

# ETHICAL LAWYERING AND ARTIFICIAL INTELLIGENCE

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## I. Introduction

The broad integration of artificial intelligence (AI) into society promises not only to influence the type of work that lawyers undertake, but also how they complete that work. Because it is a general application technology,<sup>1</sup> lawyers using and/or advising on AI must have at least a basic understanding of what AI is, how it works (i.e. the different methodologies), how it can be applied and what the legal and ethical implications of its design and use might be. Students must be introduced to the need for this technology-specific competence while they are in law school and that competence must carry over as part of their professional responsibilities when they enter into the practice of law.

This chapter explores the ways in which AI does and will have an impact on what it means to be an ethical lawyer.<sup>2</sup> More specifically, I look at the ethical implications for lawyers (1) in relation to providing clients with legal advice on the use and marketing of AI, and (2) in relation to the use of AI technologies in the provision of legal services. I begin the chapter by drawing attention to how important, yet complicated it is to understand the various implications of different applications of AI. Lawyers must be capable of undertaking some degree of socio-legal-ethical analysis before using or advising about the use of AI. I then offer a more detailed analysis of the important role that ethics plays in the practice of law and explore specific applications of AI in the legal sector and how they can have an impact on lawyers' professional (ethical) responsibilities. The uses of AI in legal practice are evolving and advancing

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<sup>1</sup> I will be referring throughout to a broad and inclusive conception of AI as being computerized systems/algorithms that simulate and/or enhance the cognitive analytic capabilities of humans by searching for correlations/connections/patterns in the data to which they have access.

<sup>2</sup> My focus herein will be exclusively on lawyers in private practice. While much of the content will be useful to lawyers in public sector practice, the important nuance about who their client is signals a need for a separate study.

quickly however, so I conclude by looking ahead at what future challenges and opportunities AI might give rise to in the context of ethical lawyering.

## II. A.I. and Ethics Frameworks

The legal and ethical implications of using AI vary depending upon the context being considered. This is important to make note of because more lawyers are now being asked to advise clients about the marketing of AI tools and the possible use of AI in their operations. Lawyers who advise clients have a professional obligation to exercise independent professional judgment in providing candid advice. Exercising independent professional judgment means that lawyers giving advice about the use of AI “may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.”<sup>3</sup> On matters as deeply steeped in ethical implications as is AI, it makes sense then to provide advice that includes reference to moral, social and political considerations.

A lawyer might wish to draw their client’s attention to work that is being done in relation to algorithmic accountability or impact assessment.<sup>4</sup> They may choose to call attention to the risks associated with bias in data collection and selection;<sup>5</sup> the implications of black box analysis for explainability and liability;<sup>6</sup> concerns about privacy and the unethical use of personal information<sup>7</sup> and the human rights-related risks that the use of AI can give rise to.<sup>8</sup> A tremendous amount of energy is also being put towards advancing notions of human-centered AI,<sup>9</sup> with the number of articles, principles, regulatory measures and technical standards related to AI governance growing by the week.<sup>10</sup> Giving holistic advice about AI can accordingly become

<sup>3</sup> American Bar Association, *Model Rules of Professional Conduct*, Center for Professional Responsibility, updated to 18 November 2019, R 2.1 [*ABA Model Rules*]; see also The Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: updated to 19 October 2019, R 3.1-2, commentary 10 [*FLSC Model Code*]

<sup>4</sup> See e.g. Government of Canada, “Algorithmic Impact Assessment” (5 May 2019), online: *Government of Canada* <<https://www.canada.ca/en/government/system/digital-government/modern-emerging-technologies/responsible-use-ai/algorithmic-impact-assessment.html>> (for an example of cutting-edge work done by the Treasury Board of Canada on Algorithmic Impact Assessment).

<sup>5</sup> See Aviv Gaon & Ian Stedman “A Call to Action: Moving Forward with the Governance of Artificial Intelligence in Canada” (2019) 56:4 *Alta L Rev* 1137 at 1145 (for a brief explanation of a few types of bias that lawyers should be familiar with — i.e. latent, selection, interaction and emergent bias).

<sup>6</sup> See e.g. Iria Giuffrida, “Liability for AI Decision-Making: Some Legal and Ethical Considerations” (2019) 88:2 *Fordham L Rev* 439.

<sup>7</sup> See e.g. Kate Crawford et al., “AI Now 2019 Report” (New York: AI Now Institute, 2019) (for a broad ranging discussion about privacy concerns in relation to the use of AI).

<sup>8</sup> See e.g. Mathias Risse, “Human Rights and Artificial Intelligence: An Urgently Needed Agenda” (2019) 41:1 *Hum Rts Q* 1.

<sup>9</sup> See e.g. Mark O Riedl, “Human-centered artificial intelligence and machine learning” (2018) 1 *Human Behavior & Emerging Technologies* 33.

complicated very quickly as a result of the growing number of frameworks that could be relevant to any particular matter, including those that overlap and/or are complementary in their application. Furthermore, even though AI is a general application technology, a lawyer must be careful to explain the context-specific nature of AI ethics and the fact that there are limits to what codes and frameworks can offer.<sup>11</sup>

Trying to wrap one's head around the range of ethical considerations and applicable standards can be overwhelming. What seems to be clear, however, is that the ethical use of AI requires more than that an organization simply commit itself to internally established, unpublished ethical principles for which there are no external accountability measures or mechanisms.<sup>12</sup> To be able to determine what more is needed in order to properly advise a client, a lawyer should, at a minimum, seek out the following lifecycle information about the AI product(s) in question:

- 1) What is the problem that the AI is expected to solve?
- 2) What data is being used to train the AI, how was it collected and why was it selected? This includes identifying the limitations of the data (including how it was captured, what it represents and how it is being stored and secured, if at all) and determining whether those limitations could give rise to legal, ethical, social and/or political risks,<sup>13</sup> including, for example, whether the AI product might be ethically problematic. Depending on the client's answers, the lawyer should also consider the degree to which the system might be required to explain its analysis to its users;
- 3) How the algorithm(s) was designed (e.g. what methodology/ies were used and what philosophical assumptions were relied upon) and how it is/was trained;
- 4) How the AI will be operationalized, including whether it is intended to be public-facing. If the AI is going to inform decisions that affect people, then it is absolutely crucial to think through who could be harmed and who can and will be held responsible for harm caused. Certain AI systems may need to receive prior approval or certification

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<sup>10</sup> Anna Jobin, Marcello Lenca & Effy Vayena, "The global landscape of AI ethics guidelines" (2019) 1 *Nature Machine Intelligence* 389.

<sup>11</sup> Sonia K. Katyal, "Private Accountability in the Age of Artificial Intelligence" (2019) 66 *UCLA L Rev* 54.

<sup>12</sup> See e.g. *Ibid* (wherein the author argues that the state seems reluctant to regulate AI and private corporations accordingly have a greater role to play in addressing concerns about transparency and accountability).

<sup>13</sup> As noted *supra*, note 3, the ABA Model Rules allow lawyers to refer to "political factors" when advising clients. One example of this may be if a U.S. AI company is marketing their product to a foreign country despite knowing that the United States has banned its use domestically. It might be prudent to advise such a client that marketing a product like this could possibly give rise to less favourable treatment from U.S. regulators in the future.

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from a regulatory body in order to be accepted for use in certain settings.<sup>14</sup> A lawyer will of course also have to investigate and advise on any certification requirements;

- 5) Whether and how an algorithmic impact assessment (AIA) has been conducted, what the results were and whether that AIA ought to be made public for any reason. AIAs are particularly useful for identifying risks, particularly if the product is going to be used out-of-the-box and/or if the manufacturer is not going to be providing continuous real-time support to users.

There are of course other questions relevant to the nature of each AI product that can be asked to help gauge legal, ethical, social and/or political risks. The list above is offered as a starting point for any lawyer working with clients on AI-related matters. These questions are useful both when considering whether to bring an AI product to market and when considering whether to integrate a product into an organization's operations.

### III. Codes of Ethics in the Practice of Law

The practice of law is also replete with ethical considerations and commitments. If this collection is to offer itself as a toolkit about AI for practicing lawyers, it must address the topic of lawyers' ethical obligations. I will do this by making reference throughout this chapter to relevant jurisprudence, academic literature and the model codes of professional conduct published by the American Bar Association (ABA)<sup>15</sup> and the Federation of Law Societies of Canada (FLSC).<sup>16</sup> Both of these organizations represent their membership (i.e. national or sub-national regulatory bodies for lawyers) by publishing a harmonized code of ethical conduct that their members can draw from and model their own individual codes after. The over-arching goal is to ensure that members of the public can reasonably expect substantially similar ethical requirements to apply to legal professionals wherever, geographically speaking, they seek their advice and/or representation.

### IV. A.I. in the Practice of Law

Legal technologies (legaltech) exist that assist practitioners with improving workflows, reducing costs and minimizing some of the unpredictability that is inherent in much of the practice of law. A fast-growing number of legaltech

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<sup>14</sup> See e.g. Ryan Calo, "Artificial Intelligence Policy: A Primer and Roadmap" (2017) 51:339 UC Davis L R 399 at 419.

<sup>15</sup> *ABA Model Rules*, *supra* note 3.

<sup>16</sup> *FLSC Model Code*, *supra* note 3.

tools leverage AI to benefit their users. Likely the most widely adopted AI-based legal tech is software that uses natural language processing (NLP) to assist with legal research.<sup>17</sup> These AI-driven tools learn from information that a user inputs or uploads (e.g. a legal brief or some other material that provides context about the matter being researched) and search through different databases (e.g. caselaw, academic literature, legislation, etc.) to find the most accurate and relevant information sources. AI tools are also being used to assist with due diligence and document review (e.g. to confirm facts and figures and to uncover errors, missing information and inconsistent language),<sup>18</sup> with brief and contract preparation,<sup>19</sup> smart contracts and contract management,<sup>20</sup> searching through patent filings,<sup>21</sup> analyzing cases to predict the outcome of litigation, including by focusing on particular judges and lawyers<sup>22</sup> and to assist with mediations, negotiations and administrative proceedings.<sup>23</sup> This list is not exhaustive and new applications are emerging regularly. In fact, legaltech incubators like Ryerson University's Legal Innovation Zone (Canada) are popping up all over the world with the mission of helping innovators bring new legaltech to market.<sup>24</sup>

Some AI research tools are also being offered to law students free of charge.<sup>25</sup> This is an important development because the cost to attend law school can already be very high without students also having to pay extra in order to learn how to use legal research tools. The law school curriculum is jam-packed and not everyone who goes to law school will have previously earned a degree in computer science. Early access to these tools accordingly opens up opportunities for students to learn about the methodologies they use and how those methodologies differ from the way legal research has traditionally been taught and undertaken.

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<sup>17</sup> Agnieszka McPeak, "Disruptive Technology and the Ethical Lawyer" (2019) 50 U Tol L Rev 457.

<sup>18</sup> Technology assisted review" or "TAR" uses predictive coding to search large document sets to identify potentially relevant content. See e.g. Maura R Grossman & Gordon V Cormack, "Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review" (2011) 17:3 Rich JL & Tech 1.

<sup>19</sup> David Hricik, Asya-Lorrene S Morgan & Kyle H Williams, "Ethics of Using Artificial Intelligence to Augment Drafting Legal Documents" (2018) 4:5 Texas A&M J Property L 465.

<sup>20</sup> See e.g. Iria Giuffrida, Frederic Lederer & Nicolas Vermeys, "A Legal Perspective on the Trials and Tribulations of AI: How Artificial Intelligence, The Internet of Things, and Other Technologies Will Affect the Law" (2018) 68:3 Case W Res L Rev 747.

<sup>21</sup> Harry Surden, "Machine Learning and Law" (2014) 89:87 Wash L Rev 87 at 114.

<sup>22</sup> *Ibid* at 102.

<sup>23</sup> David Allen Larson, "Artificial Intelligence: Robots, Avatars, and the Demise of the Human Mediator" (2010) 25:1 Ohio St J Disp Resol 105.

<sup>24</sup> Legal Innovation Zone, "Legal Innovation Zone" (21 December 2019), online: *Legal Innovation Zone* <<http://www.legalinnovationzone.ca/>> .

<sup>25</sup> Ross Intelligence, "Ross Intelligence Launches Law School Program" (27 November 2019), online (blog): *Ross News* <<https://blog.rossintelligence.com/post/ross-intelligence-launches-law-school-program>> .

Given the expected prevalence of AI in all sectors, it is reasonable to anticipate that it will also become the subject matter in a growing number of legal disputes. Algorithms are already being used by some courts to assist with sentencing<sup>26</sup> and by some governments to assist with decision making.<sup>27</sup> Most AI systems are intended to help uncover statistical correlations however, not to uncover underlying causal mechanisms. When not given appropriate consideration by users, the disjunct between correlation and causation can give rise to problematic uses of AI. AI algorithms are trained on retrospective data and they do not ‘think’ about how that data was collected, what biases are buried within it, or what the moral implications are of using that data to predict future behaviour in certain contexts. These analytic challenges are left to the human users of AI. This is again why early and ongoing exposure to AI methodologies in law school is important if we want lawyers to be able to recognize AI-specific challenges in practice.

## V. A.I.’s Implications for Legal Ethics

While AI-based tools may be a relatively new addition to the practice of law, lawyers have always had implicit professional ethical duties when it comes to the use of technologies in their practice. What we are starting to see, however, is that those duties are being made explicit. The ABA’s Model Rule regarding competence now includes an explanatory comment that refers to technological competence:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.<sup>28</sup>

Language identical or substantially similar to this was adopted by lawyers’ regulatory bodies in more than 30 U.S. states by the end of 2019.<sup>29</sup> I further explore the idea of competence below and identify other specific ethical duties that are implicated by lawyers’ use of AI.

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<sup>26</sup> Kia Rahnama, “Science and Ethics of Algorithms in the Courtroom” (2019) 1 *JL Technology and Policy* 169.

<sup>27</sup> See e.g. Fenwick McKelvey & Margaret MacDonald, “Artificial Intelligence Policy Innovations at the Canadian Federal Government” (2019) 44:2 *Can J Communication* 43; Petra Molnar, & Lex Gill, “Bots at the gate: A human rights analysis of automated decision-making in Canada’s immigration and refugee system” (Toronto, ON: Citizen Lab, 2018) (for a detailed account of Canada’s efforts to use AI for automated decision-making within its immigration and refugee system).

<sup>28</sup> *ABA Model Rules*, *supra* note 3 R 1.1 comment 8.

<sup>29</sup> LawSites, “Tech Competence” (21 December 2019), online (blog): *LawSites* < <https://www.lawsitesblog.com/tech-competence> > (the author notes that 38 U.S. states have adopted the duty of technological competence as of December 2019).

## 1. Competence

A lawyer must only provide services for clients if they are in fact competent to provide those services. As per the ABA Model Rules, “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>30</sup> If a lawyer is going to competently provide legal services using the tools that clients increasingly expect them to use, ongoing education and training will be necessary. In fact, language about the importance of technological competence was adopted by the ABA as early as 2012. The FLSC’s Model Code likewise requires lawyers to provide “service that is competent, timely, conscientious, diligent, efficient and civil”<sup>31</sup> and was also updated in October 2019 to specify that this includes technological competence.

Under the FLSC’s Model Code, what it means for lawyers to fulfil their duty of technological competence is context-specific. The required level of competence depends on “whether the use or understanding of technology is necessary to the nature and area of the lawyer’s practice and responsibilities and whether the relevant technology is reasonably available to the lawyer.”<sup>32</sup> It seems then that lawyers at a minimum need to understand what legaltech tools are available, what those tools can and cannot do, what they cost to acquire/use and how those tools can be properly and efficiently integrated into practice. The importance of maintaining a basic level of technological competence was truly brought to the fore in 2020 during the global COVID-19 pandemic. Most lawyers were told by their governments that they had to work from home in order to adhere to general public health requirement that people maintain adequate social distancing (i.e. avoid physical interaction with people outside their immediate household as much as possible in order to curtail the spread of the COVID-19 virus). This caused sudden changes in the practice of law, including the need to move legal proceedings online in order to minimize the disruption to the justice system and limit the further perpetuation of pre-existing concerns about access to justice.

The shift in legal practice caused by COVID-19 will almost certainly be the catalyst for more law societies to adopt formal duties of technological competence. As this happens, lawyers will need to know more about all technology relevant to their practice, including how to use, behave and even dress in online meeting rooms, as well as how to improve their efficiency as service providers through the use of AI-based technologies. As a result of the COVID-19 pandemic, it now seems very likely that the widespread adoption of a duty of technological competence will happen much earlier than we might

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<sup>30</sup> *ABA Model Rules*, *supra* note 3 R 1.1.

<sup>31</sup> *FLSC Model Code*, *supra* note 3 ch 3.2-1.

<sup>32</sup> *Ibid*, ch 3.3, comments 4A, 4B.

otherwise have anticipated. After 2020, it should no longer be acceptable for lawyers to bury their heads in the sand and refuse to consider the use of new technologies in their practice.

## 2. Duty to Communicate

ABA Model Rule 1.4 requires lawyers to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”<sup>33</sup> This requirement is captured slightly differently by the FLSC Model Code which stipulates that a lawyer must provide “service that is competent, timely, conscientious, diligent, efficient and civil”, including by communicating effectively with the client.<sup>34</sup> What counts as effective communication is explained in the commentary as varying “depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.”<sup>35</sup> This seems rather straightforward, but can become complicated depending on the type of AI tool being used. A lawyer may have a duty to explain what an AI does, how it does it and why it is being used to assist them in their representation of the client. Effective communication may also require a lawyer to have a discussion with the client about how that tool treats the client’s data and whether there are any other known or potential risks associated with the use of that tool.

Special care must also be taken when predictive AI is being used — in particular, when the predictive AI’s analysis is opaque or ‘black box’ in nature. It is unclear whether a lawyer must be able to understand and explain exactly what goes on inside the black box. If the tool cannot explain its analysis in a manner that allows its user to verify that analysis, then the user/lawyer may be unable to effectively communicate with the client in order to receive instructions. The black box problem could also give rise to the tangentially related issue of bias in client selection. It is reasonable to expect that lawyers will leverage AI analytics to help them understand the prospect of a potential client’s case either before agreeing to represent that client or before advising them on how to proceed with their matter. Something ought therefore be said about the use of these tools to discriminate in client selection, particularly if the analysis being relied upon is not readily explainable by the lawyer in question.

Until a lawyer agrees to represent a client, there is little other than their duty of competence and human rights laws to provide them with formal guidance about who it is appropriate to accept or reject and for what reasons.<sup>36</sup> The decision to represent a client can also be very difficult to reverse once the

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<sup>33</sup> *ABA Model Rules*, *supra* note 3, R 1.4(a)(2).

<sup>34</sup> *Ibid* at R 3.2-1 (including comment 3).

<sup>35</sup> *Ibid* at comment 3.



attorney-client relationship has been established. Consider also that lawyers' forecasts about the potential for resolution and/or justiciability of their client's disputes play an important role in the advice-giving relationship. In the course of litigation, for example, lawyers must engage in constant strategic analysis in order to advise clients about their best courses of action and prospects for success. Studies into the advice-giving relationship have found that lawyers can become overconfident in their predictions, particularly when related to their client's chances of success,<sup>37</sup> and that the calibration of those predictions does not generally improve the longer one practices law.<sup>38</sup>

Lawyers need to predict in order to advise. AI-based predictive legal tools are therefore likely to see wide uptake as lawyers come to realize that these tools can assist them with the accuracy of their predictions. Lawyers will see these tools as a way to improve their efficiency and effectiveness and as a way to help them offer value-added services that give them a competitive advantage. For some lawyers that advantage may lie in improving the results for their clients, e.g. the amount they are able to recover in a dispute, but for others the advantage may lie in maximizing their own success and statistics. Legal regulators must accordingly consider whether to play a role in guarding against the possibility that these powerful tools will be used to fill lawyers' client rosters with only those clients that AI predicts will be guaranteed winners in their legal disputes. Allowing this to happen would have negative implications for who is able to access legal services. Criminal defense, and contingency fee (including class action) clients, among others, might disproportionately suffer from this use of predictive analytics.

### 3. Duty to Charge Reasonable Fees and Disbursements

A lawyer has a duty to only charge or accept a fee or disbursement "if it is fair and reasonable and has been disclosed in a timely fashion."<sup>39</sup> Given that AI tools can now be used to help lawyers and law firms better understand and predict their labor requirements and billing practices,<sup>40</sup> something more may soon be required of lawyers in the context of fair and reasonable billing. Absent obvious unreasonableness in a lawyer's fees, courts can be hard-pressed to lower fees and disbursements when a client contests them, but AI tools can now offer significantly more detailed and precise ways to track a lawyer's billable

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<sup>36</sup> Allan C. Hutchinson, "Taking it Personally: Legal Ethics and Client Selection" (1998) 1:2 *Legal Ethics* 168.

<sup>37</sup> See e.g. Elizabeth F Loftus & Willem A Wagenaar, "Lawyers' Predictions of Success" (1988) 28:4 *Jurimetrics* 437.

<sup>38</sup> See e.g. Jane Goodman-Delahunty, et al, "Insightful or wishful: Lawyers' ability to predict case outcomes" (2010) 16:2 *Psychology, Public Policy, and Law* 133.

<sup>39</sup> *FLSC Model Code*, *supra* note 3 ch 3.6-1; see also *ABA Model Rules*, *supra* note 3 R 5.1.

<sup>40</sup> Melanie Reid, "A Call to Arms: Why and How Lawyers and Law Schools Should Embrace Artificial Intelligence" (2019) 50 *U Tol L Rev* 477.

work and calculate the fees for a particular matter.<sup>41</sup> Consider as well that clients are starting to demand fixed-fee and other alternative billing arrangements, like capped fees, risk collars and more detailed estimates. Depending on the cost and availability of these AI tools, clients and courts may come to expect that lawyers use them and share their analysis as part of the client intake and retainer process.

We are also going to see more lawyers adopting analytic tools in their practice to assist them with research and case management. As a greater number and variety of tools become available, they will invariably differ in their area of application, ease of use, analytic complexity, accuracy and affordability. These tools will generally be connected online to their manufacturers so that they can be actively updated with new information to improve their usefulness and accuracy. Law firms and lawyers will pay for access through licensing agreements and the tools that prove themselves most useful by offering more features, having greater accuracy and being well-serviced will no doubt end up being more expensive to use. That expense might be passed along to clients in the form of a disbursement which, it is plain to see, risks further exacerbating concerns about access to justice. Clients who can afford to pay for their lawyers to leverage these expensive tools will have access to greater analytic specificity in the legal advice and services they receive. This is not a new problem, of course — the affluent have always had access to higher cost services. I do not intend here to propose a solution, but it is certainly important to draw attention to the likelihood this further access to justice concern will emerge as a result of the adoption of AI tools in legal practice.

#### 4. Duty of Confidentiality

Lawyers have an obvious professional duty to keep client information confidential.<sup>42</sup> In this era of cloud computing, a lawyer must accordingly have an advanced understanding of cybersecurity and privacy risks. This is true for lawyers who ask clients to upload their information by themselves and for lawyers who input client information into the online tools and/or applications that they use while providing legal services. The ABA Standing Committee on Ethics and Professional Responsibility acknowledged this emerging challenge when it issued a Formal Opinion in 2017 to provide guidance to lawyers on transmitting information relating to the representation of a client over the internet and storing client information in the cloud. The Opinion clarified that lawyers may use the cloud for these purposes as long as they undertake “reasonable efforts to prevent inadvertent or unauthorized access.”<sup>43</sup> Many

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<sup>41</sup> Dana Remus & Frank Levy, “Can Robots be Lawyers? Computers, Lawyers, and the Practice of Law” (2017) 30 Georgetown JL Ethics 501 at 506.

<sup>42</sup> *ABA Model Rules*, *supra* note 3, R 3.3-1; *FLSC Model Code*, *supra* note 3 ch 3.3-1.

<sup>43</sup> American Bar Association Standing Committee on Ethics and Professional Responsibility,

state-level regulators in U.S. have followed suit and issued similar guidance documents about the use of cloud computing services.<sup>44</sup>

Most legal technologies using AI will be licensed to the lawyers who use them. If the underlying AI uses a machine learning methodology, it is possible that confidential client information will be shared with a third-party service provider. Even if an AI is only being used internally at a firm in order to analyze billing data, there are risks related to confidentiality, privilege, and commingling of multiple clients' data. Lawyers must accordingly exercise necessary precaution to ensure that these AI tools preserve the security and confidentiality of their clients' data.

## 5. Obligations to Former Clients

AI generally performs better (i.e. is more accurate in its predictions) when it has access to more data, not less. Problems could therefore arise if an AI tool is being used that learns from client data. First, lawyers are subject to an important common law duty under the implied undertaking rule. This rule stipulates that lawyers must maintain confidentiality with respect to any documents that come into their possession during the course of legal proceedings. Unless the lawyer obtains consent for further use, those documents may only be used in the context of the proceeding(s) in which they were disclosed. Lawyers also have a related ethical obligation not to reveal information relating to former clients and not to use that information to the disadvantage of the former client, except as may be permitted or required by the Rules.<sup>45</sup> Under the FLSC Model Code, the ethical obligation extends to forbid “. . .the lawyer or a third person from benefiting from the lawyer's use of a client's confidential information.”<sup>46</sup> Given the above, it is clear that lawyers must be careful to ensure that client information is not stored by AI tools for a period of time or for a particular use that is not consented to by the client.

It is no surprise that the general duty to maintain client confidentiality survives individual lawyers. Concerns about the indefinite storage of confidential client information are well recognised by legal regulators. Lawyers and law firms are encouraged and expected to develop robust file retention, destruction and cybersecurity policies and to communicate those

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“Formal Opinion 477R\*: Securing Communication of Protected Client Information” (22 May 2017), online (pdf): *American Bar Association* <[https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_formal\\_opinion\\_477.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_477.pdf)> .

<sup>44</sup> American Bar Association Centre for Innovation, “Legal Innovation Regulatory Survey” (originally published August 2019, but updated regularly), online: *American Bar Association: Center for Innovation* <<http://legalinnovationregulatorysurvey.info/>> (see under the subheading for “Cloud Computing”).

<sup>45</sup> *ABA Model Rules*, *supra* note 3 R 1.9(c).

<sup>46</sup> *FLSC Model Code*, *supra* note 3 ch 3.3-2, commentary 1.

policies to their clients at the outset of any retainer. Given the likelihood that analytics will soon be leveraged internally by lawyers and law firms to help manage caseloads, caseflows, billing, etc., file retention policies should also reflect and address when, how and why the extended retention of client information for the purpose of data analytics might take place. These policies should factor in relevant local private and/or public sector privacy laws and explain to clients how they can deny consent, withdraw consent or request the destruction of their file, whether that file is paper or digital.

A major focus of ethics rules is to ensure that clients can feel comfortable being open and honest with the lawyer who represents them. Indeterminate retention of client data, whether it is to improve the predictive ability of a practice's AI tools or because the third-party tools learn from that data, could threaten the comfort and trust that encourages candour in the lawyer-client relationship. When considered alongside the duty to communicate and the duty of confidentiality that were discussed above, it is clear that lawyers owe a positive obligation to their clients to: 1) understand the privacy risks of using AI, 2) communicate those risks, including if and how data may be retained by the AI tool and/or AI service providers, 3) seek their client's informed consent for any such data use and/or retention, and, if applicable, 4) seek the client's consent to rely on AI tools in the course of providing legal advice if that tool offers black box analysis that cannot be fully understood or explained.

## 6. Unauthorized Practice of Law

Lawyers regularly delegate work to other legal service providers in an effort to serve their clients more efficiently. Delegation is a normal part of the practice of law. In this context, it is easy to see how failing to use new technologies like AI may represent a missed opportunity. Just as there are some tasks that a lawyer cannot delegate to a non-lawyer, however, there are also tasks that it is inappropriate to use an AI tool to accomplish. Lawyers must understand this. The rules of ethical conduct tackle this distinction, in part, by seeking to limit the unauthorized practice of law.

Rules of professional conduct can only regulate the conduct of lawyers and those who hold themselves out as lawyers by providing that which has been recognized as a legal service. Accordingly, the Rules are framed to require that lawyers "assist in preventing the unauthorized practice of law."<sup>47</sup> Key to being able to do this is understanding the difference in character between tasks performed by humans and those performed by machines. More specifically, can an AI tool be considered to be practicing law or providing legal services?<sup>48</sup> A

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<sup>47</sup> *Ibid*, ch 7.6-1; See also *ABA Model Rules*, *supra* note 3, R 5.5(a) (which states that "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.").

second circuit decision from 2015 seems to have addressed this very question when the court determined that a task does not constitute the practice of law if it can be performed entirely by a machine.<sup>49</sup> This may be problematic however, as it raises the possibility that matters traditionally considered the practice of law could fall outside the scope of legal practice if they can be accomplished entirely by a machine.<sup>50</sup> Lawyers might then have no obligation to consider whether using those tools is facilitating the unauthorized practice of law.

In a way, this makes sense. If an AI tool suggests a response to a lawyer's inquiry, that lawyer would still have an ethical duty to understand and independently validate that suggestion before relying on it to provide advice to a client. Characterizing an AI as not practicing law therefore means that the AI must be accepted as a tool that automates a task in order to augment a licensed lawyer's ability to provide competent, independent professional advice. Things become more complicated when lawyers create or maintain their own AI chatbots however. A chatbot may be programmed to offer very simple and easy to understand advice about routine legal matters.<sup>51</sup> Depending on how thoughtfully it is integrated into the lawyer's practice, a chatbot of this nature may raise concerns about the unauthorized practice of law. Some bots have already caught the attention of legislators in California, who passed the *Bolstering Online Transparency (BOT) Act* in July 2019.<sup>52</sup> The law makes it unlawful to use a bot to communicate with another person to incentivize the purchase or sale of goods or services, unless it is disclosed to the user that they are communicating with a bot.<sup>53</sup> Legal chatbots will undoubtedly also be subject to regulatory oversight.

It seems inevitable that chatbots will prove to be one of the most important, low-cost and widely accessible ways that the legal profession can use technology to help it tackle the pervasive access to justice problems within our legal systems. Given that analytic tools already to assist lawyers with predicting the outcome of certain disputes if brought before a court, it is no stretch to expect a chatbot to be able to assist a self-represented litigant with navigating the rules of civil or criminal procedure, for example. Imagine that an individual could go online or even place a toll-free phone call to speak with a chatbot about a dispute they were having and the chatbot could provide them

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<sup>48</sup> Thomas Spahn, "Is Your Artificial Intelligence Guilty of the Unauthorized Practice of Law?" (2018) 24:4 Rich JL & Tech.

<sup>49</sup> *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, 620 Fed. Appx. 37, No. 14-3845 (2d Cir., 2015).

<sup>50</sup> Michael Simon et al, "*Lola v. Skadden* and the Automation of the Legal Profession" (2018) 20 Yale JL & Tech 234.

<sup>51</sup> Remus & Levy, *supra* note 41.

<sup>52</sup> US, SB1001, An Act to add Chapter 6 (commencing with Section 17940) to Part 3 of Division 7 of the Business and Professions Code, relating to bots" (2017-2018), Reg Sess, Cal, Cal, 2018 (enacted 1 July 2019).

<sup>53</sup> *Ibid* s 17941.

with information about whether there is a legal avenue available to help resolve that dispute and where to go for further assistance. We should want to facilitate this technology.

Many individuals who could potentially benefit from having access to legal services might reasonably also be intimidated by the prospect of entering the legal system and engaging with its actors, many of whom communicate using terms of art that are inaccessible to those without legal training. Chatbots could come a long way to helping close that gap by opening up formal dispute resolution channels to individuals who might not otherwise have known they existed or had access to them. To do this however, law societies would have to play a much more active role in regulating (e.g. by testing, approving, certifying and/or assigning responsibility for) the tools being deployed.

## VII. Future Opportunities and Challenges

We are now at a moment in history where it is clear that legaltech will have a lasting impact on the practice of law. For many in and around the legal profession, there is hope that using technology to reduce costs and improve efficiency will give rise to opportunities to improve access to justice.<sup>54</sup> This is nowhere more evident than it has been in the move to allow and encourage legal proceedings to take place virtually/online. For innovative thinking to continue its move into the mainstream of legal practice however, something must also be done to change how we regulate the practice of law. We must start to think differently about who and/or what ought to be considered a legal service provider, especially if we have a vision for the future in which an AI-based system should be permitted to independently offer some forms of legal assistance. Continuing with the status quo will almost certainly stifle the kind of innovation that AI can give rise to and prevent us from moving forward in our efforts to address our undeniable access to justice challenges.<sup>55</sup>

States like Utah have taken the lead in this conversation about how to recognize, facilitate and regulate alternative legal practice.<sup>56</sup> Other states<sup>57</sup> and some jurisdictions outside of the U.S.<sup>58</sup> have also begun to take up this

<sup>54</sup> See e.g. Emily S Taylor Poppe, “The Future is Complicated: AI Apps & Access to Justice” (2019) 72 Okla L Rev 185.

<sup>55</sup> Utah State Bar, Work Group on Regulatory Reform, “Narrowing the Access-to-Justice Gap by Reimagining Regulation” (August 2019), online (pdf): *Utah State Bar* <<https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>> .

<sup>56</sup> *Ibid.*

<sup>57</sup> See *Ibid* at footnote 6 (for a list of U.S. jurisdictions actively considering reform at the time of publication of that report).

<sup>58</sup> Jordan Furlong “The Coming End of Lawyer Control over Regulation” (8 February 2019), online: *Slaw* <<http://www.slw.ca/2019/02/08/the-coming-end-of-lawyer-control-over-legal-regulation/>> (where the author explains that England, Wales, Australia and Nova Scotia, Canada have all considered regulatory reform).

challenge. Facilitating greater innovation in the legal sector is incredibly challenging because the best way to encourage creativity is to have flexible regulatory mechanisms that will allow us to respond to AI and other innovative technologies that are able to do things we had not previously contemplated. We must be able to effectively assess and regulate technologies that the drafters of our ethics rules may not have even imagined.

For the practicing lawyer who is not actively involved in the work of their regulatory body however, there are equally pressing concerns about how to establish and maintain technological competence. This professional responsibility may prove more challenging for sole or small practice lawyers than it is for those in larger firms. Larger, well-resourced firms are starting to add data scientists to their payroll and are also assigning someone the task of establishing expertise in AI. An in-house expert can support the firm's lawyers by staying abreast of meaningful technological developments, encouraging others to engage in technology-related continuing legal education and developing or contributing to an overall technology strategy for the firm.

Some specific AI-related issues that lawyers will want to keep abreast of are regulatory responses to matters that governments see as posing a threat. France, for example, has passed a law that punishes those who use analytics tools to predict how an individual judge might decide in a particular legal matter. Although the judiciary will continue to publish the names of the judges who are involved in individual cases, article 33 of the *Justice Reform Act* states that “[t]he identity data of magistrates and members of the judiciary cannot be reused with the purpose or effect of evaluating, analysing, comparing or predicting their actual or alleged professional practices.”<sup>59</sup> It is plain to see how this prohibition will have a negative impact on the uptake of predictive analytics tools by litigators in France.

Not surprisingly, this law will also limit the availability of tools that judges could take advantage of in order to improve their own performance. For example, judges can use analytics to identify patterns or inconsistencies in their own decisions that would allow them to compare those findings with relevant data from their peers and to then adjust their own behaviors, where warranted. Unfortunately, lawyers in France have now also demanded the same protections as have been afforded to judges<sup>60</sup> which, if granted, would have severely negative consequences for access to justice efforts in that jurisdiction. More public access to raw and/or processed data could reduce the need to hire

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<sup>59</sup> LOI n° 2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice (1), JO, 24 March 2019, art 33.

<sup>60</sup> Conseil National Des Barreaux, “Resolution du Conseil National Des Barreaux Portant Sur L’Open Data Des Decisions de Justice” (Adoptée par l’Assemblée générale des 14 et 15 juin 2019), online: *Conseil national des barreaux* < [https://www.cnb.avocat.fr/sites/default/files/cnb-re2019-06-15\\_open\\_datafinal.pdf](https://www.cnb.avocat.fr/sites/default/files/cnb-re2019-06-15_open_datafinal.pdf) > .

## VIII Ethical Lawyering and Artificial Intelligence

a lawyer in some situations by helping steer potential litigants towards alternative dispute resolution pathways. Shockingly, the penalty for violating this judicial analytics ban is up to five years in prison. Lawyers everywhere should want to keep abreast of developments like this so they can learn from and help guard against extreme regulatory approaches to judicial analytics like the one France has taken.

An in-house AI/technology expert will also be able to keep abreast of changes in professional regulation and enforcement. It seems inevitable that regulators will learn to use technology more effectively to help them fulfil their duty to protect the public. A simple example could be the use of AI-based natural language processing to scrape and/or scan lawyers' websites and advertisements and assess them for compliance with any relevant rules of professional conduct. As regulatory bodies adopt these tools, lawyers will want to be prepared to hold them accountable for their use.

### VIII. Conclusion

The legal profession is not afraid to use technology. What has been made clear by the COVID-19 pandemic and by the world's rising interest in AI however, is that maintaining professional competence in an era of tremendous technological creativity and growth can be very demanding. Law schools must teach about legaltech and how it can be used as early and often in the curriculum as possible.<sup>61</sup> Introductory courses on contract law, tort law, legal research, legal ethics, etc., will be doing a disservice to students if they do not address, explain and even demonstrate the role that legaltech plays in the practice of law. That being said, the ability to provide legal advice and counsel to those in need requires special skills that cannot be replicated and/or replaced by a machine. Computers cannot perform tasks that require creativity or emotional intelligence and they cannot counsel or make arguments in a courtroom.<sup>62</sup> For this reason, it is important to speak about current AI tools as being technologies that enhance, rather than replace, the work done by lawyers.

With respect to the practicing bar, it is now up to the individual law societies to include technological competence in their codes of professional conduct. It is undeniable that doing this will be crucial for the sustainability of the broader legal profession in the years ahead. In the absence of having to meet a positive duty, some lawyers might resist adopting legaltech because they are concerned about potential risks and liabilities. There is no standardized, universally-accepted way to test an AI tool (including those using 'black box'

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<sup>61</sup> Reid, *supra* note 40.

<sup>62</sup> Alyson Carrel, "Legal Intelligence Through Artificial Intelligence Requires Emotional Intelligence: A New Competency Model for the 21<sup>st</sup> Century Legal Professional" (2019) 35:4 Ga St U L Rev 1153.



algorithms) such that a court or professional body would want to certify that it was made the right way and could be trusted for use. But given the increasing prevalence of these AI tools, it is no longer acceptable for a lawyer to be wilfully blind to the ways in which they may be able to use them to provide more accessible, effective and lower cost services to their clients. Having a duty of technological competence forces lawyers to make informed decisions about whether to adopt AI-based legaltech in their practice by reading both the fine print and between the lines to clarify how liability for harm can and/or will be apportioned, and then governing themselves accordingly based on that information.

Finally, many jurisdictions are reviewing their regulatory frameworks to determine whether they should be revised to encourage greater innovation. Changes of this nature will have huge implications for the practice of law. With bots and different AI tools, many of which are being made available to the public by companies and are not the responsibility of any particular (regulated) lawyer, we are now grappling with questions about where liability for bad legal advice lies if you not only take lawyers out of the solicitor-client relationship, but also fully take humans out. Those seeking legal assistance from non-lawyers must do extra due diligence in order to protect themselves. So too must lawyers who are using these tools, particularly if they want to maintain their competence in this era of AI.