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AI on the Case: Legal and Ethical Issues

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Agenda

I.   Introduction

II. Professionalism in the Digital Age

III. AI Ethical Issues

IV. Concluding Thoughts - AI in the Practice of Law

I.   Introduction

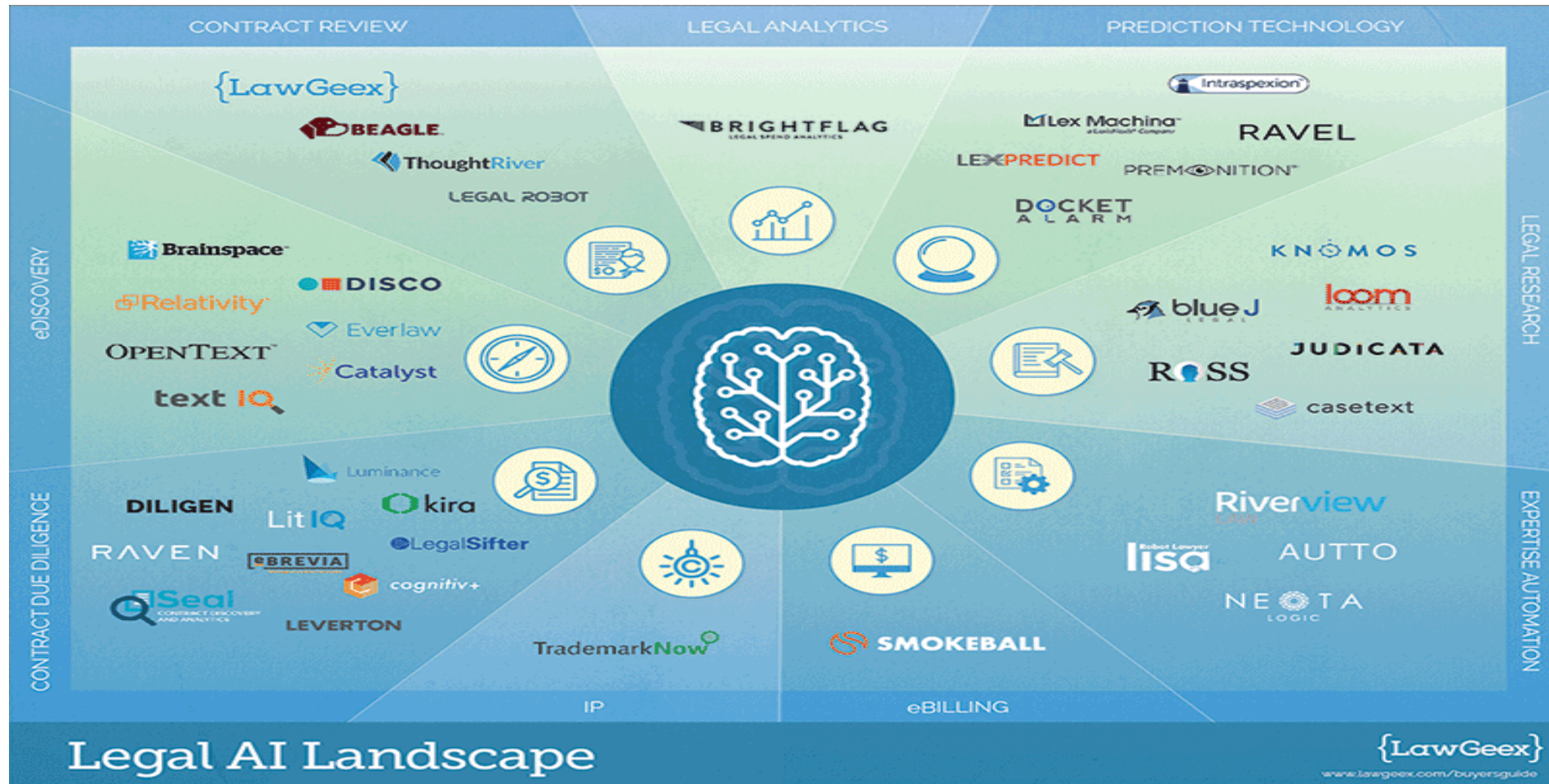| ARTIFICIAL INTELLIGENCE			
Learning	Speech	Vision	Language
Computers teaching themselves and learning from experience	Understanding spoken words	Recognizing and distinguishing visual images	Understanding the meaning of written words
to			
apply / integrate the knowledge, understanding or information to perform (human-like) analysis, solve (similar) problems, respond to (related) questions, instructions and observations and make recommendations and decisions (in the same or similar areas)			

Legal AI Products and Services

Table from Jonathan Marciano, *Automating the Law, A Landscape of Legal AI Solutions*, TOPBOTS, June 2017, reproduced in Sandra McCandless and Stephen Klein, Ethical Issues Posed by Artificial Intelligence, June 15,2018

How Legal AI Products and Services are being applied

Technology-Assisted Review	Legal Analytics (Big data, algorithms and AI)	Practice Management Assistants	Making Legal Decisions	Legal Bots
• E-discovery • M & A due diligence • Record keeping investigations	• Predictions on trends and outcomes in IP and other litigation • Recommendations on staffing, billing and timelines • Predictions on judges' decisions, recommendations on precedents and language	• Transactional due diligence • Bankruptcy • Litigation research and preparation • Real Estate • Legal research and analysis • UTBMS / LEDES coding • Automated time recording	• Algorithms for criminal sentencing decisions • Online dispute resolution tools • Online portals providing legal advice	• Assisting clients in dealing with specific legal issues • Providing pro bono legal advice

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But implementation challenges exist:

➢ AI-based system used for setting bail conditions and sentencing alleged to discriminate based on race

➢ Facial recognition systems used to establish sexual orientation

➢ Accuracy of facial recognition systems identifying individuals in arrest databases questioned

➢ Hiring system to identify top technical talent withdrawn from use for not rating candidates in a gender neutral way

➢ Chatbox trained on conversations with Internet users removed from service after 24 hours for being sexually focused, Nazi sympathizing

Issues involved in Using AI Products and Services

➢ How do lawyers determine if they have an obligation to use, or to not use, AI products or services?

➢ What due diligence do lawyers need to do before using AI products and services?

➢ How can lawyers assume responsibility for self-learning AI systems that make decisions or recommendations? How do the lawyers ensure the systems are fair, accurate and provide proper legal advice?

➢ How can lawyers disclose the information that self-learning systems need to be trained without breaking client confidentiality?

➢ Will AI systems replaces lawyers and paralegals? Can companies obtain legal services directly from vendors of legal AI products and services?

➢ How will billing be impacted, when AI systems can do in seconds what previously required [hours]/[days]/[weeks] of effort?

➢ How will young lawyers be trained?

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Issues continued

➤ Are there obligations to explain that an AI system is being used, how it is being used and any inherent or other limitations to: (i) clients?; (ii) opposing counsel?; or (iii) the courts?

➤ What happens when the expert systems conflict? Whose software rules?

➤ Can an expert system be deposed? Will those using AI Systems need to be able to explain the algorithms underlying the system?

➤ Will technology-assisted review systems used for e-discovery accurately recognize when legal advice is being given (in order to assert privilege over relevant legal documents)?

➤ What happens to CPD obligations when AI tools will (hopefully) always track changes in the law?

➤ How do we ensure the focus remains on the law and not on the legal profession?
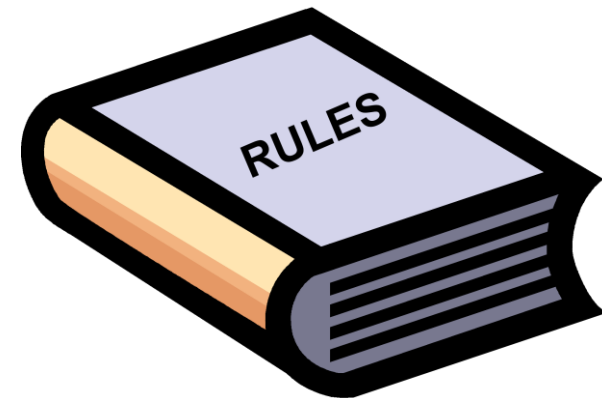
II.   Professionalism in the Digital Age

American Bar Association (ABA) Model Rules of Professional Conduct:

- ➢ Preamble: A Lawyer's Responsibilities
- ➢ Rule 1.1 Competence
- ➢ Rule 2.1 Advisor
- ➢ Rule 5.3 Responsibilities Regarding Nonlawyer Assistance
- ➢ Other Rules

Preamble: A Lawyer's Responsibilities

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client … .

[6] As a public citizen, a lawyer should seek improvements of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. …

[16] … The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by the legal rules. …
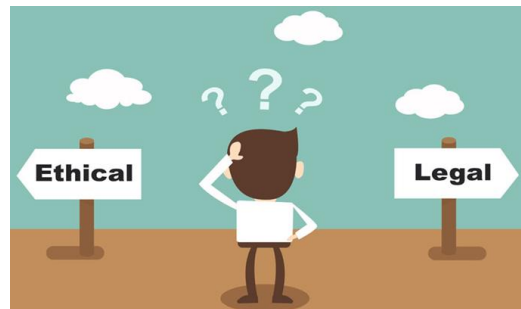
Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
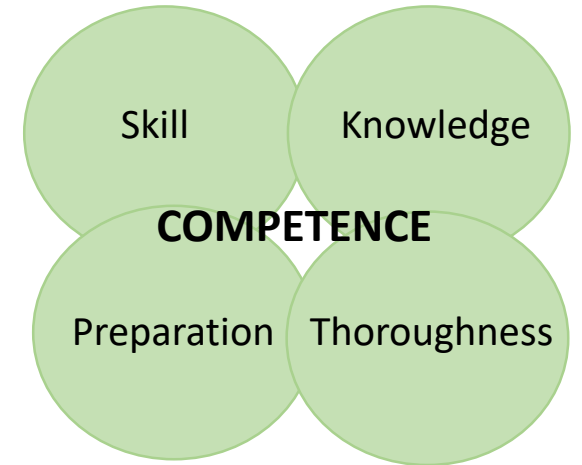
Comment

Maintaining Competence

[8] 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.

Skill
Knowledge
COMPETENCE
Preparation
Thoroughness

What is "Competence"?

"... legal prowess and good intent do not create a sufficient level of competence to effectively evaluate, operate or measure the efficacy of algorithmic tools."

Jason Tashea and Nicolas Economou, *Be competent in AI before adopting, integrating it into your practice*, ABA Journal, April 23, 2019

Competence will require sufficient knowledge and skill to provide advice and supervision regarding:
- ➢ what the AI does
- ➢ its effective operation
- ➢ whether the desired objectives are met

Lawyers do not need to be AI specialists but should recognize that being competent requires:
- ➢ understanding the limits of their own knowledge
- ➢ knowing when to enlist skilled assistance, and doing so

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ABA Model Rules of Professional Conduct
Rule 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgement and render candid advice. In rendering advice, a lawyer 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.

> ➢ AI Systems are not the lawyer. Regardless of the technology, lawyers are required to exercise "independent professional judgement"

> ➢ Consideration of moral, economic, social and political factors is the domain of the lawyer, not the AI System

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Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(b)   a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer …

Comment

Nonlawyers outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations.

➢ Supervision of AI assistance may soon be specifically within lawyer's responsibilities

Other Rules

Rule 1.3 (Diligence)	Duty of lawyer to act with reasonable diligence and promptness in representing a client
Rule 1.4 (Communication)	Duty to consult with the client about the means by which the client's objectives are to be accomplished and to keep the client informed of status Issues to be explained to the extent reasonably necessary to permit the client to make informed decisions.
Rule 1.5 (Fees)	Fees and expenses shall not be unreasonable. Basis or rate of fees shall be communicated to the client, preferably in writing
Rule 1.6 (Confidentiality of Information)	Information to be kept confidential except in limited circumstances (including where the client gives informed consent) Lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to client information
Rule 3.3 (Candor toward the Tribunal)	Duty to disclose use of AI tools and systems to the court?
Rule 3.4 (Fairness to Opposing Party and Counsel)	Duty to disclose use of AI tools and systems to opposing counsel?

III.   AI ETHICAL ISSUES

" … the surrender of human decision-making to machines entails the dystopian risk of a dehumanized legal system, which mindlessly perpetuates biases, sacrifices the spirit of the law in pursuit of efficiencies, undermines legal institutions, destabilizes jurisprudence and corrodes public trust.

 We can reap the benefits of artificial intelligence in the law while mitigating its risks, but only if we develop a normative answer to the central question facing us: "What it comes to the legal system, to what extent should society entrust to artificial intelligence decisions that affect people?"

Eileen M. Lach and Nicolas Economou, *INSIGHT: Four Principles for the Trustworthy Adoption of AI in Legal Systems*, Bloomberg Law, March 29, 2019

The Rationale for Ethical AI Legal Systems

➢ To realize the benefits of AI systems, we must trust they are safe and effective

➢ Especially the case for AI in our legal systems:
   ○ Black box systems and lack of trust in AI will undermine the use of Legal AI Systems

➢ If AI is to be accepted and improve the functioning of our legal systems, we require principles, policies and practices that encourage AI to be adopted on the basis of informed trust

Ethics Frameworks

➢ European Commission, *Ethics Guidelines for Trustworthy AI*, 2019

➢ IEEE Global Initiative on Ethics of Autonomous and Intelligent Systems, *Ethically Aligned Design: A Vision for Prioritizing Human Well-being with Autonomous and Intelligent Systems*, 2019, pp. 211 – 281

➢ ITechLaw, *Responsible AI: A Global Policy Framework*, 2019

➢ Singapore Personal Data Protection Commission, *A Proposed Model Artificial Intelligence Governance Framework*, 2019

➢ Treasury Board of Canada, *Directive on Automated Decision-Making*, 2019

ITechLaw, Responsible AI Policy Framework

Responsible AI Policy Framework	
Organizations that develop, deploy or use AI systems and any national laws that regulate such use	
Principle 1 (Ethical Purpose and Societal Benefit)	should require the purposes of such implementation to be identified and ensure that such purposes are consistent with the overall ethical principles …
Principle 2 (Accountability)	shall respect and adopt the eight principles of this Policy Framework for Responsible AI (or other analogous accountability principles). In all instances, humans should remain accountable for the acts and omissions of AI systems.
Principle 3 (Transparency and Explainability)	shall ensure that, to the extent reasonable given the circumstances and state of the art of the technology, such use is transparent and that the decision outcomes of the AI system are explainable.
Principle 4 (Fairness and Non-Discrimination)	shall ensure the non-discrimination of AI outcomes, and shall promote appropriate and effective measures to safeguard fairness in AI use.
Principle 7 (Privacy)	shall endeavour to ensure that AI systems are compliant with privacy norms and regulations, taking into account the unique characteristics of AI systems, and the evolution of standards on privacy.

IEEE, Ethically Aligned Design

Effectiveness: Adoption of A/IS in a legal system should be based on sound empirical evidence that they are fit for their intended purpose.	**Competence**: A/IS should be adopted in a legal system only if their creators specify the skills and knowledge required for their effective operation and if their operators adhere to those competency requirements.
Accountability: A/IS should be adopted in a legal system only if all those engaged in their design, development, procurement, deployment, operation, and validation of effectiveness maintain clear and transparent lines of responsibility for their outcomes and are open to inquiries as may be appropriate.	**Transparency**: A/IS should be adopted in a legal system only if the stakeholders in the results of A/IS have access to pertinent and appropriate information about their design, development, procurement, deployment, operation, and validation of effectiveness.

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IV. Concluding Thoughts - AI in the Practice of Law

Remain Competent

➢ Keep up-to-date on developments in AI and how it is being and can be used

Understand the Role of AI in your practice

➢ Pay attention to the benefits, limitations and liabilities of using AI

➢ Understand how AI is being used in your practice

➢ Seek appropriate advice from outside experts

➢ Require standards and accreditations

Interpret the lawyer's professional obligations broadly

➢ Duty of confidentiality

➢ Duty to supervise

➢ Obligations to communicate

"We always overestimate the change that will occur in the next two years and underestimate the change that will occur in the next ten. Don't let yourself be lulled into inaction."

Bill Gates

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2. European Commission, *Ethics Guidelines for Trustworthy AI*, 2019, available at https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai

3. IEEE Global Initiative on Ethics of Autonomous and Intelligent Systems, *Ethically Aligned Design*: *A Vision for Prioritizing Human Well-being with Autonomous and Intelligent Systems*, First Edition. Pp. 211 – 281, available at https://standards.ieee.org/content/dam/ieee-standards/standards/web/documents/other/ead1e_law.pdf

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5. Katherine Medianik, *Artificially Intelligent Lawyers: Updating The Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 Cardozo Law Review 1497 at 1513-1514

6. Singapore Personal Data Protection Commission*, A Proposed Model Artificial Intelligence Governance Framework*, 2019 available at https://www.pdpc.gov.sg/-/media/Files/PDPC/PDF-Files/Resource-for-Organisation/AI/A-Proposed-Model-AI-Governance-Framework-January-2019.pdf

7. Jason Tashea and Nicolas Economou, *Be competent in AI before adopting, integrating it into your practice*, ABA Journal, April 23, 2019 available at http://www.abajournal.com/lawscribbler/article/before-lawyers-can-ethically-adopt-and-integrate-ai-into-their-practices-they-must-first-be-competent

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