„While Knowledge Abounds, Skills Are What Counts“: - An Essay About the Attorney of Tomorrow -

By Jörg Risse[*]

A. Introduction: What does really count?

What are the key qualifications for tomorrow's attorney? And how do we have to structure legal education to teach the so-determined qualifications? The answers to both questions seem difficult, if not impossible, since they require a prediction of how the legal market will develop. However, as with most difficult questions, the answers prove to be easier than expected: In this case, they may be embodied in two poems by the German poet Erich Kästner (1899-1974) which are quite meaningful, not only in our regard. The first poem reads:

> *Wissen ist Macht,*
> *wie schief gedacht,*
> *Wissen ist wenig,*
> *Können ist König.*

A rough, not literal translation may read as follows:

> Knowledge is power.
> That's what you think?!
> While knowledge abounds,
> skills are what counts.

If we interpret those four lines by trying to establish a relation to our introductory questions, we may arrive at the following solutions:

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B. Analysis: The Declining Value of Knowledge

In the first two lines of his poem, Kästner points out that the importance of knowledge is generally overestimated. That proves to be true for legal knowledge as well. Four arguments support this hypothesis:

The impossibility „to keep track": Legal knowledge as a whole is expanding at a speed which renders it impossible to keep track. If the often stated assumption is true, that the knowledge of the world doubles every five years, that certainly applies to legal knowledge. In Germany alone, three different legislative bodies (*Länder* (State) and Federal Governments plus the European Union) increase the body of statutory law at a breathtaking speed. This black letter law is not only interpreted by the courts but also commented upon by commentators, academics, practitioners in numerous (and expanding) legal journals. If you, esteemed reader, want to keep track with that development, be prepared, alert and tireless! And if, for example, you happen to be in tax law: Did you know that about 60 % of the entire legal publication on tax law is written in German? You want to keep track? Well, back to your desk, then!

The impossibility to stay up to date: In addition to the rapid expansion of legal rules, it is also changing quickly. A well-known saying by the 19th Century German Lawyer, Julius von Kirchmann, is that *„Ein Federstrich des Gesetzgebers, und ganze Bibliotheken werden zur Makulatur"* which translates to „With a stroke of the legislator's pen, multitudes of libraries can turn into waste paper". A good example for that development is the recent change of the German law of obligations.[1] A practicing attorney with a busy schedule must work nightshifts to stay up to date.

The improved access to the law: No practicing attorney must become desperate in the face of the law's expansion and its speedy change. The described development is partially compensated by the lawyer's easier access to that knowledge. Why is that? Well, to start with, still only twenty years ago, most of that knowledge had to

[1] See, e.g., Peter Schlechtriem, The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe, Oxford University Comparative Law Forum, http://ouclf.iuscomp.org/articles/schlechtriem2.shtml; Hans Schulte-Nölke, The New German Law of Obligations: an Introduction, http://www.iuscomp.org/gla/literature/schulte-noelke.htm; Reinhard Zimmermann, Breach of Contract and Remedies under the new German Law of Obligations, http://w3.uniroma1.it/idc/centro/publications/48zimmermann.pdf .

be amounted and collected in the head of the practicing lawyer - at least to a degree that he knew where to look up the legal problem if that legal problem arose. Nowadays, highly sophisticated and fully computerized data bases support the practicing lawyer in locating answers to most intriguing legal questions. To find remote, but clearly applicable court decisions to a given legal problem requires little more than the proper use of a keyboard and the typing of a few key words. In a nutshell: While it is less necessary ou to know the answer to questions you simply have to know where to find it. The only remaining skill involved is to determine the right question and that is indeed difficult enough and requires the corresponding knowledge.

Knowledge is rarely a lawyer's USP, a *unique selling point*: In order to succeed in professional life, each lawyer needs a USP. Such USP is the lawyer's argument to convince a prospective client to assign the matter to him and not to his competitor next door who offers the same legal services. Since, at least in Germany, the number of qualified attorneys increases at a staggering speed which in turn furthers a sometimes fierce competition, it will become more and more important to establish a unique selling point. However, and that often comes as a surprise, legal knowledge as such has hardly ever been such a USP. The majority of clients is not in a position to effectively ascertain their lawyers' knowledge. The sole exception might be that the client has a sophisticated legal department - but that is rarely the case, especially for the more ordinary attorney whose prime business is to advise private individuals and small companies. You may compare the client's situation to a painful visit to the dentist: in 9 out of 10 cases, it is hard to say whether the dentist did an average, good or an excellent job. In all of its irrationality, your judgment will exclusively hinge on the degree of pain endured. The greater the pain, the greater the suspicion vis-à-vis the dentist's professional qualifications. Yet, the average dentist does, in the eyes of his patients, not differ from a good or excellent colleague – and the same applies to the client/attorney relationship. And what is true for individual practitioners is also true when comparing large law firms: the quality of those law firms is always above average as far as the applied legal knowledge is concerned and new matters are rarely assigned because of known differences in quality. Thus, even the large and economically successful German and international law firms must not focus on marketing their superior legal knowledge since this knowledge is generally not disputed by the clients.

All four arguments hint into the direction which Kästner phrased so elegantly: As knowledge abounds, knowledge itself is losing its importance as a key factor for the attorney's professional success. Thus both the attorney's education and the attorney's marketing should focus on other issues.

C. We conclude: Skills Are What Counts

If the hypothesis is correct that legal knowledge as such is losing importance, one question arises: What shall replace or amend legal knowledge as the decisive teaching and marketing issue? If we analyse this problem we quickly arrive at a magic formula:

Attorney's Success = Legal Knowledge + Applied Skills + Fortune

The work product of an attorney is the addition of legal knowledge and applied skills; his success is the sum of the former plus some luck, or fortune. In this formula, legal knowledge means nothing more than everything an attorney has learned at law school and during his continuing legal education minus what he has forgotten in the meanwhile. Skills are the ability to transport what is left of that legal knowledge into the minds of the addressee, namely the client, the judge or the opposing counsel. Since we have learned that this knowledge loses in importance and since we know that luck cannot be acquired by personal endeavours, we must clearly conclude: The „skill" is the only variable left in our magic formula and thus it should be the target of the attorney's learning and marketing.

Three examples may illustrate how acquired skills improve the attorney's work product:

Effective Writing: Attorneys mainly communicate in writing but how little do we really know about the art of *legal* writing? A small experiment: What do you, esteemed reader, believe to be the better and therefore more effective sentence in a legal brief: „The dog chases the cat" or „The cat is chased by the dog"? To start here, German lawyers will almost unanimously opt for the first sentence since the „active voice" is generally considered superior to the „passive voice". But, judged on the basis of effectiveness and not on verbal beauty alone, this is plainly wrong! Studies demonstrate that the answer depends on the audience who always tends to identify with the subject of the sentence. Thus, if you write to a cat lover, you are advised to use the passive voice alternative (likely to prompt a reaction of compassion: „Poor kitty"), if you write to a dog trainer you might want to use active voice (the likely reaction being one of sports like excitement). That example seems too remote? Well, if you write to a client about your recent victory in the courtroom you should emphasize the role of your law firm by using its name as the sentence's subject: „Miller & Tweeds have successfully argued ….." (reaction: „great law firm"); if the judge has decided against your client you might choose not to focus on your firm's services but to blame others: „The judge did not understand the argument …" (reaction: „stupid judge"). Does that sound more practical?

Skilful Presentations: One of the best promotional opportunities for an attorney is to give a speech to an audience of potential clients. Most attorneys will make elaborate use of powerpoint presentations with colourful slides and interesting gimmicks. Doing that, most attorneys violate the „three second-rule": It is well established that the short-term memory of their audience can only bridge a distraction of three seconds. In a powerpoint presentation three seconds translate to roughly 12 syllables and if the audience looks at a longer slide presentation, there is a high probability that the audience will lose track of the speech itself. Thus, often powerpoint presentations tend to be much too long and a textual slide of adequate length can hardly convey anything meaningful. The exception are images or graphs which we can grasp in less than three seconds. As a rule of thumb, we might thus be well advised to use powerpoint only quite moderately in order to permit the audience to focus on the most important issue, namely on your speech and on yourself as the speaker. Another issue is that a skilled speaker always creates a „memory effect" since he knows that an average audience will forget more than 90 % of the speech within 24 hours. What is left is an impression („an interesting speech") which the speaker must link to his person: „I seem to remember only the speaker's rather outrageous tie…".

Professional Negotiating: In commercial and corporate practice, but also in many other fields of an attorney's work, her main job is to negotiate contracts or settlements. Most often she is an expert as to the substance of that negotiation but rarely will she be fully aware of the details of the „art and science of negotiation" itself. So, as one result, she might tend to focus more on positions than on interests. A position is the assumed solution of a problem consisting of the underlying interest. Another, admittedly childish example might serve as an illustration: Two brothers fight for an orange when their mother comes in. Like Salomon, the mother happens to propose to cut the orange in half – which she then swiftly moves to do in order to avoid more quarrel among the young competitors. What a mistake! After proper questioning the kids might have revealed that one wanted to actually eat the orange (= interest 1) while the other desired the orange skin merely to play with it or to cook bitter marmalade together with his mother (interest 2). The negotiation that exclusively targeted the presumed positions (i.e. that both wanted the orange as assumed solution for the problem) eventually led to a suboptimal result. Again, a too remote example? In the lawyer's practice, most negotiations are indeed about money and financial stakes. To avoid complexity of negotiations unskilled negotiators reduce the discussion to one position, namely the amount to be paid. They forget to discuss the time of payment, the mode of payment (instalment plans) or the „currency" of payment (cash or transfer of a valuable licence). Many negotiations then fail. If the parties had been asked about their interests, one might have revealed the desire to pep up his balance sheet by receiving something of great value while the party would have invoked its interest

to protect its tense cash situation. A transfer of the valuable licence would then serve both interests. The same would be true for an agreement of a high settlement amount payable in six months and secured by a pledge of some assets. The skill in negotiations not to decrease complexity but to organize complexity in order to find intelligent solutions often helps the client more than the most sophisticated legal knowledge – although the latter remains certainly crucial!

All three examples show what Kästner meant by the two final lines of his poem: Skills matter – possibly even more than mere expert knowledge. The greatest encyclopaedic knowledge of German tax law is practically worthless if the tax lawyer lacks the skill to communicate and apply this knowledge effectively in her letters, speeches or negotiations. An attorney with limited knowledge but excellent skills will help her client more and will be more successful in professional life than her gifted colleague.

D. Action Plan: What remains to be done

If the findings of our analysis are correct, namely that the importance of legal knowledge decreases and that skills to apply that knowledge do really matter, we need to transform these findings into practical actions. Two action items may be proposed:

Refocus of legal education: Legal education must be restructured with a much higher focus on skills. The main task of a university is to prepare its students for professional life. If skills matter in professional life, the university must teach those skills. Some may now argue that the German lawmaker has learned that lesson and that he has recently introduced a law students' obligation to attend one class in „soft skills / key qualifications" during his university career. That shows a good intention and the right direction but it is not more than the proverbial „drop in the ocean". One compulsory class will not constitute more than 2 % of the average student's entire „class time". The overall goal must be more in the 30 % - region of entire class time. How that can work in practice is demonstrated by leading American law schools. Not only do they have countless classes that explicitly target the training of soft skills in their curriculum but they have also introduced „clinical classes" where students work on actual cases and thus have to combine legal knowledge and applied skills while still in university.[2] The problem remains that teachers must be found to teach soft skills and clinical classes. While some German law professors are highly talented and gifted in that respect, very few will have the

[2] See for example: www.law.berkeley.edu/cenpro/clinical/; www.law.nyu.edu/clinics/; www.law.harvard.edu/academics/clinical/ .

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necessary theoretical background to teach soft skills effectively. Thus, practitioners must be invited into the universities to take over that task. In addition, universities should create university chairs exclusively for „soft skills" to highlight the importance of this subject and to demonstrate a commitment to prepare their students for real life challenges.

Skill-teaching in law firms: Practising lawyers will not profit from the hoped-for changes of legal education. To improve their skills they have to follow a multi-step approach: First, law firms and attorneys have to accept that skills are decisive for professional success and the „best practice"-idea and that such skills must be actively learned. For some that might be an uncomfortable idea after having adhered to the „knowledge is power"-idea and after having followed the „learning by doing"-approach for many years. Second, training programs must be developed for and introduced into those law firms to create a forum to acquire the needed skills. Some larger law firms have already acted by creating „Inhouse Universities" and the like; smaller law firms and single practitioners must look for alternative ways to learn those skills if they do not want to lose ground. And third, a law firm must define clear quality standards not only with regard to the knowledge of its attorneys but also with regard to applied skills.
Putting both action items into practice will be everything but easy. As universities raise serious complaints about their current financial restrictions that do not permit them to introduce new classes and even less to hire additional lecturers for skill teaching, the prospects for a fast change are bleak. Law firms and attorneys will complain about their work load and refer to their past success to avoid the necessary skill training. So the task is difficult.

E. *Summary*: The Good, there is none …

At the beginning of this article I meant to point your attention to two poems of Erich Kästner and so far have only revealed one of them. Well, with regard to the first one, we have heard four arguments why knowledge loses importance, have read three examples how skills can improve the quality of an attorney's work and have finally arrived at two action items to be put into practice as soon possible. To realize those action items might be difficult, but it can be done. This all leaves us with one consequence which Erich Kästner with his phenomenal gift to translate practical truth into simple poems described as follows:

Es gibt nichts Gutes,
außer: Man tut es.
or
The Good – there is none
Until it is done.

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