



The State Bar of California

Task Force on Access
of Legal Services – Subcommittee on
Unauthorized Practice of Law
and Artificial Intelligence

ATILS Agenda Item C.1.c.
UPL-AI Agenda Item B.3.
05-13-19 Meeting

To: Subcommittee on Unauthorized Practice of Law and Artificial Intelligence
From: Simon Boehme and Daniel Rubins
Date: May 2, 2019
Re: B.3. Recommendation: Regulation of an entity permitted to practice law using technology must include the establishment of adequate standards that regulate both the provider and the technology itself

Section IV(E)(3) of the UPL/AI Report

Technology provides opportunities to serve legal needs at greater scale than humans, with higher availability than humans, and in many other ways differently from humans. However, as consumers of legal services, individuals, corporations, and government organizations are accustomed to receiving certain protections and guarantees with legal services. The Rules of Professional Conduct contain many of the customs and safeguards for consumers of legal services but are tailored to the practice of law by human lawyers. Parallel rules (sample of Rule 1.1 to 1.5.1 in Appendix A) for legal technology providers engaging in the practice of law should be carefully developed from the Rules of Professional Conduct, Statutes, and Rules of Court to provide similar protections for all consumers of legal services and avoid creating (or, arguably, worsening) a two-tiered system of justice. For example, for admission to the bar, lawyers submit to a moral character review. Should a legal technology provider wish to deploy technology products that engage in the practice of law, the legal technology provider should be similarly screened to protect the public from dubious actors.

The nature of technology and the practice of law by legal technology providers also introduces new challenges and risks for society that regulations for human lawyers do not adequately address. Accordingly, we also recommend the following technology standards that extend beyond the Rules of Professional Conduct. Since technology can be developed in a manner that avoids the accountability provided by human actors, we make specific recommendations to ensure algorithmic transparency.

Legal technology products shall:

1. Preserve confidentiality, privacy, and security of client information using reasonable technical means.
2. Employees, contractors, and vendors must either
 - a. have no access to client data; or both (b) and (c)
 - b. the legal technology provider must obtain, and keep on file for inspection, executed non-disclosure agreements between the client and any individual that may access client data in their role as an employee, contractor, vendor, etc. of the legal technology provider; and
 - c. perform a conflict check between each individual in their role as an employee, contractor, vendor, etc. of the legal technology provider, as well as between each client that any individual has ever had data access.

3. Use modern, accessible design techniques and patterns for client-facing applications.
4. Use clear, precise language appropriate for the intended audience.
5. Clearly communicate legal terms so any lay person may reasonably understand terms of service, privacy policy, and any necessary disclosures, or disclaimers (i.e. no click-wrap, browse-wrap, or unnecessarily long legal documents).
6. Obtain freely given, specific, informed, and unambiguous consent for any limitations of liability, modification of rights, limitation of scope, or potentially adverse effect of using the legal service.
7. Provide reasonable default settings that maximize privacy and security.
8. Provide a portable copy of stored data upon request.
9. Provide a reasonable account deletion and data removal process.
10. Provide multi-factor authentication, when feasible.
11. Publicly designate a Data Protection Officer (DPO).
12. Provide notification of any data breach within 72 hours of becoming aware of any breach.
Report any data breaches to the State Bar in a timely manner. Does not apply to encrypted data.
13. Maintain and information security policy for all personnel.
14. Ensure reasonable service availability and uptime.
15. Provide appropriate notice to clients before terminating a product.

Technology lacks the singular mental state of an individual and can therefore mitigate many of the harms that the Rules of Professional Conduct currently protect against. However, to sufficiently isolate client information, technology products must be intentionally designed to do so, just as lawyers are trained to avoid sharing confidential information. For example, legal technology providers should not be exempt from performing conflict checks on the prospective clients of their legal service, *unless* they have developed technological mechanisms, policies, and procedures to prevent information leakage from one client to another, or knowledge of a client's affairs by any third party like the technology provider's employees, vendors, etc. Regular access control measures would clearly be insufficient, and the presence of full-screen recording analytics tools, or user impersonation would be disqualifying. However, if a legal technology provider can demonstrate to a panel of experts that their system uses reasonable technological measures to avoid knowledge of client information, for instance, using end-to-end encryption with no backdoors, the panel could exempt the legal technology provider from certain duties like performing conflict checks.

Finally, there are certain domains that are not suitable for technology to provide a legal service, namely representation in Court or before a Tribunal, particular legal advice involving criminal matters, and other highly complex or consequential issues. However, it is impossible to fully enumerate the specific areas where legal technology providers may reasonably engage in the practice of law using technology. Therefore, we recommend case-by-case evaluation by a panel of experts.

It is clearly in the public interest for legal technology providers to develop these products and serve more of society's legal needs, so the State Bar should provide further guidance, information, and encouragement as the standards evolve and technology changes.