



Law Society
of Ontario

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Technology Task Force

Update Report

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Executive Summary

In a time of significant technological change, the Law Society must look anew at its regulatory mandate, framework, and standards, to determine whether they will adequately serve the needs of Ontarians going forward.

Emerging legal technologies have the potential to significantly impact the public, the legal professions, and the Law Society as a regulator. Licensees and members of the public are increasingly looking to the Law Society for more direction on the use of legal tech. Many of the developments occasioned by the rise of these tools are novel and challenging, and they go to the core of the Law Society's mandate. The Law Society must be forward-looking in identifying the appropriate role(s) for technology in the delivery of legal services, its own role as a regulator in this changing environment, and the nature of the public interest.

The Law Society's Technology Task Force, composed of lawyer, paralegal, and publicly-appointed lay benchers, is examining these issues with a view to recommending regulatory approaches and tools that will appropriately facilitate access to justice and protect the public from risks of harm. This report outlines some of the Task Force's preliminary observations, frames the issues for consideration, and plots the Task Force's intended work process.

Significant recent advancements in technological capabilities like artificial intelligence, combined with a variety of market forces, have contributed to the rapid rise of novel legal technology tools and services. Many of these tools offer support to lawyers and paralegals in their work, while other tools aim to provide legal information and assistance directly to members of the public. This report canvasses many of the ways in which these tools engage current regulatory standards and professional conduct rules, as well as their prospects for making legal services and justice outcomes more accessible.

This report also introduces key guiding principles, policy objectives, and practical challenges that will inform the Task Force's project. Emerging legal technologies raise complex and multi-faceted issues, but analysis of these issues can be grounded in the Law Society's mandate and foundational principles. The report also sets out key topics of inquiry that the Task Force has developed during its first year. These topics – which address three regulatory objectives of defining scope, determining responsibilities, and fostering innovation – will guide the Task Force's deliberations.

Finally, this report identifies some of the regulatory approaches and tools that it will consider in its ongoing work. A wide variety of potential frameworks are available to



respond to legal tech tools that deliver services directly to the public and related innovative delivery methods.

With respect to use of legal tech by licensees, it is more immediately clear that the Law Society should take new steps to foster innovation within the legal professions. There are many different ways to accomplish that objective, but as a first step the Task Force will begin to develop enhanced professional guidance about technology usage.

Introduction

For as long as there have been lawyers and paralegals, there have been new technologies continually arriving to assist and transform the delivery of legal services. Legal research databases, personal computers, email, practice management software, smartphones, and many other technologies have all arrived with a mix of enthusiasm and concern over their implications for the future of legal services. Ultimately, imperatives extending well beyond the legal professions – such as client demands for greater convenience and reduced cost, and legal professional interests in increased productivity and proficiency – have typically forced the inevitable integration of these technologies into legal practice. Professional regulators have routinely needed to adjust rules and guidance in order to facilitate desirable outcomes from the use of these technologies, and to avoid harmful outcomes.

Yet the latest emerging legal technologies possess some unique qualities such that they can be seen as not merely a difference in degree, but a difference in kind. These technologies are developing unprecedented capabilities at an unprecedented pace. They are spurring a variety of innovations in the ways that legal services are being delivered. Many legal tech tools can help lawyers and paralegals do their jobs more effectively, by improving service quality and by reducing time and expense. Many tools can also help consumers of legal services make more informed decisions in their own legal matters. In some cases, legal services are now being delivered directly to the public through these emerging technologies, without the involvement of lawyers or paralegals.

As the legal services regulator in Ontario, the Law Society has a keen interest in understanding how these legal technologies will impact the public's access to high-quality legal services. With new service models and tools becoming increasingly available, it is clear that they will present innovation opportunities across all legal practice areas and settings, and that the public will expect providers to take advantage of these opportunities. It is equally apparent that, as is the case for many other professional services, some members of the public also want to access legal information or services directly through

one of these new tools, rather than using the traditional method of retaining the services of a licensed legal professional.

These developments raise novel and challenging questions for the Law Society's regulatory framework and activities. These issues are varied, complex, and evolving at a relatively rapid pace. Among the Ontario public and the legal professions, there is a general lack of common understanding of the facts underlying these issues. The goals of this report are to provide introductory information and analysis, help frame issues, and enhance public understanding of and interest in the conversations in which the Technology Task Force is actively engaged.

Overview of the Technology Task Force

To address the issues explored in this report, the Treasurer created a Technology Task Force in 2018. The Task Force's mandate is to consider the role of technologies in the delivery of legal services, and the Law Society's role as a regulator in this changing environment. It is looking closely at both current and developing legal tech issues, to consider regulatory approaches for technologically-delivered legal services provided through the professions as well as directly to the public. The Task Force is also examining how the Law Society can better facilitate and encourage innovation within the professions through the use of technologies, to assist licensees in delivering legal services to clients more effectively.

This topic cuts across many segments of the Law Society's work as a regulator. Emerging legal technologies require careful, open-minded thinking, and proportionate balancing of the Law Society's duties, including the duties to facilitate access to justice and to protect the public from risk of harm.

Under the previous term of Convocation, the Technology Task Force was composed of twelve benchers and chaired by Jacqueline Horvat.¹ This group first met in October 2018, and met monthly until May 2019.

The reconstituted Technology Task Force is now composed of returning chair Jacqueline Horvat, returning members Thomas Conway and Seymour Epstein, and new members Jack Braithwaite, Paul Cooper, Gary Graham, Shelina Lalji, Cheryl Lean, Michelle

¹ The other original members of the Technology Task Force were John Callaghan, Suzanne Clément, Thomas Conway, Cathy Corsetti, Janis Criger, Seymour Epstein, Howard Goldblatt, David Howell, Michael Lerner, Anne Vespry, and Peter Wardle.

Lomazzo, Brian Prill, Clare Sellers, Andrew Spurgeon, Tanya Walker, and Nicholas Wright. This group includes lawyer, paralegal, and publicly-appointed lay benchers.

Over the past year, the Task Force has focused considerably on educating itself, as well as other benchers and senior Law Society staff, about these topics. This has involved reviewing leading reports and informational resources, and liaising with subject matter experts from legal, academic, technological, entrepreneurial, and public interest backgrounds. This update report reflects the progress the Task Force has made over its first year, and also serves as the preliminary basis for the work the new Task Force cohort intends to do.

The Task Force's primary focus over the coming year will be to continue to advance these important conversations, consult widely with experts and stakeholders, and begin to develop regulatory approaches for Convocation's consideration.

Background: the Technological Landscape for Legal Services

A. A New Phase in the Evolution of Legal Tech

Over the past decade, the pace of technological advancement has accelerated. So, too, has the pace of integration of technology into legal practice.² The specifics of these advances are explored in more detail below. What is important to note at the outset is that the newest steps along this evolutionary continuum for legal tech potentially represent a rupture from the advances that came before.

Until recently, it was taken as given that technologies could be used merely to support trained legal professionals in their legal work. The actual provision of legal services self-evidently required the exercise of human judgment and skill. However, the emerging technologies discussed in this report are beginning to upend these assumptions.³ Through new capabilities such as process automation, data analytics, and cognitive computing, these tech tools now offer the promise of autonomously-provided services, and beyond simply supporting a legal professional many now claim to be capable of accomplishing a particular legal task or function better, faster, and/or cheaper than that legal professional.

² Carla Swansburg, "Artificial Intelligence and Machine Learning in Law: The Implications of Lawyers' Professional Responsibilities for Practice Innovation" (2018) 60:3 Canadian Business Law Journal 385.

³ Benjamin Alarie, Anthony Niblett and Albert Yoon, "How Artificial Intelligence Will Affect the Practice of Law" (2018) 68:1 University of Toronto Law Journal 106.

Emerging legal technologies are re-shaping the work environments in which legal services are delivered, both in terms of the people and skill sets involved and the structures through which they organize themselves. Coding and software development experts, data scientists, and other technological professionals have begun to work alongside licensees within legal offices. Roles for trained “legal technologists” and “legal process engineers” are proliferating and gaining recognition.⁴ Outsourcing of certain legal support services from firms to external providers has become increasingly common. The technologies themselves are also opening up new opportunities for legal services to be bundled with other consumer services.

A variety of legal sector dynamics are motivating the quickening advancement of legal technologies and their deepening integration across the sector.⁵ The economic models for legal practice are in flux, and there is constant downward pressure on prices for legal services. Clients today also increasingly seek transparency in the services they are being provided and on-demand availability of those services.⁶ In this context, opportunities to automate certain tasks or functions, employ data-driven analytical techniques, and seek out technological solutions for legal work have begun to appear as imperatives.

Meanwhile, the availability of assistance from a lawyer or paralegal has become out of reach for large segments of society, and navigating the legal system itself in order to understand one’s justice problem and its potential remedies can be cumbersome for many people. A 2009 report published by the federal Department of Justice found that Canadians only sought assistance from a legal professional for 11.7% of their justiciable problems. For the remaining 88.3% of events, Canadians either sought non-legal assistance (e.g. from a trade union, government office, or friend), handled the issue on their own, or took no action.⁷ Similar studies have confirmed the finding that, for more than

⁴ For example, see Law Society of Scotland, “Law Society launches new accreditation for legal technologists” (2019), online: <<https://www.laws Scot.org.uk/news-and-events/news/accredited-legal-technologist-launch/>>

⁵ The Canadian Bar Association Legal Futures Initiative, “The Future of Legal Services in Canada: Trends and Issues” (2013), online: <<http://www.cba.org/CBA-Legal-Futures-Initiative/Home>>

⁶ Dan Pinnington, “Perspectives on the Future of Law – How the Profession Should Respond to Major Disruptions” (2018), LAWPRO Magazine, online: <<https://www.practicepro.ca/2018/01/perspectives-on-the-future-of-law/>>

⁷ Ab Currie, “The Legal Problems of Everyday Life – The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians” (2009), at p. 55, online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf>.



80% of their legal issues, Canadians do not seek assistance from a legal professional.⁸ Digital or online legal tools may more effectively meet people where they are.

Wider societal expectations about use of technology are also encouraging its integration within the legal sector. Clients increasingly expect their lawyers and paralegals to be comfortable employing the latest technology, with benefits for convenience and efficiency. This trend appears not only at large law firms that primarily serve sophisticated institutional clients, but throughout all segments of the legal services market, as people become increasingly accustomed to engaging with technologies for other professional services they receive, such as banking, accounting, and healthcare provision.

For many lawyers and paralegals, too, utilizing the latest and most innovative technologies in their practice is an appealing proposition. Most licensees already engage with artificial intelligence and other cutting-edge technologies regularly in their lives – whether through reviewing results from a search engine, asking their smartphone or a consumer website for assistance with a routine question, or even advertising their business online. Although they may not yet have consciously integrated such technologies into their everyday legal work, adoption may increasingly seem natural.

B. Artificial Intelligence Overview

The most significant and testing of today's emerging technologies from a regulatory standpoint are those that incorporate artificial intelligence ("AI"). In order to understand the regulatory challenges ahead, it is first necessary to understand artificial intelligence and its growing role within legal tech.

AI is a complex and rapidly developing field. A generally acceptable definition of AI is the ability for computers to accomplish tasks normally associated with the intelligent actions of human beings.

AI is a field of research and development: a branch of computer science focusing on the simulation of intelligent behaviour in computers. It can also be seen as an outcome: the capability of a machine to imitate intelligent human behaviour. Others describe AI as a collection of processes or techniques: for example, "machine learning" (the acquisition of

⁸ For example, a similar 2016 study found that 19% of Canadians sought legal advice for the legal problems they identified: Trevor C.W. Farrow et al., "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report" (2016), at p. 9, online: <<http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>>. A 2018 study found that 14% of low-income British Columbians sought legal assistance for their everyday legal problem: BC Legal Services Society, "Everyday Legal Problems" (2018), at p. 14, online: <https://lss.bc.ca/sites/default/files/2019-03/lssEverydayLegalProblems07_2018.pdf>.

information and of rules for the use of information), reasoning (using the rules to reach conclusions), and self-correction.

Currently, AI applications typically focus on developing a machine's ability to perform a specific task or set of tasks in a manner that mimics a component (but not all) of human intelligence.

"Machine learning" is a key subset of AI. Machines "learn" from recognizing patterns and adjust their behaviours over subsequent experiences. Most commercial applications of AI currently use machine learning techniques.

Machine learning uses algorithms to parse data, learn from it, and then make a determination or a prediction based on it. Whereas traditional computing involves coding software to supply a specific set of instructions for a task, machine learning trains the computer to accomplish that task according to its own instructions, by inputting large amounts of data and algorithms that give it the ability to learn how to perform the task and improve through repetition.

Another key subset of AI is "natural language processing", which derives useful meaning from written and spoken language by drawing connections between words and phrases. It offers the ability to organize, analyze, and adapt texts. Natural language processing can be used to perform tasks like automatically summarizing a document, translating it, and identifying its relevant terms and topics.

A "chatbot" is an AI-based program designed to simulate typical human conversations with human users, via audio or text. Incorporating natural language systems, chatbots are increasingly being used by organizations that receive a high volume of predictable client inquiries. Chatbots can acquire targeted information and provide helpful responses, including navigating someone through its information-gathering process.

A related concept to AI is "robotic process automation", which mimics the actions that a human operating a computer system would perform in order to complete sequential, rules-based tasks. Compared to human abilities, automation allows these actions to be performed with greater accuracy, at a fraction of the time and cost. In combination with AI techniques, process automation enhances the volume and scale of tasks that software can perform.

Today, AI is integrated into numerous popular tools and products. Online search engines were not originally based on AI, but leading current versions have been enhanced to incorporate machine learning techniques and natural language processing. Personal assistant devices also use natural language processing, speech processing, and machine

learning. Chatbots are now used by many companies' websites to direct customer service inquiries. Television and music streaming services use AI predictive functions to recommend content targeted to individual users.

The financial services industry has recently seen the rise of "robo-advisors", tools that use AI algorithms to monitor data (e.g. news, stock prices, and indicators of investor sentiment) to make trades and balance client portfolios. The automotive and shipping industries are developing autonomous vehicles ("self-driving cars"), which rely heavily on AI. These are just a few of many prominent examples of everyday AI integration.

C. The Roles of Artificial Intelligence in Legal Tech

Legal Tech Capabilities:

Common AI applications in the legal sector include document discovery and due diligence, contract analysis, assistance with routine questions, outcome prediction, and legal document generation. These all aim to use intelligent technology to perform tasks and functions faster, cheaper, and more effectively than they would otherwise be performed by human legal professionals.

Certain AI capabilities tend to be common throughout these legal applications, including:

- Entity extraction (highlighting things, places, people, and products);
- Information extraction (identifying relationships between entities);
- Document analysis (categorizing documents);
- Natural language generation (generating correct sentences);
- Summarization (creating summaries of documents); and
- Question answering (answering questions based on available data).

E-discovery is an example of an area of legal work that has transformed rapidly over the past decade thanks to significant advancements in technological capabilities.⁹ AI-enabled e-discovery platforms can now use techniques like "predictive coding" to infer certain characteristics about documents (e.g., relevance or privilege). This enhances the

⁹ LAWPRO Magazine, "Artificial Intelligence: What is AI and Will it Really Replace Lawyers?" (2018), online: <<https://www.practicepro.ca/2018/01/artificial-intelligence-what-is-ai-and-will-it-really-replace-lawyers/>>; Elizabeth Raymer, "E-discovery Evolution" (2019), Canadian Lawyer Magazine, online: <<https://www.canadianlawyermag.com/practice-areas/litigation/e-discovery-evolution/276072>>

collection, processing, review and production of documents for due diligence in transactions or for production requirements in litigation.

Many legal research databases have also begun to integrate AI techniques and processes into their existing search capabilities. These tools use natural language processing and machine learning elements to more effectively retrieve and sort relevant jurisprudence.

AI has also allowed for new applications in automated document generation, in which a technical process sorts through data to fill out legal documents such as a statement of claim or defence, a separation agreement, or an agreement of purchase and sale.

Predictive analysis is a nascent area of legal AI development.¹⁰ AI promises to enhance the predictive capabilities of computing and statistical analysis due to its ability to handle vast amounts of both input data and variables.¹¹ When algorithmic AI processes generate a prediction, the outcome can also be fed back into the data to inform the next prediction task, further enhancing its reliability in a feedback loop. In the legal field, AI prediction involves inputting available facts that are relevant to a question (including individual case facts and legal precedents). Through machine learning algorithms, the tool could situate these facts within the appropriate legal contexts and generate predictions. These kinds of tools are still in the early stages of development with relatively low levels of capability.

Significant investments are being made into AI development around the world, and it is anticipated that the capabilities discussed above will continue to be enhanced, along with new capabilities yet to be unlocked.

Legal Tech Integration:

Ontario lawyers and paralegals, in legal workplaces both large and small, are beginning to use AI tools. These applications have typically been focused on discrete areas and tasks (e.g. predictive coding in document review for litigation, or case outcomes prediction in tax law), and have been introduced in limited capacities (akin to piloting), at first only for expressly consenting clients.

Tools that improve the quality and speed of legal research and document review, or that predict case outcomes with greater accuracy and consistency, can help legal professionals enhance their practice by enabling them to do more and better work in the same amount of time. Increased efficiency can allow them to perform more work for a client, or to provide

¹⁰ Jena McGill, Suzanne Bouclin and Amy Salyzyn, "Mobile and Web-based Legal Apps: Opportunities, Risks and Information Gaps" (2017), 15 Canadian Journal of Law and Technology 229, at p. 239.

¹¹ Alarie et al., *supra* note 3.

services to more clients. The lower costs associated with these developing technologies can also improve access to justice outcomes.

By harnessing advanced analytical capabilities, legal tech tools can also help build a case more rigorously, guide parties in negotiations more effectively, and strengthen the quality of legal reasoning, advocacy, and decision-making. Courts and other adjudicative bodies can also take advantage of these innovations, ultimately benefiting the public and the legal system.

While many emerging legal tech products have been developed for use by legal professionals to complement their practices, other tools are being marketed directly to members of the public as consumers of legal services. These kinds of AI tools have clear potential to improve justice accessibility, but also engage a host of uniquely vexing public protection concerns. Direct-to-public legal tech tools will be discussed in more detail below.

Ontario is on the cutting edge of AI development in the legal sector. Many leading companies have strong presences in Ontario, and several Ontario law firms operate or support incubator projects focused on emerging legal technology products. The Legal Innovation Zone at Ryerson University is another incubation hub for developers working in these fields.¹²

There are currently over one thousand legal tech companies operating across different function categories around the world, some of which have a presence in Ontario.¹³

D. Other Emerging Legal Technologies and their Applications

Blockchain:

A blockchain is a networked, distributed digital ledger for permanently recording transactions. The ledger allows transactions to flow directly from one party to another, without the need to pass through a trusted third party or central authority (like a financial institution). Blockchain systems can handle complex transactions, involving multiple parties.

Blockchain technology allows parties to securely verify and record every step in a transaction. Because of its built-in fail-safes, a blockchain is considered tamper-proof.

¹² Legal Innovation Zone, online: <<http://www.legalinnovationzone.ca/>>. Similar initiatives are emerging through Ontario law schools and in commercial settings. An example is the LTEC Lab and Legal Innovation Hub at the University of Windsor Faculty of Law, online: <<http://www.lteclab.com/>>

¹³ Stanford CodeX Legal Tech List, online: <<https://techindex.law.stanford.edu/>>

Part of the appeal of blockchain is that every transaction on a particular ledger is available to be viewed, either publicly or in a private network between specific eligible parties. Transparency can be enhanced while the blockchain can also be tailored to incorporate high degrees of privacy and anonymity where desired. However, inadvertent misuse of these transparency mechanisms by legal professionals poses risks of confidential client information being disclosed publicly.

Blockchain technology is currently being used to build tools and infrastructure that assist with drafting and automatically generating contracts, recording commercial transactions, embedding “smart contracts”, and verifying legal documents. To date, these applications have not been integrated into legal services to any significant degree.

A smart contract is a more complex function that can be facilitated by blockchain, and involves overlap with AI processes. A smart contract refers to a transaction that can be completed entirely on a digital basis. Steps that can be digitally integrated include verifying the identities of parties, preparing and signing documents, applying for and advancing loans, making and verifying payments, and instructing, tracking, and paying for shipping. By converting a legal agreement into “code”, a smart contract can be read and understood across jurisdictions.

One of the potential advantages of a smart contract is that many kinds of contractual clauses may be made partially or fully self-executing and self-enforcing. For example, a smart contract can automatically transfer a payment from one party to another upon execution of the transaction, and could automatically transfer continuing payments upon additional targets being achieved under the contract.

Blockchain technology also supports crypto-currencies, which may themselves engage new regulatory issues around the conduct of transactions, the legal interests attached to digital assets, and the financial and accounting practices of legal professionals. To date, crypto-currencies have been ripe for fraudulent activities – especially obscuring illicit transactions and exploiting illusions of security.

Cloud Computing and Cloud Storage:

“Cloud computing” refers to operating and maintaining computing services over the internet (rather than hosting these functions directly on the user’s computer). “Cloud storage”, a subset of cloud computing, is a model of information storage in which digital data is stored across multiple servers (often in different locations). The physical storage environment is typically owned and managed by a hosting company. Cloud storage providers are responsible for keeping the data available, accessible, and secure, and for

keeping the physical environment protected and maintained. Customers buy or lease storage capacity from the providers to store data about users, applications, or themselves.

The rapidly expanding array of new cloud computing and storage services and applications are attractive to licensees for the ability to offload maintenance and upkeep to cloud providers, the ability to access data from anywhere, and the reduction of capital costs. However, potential regulatory issues, like informed client consent to information usage and whether contractual terms of service by cloud providers could affect licensees' abilities to comply with their professional obligations, will need to be carefully examined.

Big Data:

“Big Data”, closely connected to other emerging tech like AI and cloud computing, is the term given to the exponential growth in the availability of information and in its automated use. It refers to gigantic digital datasets held by large organizations and governments, which can be extensively analyzed using computer algorithms. Big Data involves large amounts of different types of data produced at high speed from multiple sources, whose handling and analysis require ever more powerful processors and sophisticated algorithms. It can be used to identify general informational relationships and trends, as well as individual information.

Online Dispute Resolution:

“Online dispute resolution” (“ODR”) is a technological means to navigate, mediate, and adjudicate traditional civil legal disputes. ODR techniques use information and communications technologies to automate and speed up information processing and to overcome distances between parties. Typically, this involves an online platform onto which legal documents (both evidence and argument) can be uploaded, stored, organized, and made accessible to parties and neutral third party mediators or adjudicators.

ODR platforms can also incorporate sophisticated tech tools that can provide litigants with legal information (both general and specific to the case), as well as generate legal opinions, predicted outcomes to facilitate mediation, and/or decisions about the case or certain elements of it.

E. Direct-to-Public Legal Tech Tools

Developers of legal tech tools are increasingly seeking opportunities to create software, applications, and other services that reach people directly to assist with their legal issues. These are typically positioned as a kind of substitute for the need to involve a lawyer or paralegal.

Like legal tech tools aimed at supporting legal professionals, direct-to-public tools are being developed to serve a broad range of tasks and functions across broad areas of law.¹⁴ There are now tools providing assistance to members of the public with locating and identifying legal information, assistance with routine questions or legal system navigation, contract analysis, legal document generation, and outcome prediction.

Some of these tools are being developed by the private sector, often (but not always) involving legal professionals in their creation. Public sector institutions including governments and non-profit legal organizations have also taken an increasing interest in developing these tools.¹⁵ Among the privately-developed tools, some are marketed for profit while others are made freely available for the public's benefit. While most direct-to-public tools to date have aimed at individuals' legal issues, some have also begun to be developed for use by more legally sophisticated consumers such as large corporations.

As of August 2019, 88 direct-to-public legal tech tools have been identified as operating in Canada.¹⁶ The current market for these direct-to-public tools is less mature, stable, and coordinated than the market for legal tech tools aimed at supporting licensees.¹⁷

Among the public, different users may see these tools as a substitute for a legal professional, as a precursor or supplement to a legal professional, or as the only practical option for legal assistance available to them.

Interest in these tools is consistent with wider consumer trends towards faster and cheaper outcomes, simpler and more user-friendly designs, and around-the-clock availability. It is also consistent with trends demonstrating increasing access to justice challenges for people with legal issues.¹⁸ In recent years, self-represented litigants have proliferated and demand for legal aid assistance has increased. In these contexts, low-cost or free resources offering any degree of legal assistance on demand carry obvious appeal.

¹⁴ McGill et al., *supra* note 10.

¹⁵ *Ibid.* at pp. 235-238.

¹⁶ Amy Salyzyn, William Burke, and Angela Lee, "Direct-to-Public Legal Digital Tools in Canada: A Draft Inventory" (2019), online: <<https://techlaw.uottawa.ca/direct-public-legal-digital-tools-canada>>

¹⁷ Teresa Scassa et al., "Developing Privacy Best Practices for Direct-to-Public Legal Apps: Observations and Lessons Learned" (2020), 18:1 Canadian Journal of Law and Technology (forthcoming). See also the Law Society of England and Wales, "Technology, Access to Justice and the Rule of Law" (2019), at p. 8, online: <<https://www.lawsociety.org.uk/support-services/research-trends/technology-access-to-justice-rule-of-law-report/>>

¹⁸ McGill et al., *supra* note 10, at p. 231.

Access to Justice Opportunities and Challenges

The Task Force recognizes that technology alone will not be a panacea for access to justice. Unmet legal needs are increasing across society, and these gaps have profoundly negative impacts on individuals and communities.¹⁹ Even in an implausible scenario of wholesale conversion to technologically-delivered legal services, serious access to justice barriers and gaps would remain unremedied. Improvements to the availability of legal information, system design, service delivery, and many other factors (both internal to the legal system and beyond it) are all necessary components of more accessible justice. Nevertheless, legal tech can also play its own important role in facilitating many of these improvements.

The combination of the technological capabilities described in this report and the digitized nature of the service delivery make many legal tech tools particularly promising for access to justice. By enabling legal services to be provided more quickly, directly, and cheaply, they can either assist a legal professional to perform more higher-value work at lower cost to the person with the legal issue, or can assist that person themselves by equipping them to make more informed decisions about how to proceed. The benefits could be significant.

Legal technologies employed responsibly can lower the barriers (financial, psychological, informational, and even physical) that people face in accessing the law and the legal system.²⁰ In this way, they not only make law more user-friendly, transparent, and accountable, but they also contribute to upholding the rule of law and a free and democratic society.

It is unlikely that continued reliance on the traditional model of one legal professional supplying services to one client will by itself ever bridge the gaps of unmet legal needs that persist in society today. Many new legal technology tools promise the more efficient delivery of services to many people, with little or no additional supply inputs for each extra recipient. This kind of delivery model – termed “one-to-many”, as opposed to “one-to-one”²¹ – offers supplementary opportunities to serve unmet legal needs.

¹⁹ Law Society of Ontario, Access to Justice Committee, “Review of the Law Society’s Access to Justice Approach: Call for Comment” (2019), online: <https://lawsocietyontario.azureedge.net/media/iso/media/about/convocation/2019/access-to-justice-consultation-report.pdf>

²⁰ McGill et al., *supra* note 10.

²¹ William D. Henderson, “Legal Market Landscape Report: Commissioned by the State Bar of California” (2018), p. 11, online: <http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000022382.pdf>; and



Despite these prospects, it is likely that – at least for the foreseeable future – there will be many scenarios where it would not be responsible for an autonomous legal tech tool to be the sole source of legal assistance for a person’s issue. That approach may also not match what a person is looking for. Many vulnerable persons in need of legal assistance may, for a variety of reasons, lack access to such tools in the first place, and/or may not feel comfortable trusting their matter to an innovative but unestablished resource like a legal tech tool.²²

Bearing these considerations in mind, the Task Force recognizes that, while emerging legal technologies offer tremendous promise for people’s abilities to receive legal assistance and secure their legal rights, “realizing that promise is not a technological challenge, but rather a social one.”²³

The Intersections of Legal Technologies and Regulation

The legal tech applications coming to the fore today highlight regulatory tensions between public protection risks and access to justice opportunities. Many of these novel tools promise more efficient and convenient provision of legal services at lower (or no) cost, and in this way they can be presented as beneficial to the public. On the other hand, many of these tools do not follow the same processes, or apply the same techniques, that might be expected of a skilled legal professional. Novel methods present the potential for harm. The autonomous provision of legal services could undermine the public’s trust in the transparency of the justice system.

To address these challenging issues, it is necessary to examine the circumstances in which these tools intersect with and engage regulatory standards. The Law Society’s

Richard Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future*, 2nd Ed. (Oxford University Press: 2017).

²² Tanina Rostain, “Techno-Optimism & Access to the Legal System” (Winter 2019), Dædalus, online: <<https://www.amacad.org/publication/techno-optimism-access-legal-system>>. See also The Action Group on Access to Justice, “Public Perceptions of Access to Justice in Ontario” (2016), online:

<https://theactiongroup.ca/wp-content/uploads/2015/08/Abacus_TAG_Release_Oct14.pdf>, and The Action Group on Access to Justice, “Millennials, Technology and Access to Justice in Ontario” (2017), online: <https://theactiongroup.ca/wp-content/uploads/2015/08/TAG_Millennials_Technology_and_Access_to_Justice_in_Ontario.pdf>

²³ Rebecca L. Sandefur, “Legal Tech for Non-Lawyers: Report of the Survey of US Legal Technologies” (2019), at p. 16, online:

<http://www.americanbarfoundation.org/uploads/cms/documents/report_us_digital_legal_tech_for_nonlawyers.pdf>



enabling legislation, professional conduct rules, and by-laws establish those standards, and illustrate the key safeguards that legal services regulation has traditionally sought to impose for the benefit of the public.²⁴

Public protection risks are present where the legal tech application in question merely augments a licensee's practice. These risks tend to be more novel and challenging where an application is aimed directly at legal consumers, and is not being delivered by a responsible licensee. This section begins by reviewing certain unique and overarching regulatory considerations that relate primarily to direct-to-public tools, before probing specific regulatory standards that are engaged in both the direct-to-public and licensee-supporting dimensions.

A. Unique Regulatory Considerations for Direct-to-Public Tools

Some direct-to-public tools may ultimately become extremely proficient and could offer a better quality option than an individual lawyer or paralegal (for example, a tool that could instantly recall and skilfully synthesize all relevant jurisprudence would be positioned as better, faster, and cheaper option than the human equivalent). However, some of these tools may also be extremely rudimentary and could fall well short of the standards that people seeking assistance with their legal problems require. The risks to the public from that latter scenario are novel.

While a similar quality continuum will undoubtedly exist in the marketplace for licensee-supporting legal tech tools, there is a much greater expectation that legal professionals will be capable of assessing quality and exercising independent judgment and discretion about the extent to which they should rely on such tools. Moreover, the professional will in any event be ultimately responsible – to the client, the courts, and their regulator – for the legal services that are provided, no matter the extent to which they were aided by legal tech.

This safety net does not exist where direct-to-public tools are concerned. There is not necessarily an intermediary in place to assess or mitigate the risks of harm caused by inadequate service provision. For this reason, the concerns about direct-to-public tools' ability to measure up to traditional regulatory standards are both different and more acute than those concerns for legal tech tools that are marketed for use by legal professionals.

While specific rules and standards will be discussed in more detail below, there are also several key threshold questions about the Law Society's regulatory framework that arise in relation to direct-to-public tools. First, given these "self-help" tools' advancing capabilities,

²⁴ For ease of reference, this report will refer primarily to the Law Society's *Rules of Professional Conduct*, which applies to lawyers. The *Paralegal Rules of Conduct* generally operate in parallel.

there may be a need to re-examine the traditional distinction drawn between, on the one hand, “legal information”, and on the other, “legal advice” or “legal services”.

The *Law Society Act* states that “a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.”²⁵ Subject to limited exceptions, these activities are currently reserved to be performed only by licensed lawyers and paralegals in Ontario: s. 26.1(1) of the *Act* provides that “no person, other than a licensee whose licence is not suspended, shall practise law in Ontario or provide legal services in Ontario.”

This statutory prohibition was designed to protect the public from entrusting their legal affairs to untrained, unskilled, and/or unscrupulous persons. However, its purpose and application will need re-examining as some new legal tech products (with varying levels of sophistication) potentially cross this traditional information/advice line by providing legal advice or services directly to people in Ontario.²⁶ Does the legislative definition of providing legal services apply in the same way to technology-based delivery models and, if it does, are new tools engaging in that activity? To the extent that these “self-help” tools deliver legal services via non-human intelligence and/or involve unlicensed persons (e.g., software developers, or organizations with core business other than the practice of law), where there is no responsible licensee involved in the delivery of that service, questions arise about “unauthorized practice”, and about who in the absence of a licensee should bear responsibility when things go wrong.

This also raises novel questions about potential approaches to regulation. The *Act* permits the Law Society to determine classes of licence, and the scope of activities authorized under each class of licence.²⁷ It also permits the Law Society to determine situations in which non-licensees may be permitted to practice law or provide legal services.²⁸ If direct-to-public legal tech tools have a legitimate role to play in delivering legal services, then the Law Society will need to determine whether its regulatory approach should include licensure and active regulation, or whether it would be more appropriate to create exemptions from licensure.

To the extent that such permission would be granted in some way to these direct-to-public tools, numerous consequential issues would also need to be considered, including

²⁵ *Law Society Act*, R.S.O. 1990, c. L.8, s. 1(5).

²⁶ McGill et al., *supra* note 10, at pp. 251-253. See also Swansburg, *supra* note 2.

²⁷ *Law Society Act*, R.S.O. 1990, c. L.8, s. 27(1).

²⁸ *Law Society Act*, R.S.O. 1990, c. L.8, s. 26.1(5).



whether and when a client relationship is formally engaged in circumstances where a client is interacting with software, an online platform, or another kind of technological tool.

The development of these cutting-edge products also raises complex questions for jurisdiction and accountability with respect to geographic locations. New legal tech tools can provide services digitally, and they can do so more easily, cheaply, and quickly than ever before. As a provincial regulator, the Law Society may see more legal services being provided to Ontarians by persons or entities located outside of the provincial or even national boundaries. This trend poses serious challenges for accountability and the enforceability of regulatory regimes. A related challenge would be posed by Ontario-based legal tech tools providing legal services to persons in other jurisdictions.

B. Regulatory Standards and Professional Rules Engaged by Emerging Legal Technologies

Legal tech tools – whether aimed at licensees or at members of the public – can be expected to engage regulatory standards across at least three overarching categories: (1) service provision; (2) client information and relationships; and (3) practice management and business practices. Some of the most pertinent issues are highlighted below.

(1) Service Provision:

i. The Duty of Competence (Rule 3.1)

The Law Society's *Rules of Professional Conduct* (for lawyers) and *Paralegal Rules of Conduct* are principles-based and outcomes-based. Rather than prescribing certain methods or tasks to achieve an outcome, they typically require only the achievement of that outcome, while flexibly accommodating a variety of approaches for achieving the outcome.

The duty of competence, set out in Rule 3.1-2, is a good example of this approach. It provides: "A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer."²⁹

AI-enabled self-help legal tools will likely engage the purpose of this Rule. Regulators will likely need to consider whether such tools – even those that generate outputs with impressive levels of accuracy and reliability – are capable of meeting the standard of a "competent lawyer" that is set out at length in Rule 3.1-1.³⁰ Regulatory tension between

²⁹ Rule 3.01(1) of the *Paralegal Rules of Conduct* provides: "A paralegal shall perform any services undertaken on a client's behalf to the standard of a competent paralegal."

³⁰ The standard of a "competent paralegal" is set out in Rule 3.01(4) of the *Paralegal Rules of Conduct*.

assessing the quality of the tool's service provision and its efficiency and efficacy in providing legal services to the client will be present here. More practical questions about how to measure competence in these new contexts also arise.

Moreover, commentary paragraph [8] to Rule 3.1-2 states, "A lawyer should clearly specify the facts, circumstances, and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client." Where a legal product has generated an "opinion" using its proprietary algorithm, which the product's provider wishes to protect for competitive reasons, there may be concerns about the extent to which these bases are, or even can be, disclosed to clients. This could undermine clients' and consumers' abilities to meaningfully understand how a particular conclusion was reached, and the risks, consequences, and alternative options related to that conclusion.

For another specific example, commentary paragraph [9] to Rule 3.1-2 states, "A lawyer should be wary of providing unreasonable or over-confident assurances to the client, especially when the lawyer's employment or retainer may depend upon advising in a particular way."³¹ This could be particularly relevant to legal AI applications that aim to predict case outcomes, based on data analytics and algorithmic processes, typically with little or no intervention of human judgment. The potential application of this guidance to self-help tools could prompt new consideration of how standards like "unreasonable" or "over-confident" would be applied in an algorithm-driven process.

Emerging legal tech products aimed at supporting licensees also engage the application of the duty of competence. For example, Rule 3.1-1 sets out a lawyer's responsibilities to have and apply "relevant knowledge, skills and attributes" in the performance of various tasks, as well as to apply "intellectual capacity, judgment and deliberation to all functions." The continued application of these standards to a licensee personally, where the licensee uses an AI tool to perform a supporting task, should be evaluated.

Many American jurisdictions have adopted rules requiring "technological competence" for lawyers.³² In Ontario, Rule 3.1-1(k) currently requires that a "competent lawyer" be capable of "otherwise adapting to changing professional requirements, standards,

³¹ Paragraph 8 of Guideline 6 of the *Paralegal Professional Conduct Guidelines* provides: "A paralegal should be wary of providing unreasonable or over-confident assurances to the client, especially when the paralegal's employment or retainer may depend upon advising in a particular way."

³² Bob Ambrogi, "A 37th State Adopts the Ethical Duty of Technological Competence" (2019), LawSites, online: <<https://www.lawsitesblog.com/2019/09/a-37th-state-adopts-the-ethical-duty-of-technology-competence.html>>

techniques, and practices.”³³ While this does not specify technological competence, it may be considered able to accommodate shifting standards in the use of technologies. However, Canadian law societies will continue to consider whether adoption of a standalone duty of “technological competence” is appropriate. In October 2019, the Federation of Law Societies of Canada added new commentary paragraphs to the rule requiring competence in its Model Code of Professional Conduct. The commentary is intended to provide guidance prompting legal professionals to consider both the benefits and risks associated with the use of technology, as well as to set out an obligation to be technologically competent in a manner appropriate to the licensee’s circumstances.³⁴

Finally, while discussions around legal tech’s implications for the duty of competence often presume its inferiority to human legal professionals, the duty can also be engaged by the converse presumption. As predictive tools become more reliable, and as licensees in turn come to rely more heavily on AI applications, there may also be increasing calls to require consultation with AI tools as part of a licensee’s competent practice. For example, if outcome prediction applications become more reliable and accessible, “competence” could be seen to require a licensee to inform their judgment by making reference to such tools as the most accurate sources of legal information available.

ii. Duties to Provide Quality Service (Rule 3.2)

Rule 3.2-2 provides, “When advising clients, a lawyer shall be honest and candid.”³⁵ Commentary to that rule expands on this principle to require that licensees’ advice “must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.”

This rule – invoking critical issues of transparency and explainability – may be engaged where legal tech tools use proprietary algorithms to generate work products for clients. These issues would be present both in circumstances where a licensee uses the tool to support their client service and where the tool provides the service directly to a client. Besides competitive concerns around disclosing the bases for an algorithm’s opinions, the extremely complex and technical nature of an AI tool’s algorithm(s) might also make it difficult to assure a client that its opinion is “based on a sufficient knowledge of the

³³ This parallel standard is set out at Rule 3.01(4)(k) of the *Paralegal Rules of Conduct*.

³⁴ See Federation of Law Societies of Canada, “Model Code of Professional Conduct, as amended October 19, 2019” (2019), Commentaries [4A] and [4B] to Rule 3.1-2, online: <<https://flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf>>

³⁵ Rule 3.02(2) of the *Paralegal Rules of Conduct* provides: “A paralegal shall be honest and candid when advising clients.”

relevant facts, an adequate consideration of the applicable law, and the lawyer's [*or tool's*] own experience and expertise", pursuant to commentary [2] to Rule 3.2-2.

There may also be regulatory concerns around bias (either unintentional or deliberately-designed) and the spectre of "upselling" through the use of AI tools. Unintentional bias stems from the fact that machine learning systems can only be as effective as the data they rely on (commonly described as the "garbage in, garbage out" principle). There have been examples of AI tools generating conclusions that have replicated existing biases.³⁶

There are also concerns that bias could be deliberately programmed into machine learning data sets, particularly in order to influence a client towards a particular outcome or service. A programmer could, for example, design an AI tool to generate predictions that exaggerate or diminish a litigant's prospects of success at trial (in order to influence negotiating positions or to secure a retainer), or that misleadingly identify a client seeking help drafting a will as one who would particularly benefit from the more expensive "full service" package.

These same issues could equally engage the duty to charge reasonable fees and to disclose the bases for them, pursuant to Rule 3.6-1.³⁷

iii. Supervision Requirements (Rule 6.1 and By-Law 7.1)

Pursuant to Rule 6.1-1, lawyers must "assume complete professional responsibility for their practice of law" and "directly supervise non-lawyers to whom particular tasks and functions are assigned."³⁸ AI-based tools present opportunities for technologies to go beyond merely performing support functions (e.g., word processing or traditional dictation software) to now autonomously perform legal service functions. In these circumstances, it may become necessary to re-examine the rules around adequate supervision of non-licensees, and to consider their application to non-person entities.

(2) Client Information and Relationships:

i. The Duty of Confidentiality (Rule 3.3)

Confidentiality and information/data security are also key considerations for the intersection of tech tools and legal services regulation. Rule 3.3-1 provides, "A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of

³⁶ See, for example, Julia Angwin et al., "Machine Bias" (2016), ProPublica, online: <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>>

³⁷ The parallel rule is set out at Rule 5.01 of the *Paralegal Rules of Conduct*.

³⁸ The parallel rule is set out at Rule 8.01 of the *Paralegal Rules of Conduct*.

the client acquired in the course of the professional relationship and shall not divulge any such information”, except in limited circumstances.³⁹

While some commentators take the position that this broad principle can be applied to new legal technologies just as it has extended to previous technological iterations, others see unique and novel issues arising from the new technological advancements.

AI applications typically handle vast amounts of data. In some cases, that data may include proprietary and personal information, which is processed in conjunction with the machine’s existing data sources in order to generate outputs. Consideration will need to be given to the uses to which client information may be put by AI software, and to what extent informed consent will be needed.

Licensees and firms have begun to use client data (including personal information) for analytical purposes. They can use this information in the context of an individual file to make decisions about how the client’s objectives can best be achieved, or in aggregate to analyze and predict outcomes for subsequent files. At present, the *Rules of Professional Conduct* do not expressly require licensees to communicate with clients to advise on these issues and obtain a client’s affirmative, informed consent to these uses of their information.

The security of client data held by tech tools is also a paramount concern. Digital client information may be at risk of exposure through vulnerabilities in a network, a program or service, a device, or the data itself.

Some regulators, including the Law Society of British Columbia and the Law Society of Saskatchewan, have focused on “cloud computing” issues to require that the location(s) in which a client’s information is being held offers assurances of adequate security.⁴⁰ Because cloud storage services involve contracting out the data storage to third party providers, licensees may need to consider extra precautions to ensure continued compliance with professional obligations.

Even if existing professional conduct rules do appear to effectively capture a new practice like cloud storage, such a practice may still heighten the systemic risk of contravention of those rules, by, for example, increasing the opportunity for “breaches” of client

³⁹ The parallel rule is set out at Rule 3.03(1) of the *Paralegal Rules of Conduct*.

⁴⁰ See Law Society of British Columbia, “Cloud Computing Due Diligence Guidelines” and “Cloud Computing Checklist”, online: <<https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/law-office-administration/>>. See also Law Society of Saskatchewan, “Cloud Computing Guide: Best Practices & Checklist for Law Practices in Saskatchewan” (2018), online: <<https://www.lawsociety.sk.ca/media/395148/lssccloudcomputingchecklist.pdf>>

confidentiality. In addition, the larger volumes of client information now stored digitally may exacerbate the potential severity of any confidentiality breach.

The American Bar Association's Commission on Ethics 20/20 examined the risks that new technologies posed to client confidentiality, resulting in updates to the ABA's Model Rule 1.6. These include a list of factors lawyers should consider when assessing the reasonableness of efforts to prevent unauthorized disclosure of client information.⁴¹

For firms and tools that operate across multiple jurisdictions, and/or provide services to clients with multi-jurisdictional operations, compliance challenges also arise where privacy legislation and relevant professional regulatory frameworks develop unevenly or conflict.

Direct-to-public tools may also engage unique information security and privacy issues, including uncertainty over whether the user would be protected by solicitor-client privilege, and the potential use and misuse of sensitive personal information by non-licensees.⁴²

ii. Client Identification and Verification (By-Law 7.1)

Part III of By-Law 7.1 sets out requirements to identify and verify clients, at various points in the licensee-client relationship. Subsection 23(8) provides alternative procedures for circumstances where the licensee is not providing instructions to the client face-to-face; however, these alternatives still rely on verification by a different independent person. Novel contexts, for example legal services provided online through a chatbot interface with a "client", may challenge compliance with these rules. This kind of tool could pose difficulties for verifying user identities, or for detecting circumstances where there may be other unidentified persons either influencing the "client" user or relying on the legal services being provided. Regulators will need to consider either strengthening these rules or their application, or revising them to operate differently in these circumstances.

In addition, professional services across many industries are increasingly considering opportunities to accept electronic signatures and remote document verification methods, including remote commissioning of documents in the legal context. These practices could offer increased convenience and decreased costs for transacting parties. However, they may present increased risks of fraud and related misconduct, which current rules requiring physical presence and formal execution of documents are intended to protect against.

⁴¹ American Bar Association Commission on Ethics 20/20, "Report to the House of Delegates" (2012), online: <https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105_a_filed_may_2012.pdf>

⁴² Scassa et al., *supra* note 17.

Legislators and regulators are being asked to reconsider the need for stringent rules in this area, and must balance those regulatory tensions within this evolving environment.

iii. Preservation and Return of Client Documents and Records (Rules 3.5 and 3.7)

Rules 3.5 and 3.7 govern, respectively, the preservation of client property and the return of client property upon withdrawal from representation.⁴³ New digital data practices and data analytics applications have begun to raise novel questions about what counts as a client's documents or records. For example, it may now be more difficult to ascertain the source of certain data, including whether the licensee collected it directly from a client or through a third-party source.

It is also becoming increasingly complex to determine questions of access to and ownership of digital data, including whether the original data belongs to the individual source or to a holder of pooled information, and who owns any insights drawn from analysis of the data.

(3) Practice Management and Business Practices:

i. Professional Liability Insurance Requirements (By-Law 6)

By-Law 6 requires licensees to carry professional liability insurance. If the decision is made to regulate self-help tech tools that are providing legal services, then the Law Society will need to consider whether and how these insurance requirements should apply to the tools and/or their providers. Conversely, if these tools do not become regulated, then they will not likely be required to purchase this type of insurance, thereby reducing the overall public protection provided by the professional liability insurance regime.

ii. Advertising and Marketing Legal Services (Rules 4.1 and 4.2)⁴⁴

One of the most prominent areas of application for data analytics today is targeted advertising. In the legal sector, licensees have started to use data analytics from social media and search engines to generate new client leads and to better target their marketing campaigns, especially in personal plight legal practice areas.

In most instances, the impacts of these applications are understood to be relatively benign. For example, many clients and licensees are now used to seeing targeted

⁴³ The parallel rules are set out at Rules 3.07 and 3.08 of the *Paralegal Rules of Conduct*.

⁴⁴ The parallel rules are set out at Rules 8.02 and 8.03 of the *Paralegal Rules of Conduct*.

advertising for other legal services providers in their web browsers or email accounts, as a result of their search histories.

As micro-targeting tools become more sophisticated, however, and wherever advertisers gain access to more sensitive personal information, concerns around privacy are likely to be raised. These may lead to calls for increased regulatory action. For example, in 2013, the Supreme Court of Ohio issued an ethics opinion that approved lawyers' use of data from police records to solicit potential clients by text message.⁴⁵ While criminal and health records are not publicly available in Ontario, it is not difficult to imagine a sophisticated analytics program being capable of identifying potential clients facing criminal charges, or interested in personal injury representation, solely through the use of commercially purchased internet search history data.

Key Regulatory Considerations and Questions

A. Guiding Principles and Policy Objectives

The Law Society has identified the impacts of emerging technologies on the delivery of legal services as a significant issue for the public, the professions, and the regulator. These developments raise complex and multi-faceted issues and engage fundamental questions that go to the core of a regulator's mandate.

As is the case for any emerging issue, the analysis of regulatory approaches for innovative new tools and technologies must be grounded in the Law Society's mandate and foundational principles. These are set out in ss. 4.1 and 4.2 of the *Law Society Act*.⁴⁶

Function of the Society

4.1 It is a function of the Society to ensure that,

(a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and

(b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law

⁴⁵ Supreme Court of Ohio, Board of Commissioners on Grievances & Discipline, "Opinion 2013-2 – Direct Contact with Prospective Clients: Text Messages" (2013), online: <https://www.ohioadvop.org/wp-content/uploads/2017/04/Op_13-002.pdf>

⁴⁶ *Law Society Act*, R.S.O. 1990, c. L.8.

apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.

Principles to be applied by the Society

4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
3. The Society has a duty to protect the public interest.
4. The Society has a duty to act in a timely, open and efficient manner.
5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.

This mandate demands an ongoing focus on protecting the public interest, facilitating access to justice, and evaluating regulatory risks and opportunities in a manner proportionate to the Law Society's regulatory objectives.

Emerging tech applications highlight regulatory tensions between public protection risks and access to justice opportunities. They require comprehensive investigation: in what ways could these tools strengthen legal services provision, and in what ways could they weaken it? They demand a new examination of regulatory balance and proportionality: how much risk of inadequate service provision should a regulator accept in order to enhance the availability of legal services? Finally, their impacts are potentially so resounding and widespread – across the legal sector and across borders – that they also challenge established structures and attitudes: what are the risks of attempting to preserve the regulatory status quo?

The Law Society's long history of professional regulation and governance in the public interest provides the necessary foundations for the principles and objectives that should guide the Task Force's deliberations on these issues.

The fundamental justifications for regulating legal services provision must ground this analysis. These justifications include:

- that there is a public interest in ensuring that people with legal issues are provided competent services, are protected from unprofessional behaviours by their providers, and are remedied for harms resulting from those behaviours;
- that there is a public interest in ensuring that people with legal issues have meaningful access to legal services and can make informed choices about the providers of those services;
- that people often lack sufficient information to adequately evaluate the legal services being provided to them; and
- that lawyers and paralegals play critical roles in the administration of justice and in the maintenance of a free and democratic society.

When considering potential regulatory frameworks for legal tech, overarching principles can help frame the questions of whether and to what extent the Law Society should actively regulate within a given sphere of legal activity, and what factors the Law Society should consider when implementing such a framework. These principles include:

- that regulation should focus on those activities or functions that are essential to the regulator's mandate, including maintaining safeguards and standards for fundamental concepts such competence, candour, confidentiality, the avoidance of conflicts of interest, integrity and good character, professional independence, responsibilities to the administration of justice, and service to the public good;
- that a regulator should maintain a constant openness to considering reforms that demonstrate potential to enhance access to justice and/or foster innovation, particularly in areas of unmet legal need that are not well-served by existing methods of legal service delivery;
- that regulatory standards for legal service providers – as well as restrictions on who may provide particular services or on how they may be provided – should be balanced proportionately with the significance of the regulatory objectives sought to be realized;
- that the balancing of the key dual goals of protecting the public from risk of harm and facilitating access to justice should consider appropriateness, efficacy, and sustainability of regulatory tools and approaches;
- that there should be meaningful consequences for legal service providers who fail to meet competence or conduct standards, and meaningful remedies available for members of the public who are harmed by such behaviour;
- that a regulator should ensure timeliness, openness, and efficiency in carrying out its functions;

- that regulatory frameworks and standards should be as uncomplicated as possible to achieve the desired objectives;
- that, when implementing changes, a regulator should consider impacts on licensees and stakeholders, as well as on the public's legal needs (particularly unmet legal needs);
- that any regulatory reforms should be amenable to orderly, responsible, and inclusive transitions, and should be mindful of any necessary disruptions that may be occasioned;
- that a regulator should ensure that members of the public are informed about the manner in which it is discharging its duty to protect the public interest; and
- that a regulator should ensure that governance and regulatory proceedings are conducted in public and that its decisions are communicated not only to legal professionals but also to the public.

In short, regulation needs to be in touch with the people who use and deliver the services being regulated, and it needs to be proportionate to its aims.

Developing regulatory responses in this area will, by necessity, be a long-term project involving many perspectives and careful deliberation. However, this project must also be pursued expeditiously, as legal tech innovations are rapidly evolving and establishing roots throughout the sector. Regulatory response options can become more practically constrained by more entrenched conditions.

There is an opportunity for the Law Society to play a leading role in developing an effective regulatory framework for legal tech. Ontario has earned a reputation as a leading hub for legal tech entrepreneurship worldwide. The province also boasts leading practitioners and academics working at the forefront of these developments, as well as government and judicial officials who have expressed strong interests in enhancing the capacity of the legal sector to innovate and adopt technologies. The conditions within the province are ripe for its legal services regulator to lay out a modern path that can serve as an exemplar for other regulators. Regulatory stability can benefit all participants in this system.

B. Task Force Topics of Inquiry

From the outset, the Technology Task Force has recognized that it will need to consider regulatory responses to two distinct segments of legal technologies: tools and services that support licensee delivery of legal services, and tools and services that deliver legal services directly to members of the public (without necessarily involving a licensee). Although often inter-related, from a legal services regulator's perspective these two segments pose some different opportunities and challenges. The Task Force has

approached them in parallel but separately, recognizing that they may ultimately require different regulatory approaches and tools.

During its first year, the Task Force developed a list of key topics of inquiry that elaborate on its mandate and guide its deliberations. Broadly, these inquiries have addressed three regulatory objectives: (1) defining scope, (2) determining responsibilities, and (3) fostering innovation. The first two of these objectives relate primarily to the consideration of direct-to-public legal tech, while the third relates primarily to the consideration of licensee-focused legal tech; however, there is naturally some overlap across these categories.

The Task Force's key topics of inquiry are as follows:

(1) Defining Scope:

- Should the Law Society's regulatory jurisdiction and mandate extend to the provision of legal services in all forms in Ontario, or should it be limited to regulation of persons who provide legal services?
- Do technological tools developed and delivered by non-licensees to assist with legal issues constitute legal services? If they do, does the Law Society's legislative mandate require it to apply its regulatory powers through enforcement, or does the Law Society have the discretion to develop alternative regulatory approaches?
- How should the Law Society's principles of facilitating access to justice and protecting the public be balanced in consideration of technologically-enabled legal services delivery? Should the Law Society move quickly to address these issues or cautiously monitor them?
- Assuming legal services can be delivered via technologies in ways or in areas that are not currently being pursued by licensees, how should the Law Society respond?

(2) Determining Responsibilities:

- Based on determinations about the Law Society's appropriate scope, in order to best facilitate its regulatory objectives, how should the Law Society be structured and what processes and practices should be implemented?
- Should another (existing or proposed) regulatory body assume responsibility for aspects of regulating technologically-delivered legal services, and if so, what should be the Law Society's relationship with that body?



- If it is appropriate for the Law Society to regulate the delivery of legal services by non-licensees through technologies, should the Law Society's regulatory framework focus on the tools, the persons/entities providing them, or both?

(3) Fostering Innovation:

- Should the Law Society's approach(es) to regulating the use of technologies by licensees focus on the tools, the licensees, or both?
- Should the Law Society's regulatory approach(es) in this area focus on adopting rules and standards, promoting education and guidance, or both?
- What specific actions should the Law Society take to better encourage innovation and adoption of emerging legal technologies within the professions?

C. Practical Regulatory Challenges

The Law Society is an independent legal services regulator with a statutory mandate to regulate the providers of legal services in Ontario in the public interest. It currently regulates more than 50,000 licensed lawyers and more than 8,000 licensed paralegals in the province. Currently, lawyers and paralegals are regulated on an individual basis.⁴⁷ The Law Society is considered a self-regulating body, in that Ontario lawyers and paralegals themselves are entrusted with the duties of governing (along with a minority of appointed lay benchers).

As the Task Force considers its topics of inquiry, it will be mindful of addressing whether and how a provincial legal services self-regulator is appropriately situated to effectively regulate persons or entities operating legal tech tools, and whether it has the means to accomplish such a task. For enforcement of regulatory standards to be effective, it requires the right resources and subject matter expertise. With respect to regulating legal tech tools, this would include substantial technological knowledge and wherewithal.

If the Law Society were to be expressly engaged in the regulation of new kinds of professionals, entities, or tools and methods for delivering legal services, this would have ramifications across the organization, and would likely impact its operational and governance structures.⁴⁸ These consequential effects require careful strategic planning.

⁴⁷ In recent years, some Canadian regulators such as the Nova Scotia Barristers' Society have adopted models for regulating entities. The Law Society has requested legislative amendments that would enable entity regulation in Ontario.

⁴⁸ Malcolm Mercer, "The Bencher from Amazon?" (2018), *Slaw*, online: <<http://www.slw.ca/2018/08/28/the-bencher-from-amazon/>>

D. Other Legal Regulators Considering Innovation and Tech Tools

Many regulators and professional associations are beginning to examine regulatory approaches to innovation and the integration of tech tools capable of delivering professional services. The Task Force is monitoring these initiatives with interest.

In Canada, although no provincial law society has yet adopted a formal strategy or approach to these issues, several besides Ontario have undertaken specific initiatives to explore them. The Law Society of British Columbia's Futures Task Force, which adopted its mandate in March 2019, is one such example.⁴⁹ The Federation of Law Societies of Canada has also begun to focus on these issues, and offers a mechanism for coordination of efforts across the provinces.⁵⁰

Many legal services regulators outside of Canada have taken significant steps to explore these topics. Until relatively recently in the United States, action by state regulators was primarily limited to initiating unauthorized practice of law proceedings against certain innovative legal services companies;⁵¹ however, over the past two years, legal regulatory bodies in states like California, Arizona, Utah, Washington, and Illinois have struck task forces to consider regulatory reforms that could open the door to new legal services delivery methods including through legal tech tools.

For example, the State Bar of California's Task Force on Access Through Innovation of Legal Services includes a mandate to "study online legal service delivery models and determine if any regulatory changes are needed to better support and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice."⁵² It made a number of recommendations to the State Bar of California's Board of Trustees, which were adopted in July 2019 and posted for public comment.⁵³ The recommendations include sixteen

⁴⁹ Law Society of British Columbia, "Mandates established for Futures Task Force and Annual Fee Review Working Group" (2019), online: <<https://www.lawsociety.bc.ca/about-us/news-and-publications/news/2019/mandates-established-for-futures-task-force-and-an/>>

⁵⁰ Federation of Law Societies of Canada, "Robots and Rule-Makers: New Frontiers for Legal Regulation – Report from the 2018 Annual Conference" (2018), online: <<https://flsc.ca/wp-content/uploads/2019/07/PEIReportERF.pdf>>

⁵¹ Swansburg, *supra* note 2. See also Benjamin H. Barton and Deborah L. Rhode, "Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators" (2019) 70:4 *Hastings Law Journal* 955.

⁵² State Bar of California Board of Trustees, "State Bar Study of Online Delivery of Legal Services – Discussion of Preliminary Landscape Analysis" (2018), online: <<http://board.calbar.ca.gov/docs/agendaitem/Public/agendaitem1000022382.pdf>>

⁵³ State Bar of California Board of Trustees, "Options for Regulatory Reforms to Promote Access to Justice", online: <<http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2019-Public-Comment/Options-for-Regulatory-Reforms-to-Promote-Access-to-Justice>>

“concept options for possible regulatory changes”, such as adding an exception to the prohibition against the unauthorized practice of law permitting approved entities to use technology-driven legal services delivery systems to engage in authorized practice of law activities, and establishing standards for such delivery systems that would regulate both the provider and the technology itself.

The American Bar Association has also played a leading role in consideration of these issues, through initiatives like its Commission on the Future of Legal Services (which operated from 2014 to 2016) and Cybersecurity Legal Task Force, and through operating showcase events and educational resources. In August 2019, the ABA adopted *Best Practice Guidelines for Online Legal Document Providers*, intended to apply certain consumer protections to documents or forms made available online to assist members of the public with their legal matters (for example, preparing a will, engaging in a real estate transaction, or participating in litigation).⁵⁴

The United Kingdom’s patchwork of legal regulatory bodies have all been involved in reviewing their regulatory frameworks in recent years, with focuses on innovation and technology. The Solicitors Regulation Authority, the Law Society of England and Wales, and the Legal Services Board have all undertaken initiatives and published resources that provide useful guidance to this Task Force. In addition, the Task Force is following the Independent Review of Legal Services Regulation in England and Wales being led by Prof. Stephen Mayson.

Although these non-Canadian institutions operate from different models of legal services regulation, they nevertheless offer important lessons for the Law Society.

Many professional services regulators beyond the legal sector are also examining similar technological and innovation developments within their industries. In Canada, securities and financial services regulators have taken leading steps to explore new regulatory solutions.

E. Coordination with Partners and Stakeholders

Besides the regulators discussed above, the Task Force recognizes that many other partner and stakeholder institutions will likely have roles to play in regulating and/or supporting aspects of technologically-delivered legal services. These roles may be in partnership with, overlapping with, or separate from the Law Society’s role.

⁵⁴ American Bar Association, “Resolution 10A: Best Practice Guidelines for Online Legal Document Providers” (2019), online: <<https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/10a-annual-2019.pdf>>

Some of these potential partners and stakeholders that the Task Force has identified to date include:

- the Ministry of the Attorney General for Ontario
- Government of Canada departments, including the Department of Justice and the Treasury Board Secretariat
- courts and tribunals in Ontario
- legal and paralegal professional organizations
- the Law Commission of Ontario
- the Law Foundation of Ontario
- Community Legal Education Ontario and other public legal education organizations
- Legal Aid Ontario
- the Lawyers' Professional Indemnity Company ("LAWPRO")
- the Canadian Legal Information Institute ("CanLII")
- law schools across Ontario
- the Legal Innovation Zone at Ryerson University
- the Cyberjustice Laboratory at the Université de Montréal and McGill University
- the Law & Design CoLab
- the Information and Privacy Commissioner of Ontario
- the Consumers Council of Canada
- the National Self-Represented Litigants Project

The Task Force welcomes ongoing input from all those interested in these issues, and looks forward to working together with partners and stakeholders during this process. It will be critical to involve stakeholders – including the public who the Law Society serves – in the Task Force's work and in the development of any new approaches or initiatives. That will mean liaising with the public, governments, legal regulators, members of the legal professions, and legal tech experts from entrepreneurial and academic backgrounds. All of these perspectives are invaluable for understanding what is happening on the ground, and for identifying where the ground may be shifting.

The Task Force also hopes to act as a central point for connecting different actors in Ontario working on legal tech issues across a variety of sectors, such as academics, entrepreneurs, technologists, legal professionals, and regulators.

Potential Regulatory Directions for Consideration

A. Early Stages

With many new members, the Task Force is in the early stages of its consideration of these issues, and does not intend to jump to conclusions. There are a wide variety of potential approaches and initiatives that could be considered, with respect to both direct-to-public legal tech tools and licensee-supporting tools. All of these approaches need careful scrutiny. This will involve reviewing the experiences in Ontario and other jurisdictions, leading thinking on these topics, and input from all relevant stakeholders.

The Task Force intends to consult on any regulatory directions that it is considering.

B. Regulatory Options for Innovative Legal Services Delivery Methods (including Direct-to-Public Tech Tools)

Drawing from other regulators' examples, there are many possible regulatory approaches available to address legal tech tools that deliver services directly to the public and related innovative delivery methods. Resolving some of the foundational regulatory topics of inquiry posed above in this report will help steer this work.

One possible framework would be to formally expand the Law Society's mandate by expressly clarifying that it regulates the provision of all legal services in all forms in Ontario. From this orientation, various more specific regulatory approaches are available, and could be adopted either exclusively or in combination. These options include:

- prohibiting any non-licensure-delivered legal services (including legal tech tools and services) through statutory prosecution powers;
- requiring (or offering as voluntary) licensure, accreditation or certification of legal tech tools and services, using impact and risk assessment measures and quality assurance standards;
- requiring registration of legal tech tools and services, with communications to the public about the risks and benefits of using them; and
- relying more heavily on insurance requirements, particularly for legal tech tools and services that do not directly involve a licensee.

An alternative framework would be to formally limit the Law Society's mandate by expressly clarifying that it regulates only lawyer and paralegal licensees, thereby allowing other forms of "unreserved activities" to be provided by non-licensees (including legal tech tools and services). From this orientation, the Law Society could focus its efforts on setting standards for its licensees, and could collaborate with government and other institutions

involved in the regulation of non-licensee legal services. This framework would still allow for the possibility of voluntary certification or registration schemes for legal tech tools.

Additional regulatory approaches to be considered could include focusing on potential amendments to professional rules and standards, enhancing guidance and education regarding legal tech, and reducing barriers to adoption of legal tech where warranted.

Regulatory Sandbox:

More immediately, the Task Force will also consider recommending implementing a “regulatory sandbox” program to assist the Law Society in grappling with these complex issues. A regulatory sandbox (also referred to as an “innovation waiver”) is defined as a “safe space” in which innovative products, services, business models and delivery mechanisms that could benefit the public can be test-run, under regulatory supervision, without immediately incurring regulatory consequences for engaging in those activities.⁵⁵ This benefits a regulator examining its regulatory framework by providing on-the-ground experience with the tools and delivery models that are under consideration.

This model was first implemented in the financial services industry. It has now become a common structure around the world for companies and regulators to experiment with new types of services and technologies to assess the merits of different regulatory tools and approaches.⁵⁶ Financial services regulators in the United Kingdom, the United States, Singapore, Australia, the Netherlands, Switzerland, and other jurisdictions have implemented sandboxes to allow supervised innovation with respect to financial technology products. In Canada, the Canadian Securities Administrators (including the Ontario Securities Commission) introduced this model in 2016.⁵⁷

The first legal regulator to adopt this model was the Solicitors Regulation Authority, which regulates solicitors in England and Wales. Its “SRA Innovate” program grants “innovation waivers” to support legal services providers that offer new types of services, or offer existing services in new ways.⁵⁸ Legal regulators of several other American jurisdictions are also currently considering the sandbox model. The Utah Supreme Court recently approved a new regulatory sandbox model which will allow certain non-traditional legal

⁵⁵ Financial Conduct Authority, “Report on Regulatory Sandbox” (2015), p. 1, online:

<<https://www.fca.org.uk/publication/research/regulatory-sandbox.pdf>>

⁵⁶ Margaret Hagan and Jorge Gabriel Jiménez, “A Regulatory Sandbox for the Industry of Law” (2019), Legal Design Lab, online: <<http://www.legalexecutiveinstitute.com/wp-content/uploads/2019/03/Regulatory-Sandbox-for-the-Industry-of-Law.pdf>>

⁵⁷ CSA Regulatory Sandbox, online: <https://www.securities-administrators.ca/industry_resources.aspx?id=1588>

⁵⁸ SRA Innovate, online: <<https://www.sra.org.uk/solicitors/resources/innovate/sra-innovate.page>>



entities to provide legal services in the state under regulatory supervision.⁵⁹ This sandbox will be developed in conjunction with much wider structural changes to the system for legal services regulation in the state.⁶⁰

C. Regulatory Options for Facilitating Tech Innovation within the Legal Professions

It is clear that the Law Society should do more to foster innovation and adoption of emerging tech tools that aim to support lawyers and paralegals. These technologies will undoubtedly change the ways that legal professionals provide services, as well as the ways that they work together and organize themselves. The Law Society must be responsive to these changes, in order to ensure that its licensees continue to provide legal services in a competent and accessible manner.

Most licensees are interested in expanding their technological horizons. Clients also increasingly expect greater integration of technology. However, the Task Force's outreach and research has regularly indicated that, in order to take advantage of the potential benefits offered by legal tech and innovative legal service delivery opportunities, licensees typically must overcome a variety of barriers.⁶¹ Licensees and their clients are increasingly looking to the Law Society to help reduce those barriers and facilitate innovation.

Fear is a crucial barrier to adoption for lawyers and paralegals. There is fear that a new tool will not deliver to the standard required by the client, and also fear that using the tool – or misusing it – might bring the licensee out of compliance with Law Society rules or other legislation. Another common barrier for legal professionals is the lack of time or resources necessary to bring oneself up to speed on or test out the latest innovative options.

One expert with whom the Task Force consulted summed up these barriers in a resonant way: "Licensees are careful by nature, and they take their obligations seriously. The Law Society needs to give them the permission to innovate."

As outlined above in the Task Force's topics of inquiry, there are important questions to be determined about where the Law Society's approach(es) to fostering innovation should

⁵⁹ Bob Ambrogi, "Utah Supreme Court Votes to Approve Pilot Allowing Non-Traditional Legal Services" (2019), online: <<https://www.lawsitesblog.com/2019/08/utah-supreme-court-votes-to-approve-pilot-allowing-non-traditional-legal-services.html>>

⁶⁰ Utah Work Group on Regulatory Reform, "Narrowing the Access-to-Justice Gap by Reimagining Regulation" (2019), online: <<https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>>

⁶¹ Swansburg, *supra* note 2, at 388. See also Law Society of England and Wales, *supra* note 17, at pp. 9-18.

focus. Subject to these determinations, some of the potential specific regulatory tools and approaches that should be considered (either exclusively or in combination) include:

- amending professional conduct rules and introducing a rule requiring technological competence (potentially including harmonizing standards with those of other jurisdictions);
- enhancing guidance and practice resources to account for use of legal tech;
- maintaining a registry of legal tech tools and services (potentially based on an accreditation or certification system);
- introducing requirements or incentives regarding use of legal tech within mandatory professional liability insurance;
- requiring targeted continuing professional development on these topics; and
- developing self-assessment tools for licensees.

Notwithstanding the need to grapple with these issues, the Task Force recognizes that licensees have made clear their interest in receiving more guidance about technology usage, and that the Law Society can be doing more to provide these resources. This kind of direction is key to reducing barriers to adoption, not only for some of the cutting-edge, high-tech tools emerging today, but also for many existing tools that are already well-integrated into some legal services sectors, such as cloud computing and e-discovery software. These tools all come with risks for clients, especially when used improperly.

Some of the priority topics identified by the Task Force, for which better guidance resources for licensees are needed, include: (a) data, network, and device security; (b) cloud computing; and (c) digital signature and document execution practices.

This work of developing enhanced guidance will be pursued promptly, while the Task Force engages in its wider process. This initiative – which can build on existing resources developed by other legal regulators and can be accomplished in consultation and cooperation with stakeholder partners – can itself foster further progress in developing new regulatory approaches. It engages legal professionals in the process and contributes to the evidence that will support further policy development.

Next Steps for the Technology Task Force

The Task Force will continue to meet regularly and work towards the objectives outlined in this report. It intends to report periodically to ensure that the public and the legal professions are aware of and engaged with the issues and ideas it is considering. The Task Force welcomes input from all those interested in these issues.