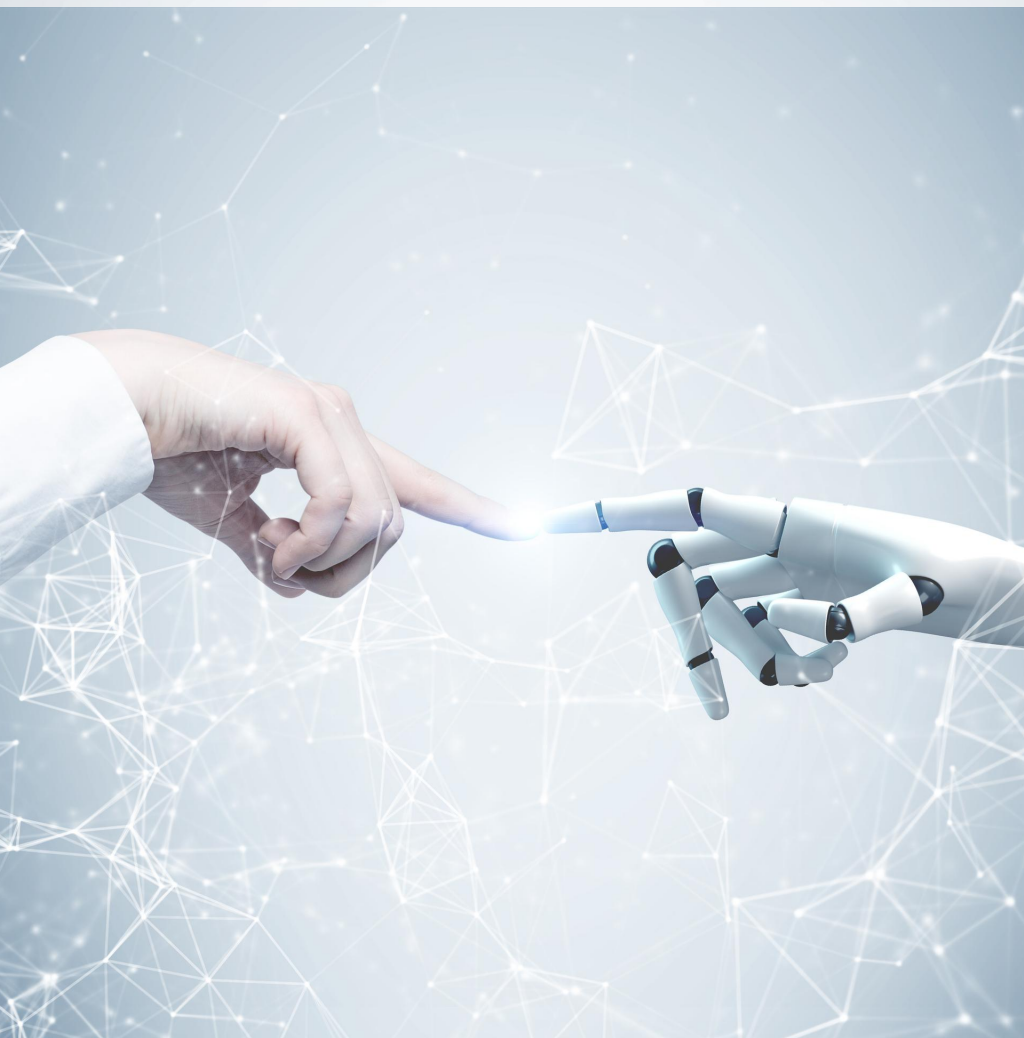


LRD COLLOQUIUM 2020 RESEARCH PAPER SERIES



LEGAL RESEARCH AND DEVELOPMENT DEPARTMENT

THE LAW SOCIETY OF SINGAPORE

About the Colloquium

The Colloquium on 'The Role of Lawyers in the Age of Disruption: Emerging Regulatory Challenges' was held as a live webinar on 19 May 2020, amidst Singapore's circuit-breaker period, and attended by over 320 members of The Law Society of Singapore. It aimed to be a platform for legal practitioners, emerging scholars, industry experts and students to contribute to developing thought leadership in topics relating to the ethical and regulatory challenges arising from technology's impact on the legal profession.

The Colloquium sought to examine two important questions. First, how should we re-examine the role of lawyers in an age of disruption, especially with increasing automation, competition and liberalisation? Second, given that professional regulation sets the parameters of lawyers' business models, practice structures and professional values, how should lawyers, law practices and potential new entrants to the legal market be regulated or re-regulated in the future of legal work?

These issues were discussed over the course of four panel sessions focusing on the following themes:

- Panel 1: **The Role of Lawyers in the Age of Disruption**
- Panel 2: **Legal Ethics & Technology**
- Panel 3: **Alternative Legal Service Providers - To Regulate or Not to Regulate?**
- Panel 4: **Law Practices and the Future of Work**

To explore these questions, 13 research papers were presented across the four panel sessions, helmed by expert moderators and commentators.

For a snapshot of the highlights of the Colloquium, please visit the [LRD Research Portal](#) for our post-event feature article [here](#).

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Panel 2 Legal Ethics & Technology

Professional Judgment as a Core Ethical Value

Gan Jhia Huei

PROFESSIONAL JUDGMENT AS A CORE ETHICAL VALUE

Gan Jhia Huei*

As artificial intelligence ('AI') increases in sophistication, lawyers are likely to rely more and more on AI in their work, even though the parameters of how lawyers should engage with AI may remain unclear for some time to come. One key concern is that lawyers will delegate the exercise of their professional judgment to AI, which may result in the erosion of professional identity. To guard against the erosion of professional identity and set the tone for the legal profession's engagement with AI, it may be useful to emphasise that the exercise of professional judgment is an ethical imperative for the legal profession. This essay suggests a few amendments to the Legal Profession (Professional Conduct) Rules 2015 to achieve this.

I. INTRODUCTION

Artificial intelligence ('AI')-driven automation is, without doubt, a threat to numerous jobs today. Workers in traditional professions such as law, accounting and medicine are not spared this threat, since the vast majority of professional jobs involve some amount of routine work that can (eventually) be performed by a computer. It appears that the likelihood of a worker being replaced by a robot is at least partly determined by how much of the job's work is rote in nature.¹ In the world of accounting, speculation is rife that AI, which is already widely deployed in fraud detection tasks, will replace auditors; a website called 'Will Robots Take My Job?' speculates that there is a 94 percent chance that accountants and auditors will be replaced by AI.²

AI is seen as a unique threat to jobs because 'narrow' AI (i.e. AI that can perform single or limited types of tasks³) is often able to perform such tasks more quickly, accurately and consistently than its human counterparts, notwithstanding the narrow range of tasks that it is able to perform. For practising lawyers, day-to-day legal work involves processing large amounts of data and information in the form of documentary

* J.D.; Associate (Rev Law LLC). The essay is written in the writer's personal capacity.

¹ Jim Vinoski, 'Robots As Job Creators? Upskilling, Cobots And AI May Prove Job Loss Doomsayers Wrong' (*Forbes*, 22 October 2019) <www.forbes.com/sites/jimvinoski/2019/10/22/robots-as-job-creators-upskilling-cobots-and-ai-may-prove-job-loss-doomsayers-wrong/#11fafa53bf4> accessed 9 May 2020.

² Will Robots Take My Job? <<https://willrobotstakemyjob.com/13-2011-accountants-and-auditors>> accessed 9 May 2020.

³ 'Narrow AI' (*DeepAI*) <<https://deepai.org/machine-learning-glossary-and-terms/narrow-ai>> accessed 9 May 2020.

and other evidence, document templates, statutes and cases (amongst other tasks). Unsurprisingly, AI has found several applications in various types of legal practice support software. Developments in natural language processing ('NLP'), a subfield of AI, have led to NLP being used to help lawyers carry out due diligence, legal research, contract review and electronic discovery⁴ more efficiently. And, following the by-now famous study in which the LawGeex document review software managed to identify potential pitfalls in non-disclosure agreements ('NDAs') with a 94 percent accuracy in only 26 seconds (while human lawyers obtained an accuracy of 85 percent with an average review time of 92 minutes),⁵ it is unsurprising that AI has been touted to eliminate the need for legal research positions within the next decade.⁶ Accountants, it would seem, are not only ones whose jobs are threatened by the rise of the robots.

II. AI AND PROFESSIONALS

A common theme in the discourse regarding AI and professional jobs (in particular, accounting jobs) is the need for the exercise of professional judgment, notwithstanding the increasing degree to which these jobs can be automated.⁷ What is meant by the related terms of 'professional judgment', 'professional' and 'professionalism'? William Goode has described 'professionalism' as having the core characteristics of 'prolonged specialised training in a body of abstract knowledge and a collectivity or service orientation'.⁸ However, professionalism also requires this specialised training to be applied holistically in the service of others; Pasquale notes that a key characteristic of professional practice is 'an ability to integrate facts and values, the demands of the particular case and prerogatives of society, and the

⁴ Daniel Faggella, 'AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications' (*Emerj*, 14 March 2020) <<https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/>> accessed 9 May 2020.

⁵ Ron Friedmann, 'AI Beats Lawyers in NDA Review Accuracy – LawGeex Study' (*Prism Legal*, 5 May 2018) <<https://prismlegal.com/ai-beats-lawyers-nda-review-accuracy-lawgeex-study/>> accessed 9 May 2020.

⁶ Neil Sahota, 'Will AI Put Lawyers Out of Business?' (*Forbes*, 9 February 2019) <www.forbes.com/sites/cognitiveworld/2019/02/09/will-a-i-put-lawyers-out-of-business/#5f6cfd3f31f0> accessed 9 May 2020.

⁷ Pat Sweet, 'Artificial intelligence Cannot Replace Professional Judgment for Auditors' (*Accountancy Daily*, 4 July 2019) <www.accountancydaily.co/artificial-intelligence-cannot-replace-professional-judgment-auditors> accessed 9 May 2020.

⁸ Helen G Hurd, 'Who is a Professional?' (*Journal of Cooperative Extension: Summer*, 1967) <www.joe.org/joe/1967summer/1967-2-a1.pdf> accessed 9 May 2020.

delicate balance between mission and margin'.⁹ Because professional practice requires the holistic evaluation and balancing of facts, principles and ethical concerns, Hatfield has observed that 'judgment is the heart of professionalism'.¹⁰ A working definition of 'professional judgment' can be found in paragraph 120.5.A1 of the 2018 Handbook of the International Code of Ethics for Professional Accountants ('ICEPA'), which defines professional judgment as 'the application of relevant training, professional knowledge, skill and experience commensurate with the facts and circumstances, including the nature and scope of the particular professional activities, and the interests and relationships involved'.¹¹

AI poses a challenge to professional practice because professionals are encouraged to make use of AI (indeed, rely upon it) for the same reasons that AI poses a threat to professional jobs—i.e. because it is faster, more accurate and cheaper than a human. However, it is also common knowledge that AI 'work products' are not assured of being completely accurate all the time—for example, even the LawGeex software did not succeed in spotting all the issues with the NDAs. Moreover, AI software may generate output that is as epistemically problematic as its input data, as is the case with AI output that reflects the biases inherent in the datasets that the AI was trained on. Kluttz and Mulligan sum up the professional's difficulty with AI in the paragraph below:¹²

The concern that engineers and logics of automation will stealthily usurp or undermine the decision-making logics, values, and domain expertise of end-users has been an ongoing and legitimate complaint about decision-support and other computer systems. As technology reconfigures work practices, researchers have documented potential loss of human agency and skill, reduced opportunities to learn in the field, both over- and under-reliance on decision-support systems, confusion about responsibility, and diminished or exaggerated accountability that leaves humans unable to

⁹ Frank Pasquale, 'Professional Judgment in an Era of Artificial Intelligence and Machine Learning' (2019) 46 boundary 2 73, 73.

¹⁰ Michael Hatfield, 'Professionally Responsible Artificial Intelligence' (2019) 51 Ariz St LJ 1057, 1060

¹¹ International Ethics Standards Board for Accountants, *Handbook of the International Code of Ethics for Professional Accountants* (International Federation of Accountants 2018).

¹² Daniel Kluttz and Deirdre Mulligan, 'Automated Decision Support Technologies and the Legal Profession' (SSRN, 15 July 2019) 5 – 6
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3443063> accessed 9 May 2020.

exercise control but bearing the weight and blame for system failures.

(Emphasis added)

Concerns with professional ‘over-reliance’ on AI are not unfounded or overblown, as computer programmes have already become the subject matter underlying medical malpractice claims in the US. In the case of *Skounakis v Sotillo*, (‘the *Skounakis* case’)¹³ the deceased, who was taking the weight loss medication Cytomel, died from atherosclerosis. A medical malpractice suit was commenced against (i) Dr Sotillo, who had prescribed Cytomel to the deceased following the recommendation of a computer programme named ‘Dr G’s Weight Loss & Wellness Program’, and (ii) the developer of the computer programme. It was alleged that the combination of Cytomel with phendimetrazine, which the deceased had taken previously for weight loss, was well known for its negative side effects and had caused the deceased’s death by atherosclerosis.

While it is unclear how the *Skounakis* case was/will be ultimately decided, the case illustrates how the professional deployment of AI as a decision support tool can give rise to difficult questions about professional responsibility for any professional in Dr Sotillo’s situation. For example, what is the appropriate standard of care that a professional should be held to with respect to his/her reliance on the recommendations of AI software? Is the standard of care breached when a professional unquestioningly relies upon software that has a track record of reliability and accuracy?

III. THE ETHICAL PROBLEM WITH OVER-RELIANCE ON AI

Questions of ethical liability also arise in parallel with the aforementioned issues of civil liability. What ethical issues could arise from the over-reliance on a computer programme when deciding an issue that could affect a person’s well-being? If Dr Sotillo had unquestioningly relied upon the software’s recommendation without taking into consideration the deceased’s medical history, she had arguably failed to exercise her professional judgment. And if judgment is at the heart of professionalism, then the

¹³ *Skounakis v Sotillo*, A-2403-15T2 (NJ Super Ct App Div, 19 March 2018) <<https://law.justia.com/cases/new-jersey/appellate-division-unpublished/2018/a2403-15.html>> accessed 9 May 2020.

failure to exercise professional judgment surely represents an undermining of that professionalism. It is therefore unsurprising that various professional codes of conduct contain exhortations for professionals to exercise their professional judgment. The phrase 'professional judgment' appears no less than 48 times in the ICEPA, which also has a whole section (120.5) titled 'Exercise of Professional Judgment', while Rule 2.1 of the American Bar Association's Model Rules of Professional Conduct ('ABA Model Rules') reads as follows:

Counselor

In representing a client, a lawyer shall exercise independent professional judgment 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.

In the context of lawyers and AI legal decision support software ('legal AI'), Simshaw has framed the ethical problem as such: "As lawyers become increasingly reliant on intelligent systems, it draws into question the extent to which their professional judgment is 'independent'".¹⁴ This essay suggests a possible starting point for addressing this problem in the Singapore context, by arguing that the Legal Profession (Professional Conduct) Rules 2015 ('PCR 2015') should place greater emphasis on professional judgment as an ethical imperative, because in an age where the 'substitutive automation'¹⁵ of jobs is likely to accelerate, professional judgment is likely to be one of the few virtues that will continue to distinguish lawyers from their AI equivalents. A greater focus on professional judgment in the PCR 2015 would therefore both provide guidance to members of the legal profession in respect of their use of legal AI, in addition to signalling the profession's commitment to intermediating between technology and the clients they serve with discernment and sound decision-making.¹⁶

¹⁴ Drew Simshaw, 'Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law' (2019) 70 Hastings Law Journal 1 173, 204.

¹⁵ Pasquale (n 9) 73.

¹⁶ Pasquale (n 9) 73.

IV. THE PCR 2015 AND USE OF AI

We first consider how ethical liability could attach under the PCR 2015 to a legal practitioner who advises a client on the basis of legal AI-generated output that he/she unquestioningly adopts as his/her own without exercising his/her professional judgment.

While there are no cases from which an analogy may be drawn, a legal practitioner who fails to exercise his/her professional judgment in respect of legal AI output could breach Rule 5(2)(c) of the PCR 2015 which requires a legal practitioner to ‘act with reasonable diligence and competence in the provision of services to the client’. Governing the interpretation of Rule 5(2)(c) are Rule 5(1)(b) (‘A legal practitioner must have the requisite knowledge, skill and experience to provide competent advice and representation to his or her client’) and Rule 5(1)(c) (‘A legal practitioner has a duty to be diligent in the advice and information given to his or her client, and in the manner the legal practitioner represents the client’) of the PCR 2015. This obligation requires the legal practitioner to, *inter alia*, properly advise the client on the law and all other matters which are incidental to the scope of the legal practitioner’s retainer.¹⁷

To obtain a sense of what a legal practitioner’s obligations in respect of legal AI-generated output might be, it may be helpful to draw an analogy between AI and a competent associate. When a competent associate turns in a piece of written work, it is often impractical for the legal practitioner supervising that associate to carry out a detailed line-by-line checking of the work. At the same time, diligence, competence and/or a sense of professional responsibility or ownership are likely to require the legal practitioner to at least carry out a critical ‘sense check’ of the work, so that he/she is satisfied that (for example) the conclusions reached in the written work are correct and adequately comprehensive legal research has been carried out, before using such work in his/her advice to the client. While the checking of work may be more appropriately classified as ‘supervision’, it should be noted that the scope of the legal practitioner’s duty to supervise under Rule 32 of the PCR 2015 appears to be confined to humans (‘A legal practitioner must ... exercise proper supervision over the staff working under the legal practitioner in the law practice’). Therefore, the failure to

¹⁷ *The Law Society of Singapore v Zulkifli Bin Mohd Amin* [2009] SGDT 4 at [32].

exercise professional judgment and critically assess legal AI output is unlikely to amount to a breach of Rule 32 under the PCR 2015.

While this essay does not propose guidelines or suggestions in respect of how much checking or ‘sense checking’ is needed by the legal practitioner, the degree of checking or ‘sense checking’ required should, as a matter of common sense, be proportionate to the difficulty and/or complexity of such work and the significance of the larger matter for which the written work was produced. Such checks ought to be carried out even if the written work was produced by an associate who is generally competent and reliable. There appears to be no reason why the legal AI output should be subject to a different level of scrutiny from the work product of a competent associate.

It is therefore submitted that a legal practitioner’s obligation of diligence and competence under Rule 5(2)(c) of the PCR 2015 would require the legal practitioner to exercise his/her professional judgment by at least carrying out some amount of ‘sense checking’ to critically assess the legal AI’s output before adopting such output as his/her own. To illustrate using the facts of the *Skounakis* case, this would have entailed Dr Sotillo critically assessing whether it was prudent to follow the computer programme recommendation to prescribe Cytomel to the deceased, in view of the deceased’s medical history of taking phendimetrazine.

V. PUTTING PROFESSIONAL JUDGMENT AT THE FORE – SOME POSSIBLE AMENDMENTS TO THE PCR 2015

A. *A separate and express obligation to exercise independent judgment in Rule 4*

However, more could arguably be done to articulate the legal practitioner’s obligation to exercise professional judgment in respect of the legal AI output for the following reasons. Firstly, it could be argued that legal AI would be deployed by lawyers precisely out of the need to be thorough and diligent¹⁸ while under time pressure, which is likely to lead to the ‘confusion over responsibility’ for the legal work product

¹⁸ Hatfield (n 10) 1108.

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described by Kluttz and Mulligan.¹⁹ Secondly, as explained below, there are no express articulations of the imperative to exercise professional judgment in PCR 2015 outside of the narrower context of Rules 10 and 12. To provide clarity on the legal profession's use and engagement with AI and to emphasise professional judgment as an ethical duty, it is suggested that a new sub-rule be introduced under Rule 4 of the PCR 2015, such as the following:

A legal practitioner shall exercise independent professional judgment with reference to his duty to uphold the administration of justice, social and economic considerations, input from any relevant technology and any other issues that may be relevant to the client's matter.

The sub-rule suggested above is modelled upon Rule 2.1 of the ABA Model Code, which obliges a lawyer to render legal advice based on a holistic assessment of the various factors and concerns relevant to the client's problem. This is clear from the Comments to Rule 2.1:

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At

¹⁹ Kluttz and Mulligan (n 12) 5.

the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

The rationale for including such an interpretive principle in Rule 4 is as follows. The PCR 2015 is structured as a series of ethical rules prefaced by general and specific interpretive principles. The general principles of interpretation guiding the interpretation of the entire PCR 2015 are all found in Rule 4, while additional, more specific interpretive principles that govern the interpretation of a particular rule or rules²⁰ (such as Rule 9(1) of the PCR 2015) are interspersed throughout the PCR 2015. Jeffrey Pinsler, SC has described these interpretive principles as 'express[ing] the spirit of the rules to which they are related'²¹ or 'facets of foundational values which more truly reflect the ethical conscience of a lawyer'.²²

Currently, Rule 4 does not contain a general interpretive principle requiring legal practitioners to exercise their professional judgment. Rather, the articulation of this professional value in the PCR 2015 is in the narrower context of the lawyer's duty to assist in the administration of justice under Division 1 of Part 3 of the PCR 2015 (titled 'Role in administration of justice'):

Rule 10(1)(b)

A legal practitioner must exercise professional judgment over the substance and purpose of any advice which the legal practitioner gives and any document which the legal practitioner drafts.

Rule 12(1)(b)

A legal practitioner must exercise the legal practitioner's own judgment both as to the substance and the form of the questions put or statements made to a witness.

²⁰ Jeffrey Pinsler, *Legal Profession (Professional Conduct) Rules 2015 – A Commentary* (Academy Publishing, 2016) para 04.003.

²¹ *ibid.*

²² *ibid.*

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Rules 10 and 12 respectively regulate the legal practitioner's conduct in proceedings before a court or tribunal and the legal practitioner's communications and dealings with witnesses. It is therefore clear that the interpretive principles concerning professional judgment in Rule 10(1)(b) and Rule 12(1)(b) are fundamentally concerned with the legal practitioner's independence from the client, and the need for the legal practitioner to resist the temptation to give in to a client's wishes to mislead the court or engage in other misconduct.²³ This flows from the legal practitioner's role as an officer of the court²⁴ and his/her paramount obligation to assist in the administration of justice, rather than merely being the client's mouthpiece in court and other proceedings.²⁵

However, this is not to say that independent judgment is required only when discharging one's Rule 10 and 12 obligations. It is clear from PCR case law that legal practitioners are obliged to holistically assess and evaluate a client's circumstances and dispense advice whose substance and form is appropriate to a particular client's circumstances, which essentially amounts to the exercise of professional judgment. As observed by the Court of Three Judges in *Law Society of Singapore v Uthayasurian Sidambaram*:²⁶

[W]here the client is inexperienced, the scope of the solicitor's duty will naturally broaden as he will require and expect the solicitor to take a much broader perspective. The scope of the duty of the solicitor depends on the extent to which the client appears to need advice: Carradine Properties Ltd v D J Freeman & Co (1982) 126 SJ 157 ('Carradine') at 158. In Carradine, the solicitor successfully demonstrated at trial that his client did not require him to advise upon the importance of checking the scope of his insurance coverage. We agreed broadly with the proposition of the English Court of Appeal in Carradine, except to emphasise that solicitors should not rely on this to shirk their responsibilities even when dealing with a sophisticated client – the duty to advise the client still remains and the

²³ Pinsler (n 18) para 10.004.

²⁴ Legal Profession (Professional Conduct) Rules 2015 rule 11(1).

²⁵ *ibid* rule 9(1)(a).

²⁶ [2009] 4 SLR(R) 674 at [79].

sole difference lies in deftly tailoring the advice to best suit the needs (and abilities) of the individual.

The Court of Three Judges in *Law Society of Singapore v Tan Chwee Wan Allan*²⁷ also observed that a legal practitioner must exercise his/her judgment when deciding on the appropriate level of supervision of his/her staff, not only in respect of the operation of the practice's client accounts, but also for all aspects of their law practice:

In summary, the duties under the SA Rules are not capable of being abdicated from and/or delegated to employees regardless of whether they are secretaries, accountants or legal assistants. Instead, it is the solicitor's unyielding responsibility to ensure that his employees are properly instructed and supervised. There are many dimensions and aspects involved in such a responsibility and it behoves all solicitors to exercise sound judgment in assessing what the appropriate level of supervision and instruction required for their practices, in general, and each client matter, in particular, is.

As Rule 2.1 of the ABA Model Rules suggests, the lawyer is obliged to exercise his professional judgment because he/she is the client's advisor and balances various factors, including moral, ethical and other considerations. As the use of AI becomes more commonplace in the legal profession, it is submitted that there should be an increased emphasis on the aspect of professional judgment that requires the legal practitioner to critically assess and balance different factors in the decision-making process. This can be done by including a new sub-rule under Rule 4 of the PCR 2015, such as the one suggested above. The factors that a legal practitioner would have to take into consideration under this sub-rule would include, where applicable, the output of legal AI software, and legal practitioners should be placed under a positive obligation to critically assess such output and make a judgment call on whether such output can be deployed to solve the client's problem (rather than rubber-stamping such output because it is assumed to be accurate). This approach in fact dovetails with the need to take a context-sensitive approach in competently advising one's client—for example, any costs savings of using AI to support the legal

²⁷ [2007] 4 SLR(R) 699 at [43].

practitioner's work would have to be balanced against the need for the legal practitioner to satisfy him/herself that the AI's output can be relied upon and adopted as his/her own work.

B. Other suggested amendments to the PCR 2015

It is also suggested that other amendments could be made to the PCR 2015 to complement the Rule 4 general interpretive principle to exercise professional judgment, such more broadly phrased duties of competence and supervision that would take into account the legal profession's increased engagement with AI and the need to use such technology in a professionally responsible way.

In 2012, the ABA implemented several changes to the ABA Model Rules, including changing the title of Rule 5.3 from 'Responsibilities Regarding Nonlawyer Assistants' to 'Responsibilities Regarding Nonlawyer Assistance'²⁸ (emphasis added) and adding a new Comment 8 to Rule 1.1 regarding technology competence,²⁹ which reads as follows:

Rule 1.1

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

[8] Maintaining 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.

²⁸ Katherine Medianik, 'Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era' (2018) 39 Cardozo L Rev 1497, 1521.

²⁹ Robert Ambrogi, 'Tech Competence' (*LawSites*) <www.lawsitesblog.com/tech-competence> accessed 9 May 2020.

As noted by one commentator, this entails that ‘a lawyer should keep reasonably abreast of readily determinable benefits and risks associated with applications of technology used by the lawyer, and benefits and risks of technology lawyers similarly situated are using’.³⁰ As regards Rule 5.3, a submission by the ABA’s Section of Science and Technology Law to the National Institute of Standards and Technology clarified that the amendment to Rule 5.3 clarified that the duty of supervision ‘encompasses non-lawyers whether human or not’.³¹ It is submitted the following amendment to Rule 4(h) of the PCR 2015 could be made:

A legal practitioner must keep up to date with all pertinent developments in the legal practitioner’s area of practice, including the law and benefits and risks associated with any relevant technology.

Additionally, Rule 32 of the PCR 2015 could be amended to read as follows:

Responsibility for law practice

A legal practitioner must, regardless of the legal practitioner’s designation in a law practice, exercise proper supervision over the staff and technology rendering assistance to the legal practitioner in the law practice.

It is submitted that adding and amending (as the case may be) the general interpretive principles under Rule 4 to (i) require legal practitioners to exercise their professional judgment and (ii) require legal professionals to keep up to date with the benefits and risks associated with any relevant technology in his/her area of practice would serve as a useful gloss on the scope of the legal practitioner’s obligations of diligence and competence under Rule 5 vis-à-vis legal AI. Likewise, an amended Rule 32 would serve to similarly reinforce the ethical notion that legal practitioners must exercise oversight over the legal AI’s output, rather than uncritically accept it. Underscoring

³⁰ Hedda Litwin, ‘The Ethical Duty of Technology Competence: What Does it Mean for You?’ (*National Association of Attorneys General*) <www.naag.org/publications/nagtri-journal/volume-2-issue-4/the-ethical-duty-of-technology-competence-what-does-it-mean-for-you.php> accessed 9 May 2020.

³¹ American Bar Association Section of Science & Technology Law, ‘Comments of the American Bar Association Section of Science & Technology Law regarding RFI: Developing a Federal AI Standards Engagement Plan’ (*American Bar Association Section of Science & Technology Law*, 10 June 2019) <www.nist.gov/system/files/documents/2019/06/10/nist-ai-rfi-abascitech-001.pdf> accessed 9 May 2020.

these proposed amendments / additions is the notion that the legal profession must remain in the 'driving seat' vis-à-vis AI, which can only be done if legal practitioners are reminded to exercise the requisite professional judgment that is required of them as their client's advisers.

VI. CONCLUSION

While it is clear that lawyers must be able to decide when legal AI output can be relied upon, how exactly this can be done remains an open question in these early days of AI development and deployment. With regard to AI-driven e-discovery systems, Kluttz and Mulligan have made the following suggestion:

Our findings reveal a need for closer alignment of automated legal decision making technologies, such as the predictive coding e-discovery systems that we have described here, with the professional logics of lawyers and the legal profession. [...] These goals can be accomplished not only via more detailed and clearly articulated professional norms and rules—such as the duty of technological competence discussed above—but also via clearer standards, shared evaluation practices, and technical design considerations aimed at connecting these technological systems to the professional domain in which they are deployed.³²

This, according to the authors, can be achieved by, *inter alia*, the development of new governance models that 'enlist appropriate technical experts in evaluating systems that support professional cognitive work' and the development of AI systems that are 'contestable' (i.e. designed to engage and interact with humans).³³ Others, such as Hatfield, propose (in relation to the highly-specialised field of AI applications in tax law) that a public-private professional certification regime be set up to certify the accuracy of legal AI software, in addition to being contestable.³⁴

However, until the necessary regulatory and technological frameworks are in place to enable legal practitioners to evaluate the reliability of legal AI output, there will be a

³² Kluttz and Mulligan (n 12) 6.

³³ Kluttz and Mulligan (n 12) 39.

³⁴ Hatfield (n 10) 58.

significant regulatory and normative gap vis-à-vis legal practitioners' obligations regarding their use of AI in practice, and one which may continue to exist for some time to come. This paper has proposed that, as a first step towards filling this normative and regulatory gap, greater regulatory emphasis be placed on the exercise of professional judgment by legal practitioners. Doing so will make explicit the importance of calibrated and holistic decision-making that is essential to the professional identity of legal practitioners, as well as distinguishing lawyers from the computers that could replace them.

