

Tomorrowland:

Scenarios for law firms beyond the horizon

From Adam Smith, Esq.

Bruce MacEwen



Adam Smith, Esq.
...an inquiry into the economics of law firms

What People Are Saying

“Must reading for every law firm managing partner, for every law firm partner, and for anyone interested in the future of Big Law. Extraordinarily well done and insightful; courageous and audacious. A tour de force.”

—Brad Karp, Chair of the Firm, Paul Weiss

“Covers some big territory very well and tests the edges of what is comfortable. Thoughtful and challenging; motivates the reader to pause and think, in spades.”

—Mark Rigotti, Chief Executive Officer, Herbert Smith Freehills

“No self-respecting law firm leader should be prepared to run the risk of leaving it unread.”

—Charles Martin, Senior Partner, Macfarlanes [from the Foreword]

“Masterful—a convergence of a lifetime of learning, and not just between the white lines of the legal industry.”

—Peter Kalis, Chairman and Global Managing Partner, K&L Gates

About the Author

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Novus Law

Ray Bayley and Lois Haubold, neither a lawyer and neither with previous experience in Law Land, founded Novus Law a little over ten years ago in 2005.⁶⁵ They had begun examining legal processes and concluded in short order that they were remarkably inefficient—a realization they quickly discovered few in Law Land shared—and believed the industry was overdue for positive, yet radical change.

Novus is based in Chicago, Illinois, employs more than a hundred professionals worldwide, and has grown to annual revenues on the order of \$20 to \$25M. It has long been cash-flow positive and profitable. It received a small round of friends and family funding when it began and has self-funded all of its growth since.

A defining principle for Novus, and part of Ray and Lois' management philosophy, is to organize the delivery of services around processes, not functions. This may sound mysterious to the uninitiated but it has a well-recognized and mainstream pedigree in management literature, most famously elaborated in Michael Hammer and James Champy's *Reengineering the Corporation: A manifesto for business revolution*,⁶⁶ which was called "the most important business book of its decade."

Reengineering focuses on defining what products or services a business (a law firm) must supply to its customers and then digs into the details of how best to supply them in order to optimize the processes involved. Let me recount an early "a-ha!" moment in the life of Novus and then explain how reengineering applies to put the insight gained in that instant into an ongoing business.⁶⁷

Our first client ever was a biotech startup, represented by Kirkland & Ellis. The company was in a do-or-die lawsuit with a markedly superior drug about to exit trials and launch. If successful, they would destroy the market share of a large biotech that was suing to block its release. We went through the drill of electronically tagging [roughly speaking, indexing] and organizing gigabytes of our client's documents, a process known as first-level document review, and turned them back over to Kirkland.

⁶⁵ Ray, President, CEO, and Co-Founder, previously was Managing Partner of PricewaterhouseCoopers' North American Business Process Outsourcing organization, one of the leading outsourcing organizations in the world, and was a member of the firm's 15-member management committee, responsible for overseeing the US operations of the firm comprising 70,000 people and \$9 billion in revenue. He earned his B.S. from the University of Illinois and MBA from Northwestern's Kellogg School.

Lois, Executive Vice President and Co-Founder, is responsible for the firm's strategy, ethics, global service delivery, and client relations. Previously she was part of the leadership team of PricewaterhouseCoopers' North American Business Process Outsourcing group. She received B.S. and M.S. degrees from the University of Illinois and an MBA from Northwestern's Kellogg School.

I have known both Ray and Lois well for some time.

⁶⁶ Harper Collins: New York, 1st ed. 1993, 2d ed. 2003.

⁶⁷ Interview with Ray and Lois, November 2016, paraphrased for clarity and concision.

What was at stake was simple: The CEO of our client had to decide whether to raise new capital to defend the lawsuit or roll over and give up. Since the CEO knew we'd completed our review, he called us and asked, "Now that you've read all of my documents, what happened?"

We didn't know what the answer was at that point and even though the law firm had all the documents meticulously tagged and organized, neither did they. Once we turned over the documents to the law firm, they immediately set about reading and re-reading them all over again to see what happened – a process that would take many more months – a process we call "the traditional process."

That was the moment we realized that what clients really wanted was not tagged and organized documents but the answer to the question, "What's the story?" Tagging documents, or doing first-level document review, was akin to selling a drill to our client when all they really wanted was the hole, or in this case, the story.

Ever since that happened ten years ago, Novus has focused on finding the story – or, if the documents could talk, what story would they tell?

This changes everything. Novus focuses on finding, documenting and delivering the story from the very first document they review instead of tagging and organizing documents, which then will simply have to be read and re-read in multiple stages.

Before proceeding further, permit me to explain "read and re-read at every stage." The way Law Land is currently arranged is into silo'ed verticals: Companies responsible for e-discovery, contract lawyers, LPO's, law firms (which are themselves silo'ed into submarkets of junior and senior associates, and partners). When matters pass from one silo to another—say from an LPO to a law firm—the new silo has to start all over by re-reading the documents to learn the matter and much of what was learned in the last reading is lost. The cost of doing this reading and re-reading is tremendous. Let's assume the average billing rate to do this work across an LPO and all of the law firm silos is \$360 per hour, or \$6 per minute or \$3 per page, assuming a lawyer reads two pages per minute, which is typical.

When you read and re-read documents multiple times at a rate of \$3 per page or \$15 per document the costs really add up, making this the largest and fastest growing revenue generator for Law Land and largest and fastest growing legal expense for clients. The friction involved is also tremendous, and tremendously costly. Economists, including yours truly, are not fans of transaction costs and friction, and here Novus had identified a glaring systemic source of those very expenses in the traditional process.

Now, it might be one thing if reading and re-reading (and re-reading and...) documents added only cost and expense, but it's worse than that; it introduces and compounds errors, a/k/a "defects" into the document examination process. This runs so profoundly counter to the way lawyers instinctively think about checking and reviewing others' work—"it's an intrinsic part of how our firm guarantees quality!"—that it begs for explanation.

Consider a simple e-discovery or due diligence document-sorting project. The goal of the examiners is to categorize documents as (a) not relevant or not germane—we can assume the vast majority; (b) responsive or germane; and (c) privileged and/or confidential—which doesn't really have an analog in the case of transactional review due diligence.⁶⁸ And let's make the perhaps heroic assumption that our examiners achieve 97% accuracy. That means that 3% of the documents are mis-coded on the first pass.

So let's go to our de rigeur "second review," also 97% accurate, and see what happens. What's *supposed to happen* is that the 3% that were miscoded are corrected so that we have achieved $[(97\%) + (97\% \times 3\% = 2.91\%)] = 99.91\%$ accuracy.

But in the real world that's not what happens at all. The premise of the second review is that no one knows going in which documents constitute the "3%" and which are the "97%," after all, if we knew that we would have corrected the 3% on the spot, as part of the first review. So we re-review all of them, with the result that after the second review the accuracy drops from 97% to 94.1% ($97\% \times 97\% = 94.1\%$). Do you still plan to engage in a third review? It will take you to 91.3% accurate, for the record. Do the overall math and the results aren't pretty; when you read and re-read documents multiple times as is done in the traditional process, the costs are exorbitant and the quality is poor, even if everyone who examines a document is 99% accurate.

Now let's go back to "reengineering" and what it actually means in the context of a business like Law Land.

Reengineering begins from the premise that most business processes are fragmented into a series of component functions, and that those functions are poorly and arbitrarily connected, creating friction and excess costs. Reengineering breaks apart the process, leading to the creation of the product or service (here, "the story the documents tell") into its component parts and reconfigures them in a blank-sheet-of-paper fashion. Often entire sub-functions, it's discovered, can be disposed of.

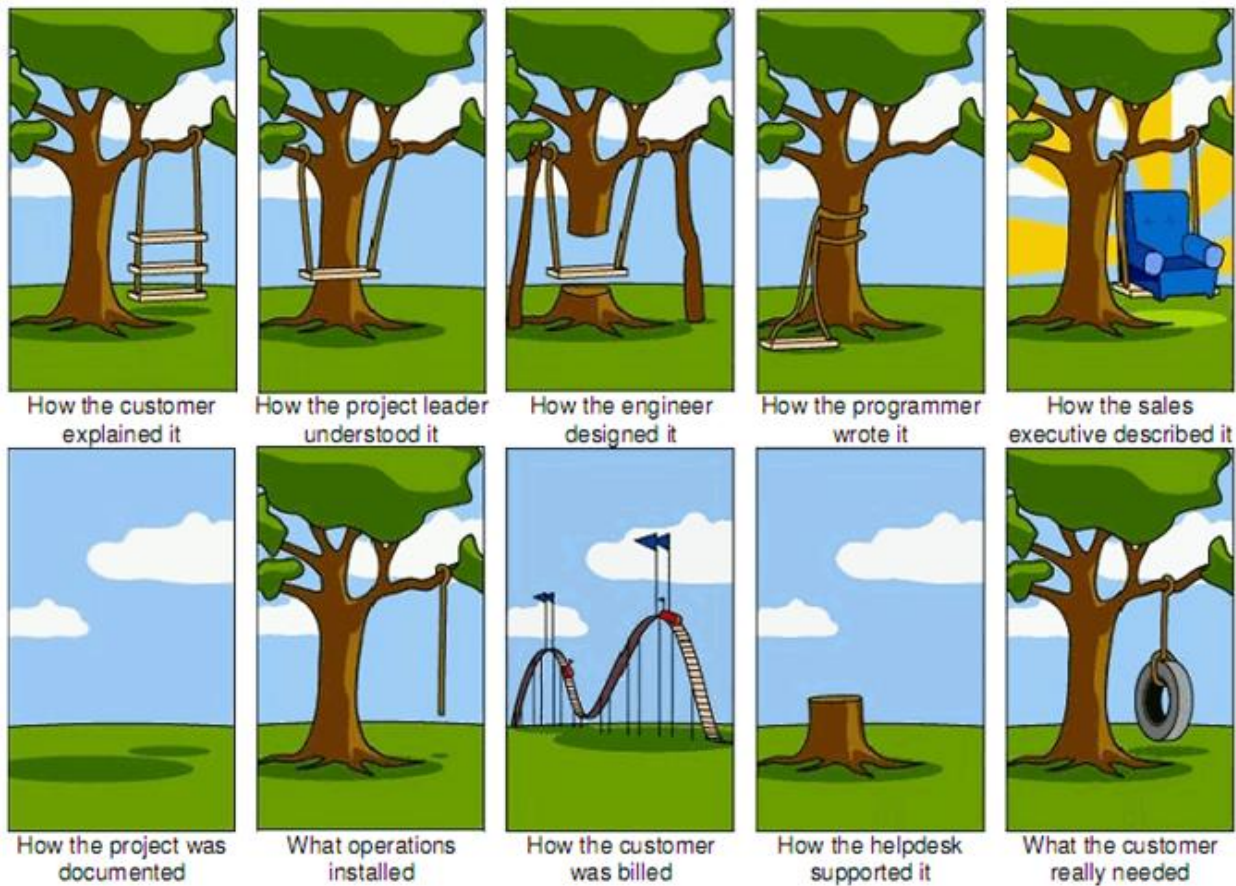
Another tenet of reengineering is that one centralized decision point needs to manage the entire process, and be accountable for results. No more of the Dilbert-ian buck-passing where design hands it to engineering which hands it to operations which hands it to production which hands it

⁶⁸ Although the concepts of lawyer confidentiality, attorney-client privilege, and work product protection are technically distinct, it's immaterial to our discussion of Novus Law. (See Sue Michmerhuizen, *Confidentiality, Privilege: A Basic Value in Two Different Applications*, American Bar Association: May, 2007 at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney_au_thecheckdam.pdf).

to sales and marketing, at the end of which the product/service is an unrecognizable (and unsatisfactory) camel.⁶⁹

The core difference between reengineering and incremental efficiencies is this:

This drive for realizing dramatic improvements by fundamentally re-thinking how the organization's work should be done distinguishes the re-engineering from process improvement efforts that focus on functional or incremental improvement.⁷⁰



⁶⁹ The famous "tire swing" cartoon has been around in various iterations since at least the early 1960's; the earliest documented example came from an internal newsletter circulated among the British Civil Service called, fittingly, *Red Tape*: See *Tree Swing Pictures*, Businessballs.com (undated) at <http://www.businessballs.com/treeswing.htm>. It has been in the public domain since at least the 1970's. For those of you not familiar with it, here's a rather advanced rendition (from Jewel Ward, *The Project Management Tree Swing Cartoon, Past and Present*, <tamingdata />, August 7, 2010, at: <http://www.tamingdata.com/2010/07/08/the-project-management-tree-swing-cartoon-past-and-present/>)

⁷⁰ United States GAO, *Business Process Reengineering Assessment Guide*, May 1997, at: <http://www.gao.gov/assets/80/76302.pdf>

Ray describes how this has changed what Novus does:

Now, if we start looking at documents at 8:00 am Monday, we're producing usable work product (the beginnings of the story) by 8:15 or 8:30 and if a client logs on to the Novus system in 24 hours or a week later, the client and the law firm can figure out basically what's going on.⁷¹

"What's the goal?" I ask. "To distill 2 million documents into 2,000 words in a matter of days rather than the months it typically takes to find the story."

Lawyers still, by and large, write those stories, but people with journalism backgrounds are also on staff and everyone gets regular in-house training on writing. Not just legal writing: investigative journalism writing. How do we report the facts without opinion but let it still be a compelling read, as it would come out in summation to a jury or a motion for summary judgment?

Don't kid yourself into thinking that this is just a snappier way to get to "the story." It has much more far-reaching implications, deriving from the powerful economics of information asymmetry: The Novus client and that client's law firm know what the story is a long time before the opposing party does. If the story that's emerging is a big bad scary story, wouldn't you want to know that and strike a settlement accordingly? Or if the story is nothing's really here, then you also know what to do.

Do not, again, kid yourself that what Novus has achieved is simple or that you could clone it at the drop of a hat. The Novus Process™ actually has three inter-related components:

- Novus One-Touch attacks the perils of reading and re-reading documents at their root, by using the Lean Manufacturing principles of Toyota to eliminate the tens or hundreds of wasteful and excessively expensive "touches" involved in the traditional process of reading and re-reading documents to find the story and reducing them to one touch per document for every purpose: Building the story and categorizing documents accurately (more than 99.9% accurate, according to independent, statistically valid audits conducted by clients' law firms).⁷²
- Novus Q is one of at most a handful of ISO 9001:2015 certified quality management programs in the global legal profession. You don't need to know everything ISO 9001:2008 requires to understand how rigorous it is, but suffice to say among other things it uses the Six Sigma principles created by Motorola and made famous by Jack

⁷¹ "Work product" means identification of the hot or key documents on which the case will turn; analysis and summary of which witnesses know what, when; and analysis and summary of the key themes in the case – all together, the story.

⁷² See generally *The Novus Approach*, undated, at <http://novuslaw.com/approach/>

Welch at GE to eliminate the mistakes that are unavoidable using the traditional process used to read and re-read documents.

- Novus C³ harnesses the collective intelligence of everyone working on a matter (“the wisdom of crowds,” in the vernacular) to eradicate the cognitive bias of individuals and ensure every story told is complete and precise. (C³ is a Novus coinage standing for an online matter-specific application in which Novus’ clients, their law firms, and Novus professionals all work together in one virtual place to communicate, collaborate, and control matters.)

Using the Novus Process, Novus has proven to reduce overall legal fees 25 to 35 percent, according to Deanna Johnston, the former vice president of litigation at Fireman’s Fund Insurance Company, with whom Novus received an Association of Corporate Counsel Value Champion Award. According to Ray, that’s a \$3 to \$4 reduction in law firm fees using the Novus Process for each \$1 billed by Novus.

If Novus is the better mousetrap, why isn’t it—or its competitive fast-following clones—more widely known and more widely adopted? I asked Ray this:

When people try to understand what Novus does, they often ask if we compete against Axiom or against Pangaea 3 or against law firms, and the answer is that we compete against some of them on some things some of the time and against none of them. More fundamentally, we’ve created a niche that we occupy ourselves, doing away with the functional view of how work is traditionally done and focusing on process.

That’s both a blessing and a curse because if no one else is doing exactly what you’re doing but it’s so eminently rational—which everyone agrees it is—then their reaction is, ‘what am I missing?’

A final statistic. According to BTI, 82% of GC’s say that lawsuits are now resolved not on the merits of the case, but based on who can afford to stay in the game, most of which is spent finding the story. This is not justice, not fairness, not “the rule of law.” (Let us not, I pray you, lose sight of those values.) It’s easy for many of us to talk about improving justice, or access to justice, but imagine if Novus could move that number down by more than 25%, say 50% or more: That would be a contribution to justice with teeth.