



2021

In-House Counsel, the Adoption of Artificial Intelligence, and Legal Ethics

Dr Felicity Bell

Prof. Michael Legg

Follow this and additional works at: <https://repository.nls.ac.in/ijlt>

Recommended Citation

Bell, Dr Felicity and Legg, Prof. Michael (2021) "In-House Counsel, the Adoption of Artificial Intelligence, and Legal Ethics," *Indian Journal of Law and Technology*: Vol. 17: Iss. 2, Article 2.

DOI: 10.55496/TNKZ9783

Available at: <https://repository.nls.ac.in/ijlt/vol17/iss2/2>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Indian Journal of Law and Technology by an authorized editor of Scholarship Repository.

IN-HOUSE COUNSEL, THE ADOPTION OF ARTIFICIAL INTELLIGENCE, AND LEGAL ETHICS

Dr. Felicity Bell & Prof. Michael Legg***

ABSTRACT In-house counsel have become a large and influential group of lawyers in many jurisdictions. When it comes to transactional and regulatory work, they play a key role. Nevertheless, in-house counsel are also under pressure to create efficiencies in legal work, with tightening legal budgets and ever-growing volumes of regulation. Artificial intelligence (AI) applications are often suggested as a means of creating these cost savings. There is a strong business case for using AI in this context as routinised work lends itself to economies of scale. But what are the implications of using AI, for the in-house lawyer? They must ensure that professional ethical standards are being adhered to. They must also be, effectively, a change manager – encouraging their staff to use the tech options available. And finally, they must be a team player, supporting and supervising the use of tech by both lawyer and non-lawyer employees. This article describes the uses of AI by in-house counsel before examining what it demands of them in their role.

Introduction	1	A. As Ethical Compass	15
I. The AI Use Case for In-House Counsel	5	B. As Change Manager	18
II. The Roles of In-House Counsel	12	C. As Supervisor	20
		III. Conclusion.	23

INTRODUCTION

There are thousands of in-house or corporate counsel around the world. In many jurisdictions, they are the fastest-growing segment of the lawyer

* Senior Research Fellow, Law Society of New South Wales’ Future of Law and Innovation in the Profession (FLIP) Research Stream at UNSW Law and Justice.

** Director, Law Society of New South Wales’ Future of Law and Innovation in the Profession (FLIP) Research Stream at UNSW Law and Justice. A strategic alliance between the Law Society and UNSW Law and Justice, the FLIP Stream engages with the challenges of technological change and their impacts on lawyers, law, and the legal system. The authors acknowledge the funding support of the Law Society for the research forming the basis of this article.

population.¹ It seems also that the role of the in-house counsel is broadening – in addition to giving legal advice and managing relations with external law firms, they are likely to be ‘intimately involved in compliance, corporate governance, and risk and reputation management’.² For example, just over half of company directors surveyed by the global Association of Corporate Counsel (an association of over 40,000 in-house counsel around the world) identified that ensuring compliance with regulations was one of the three main ways in which general counsel provide value to the company.³ At the same time, as in-house counsel are expected to act as stewards of the company’s ethical and compliance obligations, they are being pressured to demonstrate their and their team’s ‘value’ as never before.⁴ Unsurprisingly, then, automation of legal work using artificial intelligence (AI) is increasingly identified as a means of delivering this value.⁵

The corporate counsel role was already an object of academic study due to its peculiarities: the in-house counsel works for only one “client”, and moreover, this client is also the lawyer’s employer.⁶ In particular, studies have looked at in-house counsel’s ethics and how these are enacted.⁷ This article considers the influence of AI on this specific professional legal group. We find that certain ethical obligations are heightened for in-house counsel

¹ Eli Wald, ‘In-House Risks’ (Compliance & Ethics, ABA Antitrust Section Newsletter 2015) 15 (‘Over the last thirty years or so, as the number of in-house counsel rose and their role increased in scope and prominence.’).

² Michael Legg and Felicity Bell, *Artificial Intelligence and the Legal Profession* (Hart 2020) 210; See also Omari Scott Simmons, ‘Chief Legal Officer 5.0’ (2020) 88 *Fordham Law Review* 1741, 1741–42 (‘modern CLOs perform an embedded internal regulatory function, which includes “monitoring, formulating company procedures and policies, and enforcement”’).

³ Veta T Richardson and Mary Blatch, ‘Leveraging Legal Leadership: The General Counsel as a Corporate Culture Influencer’ (Association of Corporate Counsel 2017) 3 <https://www.acc.com/sites/default/files/resources/vl/public/QuickReference/1468922_3.pdf> accessed 11 July 2022; See also Marc Steinberg and Stephen Yeager, *Inside Counsel – Practices, Strategies and Insights* (West Academic 2015) 181 (referring to in-house counsel’s role in implementing law compliance programs as ‘the practice of preventive law’).

⁴ Eg, ‘Tech Tactics: The Case for Rethinking the Legal Function’ (*GC Magazine*, 27 September 2021) <<https://www.legal500.com/gc-magazine/category/feature/>> accessed 11 July 2022.

⁵ Dana Remus and Frank Levy, ‘Can Robots be Lawyers: Computers, Lawyers, and the Practice of Law’ (2017) 30(3) *Georgetown Journal of Legal Ethics* 501, 540; ‘Tech Tactics’ (n 4).

⁶ *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners* (No 2) (1972) 2 QB 102, 129.

⁷ See, eg, Robert L. Nelson and Laura B. Nielsen, ‘Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations’ (2000) 34(2) *Law and Society Review* 457, 466–68; Richard Moorhead, Steven Vaughan and Cristina Godinho, *In-House Lawyers’ Ethics: Institutional Logics, Legal Risk and the Tournament of Influence* (Hart 2018).

when using AI.⁸ Further, while in-house counsel are likely to be ‘consumers’ rather than producers of AI products,⁹ they also play an important role in procurement and in leading their teams’ use of AI technologies.

In referring to AI, we are talking about an umbrella term which might include expert systems (sometimes called ‘first wave’ AI) as well as machine learning,¹⁰ sometimes referred to as systems that can ‘learn’:

Machine learning programs excel at finding statistical patterns in data. This model developed is a pattern of statistical relationships that exist between different features of the data in the dataset. Typically, the more data analysed, the greater the accuracy of the model. The dynamism of machine learning comes from the ability of the program to refine itself as it encounters even more new data and its capacity to scale to huge amounts of data.¹¹

The use of AI, especially machine learning, in professional occupations is growing across the board. Looking in particular at legal services, Remus and Levy have explained:

As pressure increases to hold down expenses, the purchase of technology becomes more attractive. [One] factor promoting accelerated technology purchases is the shift of corporate legal work from law firms to the corporation’s own legal department. Such legal departments are part of standard, profit-maximizing organizations that put a higher value on efficiency than a partner-based firm.¹²

In a survey of general counsel, 91% reported that they thought AI would disrupt the legal industry.¹³ AI is useful for in-house counsel in several

⁸ This article does not seek to address the general topic of ethics of AI, which has been the subject of substantial research, but rather legal ethics and how those requirements impact on the use of AI by lawyers. The regulation of lawyers through professional and ethical codes of conduct may act as an indirect form of regulation of AI as legal ethics limits and guides lawyers as to when and how they may use AI. However, the focus is the regulation of lawyers so that AI is only regulated when used by a lawyer.

⁹ See, John Armour, Richard Parnham and Mari Sako, ‘Augmented Lawyering’ (University of Oxford and ECGI December 2020) Law Working Paper N° 558/2020, 9 <https://ecgi.global/sites/default/files/working_papers/documents/armourparnhamsakofinal.pdf> accessed 11 July 2022.

¹⁰ We refer to expert systems to denote pre-programed systems which can guide users through a sequence or series of steps and machine learning systems to refer to data-driven programs which use pattern recognition in data to produce their outputs.

¹¹ Legg and Bell (n 2) 29.

¹² Remus and Levy (n 5) 540: citing Deborah A DeMott, ‘The Discrete Roles of General Counsel’ (2005) 74 Fordham Law Review 955, 958–60 and Nelson and Nielsen (n 7) 466–68.

¹³ ‘Tech Tactics’ (n 4).

interrelated areas. First, it is argued that AI in legal services is well positioned to be used for repetitious legal tasks such as document review (whether of voluminous electronic documents, such as in Technology Assisted Review (TAR),¹⁴ or of single documents); and for document automation (drafting).¹⁵ Due to the 'high fixed costs' associated with assembling sufficient data for machine learning systems, the optimum context for their use is in relation to 'tasks for which relevant data are readily available and in which results can be scaled such as discovery review, contract analytics, and legal research'.¹⁶ AI has various uses for transactional law, in areas that we summarise as review and drafting, management, and analysis. These areas can also be seen as interrelated, in that the results of analysis have lessons for drafting; review is relevant to management; and management enables data collection, which in turn facilitates analysis. The potential for increased efficiency was the 'most frequently cited factor' by general counsel in a survey that asked why they were considering implementing new technology.¹⁷ At the same time, technology use in law has been conceptualised as part of a wider and long-standing shift towards commodification, and away from a traditional, bespoke manner of offering legal services.¹⁸

Second, AI may underpin regulation technology ('RegTech') that has been developed to streamline and automate compliance with increasingly extensive regulation.¹⁹ The growth of regulatory requirements and costs of complying with them has been rapid and in-house lawyers have a central (and possibly burdensome) role in achieving this compliance:²⁰

¹⁴ Legg and Bell (n 2) 109–112.

¹⁵ Remus and Levy (n 5).

¹⁶ Armour, Parnham and Sako (n 9) 4.

¹⁷ 'In-House Technology in Europe: Measuring the Appetite for Tech', (*GC Magazine*), <<https://www.legal500.com/gc-magazine/feature/the-state-of-play/>> accessed 11 July 2022 (reporting that 84% said this).

¹⁸ See, eg, Emily Carroll and Steven Vaughan, 'Matter mills and London-lite offices: Exploring forms of the onshoring of legal services in an age of globalisation' (2019) 22(1–2) *Legal Ethics* 3.

¹⁹ Australian Government Productivity Commission, 'Regulatory Technology, Information Paper' (2020) 5–6 <<https://www.pc.gov.au/research/completed/regulatory-technology/regulatory-technology.pdf>> accessed 11 July 2022.

²⁰ 'Lawtech Adoption Research' (The Law Society February 2019) 19; SH Kim, 'The Ethics of In-House Practice' in L Levin and L Mather (eds), *Lawyers in Practice – Ethical Decision Making in Context* (University of Chicago Press 2012) 198; Steinberg and Yeager (n 3) 181–211; Benjamin W Heineman Jr, *The Inside Counsel Revolution* (American Bar Association 2016) 21.

The global RegTech Market size is expected to grow USD 7.6 billion in 2021 to USD 19.5 billion by 2026, at a Compound Annual Growth Rate (CAGR) of 20.8% during the forecast period.²¹

The article is structured as follows: Part I looks at the “AI use case” for in-house counsel. Part II then considers the role of in-house counsel and how that role intersects with automation or AI use, in particular, the interplay of ethical tensions which may arise. Specifically, we argue that there are three main areas where AI might impact or change the in-house counsel role— around professional ethical obligations; as a change manager; and as a supervisor, especially of multidisciplinary teams. Part III concludes.

I. THE AI USE CASE FOR IN-HOUSE COUNSEL

The growth of the in-house counsel sector is directly linked to corporations and governments seeking to reduce the amount of legal costs incurred through reliance on external lawyers.²² It is a classic example of the ‘make-or-buy decision’. Traditionally, the decision involved the act of choosing between manufacturing a product in-house (internal production) or purchasing it from an external supplier (out-sourcing) based on which was the most cost-effective, taking into account the need for oversight of external suppliers and co-ordination of the external supplier with the firm’s processes and goals.²³ Applied to legal services, the ‘make or buy decision’ means choosing between having legal work completed by in-house counsel and purchasing it from an external supplier, usually a law firm.²⁴ The decision by corporations to ‘make’ more of their own legal services has been referred to as insourcing. Insourcing means that the in-house legal function undertakes legal work internally where previously it would have used an external law firm. Central to the insourcing decision is who can provide legal services better – in-house counsel or external counsel. Both compete for the corporation’s work.²⁵ The in-house legal function will continue while it is more efficient, or less

²¹ ‘Global RegTech Market - Forecast to 2026’ (Research and Markets February 2022) <<https://www.marketsandmarkets.com/Market-Reports/regtech-market-63447434.html>> accessed 7 July 2022.

²² ‘The Future of Law and Innovation in the Profession’ (The Law Society of New South Wales 2017) 17, 53 (a key driver of corporations insourcing legal work was the corporate imperative to contain costs in a flat commercial market).

²³ See generally Ronald H Coase, ‘The Nature of the Firm’ (1937) 4 *Economica* 386; Milton Regan and Palmer Heenan, ‘Supply Chains and Porous Boundaries: The Disaggregation of Legal Services’ (2010) 78 *Fordham Law Review* 2137, 2142–48.

²⁴ Steven L Schwarcz, ‘To Make or Buy: In-House Lawyering and Value Creation’ (2008) 33(2) *Journal of Corporation Law* 497.

²⁵ Michael Legg and Felicity Bell, ‘Insourcing – Implications for In-house Counsel and Private Practice Lawyers’ (2018) 45 *Law Society Journal* 70.

costly, than the alternative. AI provides a key source of efficiency. Further, the growth of in-house since the 1990s, both in size and prestige, means that these lawyers also play a key role in controlling the work that is sent out to external law firms.²⁶ As Wilkins noted, this was part of the general rise of corporate counsel, who held themselves out as those ‘who should be entrusted with the role of being both a ‘partner’ to the business in achieving its objectives and the ‘guardian’ of the company’s long-term reputation and values’.²⁷

Currently, in-house counsel are typically viewed as central to the establishment of an ethical corporate culture – one which is supportive of legal and regulatory compliance, where neither legal professional obligations nor corporate performance are compromised.²⁸ There is a trend toward seeing compliance as value-creating, as it is vital not only for staff and customers but also for the organisation’s wider public image. The role of the corporate counsel as an ethical compass is therefore treated with increasing importance. In this formulation, in-house legal departments are not just cost centres, but also a key part of maintaining professional ethical standards and risk and reputation management. Having said this, the role of corporate counsel has been routinely studied for its actual and potential ethical weak spots, which may include the dominance of a particular (unethical) corporate culture, the challenges of having only a single ‘client’ (the organisation), and whether the in-house counsel has the power to challenge internal corporate hierarchies.²⁹ Although they work for a single employer-client, as legal practitioners, in-house counsel must comply with the law and with the ‘law of lawyering’ – the professional ethical rules and associated general law and statutes. In this article, as examples, we draw on the conduct rules (and draft or model rules) of various common law jurisdictions.

AI has wide application for transactional law, and thus for corporate counsel. Generally, its usefulness for transactional law is the ability to scale

²⁶ Tanina Rostain, ‘General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions’ (2008) 21(2) *Georgetown Journal of Legal Ethics* 465; David B Wilkins, ‘Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship’ (2010) 78(5) *Fordham Law Review* 2067, 2081–82; Schwarcz (n 24); Raymond H Brescia et al, ‘Embracing Disruption: How Technological Change in the Delivery of Legal Services can Improve Access to Justice’ (2014) 78(2) *Albany Law Review* 553–622.

²⁷ Wilkins (n 26) 2084.

²⁸ Richardson and Blatch (n 3) 1–2.

²⁹ Nelson and Nielsen (n 7); Robert Eli Rosen, “‘We’re All Consultants Now:’ How Change in Client Organizational Strategy Influences Change in the Organization of Corporate Legal Services’ (2002) 44 *Arizona Law Review* 671; Wilkins (n 26); Omari Scott Simmons and James D Dinnage, ‘Innkeepers: A Unifying Theory of the In-House Counsel Role’ (2011) 41(1) *Seton Hall Law Review* 77; Schwarcz (n 24).

and generate significant time savings for in-house counsel and their teams. Review and management functions are among those most heavily promoted to in-house counsel. Recall the headlines generated by JP Morgan Chase's 2016 announcement that it was using machine learning to automatically obtain information from legal documents— such as 'Are Robots Taking Over the World's Finance Jobs?' and 'JP Morgan Does in Seconds What Took Lawyers 360,000 Hours'.³⁰ Data points might include key information such as dates, party names, and value such as monetary sums payable. Automatically extracting this type of information therefore allows organisation of masses of data easily. For instance, all those contracts which will expire by a certain date or concern a certain party could be quickly identified. GC magazine reported that 'the most commonly cited use of technology was for contract management, from 55% of [in-house] respondents'³¹ to a technology survey.

Review functions can also be used for individual documents. For instance, Lawgeex's contract review software claims to 'review and redline legal documents'.³² "Redlining" refers to editing the contract terms in a process of negotiation. Lawgeex explains:

Unlike other solutions that only flag unacceptable or missing clauses, Lawgeex understands the contractual context ... Our technology makes redlines to the contract and negotiates with the counterparty – just like an experienced attorney, but with enhanced speed and accuracy.³³

The automation of contract review has the potential to save considerable time: Lawgeex claims to reduce time spent on review by 80%.³⁴ Review may also be of multiple documents, such as in due diligence. Conducting due diligence refers to reviewing the affairs of a business or business entity prior to entering into a contractual arrangement, for instance, acquiring the business.³⁵ Usually this would include reviewing the contracts to which the business is a party. For example, a review of contracts with third parties may be needed to ascertain if the contract can be assigned or novated to the

³⁰ N Alam and G Kendall, 'Are Robots Taking Over the World's Finance Jobs?' *The Guardian* (11 July 2017); 'JP Morgan Does in Seconds What Took Lawyers 360,000 Hours', *Bloomberg* (27 February 2017). Note that Legg and Bell suggest this time saving may have been overstated: (n 2) 178.

³¹ 'In-House Technology in Europe' (n 17).

³² 'Contract Review Automation' (*Lawgeex*) <<https://www.lawgeex.com/cra/>> accessed 11 July 2022.

³³ *ibid.*

³⁴ 'Conquer your Contracts', (*Lawgeex*) <<https://www.lawgeex.com/>> accessed 11 July 2022.

³⁵ See Legg and Bell (n 2) 171.

new purchaser³⁶ or if a change of control due to the purchase creates a right or termination for the third party. The existence and content of assignment/novation and termination clauses may be central to the value sought from the acquisition. While it is acknowledged that automating this type of review can also generate huge time savings, Remus and Levy have argued that AI is less successful at due diligence review due to the potential for unknown or unexpected findings.³⁷

Similar methods to those used for review and management can also be used for analysis. Williams argues that drafting can be informed by machine learning analysis of many thousands of existing contracts. Williams refers to 'predictive contracting' which would mean taking empirical data about contractual clauses and using these statistics to inform drafting.³⁸

The automation of legal, particularly contractual, drafting is long-standing, though it may or may not be 'AI'. Susskind said, in 2006:

I cannot help but feel that document assembly technology is and will remain ... a fundamental technology. If one looks at the heart of legal work, it's about the production of documents and document assembly is an enabling tool that automates and streamlines that process.³⁹

Betts and Jaep argue that legal document assembly has increased in sophistication, although systems continue to operate in essentially the same way.⁴⁰ It may involve some degree of automation of a law firm or company's existing precedents or it may be a subscription-based service, giving access to a range of document types. Accordingly, '[t]his type of automation works most effectively when contracts are largely standardised'⁴¹ – and for high volume.

Meanwhile, as noted, Reg Tech has emerged in response to growth in regulation and therefore in compliance costs:

It has been estimated that governance, risk and compliance costs account for 15 to 20 per cent of the total 'run the bank' cost base

³⁶ Contracts for the supply of goods or services commonly have a clause forbidding assignment or novation without the consent of the counter-party.

³⁷ Remus and Levy (n 5) 517 (what they term the 'unstructured' component of legal work).

³⁸ Spencer Williams, 'Predictive Contracting' (2019) 2 Columbia Business Law Review 621.

³⁹ Richard Susskind, 'The Next Ten Years' (Society for Computers and Law 2006 Annual Lecture, 6 March 2006).

⁴⁰ Kathryn D Betts and Kyle R Jaep, 'The Dawn of Fully Automated Contract Drafting: Machine Learning Breathes New Life into a Decades-Old Promise' (2015) 15 Duke Law & Technology Review 216, 219.

⁴¹ Legg and Bell (n 2) 180.

of most major banks. Unsurprisingly Reg Tech applications that can reduce cost but better achieve compliance have attracted considerable interest.⁴²

Areas of regulation such as anti-money laundering ('AML'), bribery, privacy and sector-specific regulatory requirements create high value risks through state enforcement actions (including criminal prosecutions), private litigation such as class actions and reputational harm that can impact the share price. Effective approaches to compliance that avoid, or at least minimise, the above risks are crucial components of corporate operations, because of the financial and non-financial costs associated with contraventions. Equally, corporations want to minimise compliance costs. For example, the Commonwealth Bank of Australia and ING used AI to interpret about 1.5 million paragraphs of regulation on the European Union's Markets in Financial Instruments Directive. Undertaking the task manually would have taken the banks about 1800 hours (or one year's work for one full-time employee) to complete. By employing AI, the banks were able to complete the task in two and a half minutes.⁴³

It can be seen that AI has many uses for in-house counsel. However, the use of automated legal tools may give rise to its own ethical risks. In-house counsel are sometimes referred to as gatekeepers, who act to evaluate corporate actions or proposed actions, and are able to deny or stop these if they pose a legal ethical risk. A survey by Lawyers on Demand found that 45% of in-house lawyers had been asked to advise on matters of dubious ethicality, while 39% had been asked to advise on matters which were legally questionable.⁴⁴ Especially salient duties for corporate counsel include their duties of independence and to the administration of justice, which mean that they can (and should) perform the role of scrutinising the organisation's operations to ensure it is compliant. In addition, Foster and Lawson have suggested that ethical issues have been generally overlooked when it comes to AI for transactional law.⁴⁵

⁴² Matthias Memminger, Mike Baxter and Edmund Lin, *Banking Regtechs to the Rescue?* (Bain & Co 2016).

⁴³ Australian Government Productivity Commission (n 19) 14.

⁴⁴ Steven Vaughan and Richard Moorhead, 'Which way is the Wind Blowing? Understanding the Moral Compass of In-house Legal Practice' (*Lawyers on Demand*) <<https://www.lodlaw.com/au/our-thinking/reports/which-way-is-the-wind-blowing/>> accessed 11 July 2022.

⁴⁵ William E Foster and Andrew L Lawson, 'When to Praise the Machine: The Promise and Perils of Automated Transactional Drafting' (2018) 69(3) *South Carolina Law Review* 597, 598.

Lawyers have a duty to perform competently, and in their clients' best interests.⁴⁶ If AI can improve a lawyer's work and increase efficiency, then, arguably, the lawyer may have a duty to use AI tools. This is perhaps most clearly apparent in large scale document review where, as noted above, there is evidence indicating that machine learning can perform with fewer mistakes than humans.⁴⁷

The duty of independence is typically characterised as acting, and rendering candid judgement, free from external pressures.⁴⁸ The Australian Uniform Solicitors Rules refer to solicitors 'avoiding any compromise to their integrity and professional independence'.⁴⁹ Other professional rules characterise this obligation as one of acting with integrity or with honour.⁵⁰ In relation to in-house counsel, this duty has been discussed in relation to the lawyer being independent of his or her client-employer. When it comes to AI, the lawyer's reliance on the outputs of AI systems may also challenge independence if the lawyer is not exercising his or her own independent judgement but is rather deferring to the answers of an AI system. This is especially so if the way that the system works is so complex that it is effectively 'inscrutable' or unable to be ascertained or understood by humans interpreting its outputs.⁵¹ This is apparent in relation to something such as a prediction of a case outcome where the lawyer cannot necessarily either explain the way that the prediction has been generated or vouch for its accuracy, but must disclose the prediction to the client-employer.

A core duty for lawyers is the duty to the administration of justice which, in a narrow sense, focuses on not misleading the court or abusing its processes. However, the obligation is wider than an obligation to the Court and its processes – although it is the court which enforces the duty, it is really an

⁴⁶ Eg, Solicitors Regulation Authority (England and Wales) Principles, Principle 7; Legal Profession (Professional Conduct) Rules 2015 (Singapore) rr 5 and 6; American Bar Association, Model Rules of Professional Conduct, r 1.1; the Hong Kong Solicitors' Guide to Professional Conduct, r 6.01; Bar Council of India draft Code of Ethics (2011) pt III.

⁴⁷ Maura R Grossman and Gordon Cormack, 'Technology-Assisted Review in e-Discovery can be More Effective and More Efficient than Exhaustive Manual Review' (2011) 17 Richmond Journal of Law & Technology 1.

⁴⁸ Legg and Bell (n 2) 302; American Bar Association, Model Rules of Professional Conduct, r 2.1; Bar Council of India, Part VI, Ch II Standards of Professional Conduct and Etiquette, Preamble and Section II Duty to the Client; also Bar Council of India draft Code of Ethics (2011) pt III, [25].

⁴⁹ Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015, r 4.1.4.

⁵⁰ Eg, Code of Professional Conduct for British Columbia, ch 2 Standards of the Legal Profession, 2.2; Law Society of Ontario, Complete Rules of Professional Conduct 2000, 2.1-1; Legal Profession (Professional Conduct) Rules 2015 (Singapore), r 4(c).

⁵¹ Brian Sheppard, 'Warming Up to Inscrutability: How Technology Could Challenge Our Concept of Law' (2018) 68 (Supp 1) University of Toronto Law Journal 36, 50.

obligation to support the rule of law, which benefits the wider community and is part of upholding public respect for the legal profession and the institutions of justice. Accordingly, it is a duty that extends beyond the advocate or lawyer dealing directly with the court and applies to all lawyers, including in-house counsel, who must comply with the law. Examples of failure to uphold the law and comply with the duty to the administration of justice can be seen in the misconduct that was able to occur in the likes of Enron, Worldcom and Purdue Pharma (manufacturers of OxyContin).⁵²

In the sections that follow, we look at some of the points of tension for in-house counsel in upholding these duties. These includes issues around the duty of competence and the level of knowledge required in order to use AI competently, as well as to supervise others in its use; what is required for the exercise of independent judgment; and finally, a wider question about the extent to which the use of AI may impinge on legal professionalism or even give rise to rule of law issues.

We also consider in greater detail how in-house counsel must oversee or maintain RegTech and other AI systems. In addition to professional ethical complexities, there are also practical hindrances to the adoption of AI tools by in-house teams. Armour and Sako identify two key impediments.⁵³ Firstly, the investment that is needed for AI technologies. They observe that as in-house legal teams are typically not revenue generators, it may not seem worthwhile to invest in legal technologies for their use.⁵⁴ A recent survey of Australian in-house counsel appeared to support this, finding that in-house counsel's role is becoming increasingly complex as they assume broader roles, yet 'lack the time, budget and understanding to adopt legal technology tools that could help them'.⁵⁵ Secondly, most machine learning systems need voluminous data to operate effectively. Within the organisation, this data may be either hard to access and organise, or too small in volume to be used effectively. Armour and Sako explain that often internal data "will be spread across a multitude of legacy systems".⁵⁶ They note, further:

⁵² Steve Mark, 'Walking the Ethical Tightrope – Balancing the Responsibilities of In-House Counsel to Key Stakeholders' (Legalwise Seminars Pty Ltd, Sydney, 12 November 2009); Legg and Bell (n 2) 303-305.

⁵³ John Armour and Mari Sako, 'AI-enabled Business Models in Legal Services: From Traditional Law Firms to Next-Generation Law Companies?' (2020) 7 *Journal of Professions and Organization* 27, 36.

⁵⁴ *ibid.*

⁵⁵ Christopher Niesche, 'Australian In-House Lawyers Busier than Ever But Stumped by Legal Tech Solutions', *Law.com* (1 September 2021).

⁵⁶ Armour and Sako (n 53) 37.

Many organizations are of course engaging in “digital transformation” to facilitate better access to internal data. Even where this is done, only very large corporations may have sufficient data to enable effective training of AI models and generate sufficient volume of activity to justify the fixed costs of labelling training data.⁵⁷

However, regulators have made datasets available in the RegTech space to assist in the creation of tools for aiding compliance.⁵⁸

Nevertheless, the use case for AI in-house is not straightforward or clear cut, heightening the role of the in-house counsel in both procurement and adoption.

II. THE ROLES OF IN-HOUSE COUNSEL

In this part, we consider the ways in which in-house counsel mediate the use of technology, including automation technology, and how their role is, accordingly, affected or changed by the use of AI.

The role of lawyers vis-à-vis technology has been conceptualised in different ways. Armour and Sako have examined lawyers’ relations with legal tech via different types of legal business structures.⁵⁹ They have also drawn attention to the different ways in which lawyers’ work may be impacted: AI may substitute or replace, or it may augment what lawyers do.⁶⁰ Arguably, AI may also give rise to wholly new types of tasks, and, indeed, roles, for lawyers.⁶¹

Many legal AI products are marketed to lawyers as augmenting tools – whether they are characterised as time-saving, guarding against mistakes, or enhancing what lawyers do.⁶² As the discussion in Part I indicates, saving time and increasing efficiency through the automation of tasks which either do not require complex analysis or are not strictly legal, such as contract management, is one of the most widely made claims for legal AI products. There are also suggestions that AI tools can reduce human error. This has been shown most persuasively in relation to Technology Assisted Review,

⁵⁷ Armour and Sako (n 53) 37; citing A Andal-Ancion, PA Cartwright and GS Yip, ‘The Digital Transformation of Traditional Business’ (2003) 44(4) MIT Sloan Management Review 34; and GC Kane, et al, ‘Strategy, Not Technology, Drives Digital Transformation’ (MIT Sloan Management Review and Deloitte University Press 2015).

⁵⁸ See ASIC, ‘ASIC and Regtech’ <<https://asic.gov.au/for-business/innovation-hub/asic-and-regtech/>> accessed 11 July 2022.

⁵⁹ Armour and Sako (n 53).

⁶⁰ Armour and Sako (n 53) 29.

⁶¹ Armour and Sako (n 53) 29.

⁶² Legg and Bell (n 2) 181.

but extends also to other areas.⁶³ Moreover, these types of tools remain as augmenting because, for instance, while a program may be able to identify clauses that are not standard when compared with the database that it has been trained on, it likely cannot explain what is problematic about the clause or what it should be replaced with.

In terms of automated systems more generally, authors have referred to the idea of keeping a ‘human in the loop’.⁶⁴ Effectively, this means that a human can alter system outputs. Here, we refer to a ‘lawyer in the loop’. However, this role is broader than just giving the tick to ‘outputs’. The duties of independence and competence arguably require a more involved approach to interrogating the results of AI systems, such as those used for contract review or prediction. The in-house counsel’s role is to oversee and maintain legal AI systems; to check their functioning; to scrutinise their outputs; and to ensure that any changes to law or regulation are correspondingly reflected in the system. To perform such a complex role adequately, in-house counsel will need access to training or expertise. For example, the State Bar of California has suggested, in relation to competence in undertaking Technology Assisted Review, that lawyers can acquire the skills and knowledge they need, or they may consult with experts.⁶⁵ We now turn to look at three key elements of the in-house counsel role in the sections below.

First, and perhaps most importantly, in-house counsel often already play a key role in upholding and disseminating professional ethical obligations within their department and organisation. We describe this role in section A, below, as being an ‘ethical compass’. This role ought to be, if anything, heightened with the uptake of automation technologies. A professional magazine for general counsel reported that ‘84% of in-house respondents reported that they use some form of specialised legal technology within their legal department, with 82% revealing that their department’s use of technology had increased in the past five years’.⁶⁶ In-house counsel must, therefore, be an ethical compass for their team and indeed, their organisation, including when AI or automated systems are used.

Second, and as per section B below, in-house counsel are likely to either play a role in, or be entirely responsible for, technology procurement, and

⁶³ Betts and Jaep (n 40) 226; Foster and Lawson (n 45); Grossman and McCormack (n 47) (on TAR).

⁶⁴ Mireille Hildebrandt, ‘Smart Technologies’ (2020) 9(4) Internet Policy Review <<https://policyreview.info/concepts/smart-technologies>> accessed 11 July 2022.

⁶⁵ The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion 2015-193.

⁶⁶ ‘In-House Technology in Europe’ (n 17).

then in ensuring that staff use the technology and use it effectively and ethically. In other words, they must adopt a managerial role when it comes to technology uptake and use case, which includes educating teams on the benefits, both economic and ethical. We refer to this as acting as a change manager. In the context of digital courts, it has been noted that as well as technology, 'change, communication, training and lots of detailed management issues' are involved in technological change⁶⁷ – human use of technology is central. Moreover, in legal practice, there is a further overlay of complexity, given tensions about the meaning of professionalism and the association of technology with efficiency and routinisation, sometimes characterised as antithetical to the professional project.

However, technology may also be characterised as ethically benign or even beneficial – for instance, in the context of Reg Tech. Yet, the former Chair of the US Securities and Exchange Commission, discussing 'deficient corporate cultures',⁶⁸ has noted that RegTech cannot by itself alter cultural, internal ethical approaches⁶⁹ – for this, people are needed. Having said this, there is an identified debate as to whether compliance is naturally an in-house legal function. Moorhead noted that it 'mixes behavioural, managerial, and legal tasks'.⁷⁰ Langevoort suggests that compliance and legal go together in smaller and in medium sized organisations, but says:

for larger organizations there is a robust debate among compliance professionals as to whether the [chief legal officer] should be walled off from too much influence over the corporate compliance and ethics function. Many firms now have chief ethics and compliance officers with separate staffs, who may utilize in-house counsel for advice (and perhaps have specialized lawyers of their own), but who report directly to the CEO...⁷¹

⁶⁷ Lord Justice Colin Birss, 'Keynote Address to the Online Dispute Resolution Forum' (3 May 2022) <<https://www.judiciary.uk/announcements/speech-by-lord-justice-colin-birss-online-dispute-resolution-forum/>> accessed 11 July 2022.

⁶⁸ Mary Jo White, 'A Few Things Directors should Know about the SEC' (Stanford University Rock Center for Corporate Governance – Twentieth Annual Stanford Directors College, Stanford, California, 23 June 2014).

⁶⁹ Nizan Geslevich Packin, 'Regtech, Compliance and Technology Judgment Rule' (2018) 93 Chicago-Kent Law Review 193, 212; see also Donald Langevoort, 'Getting (Too) Comfortable: In-house Lawyers, Enterprise Risk and the Financial Crisis' (2011) Georgetown Law Faculty Working Papers No. 154, <https://scholarship.law.georgetown.edu/fwps_papers/154> accessed 11 July 2022.

⁷⁰ Richard Moorhouse, 'Precarious Professionalism: Some Empirical and Behavioural Perspectives on Lawyers' (2014) 67(1) Current Legal Problems 447, 459.

⁷¹ Langevoort (n 69)6.

Pacella reports that in 2020, in 48% of companies, the general counsel was also the chief compliance officer,⁷² and that this duality is not confined to smaller companies.⁷³

Finally, as explained in section C, in-house counsel must likely supervise and support members of multidisciplinary teams, including those who are not lawyers or not practising lawyers – whether they are compliance specialists, paralegals or technologists – in their use of legal technology. Rostain has said that ‘compliance regimes often require the deployment of multidisciplinary expertise...this regulatory approach calls for the participation of different types of knowledge professionals’.⁷⁴ As we describe below, then, in-house counsel may need to supervise different types of professionals, the use of technology, and different types of professionals, using technology. Rostain uses AML compliance as an example, saying ‘Federal anti-money laundering provisions... frame their mandates in terms of internal controls that require a mix of legal, computer and software expertise’.⁷⁵ In particular, if compliance is ideally diffused throughout the company, this broadens out the role of the general counsel.

A. As Ethical Compass

In terms of in-house counsel being an ‘ethical compass’ as regards the use of automation technology, we adopt an expansive and idealised approach to the in-house role, and conceive of them as a gatekeeper rather than a ‘hired gun’. A gatekeeper guards against misbehaviour by blocking improper corporate actions. The counsel’s responsibilities are ‘to identify, manage and communicate corporate legal risks to the relevant persons’.⁷⁶ As explained above, the role of the in-house counsel as an ethics compass is an important source of oversight which also gives value to the company.⁷⁷ As legal professionals,

⁷² Jennifer M Pacella, ‘The Regulation of Lawyers in Compliance’ (2020) 95(2) Washington Law Review 995, 947; citing Jamie Saine, ‘Should General Counsels also be Chief Compliance Officers?’ (*Convercent*, 13 July 2015) <<https://www.convercent.com/blog/should-general-counsels-also-be-chief-complianceofficers>> accessed 11 July 2022.

⁷³ Pacella (n 72) 949.

⁷⁴ Rostain (n 26) 468.

⁷⁵ Rostain (n 26) 468–69.

⁷⁶ Legg and Bell (n 2) 211. For a range of roles that in-house counsel may perform see Christine Parker and Adrian Evans, *Inside Lawyers Ethics* (Cambridge University Press, 3rd ed 2018) ch 9. The authors put forward a range of roles from the ‘ethically apathetic’ (at 289) to ‘responsible lawyer’ (at 305) and recognising that ‘in-house lawyers very often have the breadth of information and forensic skill needed to be the ethical watchdogs of the corporation’ (at 309).

⁷⁷ Ben Pender II, ‘Invigorating the Role of the in-House Legal Advisor as Steward in Ethical Culture and Governance at Client-Business Organizations: From 21st Century Failures to True Calling’ (2009) 12 Duquesne Business Law Journal 91, 96 (‘business organizations

in-house counsel owe duties of competence,⁷⁸ independence⁷⁹ and fidelity to the administration of justice.⁸⁰ They can undertake the role of looking at the company's operations and whether it is complying with laws and regulations. A number of authors have also considered lawyers' ethical obligations in relation to AI tools.⁸¹ Shea Boyd described the ethical duties of lawyers in regard to technology as including the following steps:

First, the lawyer must assess his own general technical competence and ability to evaluate technologies, including their benefits and risks. If he or she cannot competently evaluate the technology, he or she may consult an expert. Second, the lawyer must assess the specific technology he or she wishes to utilize to determine if it provides a reasonable expectation of privacy, and what, if any additional safeguards must reasonably be employed. Third, the lawyer must continue to monitor the selected technology provider and stay up to date with the relevant foreseeable risks and reasonable precautions. Finally, in the application of that technology, the lawyer must have the requisite expertise to supervise its use or employ technical experts as necessary.⁸²

These obligations are arguably heightened for in-house lawyers. The first and third points, attributable to the duty of competence, mean that in-house lawyers must have good general understanding of technology that they may recommend, acquire and use, including any drawbacks or issues that may need to be overcome, or risks that must be mitigated against. As Rogers and Bell have explained, this is challenging for several reasons related to opacity and the level of knowledge needed for understanding:

[need to] invigorate the role of the in-house legal advisor from "mere legal technician" to simultaneous legal gatekeeper and ethical steward").

⁷⁸ See above (n 46).

⁷⁹ See above (n 48–50).

⁸⁰ Solicitors Regulation Authority (England & Wales), Principles, principle 1; Legal Profession (Professional Conduct) Rules 2015 (Singapore) rule 9(1)(a); Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 3.

⁸¹ Katherine Medianik, 'Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era' (2018) 39 *Cardozo Law Review* 1497; Chen Meng Lam, 'Impact of Artificial Intelligence on the Professional Responsibilities of Lawyers', 37 *Singapore Law Review* 43 (2019–2020); Legg and Bell (n 2) ch 11; Justine Rogers and Felicity Bell, 'The Ethical AI Lawyer: What is Required of Lawyers when they Use Automated Systems' (2019) 1(1) *Law, Technology and Humans* 80; Mark L Shope, 'Lawyer and Judicial Competency in the Era of Artificial Intelligence: Ethical Requirements for Documenting Datasets and Machine Learning Models' (2021) 34 *Georgetown Journal of Legal Ethics* 191; Jamie J Baker, 'Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society' (2018) 69 *South Carolina Law Review* 557, 557–63.

⁸² Shea Boyd, 'The Attorney's Ethical Obligations with Regard to the Technologies Employed in the Practice of Law' (2016) 29 *Georgetown Journal of Legal Ethics* 849, 849–50.

To identify the possibility of ethical risk or whether a system is indeed competent, lawyers require awareness of the shortcomings or limitations of the tools they are using. This presents a significant challenge, as such knowledge is not likely to be readily available (i.e., the product developers are unlikely to readily explain a product's flaws). Likewise, if the software's functioning is opaque, lawyers may have no way of finding out if it is reliable. Even if openly accessible, lawyers may lack the technical knowledge to make sense of the explanation; in the case of complex applications (e.g., where a prediction is being generated), it may be difficult for lawyers to evaluate outputs themselves.⁸³

The lawyer must be sceptical, rather than assuming infallibility of the technology. Moreover, the lawyer may need to do more – such as testing that technology works as intended or desired, or works accurately enough to be relied upon. For example, in-house counsel may need to check the functioning of contract review software to ensure that it is picking up appropriate clauses and is not missing anything; or is suggesting valid changes. If lawyers rely on the workings of software without appropriate checks, they may not be properly adhering to their duty to exercise their independent judgement,⁸⁴ or their duty of competence.

Another, more nebulous area where ethical decision-making may be complex for in-house counsel is in the use of drafting software, whether this is to generate first drafts or engage in more complex processes of refinement as per the Lawgeex example above. Here, the question is whether the use of automated drafting can entrench particular clauses thereby cementing their use, even if it is not appropriate. Foster and Lawson point out that:

although automation can reduce technical errors and rapidly incorporate evolving laws and techniques, reliance on software creates risks of undue deference to computer-generated outputs and of temptation to undertake representations that strain an attorney's sphere of proficiency.⁸⁵

Of course, this could happen in any event, as Gulati and Scott demonstrated in *The 3½ Minute Transaction*,⁸⁶ but it may be that automation exaggerates the effect (though automation in this area is longstanding⁸⁷). As Rogers and Bell explain:

⁸³ Rogers and Bell, 'Ethical AI Lawyer' (n 81) 86–87.

⁸⁴ See Legg and Bell (n 2) 303.

⁸⁵ Foster and Lawson (n 45) 598.

⁸⁶ Mitu Gulati and Robert E Scott, *The 3½ Minute Transaction: Boilerplate and the Limits of Contract Design* (University of Chicago Press 2013).

⁸⁷ Foster and Lawson (n 45) 598.

pre-programmed systems automate a series of steps, but if the script does not include reference to relevant ethical factors it can hinder a person's capacity to 'see' them. Moreover, the very fact of codification into a technological system may give such 'scripts' the appearance of precision and completeness, a potential threat to professional competence... any ethical parameters included in an automated system may have been defined by those designing the system rather than the lawyers whose role the system seeks to emulate.⁸⁸

In the in-house context, it may be that the data or precedent used to support drafting software has biases or problems which will become unthinkingly replicated if the process is automated – such as overly onerous or unfair contractual clauses. If machine learning is used to conduct due diligence, there is a possibility that critical issues will be missed if the system has not been specifically trained to find them.⁸⁹ This demonstrates the importance of continuing oversight by in-house counsel of the technology being used.

B. As Change Manager

Tech projects are notoriously prone to failure.⁹⁰ Lawyers, meanwhile, are typically portrayed as conservative and resistant to change,⁹¹ though this picture has been contested in some recent literature.⁹² Taken together though, one might expect that implementing legal technology carries particular challenges.⁹³ Procuring the technology is one thing, but ensuring personnel actually use it is another. This was recently reported by some respondents to a *GC Magazine* survey: '[O]ne respondent, general counsel at a Canadian energy company, noted, "Finding technology is not a problem. Making sure that technology is being used properly by everyone in the team is the issue".'⁹⁴ The professionals within a workplace will be central to the way that new technologies are received and whether they are adopted or not. As the survey respondent went on to explain: 'You can't execute a tech transformation in a large team without having some form of discipline and training. You either

⁸⁸ Rogers and Bell, 'Ethical AI Lawyer' (n 81) 87.

⁸⁹ Remus and Levy (n 5) 517.

⁹⁰ See the summary in Mary Pratt, 'Why IT Projects Still Fail', (*CIO*, 3 March 2021) <<https://www.cio.com/article/230427/why-it-projects-still-fail.html>> accessed 11 July 2022.

⁹¹ Justine Rogers and Felicity Bell, 'Transforming the Legal Profession: An Interview Study of Change Managers in Law' [2022] *Legal Studies* 1; Helena Heizmann, Emmanuel A Mastio, Sumati Ahuja, 'Stuck in Defensive Professionalism: Undermining Organizational Change in an Intellectual Property Law Firm' (2020) 7(2) *Journal of Professions and Organization* 117.

⁹² Rogers and Bell, 'Transforming the Legal Profession' (n 91).

⁹³ *ibid.*

⁹⁴ 'Tech Tactics' (n 4).

all do it together or it doesn't work'.⁹⁵ However, managing change processes is far from straightforward, and if the organisation does not host dedicated change managers, or even if it does, the in-house counsel is likely to shoulder this burden when it comes to legal tech. This might involve utilising various change strategies, a complex managerial role, especially since employees are likely to already have established methods for carrying out their work. Lawyers, in particular, generally have high levels of autonomy and decision latitude in the ways that they conduct their work,⁹⁶ which may make them resistant to adopting new ways of working.

Change might also be particularly resisted if the technology, as many legal technologies are, is geared toward efficiencies and is therefore perceived as threatening, by the change recipients, or as a slight upon their work. Studies of technological change and professional work have highlighted possible outcomes: replacement of the professional by technology; augmentation of professional work; or generation of new types of work.⁹⁷ However, the focus on replacement is unsurprisingly at the forefront for many actually occupying these roles.⁹⁸ This may be more likely (at present) for staff who are not lawyers – Brescia has written that '[i]n some respects, as law firms adopted new technologies and their lawyers became more adept at their use, this reduction in non-lawyer staff was likely inevitable, but the pandemic accelerated firms' self-review and the actions taken in light of them'.⁹⁹ Yet in-house counsel are likely to also manage these staff, as we discuss below.

In their study of change in a mid-size IP law firm in Australia, Heizmann, Mastio and Ahuja found that change recipients were apprehensive about streamlining work processes, which they interpreted as eroding professional values.¹⁰⁰ Similar findings were reported by Rogers and Bell in their study of legal change managers.¹⁰¹ Change may also be resisted if the in-house teams hold genuine concerns about the quality of technology or what it can do, as they must accept responsibility for work outputs. As a key duty of lawyers is that of competence, they must be satisfied that the technology produces work to an acceptable standard. Yet concerns may also be more identity-based and particularized. In Heizmann, Mastio and Ahuja's study, lawyers were concerned not just with the erosion of work product standards,

⁹⁵ *ibid.*

⁹⁶ Rogers and Bell, 'Transforming the Legal Profession' (n 91).

⁹⁷ Armour, Parnham and Sako (n 9).

⁹⁸ Rogers and Bell, 'Transforming the Legal Profession' (n 91).

⁹⁹ Raymond Brescia, 'Lessons from the Present: Three Crises and their Potential Impact on the Legal Profession' (2021) 49 *Hofstra Law Review* 607, 618.

¹⁰⁰ Heizmann, Mastio and Ahuja (n 91) 125–26.

¹⁰¹ Rogers and Bell, 'Transforming the Legal Profession' (n 91).

but also that new (automated) ways of working would impact client service and reputation.¹⁰²

C. As Supervisor

Finally, in-house counsel must, in all likelihood, supervise the use of legal technology, not just by other lawyers, but by associated legal professionals, compliance personnel and technologists.

Supervision in legal practice is usually conceived of in terms of the senior lawyer supervising the work undertaken by more junior lawyers and other assistants, such as paralegals. The US Model Code requires lawyers with supervisory authority over another lawyer to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.¹⁰³ Further where ‘a nonlawyer [is] employed or retained by or associated with a lawyer’ the person’s conduct ‘is compatible with the professional obligations of the lawyer’.¹⁰⁴ The rule has been interpreted as extending to in-house counsel.¹⁰⁵ In England & Wales, the Solicitors Regulation Authority Code of Conduct for Solicitors provides:

Where you supervise or manage others providing legal services:

- (a) you remain accountable for the work carried out through them; and
- (b) you effectively supervise work being done for clients.¹⁰⁶

Similarly, the Australian Solicitors’ Conduct Rules 2015 provide that ‘[a] solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter’.¹⁰⁷ Reasonable supervision is not defined and will vary according to the employee’s experience, qualifications, role and with the type and complexity of the work delegated.¹⁰⁸

The above rules make clear that in the provision of legal services, supervision extends to both subordinate lawyers and non-lawyers. The duty to supervise may be triggered where a subordinate utilises AI as part of their

¹⁰² Heizmann, Mastio and Ahuja (n 91) 126–27.

¹⁰³ American Bar Association, Model Rules of Professional Conduct, r 5.1. See also rule 5.2 which addresses the responsibilities of a subordinate lawyer.

¹⁰⁴ American Bar Association, Model Rules of Professional Conduct, r 5.3.

¹⁰⁵ John Villa, *Corporate Counsel Guidelines* (Westlaw 2020) § 3:30 – Ethical responsibility for the actions of other lawyers and non-lawyers in corporate counsel’s office.

¹⁰⁶ Solicitors Regulation Authority (England and Wales), Code of Conduct for Solicitors [3.5].

¹⁰⁷ Australian Solicitors’ Conduct Rules 2015, r 37.

¹⁰⁸ *Legal Services Commr v Michael Vincent Baker* [2005] LPT 002, [42]; Gino E Dal Pont, *Lawyers’ Professional Responsibility* (Thomson Reuters, 6th ed 2017) [20.205].

legal work.¹⁰⁹ Supervision of lawyers generally includes ensuring that the lawyer understands the scope of their role, including the tasks they are responsible for and limits of their authority, can seek advice on matters (both legal and ethical) which they are unsure about and understand the internal operation and controls in the law firm or office of corporate counsel.¹¹⁰

In the context of AI, technology use needs to be added into the supervision definition as set out above, including ensuring the lawyer knows when and how to use AI tools, and if uncertain there is an ability to seek advice.¹¹¹ While senior in-house counsel have responsibility for supervision, they may need to call on expert assistance, from within the company or externally, to assist in training subordinates and monitoring the use of technology by subordinates.¹¹² Indeed, one of the features of technology use, especially when it extends from a pure legal role to other areas of the company, such as drafting/reviewing contracts or ensuring compliance for other functions such as sales/marketing people or purchasing/procurement people, is a multidisciplinary team approach.¹¹³ Indeed, in some areas such as compliance, the hands-on operation of systems may be by non-lawyers in other areas of the company, including a dedicated compliance function.¹¹⁴

It might also be argued that the duty to supervise includes the supervision of the technology, not just the human using the technology. Some North American authors have stated previously that legal technology must be supervised, just as a junior lawyer should be supervised in their work.¹¹⁵ But, as discussed above in relation to competence, there are key differences in the ‘inscrutable’ way that some systems operate when compared with people who can always be asked to provide an account of their reasoning

¹⁰⁹ See Shope (n 81) 193 (referring to rules 5.1 and 5.3 of the US model code as being ‘triggered when a subordinate is tasked with deciding which particular AI tool to use and further while implementing those tools.’).

¹¹⁰ Michael Legg, ‘Opening Keynote – Legal Regulation in a Changing World’ (2021 Conference of Regulatory Officers, 8 November 2021) UNSW Law Research Paper No. 21-68.

¹¹¹ The supervision requirements here mirror the competence requirements that apply to lawyers generally: see discussion above.

¹¹² Legg and Bell (n 2) 296–97; Boyd (n 82).

¹¹³ David Bundi, ‘RegTech – A Mindset for Breakthroughs’ in Michele DeStefano and Guenther Dobrauz (eds), *New Suits* (Staempfli Verlag 2019) 414, 426. See also Randall Kiser, *Soft Skills for the Effective Lawyer* (Cambridge University Press 2017) 177 (linking the need for teamwork to the complexity of contemporary legal problems and the international context in which problems arise).

¹¹⁴ Langevoort (n 69); Rostain (n 26) 468 (‘compliance responsibilities are not centralized within a corporation’s legal department, but are spread among corporate managers and employees’).

¹¹⁵ Medianik (n 81).

and actions. Consequently, supervision of AI technology may need expert assistance.

Supervision, as sketched above, takes place in a technology-enabled and teams-based environment; which means in-house counsel need to demonstrate ethical leadership, as part of being the ethical compass described above, but also utilise collaboration skills to be able to engage with other employees to be able to draw on their expertise. Modelling ethical behaviour within an organisation communicates that ethics and compliance with the law is valued – it becomes the culture of the organisation.¹¹⁶ This ethical leadership extends to the use of AI and its interaction with legal requirements. Thus, in-house counsel or the in-house legal department may need to scrutinise the use of AI in other areas of company operations. Gartner Inc, a leading research and advisory company, has identified a need ‘to prevent AI gone wild’, where the AI does not function correctly or has unintended consequences leading to legal, financial and reputational risks.¹¹⁷ For example, most jurisdictions have laws that protect consumers in relation to lending practices and the sale of financial products/services. AI may be used to aid compliance with these requirements. Equally, AI might be used to increase profits or unfairly discriminate against customers who are calculated to represent a greater risk of default, leading to ‘product steering, discriminatory pricing, unfair credit rationing, exclusionary filtering, and digital redlining’.¹¹⁸ Another example is using machine learning as part of a hiring process. While this reportedly helped Unilever to diversify its workforce, it backfired at Amazon, where the system learnt from past data that employees should be white and male.¹¹⁹ Clearly, if the use of a system is breaching law

¹¹⁶ Jennifer Robbennolt, ‘Behavioural Legal Ethics and Attorney Wellbeing in Contemporary Practice’ in Michael Legg, Prue Vines and Janet Chan, *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia 2020) 172–73. The requirement for supervision goes hand-in hand with the concept of in-house counsel as ethical compass, since supervision, especially of non-lawyers, provides an avenue by which in-house counsel can monitor compliance with legal requirements.

¹¹⁷ Jared Council, ‘Companies Bolster AI Governance Efforts’ (Wall Street Journal, 20 August 2019) <<https://www.wsj.com/articles/companies-bolster-ai-governance-efforts-11566293400>> accessed 11 July 2022.

¹¹⁸ Makada Henry-Nickie, ‘How Artificial Intelligence Affects Financial Consumers’, (Brookings Institute, 31 January 2019) <<https://www.brookings.edu/research/how-artificial-intelligence-affects-financial-consumers/>> accessed 11 July 2022. See also Gary Smith, ‘High-tech Redlining: AI is Quietly Upgrading Institutional Racism’, (*Fast Company*, 20 November 2018) <<https://www.fastcompany.com/90269688/high-tech-redlining-ai-is-quietly-upgrading-institutional-racism>> accessed 11 July 2022; James Evers, ‘Banks Warned using AI in Loan Assessments could “Awaken a Zombie”’ *The Australian Financial Review* (15 June 2021).

¹¹⁹ Bernard Marr, ‘The Amazing Ways How Unilever Uses Artificial Intelligence to Recruit & Train Thousands of Employees’ *Forbes* (14 December 2018); Jeffrey Dastin, ‘Amazon

or regulation, in-house counsel have an obligation to ensure the system is either fixed or not used. If the situation is less clear cut than this, in-house counsel may wish to refer to general ethical guidance about the use of AI, of which there is now a proliferation.¹²⁰ In-house counsel must be the voice for legality and compliance, such as ensuring that historical biases in the data used to train AI models are detected and removed.¹²¹

In-house counsel, when supervising lawyers, non-lawyers, and the technology, need to be sceptical and willing to test whether the technology does indeed assure compliance with what the law requires.¹²² Ideally, this would mean involving in-house counsel when the AI tool is being purchased or designed and then trained and tested. Further, once a system is operational, the in-house counsel should be part of the process when a compliance problem is detected, so as to ensure that steps are taken to correct the problem rather than risk that noncompliance may be overlooked or concealed.¹²³ Equally, while in-house counsel have a supervisory role to perform, they also need to involve technologists and the employees from the relevant functions. An AI tool that is used to identify potential AML or bribery contraventions but is inaccurate, will need technologists to be involved in its reprogramming. Similarly, the employees familiar with how the company's business functions and where its operations may be subject to AML or bribery contraventions need to be included.

As demonstrated by the professional conduct rules, in-house counsel have always had a supervisory responsibility in relation to lawyers and non-lawyers in relation to the provision of legal services. The adoption of AI expands that responsibility and necessitates a multi-disciplinary team approach to allow in-house counsel to draw on the necessary expertise to discharge the supervisory responsibility.

Scraps Secret AI Recruiting tool that Showed Bias against Women' *Reuters* (San Francisco, 11 October 2018).

¹²⁰ See, eg, A Jobin, M Ienca and E Vayena, 'The Global Landscape of AI Ethics Guidelines' (2019) 1 *Nature Machine Intelligence* 389.

¹²¹ Sian Townson, 'AI can Make Bank Loans More Fair' *Harvard Business Review* (6 November 2020).

¹²² Richard Gruner, 'General Counsel in an Era of Compliance Programs' (1997) 46 *Emory Law Journal* 1113, 1159 ('Because of their familiarity with governing legal standards and past offenses within their companies, general counsel will often be able to make valuable contributions in specifying the criteria and targeting strategies applied in compliance monitoring systems').

¹²³ Legg and Bell (n 2) 212.

III. CONCLUSION

Henderson argued that the ‘mechanisation’ of legal advice through software is one way that in-house lawyers can expand their capacity, as it increases their ‘ability to evaluate cost and value’.¹²⁴ However, there are unanswered questions about the extent to which the automation of legal work, including compliance, may detract from or assist attempts to, promote an ethical corporate culture.

The role of in-house counsel was already an organisationally and ethically complex one, as work has shifted in-house and away from external lawyers. The addition of AI, and a backdrop of continuous quest for value, further complicate their role. The AI use case for in-house counsel is compelling – transactional and regulatory law are key sites for the development of AI tools. As both areas have grown in complexity,¹²⁵ there is both a more pressing need for degrees of automation simply to make the volume of work feasible, and more and more data to use in the development of AI products. At the same time, in-house counsel must be aware of AI’s pitfalls – particularly, how data and design issues can not only compromise performance, but give rise to unethical or even illegal outcomes. The fear is that, at scale, this can give rise to rule of law concerns, as AI use continues to proliferate.

Here, we have shown how AI tools can both help in-house counsel to work efficiently and reduce mistakes, but also how AI systems need monitoring and oversight. Accordingly, we suggest that the in-house counsel role is more multi-faceted than ever before, requiring skills in management and the ability to supervise both other staff and technology in a competent manner. While the in-house counsel role may already have encompassed the provision of ethical oversight, the use of AI generates new issues for all lawyers around the meaning of legal professional ethics in areas such as independence, competence and supervision.

¹²⁴ William D Henderson, ‘From Big Law to Lean Law’ (2014) 38 *International Review of Law and Economics* 5, 7.

¹²⁵ Eg, M Jennejohn, ‘The Architecture of Contract Innovation’ (2018) 59(1) *Boston College Law Review* 71, 74; ‘Lawtech Adoption Research’ (n 20).