CHAPTER 9

The Lawyer's Profession in a Digital World

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1 Introduction

The law profession is a people's business. It is about assisting people in solving their legal issues, advising on contracts they enter into and settling disputes they are involved in. Even if a lot of clients are legal entities, their representatives are human beings who interact on behalf of the legal entity. Today, lawyers assist human beings regardless of whether the client is a legal entity. It is possible, but not really happening, that a lawyer is being consulted by a software program asking legal questions. It may be the case soon, when software programs, such as a virtual singer or a virtual accountant, can take decisions, manage their own bank accounts and are, by law, recognized as legal entities.

Today the feeling among most of the lawyers is that the digital world, with robots and software programs, is not really part of the legal world or at least not important to the law profession.

This may change soon. Larger law firms already invest in digital tools to assist them in their work, including ChatGPT. But also in that case, the question is to what extent can legal advice or a contract rely on software programming? In both cases, automatically generated advice or contracts must be verified by humans.

2 Software as a Legal Tool

Today firms use software programs to automate some of their work. For example: contracts can be generated digitally, by inserting information in the program relating to the parties and to what is agreed, and, as a result, a standard contract that is ready to be signed. Of course, from the moment special arrangements have to be reflected in the contract, human lawyers will start drafting these provisions after having consulted their client or after long negotiations to understand what is intended and agreed. The

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same is true for the automated process of drafting legal briefs: standardized language pertaining to specific legal arguments or personal information about the involved parties can be incorporated into briefs through automatization. For more complicated matters that require a specifically adapted argumentation taking into account all the circumstances of the matter, human lawyers will initiate and manage the drafting process.

Lawyers could be tempted to rely on more sophisticated programs, such as ChatGPT, and ask the model to write an advice, a contract or a brief. However, the first experiences are not satisfying. Indeed, lawyers who have relied on the program to write a brief found out that ChatGPT would invent case law to justify its reasoning[1]. This means that any lawyer using ChatGPT has to verify the result and should not rely on what is produced without verification. Furthermore, it already has happened that ChatGPT ignores case law which does not help its reasoning[2]. The result is therefore a highly flawed advice or brief.

Lawyers have been sanctioned for producing briefs which are composed by ChatGPT with case law that does not exist.[3] In general, lawyers and law firms rendering advice or filing briefs which contain faulty reasoning by ChatGPT will be held liable for not verifying the work produced by the AI program. Some US courts have issued standing orders following the misuse of ChatGPT and require lawyers to file a certificate attesting that either they would not use generative AI to draft any portion of any filing, or that language drafted using generative AI would be checked for accuracy by a human being using print reporters and traditional legal databases.[4] Some courts have prohibited the use of generative AI outside search engines. Also, bar associations are stepping in or will step in to at least ensure that lawyers are aware of the risks of using artificial intelligence.[5]

From a professional liability point of view, the use of software remains within the liability of the lawyer, who will be accountable for the answer produced by the applied software. The software is purchased by the law firm and used by it in its work. Mistakes because of such software will be on the account of the lawyer (and law firm). Aija Lejniece, in the proceeding chapter, explores this further through the lens of good governance principles to be introduced within law firms.[6] Of course, the lawyer could turn against the software manufacturer if the mistake is embedded in the soft-

ware. But generally, that will not be the case. The software manufacturer is not liable for the use of the software program to produce an advice or other legal document, specifically in the case of general Large Language Models like ChatGPT, whose use is not designed for legal professionals. Furthermore, the software manufacturer will exclude its liability for the use of the software as a source of factual accuracy. In this respect it is important to carefully read the liability limitation clauses which are included in the contract with the software company. In addition, law firms should verify their professional liability insurance policy to ensure that it covers wrongful legal advice generated (partly) by the software programs they use.

Most probably it is in litigation that artificial intelligence will first change fundamentally the lawyers' practice with the use of tools to analyze case law which is available on digital databases, in order to predict the outcome of a specific court case.[7] The decisions of several courts, such as the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) are digitally available. As soon as all case law is digitally available and accessible to the public, lawyers will use artificial intelligence to predict the outcome of a specific matter. The lawyer is the first judge, i.e., s/he is ethically bound to assess in an objective manner the possible chances of success of his or her client's claim, advise the client accordingly and dissuade the client from starting a court proceeding if the possible outcome is not in the client's favor. If technological tools are available to make a more informed assessment, a lawyer should use such tools. Lawyers who fail to make such assessments and acquire the software programs to conduct such analysis may in the future be held liable for professional misconduct.

3 Professional Code of Conduct

The law profession is a regulated profession. The running of a law practice must comply with the professional rules laid down in the ethical code approved by the local bar. These codes generally include rules on how to interact with other lawyers and with clients. Few codes deal with digital communication. In general, bar associations consider that the rules on written communication apply to any form of digital communication. This is, for example, important in relation to the confidentiality of the communication between lawyers themselves.

In certain countries, such as Belgium,[8] the communication between lawyers is, with a few exceptions, confidential. This is intended to facilitate a mediated solution to conflicts. Lawyers can speak freely between themselves and test several solutions which may be acceptable to their respective clients. Any exchange in this respect cannot be used in court. If a party would do so, the bar leader can prohibit the counsel to go ahead with the case. Of course, the obligation to keep the exchange between lawyers confidential does not apply to clients, who could themselves use the exchange in court, but no lawyer will be able to represent such party. It is for these reasons important to explain to clients that the information which is exchanged between lawyers is confidential, and to have the client agree to such confidentiality or take other precautions to ensure confidential use. It is furthermore important in order to maintain this confidentiality that no third parties are involved. If the communication would also be addressed by a lawyer to the opposing lawyer's client, it would by definition be non-confidential.

With the new means of communication by text (SMS), WhatsApp or email, the lines of communication between lawyers and clients became blurred. Typically, in negotiations, emails are sent to the lawyer and the client for efficiency purposes. In such cases, the communication is not confidential, unless parties agreed expressly to keep the exchange confidential. The agreement creates a contractual obligation on the parties to treat the information as confidential.

With respect to communication between lawyers from different EU and EEA Member States, the confidentiality will depend on the rules applicable to the lawyers involved. The CCBE[9] Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers (Clause 5.3) provide in this respect that "*if a lawyer intends to send communications to a lawyer in another Member State, which the sender wishes to remain confidential or without prejudice he or she should clearly express this intention prior to communicating the first of the documents*" and that "*if the prospective recipient of the communications is unable to ensure their status as confidential or without prejudice he or she should inform the sender accordingly without delay*". These rules also apply to digital communications.

As Aija Lejniece mentions in her chapter, numerous professional codes of conduct in jurisdictions around the world require human oversight and approval mechanisms to be implemented where AI-generated legal work product is involved, and one would expect these principles to be respected in the same way when it comes to the decision-making authority of arbitrators absent fundamental shifts in international practice.[10]

4 Attorney-Client Privilege

The attorney-client privilege is essential to the law profession. It makes sure that the client can tell his/her entire story without risk that parts leak out and are used against him or her. The lawyer has a duty to safeguard any privileged information. This implies that a law firm organizes its files in such manner that unauthorized people have no access. Most information today is exchanged between client and lawyer through emails or documents attached thereto. A law firm must ensure that it has the necessary security protocols in place and acquires software which is sufficiently protected against hackers.

Attorney-client privilege is attached to the information, which entails that when the information is stolen through hacking or otherwise against the will of the lawyer and made public, it continues to enjoy the protection offered by the law. This means that it is inadmissible in court, and a judge should refuse to look at the information or to take it into account. Of course, it is difficult to keep information secret when it is in the hands of third parties. Hence, it is the obligation of any law firm to take the necessary precautions to keep secret information gathered in handling matters and received from the client. This is an issue for smaller law firms who do not have the financial means to acquire the required software to keep their information sufficiently secure. Bar associations and other professional associations could step in and acquire software and make it available to their members.

Protection against hackers is not only important for ensuring that all information in the law firm is protected but also to make sure that the software programs continue to function properly. Today, law firms rely heavily on software programs for all of their work, including producing

and storing legal documents, sending emails and recording billable hours and invoicing. Any interruption of its software program could result in the law firm not being able to comply with legal and other deadlines. Internal security protocols will require shutting down the entire system if there is a hack, to avoid the entire system being compromised. Before starting up the system again each part of it will have to be verified, which will take time.

The requirement to ensure that the attorney-client privilege is secured also means that lawyers should restrain from giving legal advice through social media, such as Facebook, or discuss matters on social media which are easily accessible by third parties. If the lawyer or his/her client chooses to exchange confidential information through a public platform, they will not be able to rely on attorney-client privilege when this information is made public. They indeed choose willingly to make the information available to third parties.

Even if the information obtained by a public prosecutor's office or a court is protected by attorney-client privilege and must not be used in court, it will be difficult for the public prosecutor or the court to ignore the information when it can be used against the client. As explained, law firms should take all measures required to prevent information from being made public. In this respect, the first obligation is to always choose a secure communication tool to exchange information. This applies not only to emails with software which protects them against hacking, but also to verbal communication. Since the COVID-19 pandemic, most meetings between lawyers and their clients are conducted digitally, by using modern conferencing tools, such as Microsoft Teams, Zoom, Webex and the like. It is important to make sure that the tools used are sufficiently protected and when starting a meeting to have verified who is in the meeting, so that all persons participating are known and invited to it.

In the following chapter, Aija Lejniece writes further about client confidentiality, this time in the context of communications or other client information that may be fed into AI programs, and how critical it is to have transparent and robust internal policies in place to ensure that confidentiality at all times.[11]

5 Digital Legal Entities

To act in law, i.e., to acquire rights, enter into contracts, own property, buy goods, etc., one has to be recognized by the law as having legal personality. Legal personality involves the capacity to acquire rights that can be enforced in the entity's name. Conversely, obligations assumed by the entity are subject to enforcement against it. Legal capacity is only granted automatically to human beings by birth, at least in countries based on the rule of law. Other beings, whether in the physical world or in the digital world do not benefit from legal personality unless they choose a (legal) form which is recognized by law as a legal person. In other words, it will only acquire legal personality if the entity is set up or incorporated in the framework of a law granting legal personality or receives legal personality by a specific law. In this respect, legal provisions can vary from one country to another, and a legal entity recognized in one jurisdiction may not enjoy the same status in another. In general, countries recognize legal entities established within their own borders.

Only legal entities recognized by law benefit from this legal capacity.

In general, granting legal personality is justified (1) if the qualifying entity has an interest distinguished from the interest of other legal persons and consequently should be able to acquire assets, rights, liabilities and obligations to secure this interest, and (2) when this interest has a permanent nature, i.e., it justifies a permanent organization to manage this interest and the acquired assets.[12] Legal personality entitles the legal person to act in court and appoint a lawyer to represent its interests in court.

In the future, software programs which are able to acquire assets and take decisions independently from human beings could be recognized as legal persons. In general, it will be required that they can acquire assets and undertake obligations. The test will be whether they independently can take decisions to defend their interests and their assets.

For a legal person to act in the current physical world, it requires the intervention of human beings which represent the legal person and acts on its behalf. In the digital realm, that may no longer always be necessary. A software program could, in the future, have an algorithm which permits it to

take decisions and dispose of a bank account which is being accessed digitally. This is already technically possible today through smart contracts.

But in the future, software programs could act in the physical world through robots which they instruct to act on their behalf. These software programs would, as legal persons, own the robot and other assets both in the physical and digital world. From the moment that these software programs can take decisions and own assets without intervention of human beings being required, the law will have to consider recognizing them. The alternative is to require that the founder or the beneficiary of the software program remains liable. But this will not be possible if the program cannot be traced back to a specific human being who should be considered responsible for, or benefit from, the decisions of the software program.

At that time, law firms will be consulted by digital clients and may have to consider whether they are best represented in relation with such digital clients by digital lawyers, acting as part of the firm. The AI possibilities will likely have evolved considerably and software programs will give lawyers the opportunity to prepare legal documents by largely relying on these programs.

6 Artificial Intelligence as a Tool of Justice

Artificial intelligence to facilitate or even replace human judges is being tried in several countries.

In China, certain criminal matters are initiated by software that supports the role of public prosecutor using an algorithm to analyze case files and recommend charges.[13] This country has also initiated smart courts, which utilize digital court hearings and technological applications to assist in resolving commercial and civil disputes.[14]

This is only the beginning and we may expect two trends. First, judges will be assisted by artificial intelligence which will analyze facts and case law to propose solutions for the disputes the courts are handling. Second, dispute resolution, especially small matters, may be decided by digital state courts. Basically, an algorithm, which, on the basis of facts fed to it, comes

to a decision. In most countries this will require a modification of the judicial code.

However, it is already possible to automate pre-court decisions, subject to appeal to a state court with human judges. Examples are the automation of traffic fines, generated and sent by software programs to the traffic offenders, and the automatic calculation of taxes on basis of information which is digitally available in the different programs accessible by the tax administration, and the sending of the tax claims to the taxpayers.

Court systems around the world are slowly integrating these new legal tools. The COVID-19 pandemic has accelerated the use of digital communication. In numerous countries, hearings can be held virtually. This is, by the way, also common practice in arbitration and especially international arbitration.

Soon, it will also be generally accepted that briefs and other documents are solely filed electronically. This would allow for a court system equipped with software for analyzing the submitted briefs and supporting documents before human judges review them. The new digital tools will also accelerate the court decision-making process. If software were able, on the basis of specific questions for the judges, to give a first response, which the judges must verify and/or confirm on basis of the facts of the case, court decisions will require less time. In not so complicated matters, the judge could come to a decision at the end of the hearing or soon thereafter.

7 Arbitration

Arbitrators are subject to the secrecy of deliberation.[15] They cannot share with third parties the content of their discussions with the other arbitrators or the tribunal's secretary.

It is, however, generally admitted that an arbitrator relies on an associate within his or her firm to perform research on specific legal topics that are required to come to a decision. However, in such a case it is required that the arbitrator reads the facts and the legal argumentation and comes to his or her own conclusions, without relying on the reasoning or conclu-

sions of an associate. The associate who assists him or her will be bound by the same secrecy obligation as the arbitrators.

The parties are entitled to a hearing before the arbitrator and to consideration of all of their factual and legal arguments; both, in writing and orally. The right to a fair trial implies the right to a fair hearing, and the right to defend oneself in person or through legal assistance (Art. 6 European Convention on Human Rights). This means that the party may expect that the arbitrators listen to all the presented arguments to take them into account in their decision.

Parties can freely renounce dispute resolution by a state court and choose for arbitration. Furthermore, when choosing for arbitration, parties can waive certain conditions of a fair trial guaranteed by the European Convention of Human Rights provided that the waiver is freely given, valid, unequivocal and the arbitration proceeding is conducted with the minimal guarantees for a fair trial, taking into consideration its importance, which includes among others, the fact that each party can present its factual and legal arguments to the tribunal, and the tribunal award is duly motivated.[16]

It cannot be avoided that arbitrators will in the future use artificial intelligence to analyze documents presented to them by the parties and to find and analyze case law. Using software tools to find and analyze case law and other legal sources more efficiently is not really different from researching the law by consulting legal scholars. Artificial intelligence will permit arbitrators to find case law faster. Similarly, the use of artificial intelligence to process the facts more efficiently if limited to the facts presented by the parties and apply legal rules to these facts is not an issue, provided that this work is reviewed by the arbitrator. When, however, artificial intelligence is used to come to a decision without review by the arbitrator, the award is rendered without the arbitrator being able to assess the factual and legal arguments and thus is in violation of the right to a fair trial and due process.

Parties could however validly waive their right to a human arbitrator and agree with a decision rendered by an AI arbitrator, provided that the latter has the capacities to listen and process the factual and legal arguments of the parties, analyze the law and render an award which is duly motivated.

8 Conclusion

It is impossible to predict the (near) future and especially how artificial intelligence will affect the lawyers' profession and legal system. However, two things are clear compared with the last 50 years. The changes will be fundamental, and the development of artificial intelligence will accelerate exponentially. Law firms which do not foresee this evolution by following up and readying themselves to adapt and provide for sufficient financing to acquire the new tools, will very quickly be outpaced by the legal market. In this respect, lawyers should not forget that other players will look at invading the legal market and offer similar services as audit firms did in the past with respect to (international) tax law, due diligence, and labor law.

The modernization of the court system is an obligation of the state towards its citizens. It guarantees the right to a fair trial embedded in the European Convention on Human Rights. The new tools will make work for the courts much easier provided that the state is willing to invest the required funds in new software tools and the digitalization of court proceedings.

In the end, lawyers, whether they are working in law firms, as in-house counsel or in the court system, will all be required to become digitally literate. It is in the first place up to the universities to educate the law students in the use of digital tools. Continued education offered by bar associations and other institutions will ensure that lawyers be informed about the newest tools and how to use them throughout their career. It may soon become an ethical duty. It is recommended to read on as the following chapter clearly illustrates the myriad ethical and good governance considerations when it comes to the impending wave of AI tools that will be deployed by lawyers in their everyday work.

Notes

1 See Weiser, B. "Here's what happens when your lawyer uses ChatGPT" *The New York Times* (27 May 2023).
2 *Ibid.*
3 *Ibid*.
4 Justia "Generative AI Rules for Lawyers" (December 2023); Borella, M. "Judges Issue Standing Orders Regarding the Use of Artificial Intelligence" *JDSUPRA* August 2023.
5 E.g. the CCBE (Council of Bars and Law Societies of Europe) Guide on the Use of Artificial Intelligence-based Tools by Lawyers and Law Firms in the EU; the Generative AI Practical Guidance of the State Bar of California. https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf; the Guidelines for the Use of Generative Artificial Intelligence in the Practice of Law of the Law Society of Saskatchewan. https://www.lawsociety.sk.ca/wp-content/uploads/Law-Society-of-Saskatchewan-Generative-Artificial-Intelligence-Guidelines.pdf.
6 *See* Chapter 10.
7 Heffernan, B. "Predictive data analysis for litigation" *Lawvu* https://inview.lawvu.com/blog/predictive-data-analysis-for-litigation; Law Crossing "Harnessing the Power of Predictive Analytics in Legal Decision Making" https://www.lawcrossing.com/article/900054549/Harnessing-the-Power-of-Predictive-Analytics-in-Legal-Decision-Making.
8 Art. 113 of the Codex Deontologie voor Advocaten; Art. 6.1 of the Code de déontologie de l'avocat.
9 The Conseils des barreaux européens/Council of Bars and Law Societies of Europe.
10 *See* Chapter 10, p. 189.
11 *See* Chapter 10, p. 184.
12 Michoud, L. *La théorie de la personnalité morale et son application en droit français*, Paris, LGDI, 1906, I, 113; Van Gerven, W. *Algemeen deel*, Antwerp, SWU, 1969, nr. 94.
13 Zhabina, A. "How China's AI is automating the legal system" *DW* (20 January 2023).
14 Zou, C. "Achievements and Prospects of Artificial Intelligence Judicature in China" *Chinese Studies*, Vol. 11, (November 2022) 197; Vasdani, T. "Robot justice: China's use of Internet courts" *The Lawyer's Daily*, LexisNexis; Papagianneas, S. & Junius, N. "Fairness and justice through automation in China's smart courts" *Computer Law & Security Review*, 2023/51, 1.
15 Keutgen, G. & Dal, G.A. *L'arbitrage en droit belge et international*, Brussels, Bruylant, 2006, I, 226-227.
16 *Tabbane c. Switzerland* ECrtHR (1 March 2016) nr. 41069/12.