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Legal Loss? Self-Represented Litigants and the Need for Cross-Aisle Knowledge Management

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ABSTRACT

Knowledge management is traditionally underutilized in law firm environments, owing to a perception of it not being useful despite evidence to the contrary. In fact, knowledge management, if used properly, can contribute to increased profits for a firm. In contrast, attempted knowledge management is occurring amongst self-represented litigants, though it is hampered by a lack of interest in participation by the legal community. Open access may provide a solution to both problems: for lawyers, freeing up time for more clients, and for self-represented litigants, in helping to destroy the perception of their presence as a problem.

Keywords: Self-representation; litigants; Knowledge Management

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Introduction

To say that lawyers are expensive would be a massive understatement. Lawyers charge enormous retainer fees for their time and often have separate fees associated with courtroom time and travel time. In our country, there is a presumption of innocence and a right to justice under the law that everyone has regardless of their income. Section fifteen of the *Canadian Charter of Rights and Freedoms* (1982) clearly states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Yet, it is unspoken that when someone elects to represent themselves in the courtroom or in legal proceedings, for whatever reason, most will automatically cringe inwardly upon hearing that news, thinking that this person is destined to lose whatever case they are pursuing. Not everyone is able to qualify for an attorney appointed and paid for by the government. We do, however, have a right to self-representation in court, laid out in Nova Scotia in Rule 34 of the Nova Scotia Civil Procedure Rules (Government of Nova Scotia, 2022). We thus have a dichotomy: though we all supposedly are entitled to the right to justice, and the right to an attorney, much of the population is barred from representation because of the cost of that representation. Though self-represented litigants attempt to share relevant information amongst themselves, which is a form of knowledge management, the knowledge that would be most useful to them is being kept away from them. We now have our second dichotomy: despite the right of every citizen to represent themselves in court, lawyers do not want to share their knowledge because that could lead to people not contracting their services. This fierce opposition to cross-organizational knowledge management could not be further from the reality of the situation we find ourselves in. For lawyers, the irony is that sharing knowledge between lawyers and law firms could lead to an increased clientele. Knowledge management is already occurring at the law school level, and case studies show that it is also successful when implemented correctly in the law firm environment. We will look at several later in this paper. For their part, self-represented litigants are attempting to engage in knowledge management, but without the foundational expertise and resources, this would-be process is handicapped from the start. This paper will propose that knowledge management can benefit both self-

represented litigants and law firms: for lawyers, increased clientele and therefore income, and for the litigants, the knowledge that is needed for success.

Knowledge Management in the Legal Community

It is helpful to begin with a basic model of knowledge management. In general, knowledge is considered to be applied information which has generated experience. The information that comes out of that experience, which can only be achieved through that specific, individual experience, is knowledge. Knowledge management is the practice of trying to communicate and conserve that knowledge so it can be used by others who do not necessarily have that specific, individual experience, and in turn have their own experiences to use. In cyclical terms, information becomes knowledge through an individual, and knowledge management captures and communicates that knowledge to others so they can take it and create their own individual knowledge to capture, and so on. For the context of this paper, it is also helpful to have a definition of what specifically legal knowledge management is considered to be. Parsons (2004) writes that it is "the behaviors and processes by which a group of lawyers increases and maintains their personal, and collective, actionable knowledge to compete, to increase performance, and to decrease risk." (p. 77). Though, since we are also referring to self-represented litigants, and in the context of this quote a lawyer is meant to be the one by which representation occurs in court, we can infer that this definition could, should and does apply to everyone partaking in the representation. However, such a quote also assumes that the process is being helped along by all persons involved. This is simply not the case, and it starts in law firms themselves.

Given that the legal world is difficult to navigate, knowledge management is essential among lawyers. The term 'legalese' exists for a reason; the language, process and procedures of law are notoriously dense. Given this, the education of law schools definitely has merit, though it could be argued that even lawyers themselves occasionally become confused by their own field. This is where knowledge management becomes relevant, and it begins in law school. Many law school professors are lawyers themselves, each with their own experience. If knowledge is generated from experience, this could be considered a form of knowledge management, in ensuring the knowledge passes to the next generation of lawyers. Ideally, such a process would continue to occur after graduation and the call to the bar. However, historically law firms have not employed knowledge management fully. Parsons (2004) writes that knowledge management at law firms suffers from not being "coordinated, measured, or benchmarked" (p. 77). This sets firms up for an unfortunate cycle: knowledge management is not measured, in turn is perceived to not have any kind of benefit and continues to not be utilized in policy. This can be especially damaging to law firms that have offices in multiple locations across multiple countries. Global firm Norton Rose Fulbright, for example, has over fifty offices and employs over 3500 lawyers, so the need for a knowledge management policy is pressing.

However, there has been a slow shift in the perception of law firms and knowledge management. There has been a recognition, albeit slowly, that, as Forstenlechner et al. (2009) writes, "knowledge input, in the form of individual know-how and collective routines, provides

the basis for service provision to clients in a very flexible way to form an output that meets their different needs" (p. 56 – 57). As to why knowledge management has been underutilized in firms, Faulconbridge (2007) writes that firms tend to lean more to business-centered, quantifiable ways of measuring success, rather than the inherently qualitative nature of knowledge management. In layman's terms, if the success of something cannot be measured numerically, it is probably not worth the time of the firm. This perception of legal knowledge management as not contributing to the overall success of the firm is inaccurate and unfounded, however. In fact, case studies definitely disprove it. Shearman and Sterling LLP, a firm with multiple offices, participated in a case study to improve the output and benefits of their lacking knowledge management programs. The firm implemented multiple simple practices such as establishing a single knowledge repository with a set formatting of documents and labelling, and hiring knowledge management professionals to manage the repository and other knowledge management practices rather than asking an untrained lawyer to do so (Beaumont 2017). The results of these simple implementations, and others, included an increase in repeat searches from firm members, indicating that initial searches of the repository were successful and warranted repeat visits from researchers.

Another case study conducted by Choe (2016), using data from 117 sample law firms, showed that "strategic communications and dialogues between the employees of an organisation [for our purposes, a law firm]…enhance the degrees of the [information system] strategic alignment" (p. 137). In plain terms, any knowledge management system put in place is only as good as the knowledge given to it and the interactions it facilitates. As most, if not all,

law offices operate under the same principles, these results can be applied to other firms, indicating that the perception of knowledge management being largely unimportant is untrue. Furthermore, if we are to accept that law firms are now being run as businesses, knowledge management can be beneficial from that standpoint. If lawyers are spending less time searching for the knowledge they need because it is easier to access following knowledge management protocol implementation, this frees up time that they can then spend on other clients, and therefore generate more income. Additionally, a client wants to know that a lawyer is using the time billed efficiently, which for most will not be a label they apply to endless searching for knowledge needed for their case. If increased revenue is not a compelling reason to include knowledge management policies in the running of the firm, which is also a business, then what is?

Attempted Knowledge Management for Self-Represented Litigants

In contrast, attempted knowledge management is occurring among self-represented litigants, albeit in a way that is cross-organizational, rather than within a single group. This purpose is made more important by the fact that, according to Canada's Department of Justice, numbers of self-represented litigants are increasing year over year, though exact numbers are hard to come by. In 2016, the Department reported that between 40 and 57% of parties are self-represented by the time a case is taken up in the courtroom, and at the time that the case is first opened, that number is 64 to 74% (Department of Justice, 2016). In addition to representing themselves in the courtroom, the responsibilities of the self-represented litigant also includes research and a huge amount of time input. The simple truth is that these people

have to help themselves, because no one else will, even once arriving in the courtroom. Greacen (2014) quotes a non-profit institute: "Self-represented litigants place strain on the court system, as courts have to adjust their processes to accommodate persons unschooled in the law and in legal procedures." (p. 662). Further to this, Greacen (2014) also writes about the hesitation on the part of judges to be seen as helping a self-represented litigant, for fear of being accused of having abandoned their duty of neutrality. However, numerous advocational and non-profit groups exist for the benefit of these litigants. The Canadian Judicial Council provides free handbooks to litigants, based on the system that their case is moving through. The National Self Represented Litigants Project (NSRLP) is an advocacy group that aims to "advocate for better and deeper understanding of the needs, motivations and challenges of self-represented litigants" (National Self Represented Litigants Project 2021 at para 2). Both of these groups, and others, employ some lawyers on their staff, and part of their explicit purpose is to facilitate knowledge management for self-represented litigants.

However, the problem overall is this: those who possess the most knowledge and experience that could be shared, namely lawyers in general, are not doing so. Why is this? Because the perception is that if self-represented litigants are successfully helped to the point that they can succeed on their own, then lawyers will be facing previously unseen competition in their field. More explicitly, it is well known that lawyers are costly to engage, and if this is seen as an option rather than a non-negotiable, law firms risk losing profits. That those with the most relevant knowledge and experience are not willing to participate somewhat in the knowledge sharing and management process, means that process is hampered from the start

and can never be truly successful. This knowledge management would be more successful if it was a cross-boundary process, and not limited in scope. But there is a solution that could benefit both sides of this conflict, and that is, an open-access database.

Open Access as a Solution

We have so far established that knowledge management would be beneficial to a law firm environment, and that most are not utilizing it. We have also established that the self-represented litigant community desperately needs the knowledge and experience from across the aisle. If this occurs, knowledge management as a cross-organizational concept can benefit both law firms and self-represented litigants. This irrational fear of lawyers that they will eventually not be needed if they assist litigants is unfounded. People will always hire lawyers; this is not a system that will fade away. The prevailing reason why is time. People don't always have the extensive time needed to represent themselves, or the will. Furthermore, it is not just the representation that needs to be considered. Law firms spend thousands upon thousands of dollars each year for subscriptions to legal databases and legal textbooks. As of 2009, this industry was worth $15 billion US dollars, and it has only grown since then (Forstenlechner et al. 2009, p. 57). These services are designed for the law firm environment, for the multi-person environment, and are priced accordingly. Even the average well-paid person would not be able to afford such an expense, much less for what is likely a one-time case. While there are legal libraries that are open to the public, these are few and far between in their location and accessibility.

The knowledge management system that needs to be put in place is an open-access database repository, to be viewed by both law firms and citizens. While there are certainly open access legal academic journals that exist, these alone cannot serve as the sole factor in preparing for a case. There are other documents and texts needed to prepare, depending on the context. These may include legislative papers, amendments to legislation, case law, case commentary, documents from discovery, contracts, and others. Ideally, such a database would include some of these materials, and it would not be hidden behind a paywall. As is often the issue more generally, income is acting as an unofficial yet present barrier to justice. When justice requires all this additional information and knowledge to work well, and that knowledge is costing money to the litigant, then that is an effective barrier to justice, which cannot stand. More generally, it stands to reason that a Canadian citizen should have access to the decisions, that are not barred by confidentiality, made in our justice system. Ideally, the decision to self-represent should be made without barriers to success, whether that be in knowledge or in income. The irony of this situation is that lawyers, meant to be tools of justice, are somewhat acting as barriers to it. Having a knowledge management system, to which lawyers contribute and can use themselves, in place to mitigate risk in self-representation is one way to accomplish the goal of equality in representation. As to how one might predict the success of this product, it can be inferred that if specific knowledge has led to success in a case or area of law for a particular firm, there should be a reasonable chance of success using the same knowledge for a self-represented litigant. If this is not the case, we should ask ourselves why it is that we and the justice system are biased toward the success of lawyers and law firms, given our constitutional right to self-represent. Above all, this proposed database should prove that law firms and self-

represented litigants can co-exist effectively, and knowledge management can help ensure success on both sides.

Conclusion and Wider Implications

Though it is difficult, what is needed more broadly is a shift of perception of knowledge management within the legal field, beyond how it can help an individual attorney or firm. Legal knowledge management, because the justice system affects not just lawyers, needs to be helpful and influential for everyone who comes in contact with the justice system. This problem cannot be fixed if lawyers continue to act proprietarily over the justice system. More broadly speaking, this is also a problem of privilege. The lawyers who have been able to afford to sit for their LSAT examinations, sometimes more than once, and then cover the astronomical cost of law schools so that they can then be paid extremely well for their work, have become the gatekeepers of the knowledge they possess that could help others if managed properly. Just because one is unable, through their circumstances or by choice, to hire a lawyer, does not mean that they are not entitled to the same justice, equality, and fairness that those who engage an attorney more easily receive. Though most attorneys likely do not mean to cause harm through their gatekeeping behavior, in fact, that is what is happening. As stated, if there are barriers to information and knowledge that lead directly to an inequal application of justice, even in a situation where someone has elected to represent themselves, then there is a barrier to our rights as Canadian citizens.

In terms of how to proceed, what would be beneficial is a more current set of case studies on how useful knowledge management repositories are within the law firm context.

When combined with user surveys of self-represented litigants, this could prove useful to establish a concrete set of requirements and formats for an open access legal information database. Such studies need to occur because, as was often the case during the research of this paper, metrics on self-represented litigation and knowledge management separately are hard to come by, let alone together. As is often said, we cannot fix a problem that we do not understand, and it is clear that there is little desire to understand a practice that is viewed as a problem rather than a right. Knowledge management, much like the problem that this paper attempts to address, is all-encompassing, not limited, and the solution to this problem should be, too.

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