, but I think the hedge funds that are pushing for Alternative Business Structures are in it for money. They are not normally in it for other things. I mean, they may want more things, but they're certainly in it for money. The difficulty with Alternative Business Structures is how you regulate them. As one commentator put it: “The banking crisis was caused by doing what no society ever allows: Permitting young males to behave in an unregulated way. Anyone who studied neurobiology would have predicted disaster.” If that was true for the Banking sector, what will be the position for the legal profession?
Somewhat surprisingly there has been a move to introduce the light touch form of regulation with Alternative Business Structures which proved so spectacularly unsuccessful with the Banks. This is variously described as principle-based regulation or outcomes-focused regulation. For reasons that remain unclear the decision was taken to introduce principle based regulation into the legal profession just when it was beginning to unravel in the finance industry. Well, I wouldn't have thought that was a particularly good way of going forward, but I have told you I am biased against principle-based regulation because it doesn't offer a way forward in discipline cases. By all means give core principles to the profession, we need to emphasize them. But when it comes to dealing with professional discipline and complaints, it's no good having a vague woolly principle because any decent lawyer is going to say, “That's unfair, you can't charge me with that vague offence. You have got to give me clearer guidance as to the case which I have to meet.” So principle-based regulation is a difficult way of making your complaint system work.

Alexander McCall Smith has this interesting quote from The Ladies’ Detective Agency.

“The problem, of course, was that people did not seem to understand the difference between right and wrong. They needed to be reminded about this, because if you left it to them to work out for themselves, they would never bother. They would just find out what was best for them, and then they would call that the right thing.”

We are awfully good as human beings at rationalizing what we want to do, and then deciding it is the right thing to do ethically. So I agree with Sandy on this particular point; you need to give guidance to people. Principles are good, but you sometimes need to give them rules as well.

**The challenges facing the profession: Destabilising Forces**

**Proportionate Regulation.** As we can see from this slide, the first challenge confronting the profession is proportionate regulation. We have seen that principle-based regulation is what the English have gone for. It's been considered in Scotland; but I don’t think they will adopt it. Next, in England and Wales they have opted to split the regulatory and the representative functions of the professional body. The idea came from the consumer movement. Normally I'm quite pro the consumer movement, but not in this case. I think they've got this one wrong. What they think should happen is that the profession should deal with representation of their members’ interest, and regulation should go to an external body, and that's how we deal with it in medicine in the UK.

But what that leads to is the doctors in the UK regarding the representative body as their leaders, not their regulator. The body that sets the standards and develops the standards is not seen as their leaders. It is the one who does the representation, the trade union bit. I don't think that's the way we
lawyers should go. The doctors feel there are problems with this model, yet we have tried in England and Wales to develop this model whereby the regulators are in one corner and the Law Society and the Bar Association (the Bar Council), are in a separate corner. I don't think that's right. I think what you should do is what we are doing in Scotland still; you make the professional body be responsible both for looking after the interests of the members and for the public interest in relation to the profession, and you monitor how they do it. We use an independent commission, which looks at them and says, "You are not doing enough for the public interest," or "You are not doing enough for the profession's interest." But you are forced as a profession to engage with the public interest, as well as your own interest. If you split the two functions, then you just encourage the profession to look after its own interests and trade union functions.

**Competition.** The second challenge facing the profession is ever-increasing competition. How has the profession reacted? Unfortunately, when there is too much competition, our lawyers tend to respond tactically, by cutting prices, but not thinking strategically. Lawyers don't like to think strategically. We did research on what lawyers do when faced with more competition. The sad thing was that only 20 per cent did something strategic when faced with competition. Sixty per cent opted instead for a tactical response – cutting their prices a bit, and the other 20 per cent just ignored the increase in competition. That's not the way to make your profession thrive if only 20 per cent of your profession is thinking strategically about how to challenge the future.

**Disruptive Technologies.** The profession's third challenge is that from disruptive technologies. Here I am going to be quoting from the Chief Justice. The Chief Justice said in his speech to many of you last month at the opening of the law term:

"Innovation does not mean doing what we have always done, faster. It includes doing something differently either because it is more effective (as opposed to merely efficient) or in response to a different environment or problem."

And that is what disruptive technologies are. But if you want to know what a disruptive technology is, that's a disruptive technology (indicating). You all know what that is, it is an auto teller. But think back before we had them. At 3 o'clock in the morning, did you go up to a hole in the wall in a bank and lean through and say to somebody, “I would like $200”? No, you didn't. They didn't have them there. So what happened? We had to find a bank that was open – a tall order at the weekend - and then we had to wait in line at a counter before we could obtain our money from the bank that we had entrusted it to. Now it has all changed. You no longer have to turn up when the bank is open. You can turn up any time. But there was a downside for bank staff. The banks had to sack a whole lot of tellers because they weren't needed. That's a disruptive technology because the banks had to change the whole way they distributed cash to clients. The bad news for us as lawyers is we are going to get hit by disruptive
technologies. I will show you one or two of them shortly. We are going to have to find different ways of dealing with parts of our core functions as lawyers.

**The Solution: Strategic Thinking.** The first solution to the challenges set out above is, as the slide shows, proportionate regulation. We need proportionate regulation which achieves effective co-regulation between an ombudsman and the profession. Secondly, we need to increase efficiency. You can regulate competition and not breach the competition principles, by the way. And you need, in my view, to preserve quality by pursuing quality assurance. As to the last, we have accredited specialists in the UK, as many jurisdictions do. Unfortunately our way establishing their credentials – which is basically self-report or mutual support from fellow “specialists” is not our strongest point, and it is not the strongest point in America, although parts of America do it better than most. The profession is in a bind over accredited specialists. If you accredit some lawyers as specialists, then you are sending a message that other lawyers or generalists who do the work aren't really good at it, so the profession doesn't really like to do that, and that explains the failure to have robust accreditation of specialism mechanisms. But does it? How come we are used to having physicians with 20 different specialisms, and nobody gets worried about what that says about General Practitioners? Why do we allow lawyers to go straight into the profession, put up a shingle and they can do any kind of work at all, and we imply to the public that these new lawyers are competent to do every form of legal work? Moreover, we convince them that they're competent to do every kind of legal work for ever and a day. How? How did we get to be so competent? As soon as you got through law school, you get to be competent and you remain competent whatever you do, and don’t do by way of updating, thereafter? It doesn't convince, does it. We need quality assurance.

So how do we measure quality or do something about quality assurance? Well, as the slide suggests, you can do it in a variety of ways. You can do it by asking the lawyer (No.1), you can do it by asking the client, that's No. 2. Thirdly, you can look at the file, which is something I will come back to. Four, is you can video the courtroom. Interestingly, in the Caribbean Court of Justice, they video the courtroom. You could assess the quality of the lawyers in that court by looking at the videos and using peer review. That's what they do in Chile. There, every public defender, whether they are salaried lawyers or in private practice, is videoed in the court and their performance is assessed by an independent peer. It is a good system.

You could also get the judges to do it, as the next slide shows. Now, this is one I am not sure whether the Chief Justice wants to do here. The American judges were asked 30 years ago, "Do you want to assess the quality of the lawyers who appear before you?" because they were always complaining about the quality of the lawyers who appeared before them in the American Supreme Court and other courts. But when they were asked that, they said, "No way, we don't want to get involved in that. That would
disrupt our relationship in the courtroom and make the courtroom much more difficult to manage,” and it was absolutely true. It raises real questions about independence. Your client knows that you are being assessed by the judge and the question is, are you going to spend more time thinking about how you are being assessed than thinking about what is the best way of representing your client? It is very difficult.

So what's happening in England and Wales? At this moment a case is going from the Court of Appeal to the Supreme Court because the Bar is challenging a plan that will make judges assess the quality of all criminal defence lawyers in England and Wales; it is called QASA (Quality Assurance Scheme for Advocates). They are going to rate them on four standards, entry level standards, second level, jury level, and complex fraud case, and you have to be able to go from one to the other and prove that you have got the quality to do it. You won't just be able to turn up and say, "I have got the quality." You have to prove it, and you have to prove it on a regular basis.

Now, the Bar doesn't like this. They are worried about it. I understand that and I don't think that the judges will be terribly keen on it when it comes to having to put the scheme into practice because it is very difficult for judges to do it, and for us to achieve consistency of marking between different judges, but that's what is planned. We will wait and see whether the Supreme Court strikes it down. I think it very unlikely because all the way up, the judges have been right behind this and the Court of Appeal has just given a very resolute decision saying, "QASA is fine. There is no threat to the independence of the lawyers." So, we will see what happens.

In my view peer review by fellow practitioners is the way forward. That's me in the middle of this slide which is a mind map drawn up by the Dutch notaries when they were introducing peer review- I managed to persuade the Scots and the England with help of friends and colleagues to take up peer review, but the first country that took it up abroad was Dutch notaries, and I did not even train them; it was amazing. They just copied what I was doing with the Dutch lawyers. In the UK we do peer review on files. As this slide shows the technical definition of peer review is:

"The evaluation of the service provided against specified criteria and levels of performance by an independent person with significant or recent practical experience in the areas being reviewed."

That's what peer review is. We don't allow a competitor to review you; we don't allow someone who has got connections with you to review you. We use trained lawyers in one field to assess lawyers in the same field, in different parts of the country, against set criteria which have been agreed with the profession. It is all transparent. The profession knows what the standards are. We have websites and we have all the standards up there. We tell them what all the questions are; they know exactly how they are to be assessed and by whom. We have been doing this for over 12 years in Scotland.

Is it a way of getting rid of practitioners? No, it is not devised to get rid of practitioners. Out of
1,700 lawyers we have reviewed in Scotland -- three times we have done it to them, three cycles -- I think about 20/25 have dropped out. That's not why we do it. We do it to raise standards because we give them feedback. We are trying to get practitioners to improve and get better and better, and we have got the results to show that we are getting better results as a result of introducing peer review.

But has peer review been taken up elsewhere? Well, England and Wales do it in the case of what are regarded as higher risk legal aid firms. In Scotland we do it to all legal aid firms and practitioners whether on the civil or the criminal side. Pleasingly, there are other jurisdictions who have borrowed our ideas without our involvement. South Africa is one of these, and I’m glad to say the system has been a success. The Chileans, on the other hand introduced it with no knowledge of our work. In the Netherlands the notaries embraced the concept, having seen what we are doing, but I have also done two pilots with the lawyers there, and we are making progress. In Finland I have also done a pilot, and in Moldova. China it seems has borrowed from us but it’s not clear that it has worked. That’s good news for me in a way because I have been asked to go out there to see what went wrong.

**Re-validation or re-accreditation.** As I indicated earlier it is not a strength of our legal systems that we assume that a newly qualified lawyer attains a level of competence then and there which they never thereafter need to refresh or enhance. With doctors that position has been abandoned. As we can see from this slide we now require all UK doctors to have their competence re-validated or re-accredited every five years based on a combination of peer appraisal, patient satisfaction, complaint statistics, clinical audit and skill assessment. We have not got there in the case of lawyers, although there is research evidence which suggests that our clients assume that we have our competence re-checked, like airline pilots, at regular intervals. However, as you can see, the peer review of our legal aid lawyers is a form of re-validation. Interestingly, our large law firms are revalidating their lawyers in-house, as well, because the insurers require it as a risk control management. So it is actually only the firms in the middle that don't do legal aid work who are not peer reviewing themselves or being peer reviewed. Predictably, as we will see shortly I think that these remaining firms should be embracing peer review on a voluntary basis.

**Harnessing technology more effectively.** The third solution to the profession’s challenges is to improve our service delivery by harnessing technology more effectively. Richard Susskind says, “The market will drive out outdated lawyers.” Well, there are some outdated lawyers as this picture shows. [Laughter]. More seriously we need to take heed of another slide from Richard. We lawyers, we like to think that everything we do is bespoke; it is tailored to every client. We write every letter, draft every contract, every lease, every commercial transaction, everything is tailored anew. But, of course, today’s frenetic times do not allow such luxuries even if the client could afford them. For many years now we
have used stylebooks with different style letters, memoranda and draft deeds to save ourselves from having to re-invent the wheel with every new client or transaction. This then leads to standardization. If we are doing the same type of share transfer, the same articles of association for many similar companies, of course we don't reinvent them from scratch -- what a waste of time that would be. So we standardize, and then begin to systemize our serviced provision. In turn this leads to us packaging our services and finally commoditizing them. This is the way the market is driving us.

Already the big law firms in America, London, Australia are unpacking, unbundling their services in large transactions or cases. This involves outsourcing parts of the transaction /case to more junior or less expensive lawyers based in other English speaking countries such as Northern Ireland, Scotland, India and New Zealand. Why would a London lawyer send work to New Zealand overnight? Well,

(a) it is cheaper, since they cost less;
(b) they're equally well trained;
(c) they speak English; and
(d) because it is done overnight the firms can provide a 24-hour service to their clients.

That's the global world we are in.

Moreover if lawyers are starting to unbundle different parts of transactions or cases that means we have new jobs for lawyers. There's a whole new job skill in unbundling a transaction, and then another person is needed to put all the parts back together. These are new law jobs that the lawyers of the future are going to do, because we are not going to be delivering to our clients the traditional bespoke service of the prototypical lawyer of the past. Richard Susskind comments in his writings that he frequently discusses this change with large firm lawyers and each one says to him, “You are absolutely right in your analysis in what's happening to the profession, but it is just not going to happen in my part of the profession. We will carry on doing the bespoke work as we have always done.” And Richard says, “No, you won't. Part of what you do will remain bespoke and the clients will be able to pay for the high fees that you charge, but it is not going to last forever. The market is going to drive it in the direction of standardization and systematisation, so you will have to adjust; you have to learn from the future.”

This next slide is from the Netherlands and reflects the development I mentioned with the very first slide. This is a picture of a HEMA supermarket. HEMA decided they were going to move into other areas than just selling food. They would move into transport of food, they would move into architecture, and they decided they would go into the provision of notarial services. They would have notaries online and you would be able to go in the remote parts of the Netherlands, enter a supermarket and be able to go to a touch screen and access notarial services online. The notary would draft the contract or will and in the end you would have a meeting with the notary to check that the deed was correct and to allow the notary to be assured that the client has the capacity to instruct him. But much of it could be done online.
The Dutch notaries are seen as very radical in allowing this. I was at a meeting two weeks ago where I was on the same stage with the head of the European notaries and his first slide was, "Dutch notaries, pariah?" What he was saying is, "Have you lost your mind? Are you really, seriously going to go down this route that is going to open up competition in this kind of way?" Then the Dutch said, "Well, there was nothing else we could do," and they were quite right. The market tends to get its way in the end.

We, in Great Britain already have supermarkets which are moving in similar directions. We can see what an impact supermarkets have had on the independent high street traders, so high street law firms have good reasons to be concerned. The Co-operative supermarket is offering legal services to middle income or low income families and they have got standardized services, unbundled services which they are offering. You can see what they offer by logging onto their website. Well, as this slide shows it’s not all bad news for the legal profession [Laughter]. Co-op legal services lost a lot of money in the early stages. So you might say, “Oh, good, this new system is not going to work.” Well, I'm not sure. They invested a lot, it's too early to tell whether it is going to work, but, yes, you can be leading edge, or bleeding edge.

But look what's happening in the next slide, the top line, the brown line shows that over 70% of the population was using the internet two years ago. The pink line is people's use of the Internet to solve legal problems. This line has grown sixfold in the space of ten years. But there is a big gap between the lines. What we are doing is we are looking at how we can use technology to solve people's legal needs. Now, you will say to me, "Well, people who are of an older generation are more technologically challenged." Yes, we are. But what we also found from the research is the youth of today who use their iPhones; they don't use iPhones for studying the law. They don't, when they have legal problems, rely on their iPhones at all. So actually there is a digital divide amongst both the old and the young. They are not solving their problems by using the iPhone. So we have got to work smartly. We have got to work out how to use the Internet to its best advantage.

As we saw at the start of the lecture, early intervention is part of the answer. Remember the picture of the fence and the ambulance -- we need to get in early with help. Telephone hot lines, have a role to play, and we have got a lot to learn from China. As we saw earlier they have got a national hotline (12348) whereby wherever you ring from in China, the telephone software will direct you to the nearest Legal Aid centre to you, automatically. If that one's busy, it will direct you to the next one. If the telephone can't resolve your problem, they will set up an appointment with a lawyer in that Legal Aid centre. Integrating phone and face to face advice in this way is the key to a hotline’s success.

How best to tackle digital exclusion? I have listed on this slide the url of a report that I did with Roger Smith about face-to-face legal services, and to what extent technology can replace them. And here is one last disruptive technology that I will leave you with. This is the Rechtwijzer from the Netherlands.
It is the most advanced package of its type -- the Americans have got some systems that aren't quite there, as have the Australians. They are document assembly programmes which link to the internet. But this does it all. It is a divorce package or a matrimonial breakdown package and the clients, without the help of a lawyer, are interrogated by the software to diagnose what the problem is. They then have a dialogue with each other, without the help of a lawyer, about what their assets are; intelligent software dealing with it. At that stage, when we get to triilogue, you can be referred to a mediator or to a lawyer to give each of you independent advice. At the end it produces a legal agreement that sorts out the problem. But it does not stop there. Very radically -- remember this is a disruptive technology -- they bring in an independent lawyer, who will review the agreement and make sure it is fair. We don't do that in our current system, in our adversarial system, we don't have an independent lawyer stepping in to make sure that the divorce settlement is fair. But that's what they have got here, a new way of delivering a service. Finally, there will be aftercare to make sure that the agreement is adhered to.

European policymakers in the legal aid sphere are very interested in what the Dutch are doing. Theirs has been a typically Dutch response. As in England and Wales they have suffered a major cut to their legal aid budget. What did they do, did they go around slashing lawyers’ fees, scope and eligibility? Only to a limited extent. In a very bold way the Dutch said, “We will spend millions of Euros on a new package which may involve less lawyer input, but may produce a better service as a result.” Very radical, very brave, very bold. I am a fan. Now, it may not work. There are ethical issues with this, but it is a disruptive technology and we are all watching it.

So Susskind's new ways of lawyering have much to tell us. First that we should seek to provide an on-going service to our clients. As the lawyers of the future we need persuade them that we are their friends and trusted professional advisers on an ongoing basis, not just a distress purchase. Get in with the corporate clients, help them with early intervention, that's your job. To see off the problems before they happen. And my view, if we are to survive as lawyers, we have got to preserve the brand of “solicitor”. What's going to happen in England and Wales? In the case of conveyancing or litigation, wills, there are now up to five different groups of people delivering these services. Not just barristers, not just solicitors, or legal executives, but other groups all competing to do this. And the regulators are getting to the stage where they are saying, “Enough, we are not going to have six, seven different groups all regulating different providers to different standards. We are going to regulate the service. Whoever does conveyancing will be regulated by us, and we don't care whether you are solicitors or barristers, or whether you are legal executives, or bankers. We are going to hold you to the same standard.”

What is the profession going to do then to show that, really, we are different; that we are worth instructing? “You should instruct us and not the legal executive who is cheaper”. We are going to have to do something to mark us out. Revalidation is going to be part of it, but quality assurance and
preserving the brand is also part of it. That, to my mind, is the way forward, at least, for my profession, and in England, their profession. If they want to survive and not just become swallowed up into an amorphous group of legal services providers, they are going to have to do something to show to the public that they are doing something more than shifting the deck chairs on the Titanic. We could end up being indistinguishable from businesses, or like so many occupations which have claimed the cachet of “profession” but done little to justify a social contract. Again the profession could fragment with the really large law firms breaking away, along with alternative business structures. At the other end of the spectrum legal aid firms may peel away from the middle ranking provincial firms. I hope we're not going to fragment. I hope instead we are going to rescue the brand. However, to do that we have to embrace quality assurance and innovation. There are exciting times ahead.

Thank you.