



Exploring the ethical issues of innovation in legal services

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Section I. Introduction

In a profession that thrives on tradition, there is growing consensus that the legal industry will change “more radically over the next two decades than over the last two centuries as a result of technology” (Susskind, 2013). The impact of innovation has changed the delivery of legal service. Examining ethical issues around innovation in the legal industry will improve client awareness, empowering them to make informed consumer decisions. Practitioners must also recognize the potential liability and reputational consequences of misusing innovative technology. Changes to the traditional standards associated with legal practice impacts the core of the industry. Using Susskind’s (2013) model of “liberalisation, the ‘more for less’ challenge, and technology”, I will examine the ethical impact of innovation from three lenses: the liberalisation of the profession through alternative business structures; tackling the ‘more for less’ challenging through outsourcing and the rapidly evolving technology of artificial intelligence. Focusing on these issues will illustrate the interconnected ethical impact of innovation in legal services provision. Ultimately, fostering a strong understanding amongst both, members of the industry and laypersons, is imperative to maintaining public trust and confidence, in an ever-changing profession.

Section II. Liberalization of the Profession, through Alternative Business Models

The 2007 Legal Services Act, passed by the Government of the UK was intended to create a more dynamic and competitive legal market. The Act introduced Alternative Business Structures (‘ABS’): “allow[ing] non-lawyers to own and invest in law firms” (Lawsociety.org.uk, 2018), making available non-lawyer knowledge, management abilities and capital (Gordon and Grech, 2015).

II.i. Ethical Impact of a Non-Lawyer Management Structure

Firstly, there is growing consensus, especially in America, that the fundamental pillars of the legal profession, will be undermined by investors’ capital (Gillers, 2013). A change in a firm’s ownership structure to non-lawyers, who often are professional investors, could change the goals of the organization: yielding profits could become more relevant than delivering quality client-focused legal advice. Accepting the assumption that a firm owned by lawyers operates under a unique brand (Goshtasbi, 2013), creates a concern that including non-lawyers in the management structure will impact the firm’s professional standard to the detriment of clients. Granted, a change in firm ethos towards meeting investors’ profit-focused results (Ciampi, 2012) could result in lawyers neglecting their ethical principles. An expectation could arise that lawyers must more deliberately balance the interests of shareholders and clients, instead of exclusively delivering client-first advice. In order to compete effectively with fellow employees and net profits from their performance as expected in the investor-driven culture, lawyers may be susceptible to disregarding their moral standards (Adams and Matheson, 1998).

Moreover, in such a culture, where investors are solely interested in practice areas that yield profit, those that do not contribute to the firm’s bottom-line (such as the pro-bono practice) could be neglected. Nonetheless, it is significant to acknowledge that even lawyer-managed firms now, consistently gauge success based on rankings by annual revenue (Darian-Smith, 2017). In fact, according to Henderson (2014), Big-Law firms rely on “bad incentives”: focusing attention mainly on the achievements of individual lawyers, instead of improving the quality of legal services provided to the client. This suggests that profits and fee-earning models already influence the type of work undertaken, even in lawyer-managed firms. Additionally, from a corporate social responsibility and reputational lens, it is likely that non-lawyer owners and investors could continue to maintain a focus on public-interest law (McMorrow and Scheuer, 2011).]

II.ii. Ethical Impact of a Non-Lawyer Employees

A secondary concern is that without the same educational background, regard for professional standards, and peer-driven ethos of integrity, non-lawyers follow less stringent ethical codes. Thus,



these non-lawyers will negatively influence the professional environment, brand and conduct of lawyers. Indeed, lawyers are “trained and duty-bound to look for conflicts, prize confidentiality, and uphold other professional rules” (Robinson, 2016). Yet, there is notable research about the precariousness of the profession and its ethical standards (Moorhead, 2014); in the past decade, the legal profession seems especially plagued by a general trend of unethical behaviour (Moorhead, 2014). There is increasing evidence of incidents involving breaches of professional standards, solicitors circumventing the rules and disregarding the integrity that once was an expectation in the profession. There is no convincing evidence that non-lawyers are less likely to meet the same ethical standards that lawyers hold themselves to (Moorhead, 2015). Given that the SRA rules govern the professional responsibilities and conduct of non-lawyers as well, (SRA Handbook, 2017) I am unconvinced that non-lawyers will infringe upon legal ethical principles, either more frequently or to a greater extent than lawyers already do.

III.iii. On Balance, Are the Ethical Concerns of ABS Unmanageable?

While the data to date is non-conclusive, there is no empirical evidence to suggest that entities with an ABS licenses, or non-lawyer professionals are more likely to diminish ethical standards in legal practice as a whole. In fact, early data from Grech and Gordon (2015) use client claims to illustrate ABS firms have not faced a greater number of disciplinary actions than non-ABS firms. Moreover, given that ABS firms are currently in early-stages of development, all firms are required to comply with a regulatory process, including a clear system to capture client dissatisfaction (McMorrow, 2016, p.707). Currently, the regulatory landscape in England and Wales seems to adequately recognize and address major ethical concerns regarding ABS.

Section III. ‘More for Less’, through Outsourcing of Legal and Legal Support Services

The current market for legal services includes a notable shift from bespoke services to commoditized services (Christensen, Wang and Van Bever, 2013). Legal process outsourcing (“LPO”) is one form of unbundled legal services that fits within Susskind’s (2013) model of ‘more for less’. It is designed so high-volume legal tasks including discovery and due diligence are conducted at minimized costs.¹ Given that today, “core legal and legal support related services are being outsourced” (Ross, 2010) offshore, there are many potential ethical concerns² that must be considered by a law firm before outsourcing legal tasks, including: supervision and preventing the unauthorized practice of law, independent judgment, competence, conflict checks and confidentiality (Ham, 2008, p. 328-341).³ For the purpose of this essay, I will explore the confidentiality concern of offshore LPO.

III.i. Ethical Impact of Mismanagement of Confidential Information

The mismanagement of information and the misuse of private data raises serious ethical concerns. In situations where a law firm outsources data handling services including word processing, call handling or photocopying there is likely to be high-levels of potentially confidential client information exchanged (Ham, 2008). Firstly, there are concerns regarding the practicality of outsourcing information to countries with different outlooks on personal privacy. Secondly, in these situations, there are concerns about who has access to this data, the procedure should confidential information become compromised and how to maintain client trust. On a broader scale, it is necessary to have provisions in place for instances of breach in confidentiality. It is also critical for the outsourcing lawyer to recognize they could potentially face findings of misconduct or inadequate professional service, in the eventuality that confidential client data is misappropriated. Perhaps the most concerning aspect of this situation, is the absence of ethical guidelines from national regulatory bodies in England and Wales (such as the SRA

¹ Usually achieved through using inexpensive labour from foreign jurisdictions (‘offshore’ LPO).

² Although beyond the scope of this paper, there are also ethical concerns involving data protection export issues; potentially covered by the Data Protection Act 1998, and the EU GDPR (implemented May 2018).

³ For a more comprehensive examination of additional ethical concerns of LPO, see this article.



or The Law Society) to clarify a law firms' obligation to clients in this regard. In America, guidance is equally opaque; the New York City Bar Opinion for instance, states that "a law firm should exercise reasonable care to prevent the company from disclosing or using confidences or secrets of a client" (Formal Opinion 2006-3, 2006). However, there is no clarity as to the controls that need to be implemented to ensure effective, ethical maintenance of confidential information.

III.ii. Can Ethical Concerns with LPO be Effectively Managed?

Practically, any work that is outsourced should be subject to a confidentiality agreement with the supplier to mitigate the risk associated with a potential breach of confidentiality (SRA Code of Conduct 2011, 2017). Clearly, this creates a professional and ethical obligation that during the processing of selecting a company to outsource to, the law firm will consider the controls available, including outlining the home jurisdiction's rules around confidentiality in the retention agreement, and verifying the enforcement procedures to safeguard confidential information in the foreign jurisdiction. The San Diego County Bar Association's Committee on Legal Ethics (2007 cited in Ham, 2008, p.326) even suggested that a law firm could place its own employee (an overseas trained and licenced lawyer) in a supervisory role to manage the legal and ethical standards governing the foreign outsourcing staff. Such a solution could be useful as these lawyers would have a clearer understanding of their ethical responsibilities and are likely be more disposed to implementing these professional standards—even where the work is outsourced offshore.

III.iii On Balance, Do the Ethical Concerns of LPO Outweigh the Benefits?

Initially, LPO to foreign jurisdictions involved basic, administrative tasks; recently, there has been an increase in the complexity of tasks that are outsourced, including legal research and the preparation of legal briefs (Ham, 2008, pp.327-328). As early as 2006, the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee (2006 cited in Ham, 2008, p.325) gave a formal opinion outlining the benefits of outsourcing including reductions in cost and time, greater efficiencies and subsequently improved client service. Yet, as the market for LPO continues to expand (NASDAQ GlobeNewswire, 2017), it is critical to remain attentive to the potential ethical concerns. The ethical considerations around keeping client data confidential have far-reaching implications on the finances and reputation of the outsourcing firm, especially should there be risks of "industrial espionage or sabotage, bribery and commercial theft" (Ham, 2008, p. 335). From a commercial perspective then, unethical offshore LPO is counterintuitive to sustaining a 'more for less' law firm model.

Section IV. Technological Innovation, through the use of Artificial Intelligence

The term artificial intelligence ('AI'), conceived by John McCarthy (2007), is defined as: "the science and engineering of making intelligent machines". The ambit of artificial intelligence extends to include various computational tools (Mills, 2006);⁴ in the sphere of legal services the tasks performed will require a level of legal-knowledge and human intelligence (Alarie, Nibleet and Yoon, 2016; Winick, 2017). Certainly, concerns regarding user consent and privacy involving the mining of big-data are especially relevant when considering the use of AI. The primary ethical consideration I assess in this section, is the regulation of AI systems; specifically, how the current lack of transparency inhibits operational understanding and monitoring system decision-making.

IV.i. Tackling the Ethical Impact of Algorithmic Bias in AI Tools

AI tools help with the delivery of legal services in many ways (Susskind and Susskind, 2017, p.69).⁵ While machines may not be influenced by human-like emotion (Picard, 2001), become tired or fatigued, (Feldman, 2012) the underlying algorithms can be impacted by bias. Firstly, given that "algorithms need

⁴ For further information regarding the categorization of 'AI' tools, see this report.

⁵ See this book for a detailed categorization of legal AI tools.



to be trained extensively by real lawyers” (Kohn, 2017) these can be subject to personal prejudices by the lawyer programming them, and influenced by the decision-making process, intellect and experiences of these lawyers. Ultimately, although there is a rise of self-learning machine-learning robots (Brynjolfsson and McAfee, 2017), currently, AI tools and algorithms are developed based on historical data, and the programmer’s learned experiences. By exclusively using historical data that is likely based on previous biases, a system can be inherently influenced by its design to perpetuate these biases (Surden, 2017).

A lack of transparency in the data used for algorithm development and formulation has far-reaching consequences (Knight, 2017a; Knight, 2017b). To account for the lack of transparency within algorithms, a professional standard imposing an ethical framework would be beneficial. These ethical codes need to ensure fairness mechanisms govern those designing algorithms, so that systems that are implemented with public functions can reach equitable decisions (Rosenberg, 2017). Policy-makers must incentivize socially-responsible AI development (Iyengar, 2017), including tools such as the Algorithmic Impact Assessment (Southerland, 2018). Doing so will create a burden on programmers and developers to improve transparency and accountability in their algorithm designs, ideally improving the fairness of AI-based decision-making.

IV.ii. The Moral Ambiguity of AI Tools

There are far-reaching moral implications to entrusting AI systems to make human legal decisions (Sharkey, 2018). Given that human decisions are: “embedded in sequences and contexts” (Brooks, 2013), the process is seemingly more complex than a mathematical measurement or algorithmic formula. A unique feature of case-management and client-facing legal instruction is a lawyer’s ability to create an emotional connection and detect behavioural inconsistencies (Brooks, 2013). This allows a lawyer to capitalise on technical skill and contextualize client mannerisms in relation to the nuanced facts of a case. An AI tool, is likely unable to accurately decipher human intention in this same manner, and therefore, unlikely to be able to make the most relevant or precise judgment tailored to sensitive information. This is particularly detrimental from an ethical point of view because the fundamental basis of an attorney-client relationship is founded on trust (Cohen, 2017). It is hardly reasonable to expect that a client will want to forge such a relationship with a machine; in Moorhead’s (2016) study on Quality in Legal Services, clients highlighted the importance of emotional support from their lawyer— valuing it almost as much as they did the outcome of the case. Therefore, lack of transparency in AI systems, is detrimental to the client, who is unable to truly be guaranteed appropriate support from the machine.

IV.iii. On Balance, Can the Ethical Challenges Around AI Be Managed?

Indeed, The Law Society posits technology has a significant impact on mass legal services, and that technology will advance innovative methods of delivering process-driven legal services (Roper et al., 2015). However, it is proving challenging to create an effective method for maintaining transparency in AI development and decision-making. AI systems hold high levels of proprietary value, given the embedded intellectual property content; an attempt to protect this exclusive information perpetuates the ‘black-box’ syndrome (Sharkey, 2018). This generates a lack of transparency and limits engineers from gaining a comprehensive understanding of the formulaic decisions made. Granted, some legal scholars, programmers and cognitive scientists believe that AI-machines can be held legally accountable through requiring system ‘explanations’ to rationalize decisions (MIT Technology Review, 2017). However, until such explanations can be generated consistently and comprehensively, it is more likely that the lawyers using the technology will be expected to deal with diminishing client trust and potential reputational damage, that could arise due to AI system errors.



Section V. Conclusion

Although Susskind and Susskind (2017, p.117) predict that “working together, humans and machines will outperform unassisted human experts”, this essay aimed to illustrate that there are some serious ethical issues associated with innovation in legal services. Indeed, the opportunities around innovation in the legal profession, present clear benefits, including the reduction of costs, increasing opportunities for access to justice and improving quality in legal services (Roper et al., 2015). However, in order for these improvements to be truly meaningful they must be balanced with the ethical standards the profession is synonymous with. A lack of regulatory controls and frameworks can leave practitioners without guidance about potential financial, time and reputational risks. Clients, and even society at large, can suffer when professionals they expect to trust, are unprepared to deal with the ethical challenges of innovation. Developing an awareness of these ethical considerations in the legal profession can incentivise practitioners to work more considerately—doing so will enable delivering better value for clients. Ensuring that clients maintain trust and confidence is particularly relevant for maintaining business—critical in what is becoming an increasingly diverse and competitive legal industry. Ultimately, acknowledging the importance of ethics in the legal profession, will help reinforce the orthodoxy—that lawyers are professionals who will act with integrity, in the best interest of their client, and always with a mindset of upholding the rule of law to ensure the effective administration of justice (SRA Handbook, 2017).



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