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An Automated Formation

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An Automated < BLIP in MIT CLR's > Formation

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> *A Reflection on Legal Tech Incorporation Processes, Legal Education, and the Implications on the Legal Profession*

INTRO//
ORIGIN STORY//

The MIT Computational Law Report (the "MIT CLR") is a legal entity that was created more by metaphorical Iron Man than by C-3PO.[1] It was created by a machine but also by a human, by computer-driven legal automation tools in the hands of law students.[1] Indeed, the best elements of both human and machine united to deliver a potent legal product. The process epitomized the concept of extending intelligence of both cognition and capability to produce more effective legal professionals.

The law students in the Brooklyn Law Incubator & Policy ("BLIP") Clinic were tasked with the MIT Computational Law Report's business entity formation. Under the supervision of experienced, entrepreneurial attorneys, BLIP students have been setting up legal entities for twelve years. During this time, BLIP's professorial leadership has largely held the belief that resorting to automation tools to draft legal documents would fail both students and clients alike; the presumption was that such tools would dull the developing legal professionals' talents and intellects and that they would produce a substandard legal product. Accordingly, BLIP students were generally forbidden from using any tools that automated the drafting process, particularly if hidden behind paywalls. The exception was that students were encouraged to try to build their own automation tools, but students capable of building even the most rudimentary tools and apps were few and far between.[2] The prototypes that these students constructed were generally more proofs of concept that such tools and apps could be built, rather than constructed by those properly trained in computer programming and design.[3]

In 2011, BLIP faculty and students experienced their first wake up call on the road to inevitable human-computer collaboration. BLIP Clinic was approached by a couple of MIT engineers, calling themselves Docracy,[4] asking the Clinic to help them build and populate an online, open-source, crowdsourced, curated repository of contracts and other legal documents. The goal was to make legal documents freely available and customizable. At first, BLIP faculty and students fought against the creation of this sort of free and open repository but quickly realized that such platforms would be inevitable in the digital world, and it would be best for BLIP students, graduates, and faculty to embrace this inevitability and to learn to mutate the role of the lawyer in such a potentially societally-virtuous, human-empowering, automation-enabled digital world.

As a result, BLIP students and graduates populated the Docracy site with its most robust and mutable set of documents.[5]

In any event, since 2011, the writing on the wall—or, rather, the screen—has become more and more apparent, and 2019 marked an ever-stronger pronouncement by BLIP leadership of the benefits of automated legal tools. Emphasis was placed on the utility of both their use and their development by law students. In addition, BLIP professors began experimenting with these tools as pedagogical devices and, to a greater extent, placed an emphasis on the inputs—the legal rationale that guides drafting—rather than the outputs—the largely formulaic prose of the legal provisions themselves. In doing so, the fundamental questions shifted away from "how do we create bylaws, operating agreements, etc.?" toward "why would we want to?" and "what should we be considering when we do?"

However, even a newfound appreciation for automated tools among BLIP's forward-minded leadership could not forestall certain feelings of foreboding for the students actually tasked with carrying out incorporation through automation. Not a foreboding of the Terminator variety—clearly the technology involved in legal automation is not threatening global domination, at least not yet—but of a sort common to the plight of countless workers since the dawn of the industrial era. Were the students, by helping to nudge legal automation into the mainstream, actually articulating the demise of their own professional value? Were they laying the foundations for the replacement of lawyers with machines—taking that first small step toward beaming Lieutenant Commander Data from the fictional U.S.S. Enterprise straight into a law office?

AUTOMATION & THE FUTURE OF LAWYERING// BLIP'S IMPLEMENTATION OF LEGAL AUTOMATION TOOLS//

If accountants have not been replaced by calculators yet, then lawyers should not fear being replaced by HAL 9000 any time soon. That said, efficiency, effectiveness, and affordability drive innovation, and innovation is certainly shaking up what has conventionally been considered legal work. Legal automation tools—by replicating the work of attorneys—are pushing the boundaries of the role of the attorney, especially with regard to transactional practice. Within the transactional practice, BLIP students have found that business entity formation has been the most pertinent application of legal automation for the new ventures with which they work; however, other legal applications include everything from contract drafting and document review, to intellectual property prosecution and protection, to web documentation such as automated privacy policies and terms of service, to time entry and billing. These tasks have become progressively

more streamlined with the addition of applications like Change-Pro® Premier, CooleyGo's online suite of formation tools, and automation-tool generators like Neota Logic, Community.lawyer, and DocAssemble.

Capable of compressing research and revision time, as well as executing the mundane, affordable automation tools are overhauling many of the traditional, perhaps tedious, tasks that once filled a lawyer's day. As a result, lawyers cannot reasonably bill as much nor as many hours for routine, automatable tasks. Instead, lawyers, and those who educate lawyers, will need to figure out what tasks should be properly ceded to machines. It seems fitting that machines will perform tasks that are more readily reduced to black and white, zeros and ones, and humans will continue to perform those tasks that require subtle, nuanced legal analysis of the "gray areas"—the ambiguities of law, ethics, and philosophy that are not amenable to the speed, logic, and parsing of binary computational algorithms. Unsurprisingly then, BLIP students have been exploring the question of how to morph the role of next-generation lawyers to serve as sophisticated advisors in a world of digital documentation and automation.

Part of the answer seems to be getting freshly-minted lawyers to start to feel more comfortable both creating and donning the metaphorical Iron Man suit. Embracing the inevitable technological change, as well as recognizing the positive value of legal tech tools, BLIP students have, in recent years, been working with many potentially-disruptive legal automation platforms and have been using automation tools to further advance access to justice and to otherwise improve and democratize legal process.[6] After many fits and starts prototyping apps, websites, and tools with user-unfriendly platforms and kluge code, the toolsets are now almost ready for prime time and capable of use by even those attorneys not trained in computer programming. While only the most tech-savvy of law students were initially comfortable building crude legal tech apps, today, even the most tech-averse law students are finding the digital tool sets sufficiently friendly to allow those trained in the procedural and substantive law to interact with the technology to collaborate and build better digital legal tools.[7]

Time will tell, but while legal automation tools appear to be filling some legal roles, they are also creating a greater demand for legal minds. In short, automation tools are made more effective by lawyers, and likewise, lawyers are made more effective by automation tools. So, while lawyers may now swing the hammer of automation, truly effective legal counsel involves being familiar with the rapidly changing legal landscape, especially where it intersects with technology, being able to detect and effectively address the client's legal issues, and being capable of keeping the client's aspirations in mind

every step of the way. While machines can—and should—do some of the heavy lifting here, they certainly cannot do it all, at least not the machines of today.

AUTOMATING THE CHOICE OF DELAWARE// THE MIT COMPUTATIONAL LAW REPORT STORY//

Although lawyers may be using legal automation tools to implement their lawyerly judgment, these tools may start shaping their judgment as well. If designed properly, automation tools will prompt lawyers to consider relevant issues that may not have otherwise occurred to them. If designed comprehensively, these tools will provide an important backstop protection against potential malpractice. If designed to save time and expense, these tools might best meet the needs of a client trying to bootstrap a new venture. In these instances and others, attorneys may be served well by automation tools, but in regard to entity formation, for example, how do these tools change the playing field?

In general, for any attorney working on a new venture, the first major decision is *whether* to form a business entity at all—if so, the next decisions are *what* to form and *where* to form it. Various legal and business considerations—including cost and tax consequences, as well as the venture's liabilities, future plans for operations, and ability and desire to attract certain types of funding—inform these decisions, but for the time being, the decision of *where* to form an entity may end up being made (for many) by the availability of robust automation tools that are able to draft critical legal documents, such as bylaws and operating agreements. This is not necessarily bad, certainly not for Delaware, but it does promote giving short shrift to meaningful considerations.

Funding concerns, such as securing venture or angel capital, have driven many founders into forming entities in Delaware anyway, but as things stand, the vast majority of free automation tools are doubling down on this pressure without giving much, if any, consideration as to whether Delaware really makes sense for the venture. Free automation tools point to lower legal fees, and if a google search can take the role of counsel in deciding *whether* and *what* to form, then a Delaware C-Corp can be formed by just about anyone for a fraction of the cost. This might be bad news for lawyers. At the same time, it is not necessarily good news for every founder either, especially any for whom that google search fails to advise about such issues as 83(b) elections,[8] foreign qualification, intellectual property protections, or the like.

With all of this in mind, the MIT CLR's formation story is one worth examining. After deliberation, BLIP students formed the MIT CLR as a Massachusetts limited liability

company. An entity was needed for the MIT CLR's because the co-founders desired concrete operating procedures for business decisions, fundraising capability, and personal liability protection. So, the next consideration was *what* to form. BLIP students considered the pros and cons of forming as a C- or S-Corp, LLC, and even what it would look like to form as a Vermont BBLLC, a non-profit, an L3C, a California Social Purpose Corporation, any of the various flavors of statutorily authorized Benefit Corporations or certified B Corps, or even a Wyoming Series LLC, which might have some advantages if the entity wanted to "tokenize" itself and try to find a potential Blockchain/crypto jurisdictional corporate haven. In the end, the basic LLC won out. It provided the co-founders with the flexibility that sits in the middle ground between partnership and corporation. The flexibility and benefits of an LLC ruled the day: (1) limited personal liability, (2) no limit to the amount of ownership managers or members, (3) "pass-through" taxable income for owners, (4) no requirement of formal meetings or the accompanying documentation, (5) flexible distribution of profits, and (6) customized management and decision-making structure. The questions surrounding the adaptability and flexibility of an LLC are predominantly answered in an often highly tailored operating agreement.

As to *where* to form, BLIP students concluded that it made the most sense to form in Massachusetts. Foremost, it would be cheaper; there would be no need to foreign qualify to do business in Massachusetts nor to pay a registered agent service in Delaware. Additionally, after speaking with the founders, the traditional advantages of forming in Delaware—that is, things like a greater level of investor familiarity, more developed case law, generally lower franchise taxes, business-friendly statutes, and better filing and online services—did not seem weighty enough for the MIT CLR to benefit from forming outside of the state where it would have its principal place of business.

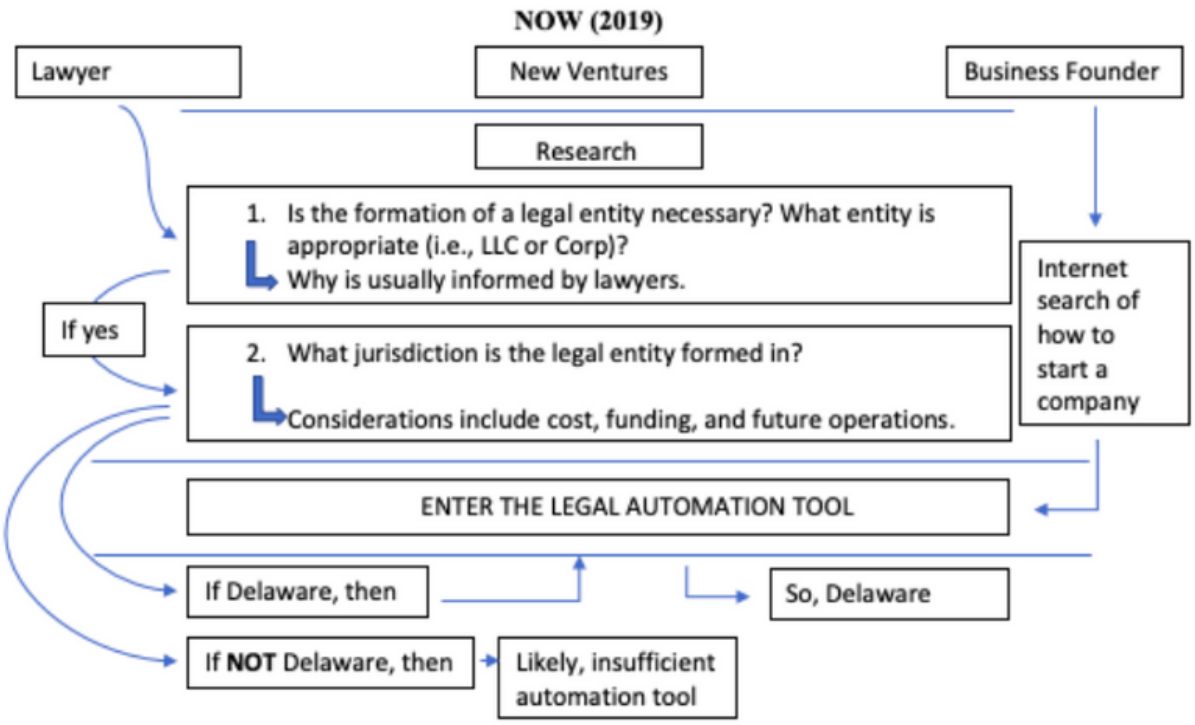


Figure 1

In the end, the decision was made to bifurcate the automate formation process. An automation tool specific to Massachusetts LLCs was used for the certificate of incorporation. However, because Massachusetts automation tools are still limited, a Delaware-specific automation tool was used to create the operating agreement, which was then manually edited to gel with Massachusetts law. Using the automation tool on the Secretary of the Commonwealth's website, the MIT CLR's certificate of organization was quickly and effortlessly drafted and filed.[9] Using the Law Help Interactive ("LHI") website, the operating agreement was drafted with substantially more thought and somewhat more initial effort.[10] While LHI's tool outperformed others that BLIP Clinic has used, it was also not designed for Massachusetts, and the slew of automation tools that the Clinic has tried have struggled across the board with the complexity of a multi-member, manager-managed LLC. In the end, automation tools produced a flawless certificate of organization, which is not surprising due to its simplicity, and an operating agreement that still needed some work.

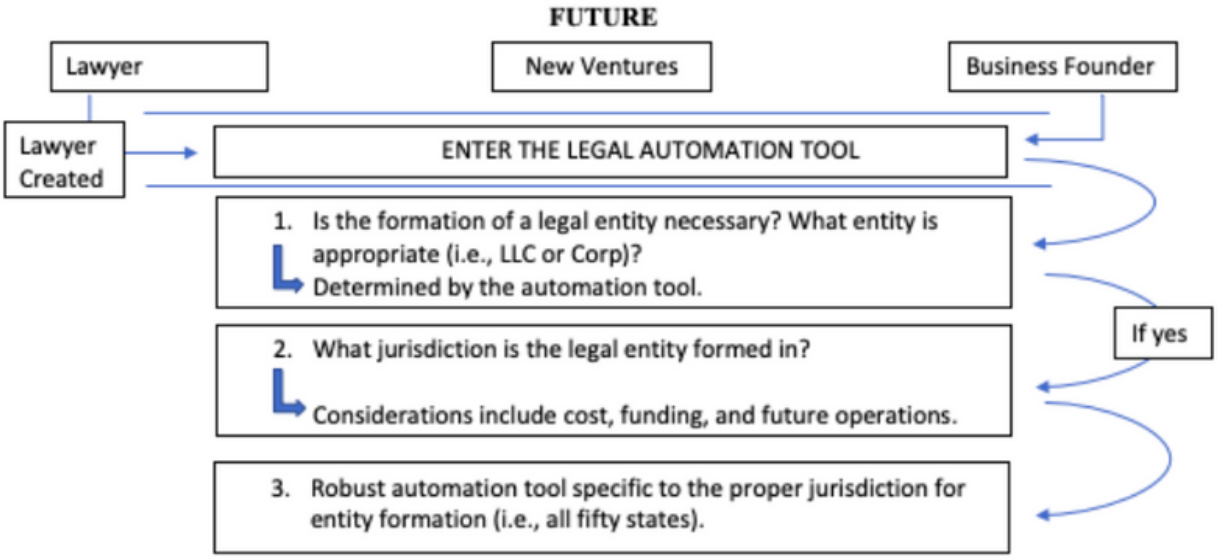


Figure 2

Critically, like the automation tools that were used to form the MIT CLR, BLIP Clinic's services are free; however, if they were not, it is not so clear that a Massachusetts LLC would have been the client's best option. Because automation tools that can form a rather complex multi-member, manager-managed LLC in Massachusetts are not in place—at least not without either hitting a paywall or undergoing a search effort too massive to be worth the time—many man-hours went into cleaning up the MIT CLR's operating agreement. So, although establishing an LLC in Massachusetts is simple, fast, and cheap, the time required to draft or rework a complex operating agreement may generate substantial legal fees for anyone that has to pay counsel to do it.[11] In short, now that there are more robust legal automation tools geared toward forming in Delaware at lawyers' fingertips, it might be cheaper for many clients just to form in Delaware.

CONCLUSION//

Recounting the story of the MIT CLR's formation has revealed at least one important truth about the automation process. Effective use of automated legal tools involves the injection of knowledge and expertise by those formally trained in the legal profession at every stage of the process. In turn, this truth leads to three important realizations. Firstly, it is unlikely that lawyers' fear of being replaced by machines will prove to be anything more than the vague and lingering paranoia attributable to any professional setting. Computer-driven legal automation tools are better depicted by WALL · E and R2-D2 than Megatron and T-1000, and by embracing automated legal tools, today's students will not undermine their job prospects. Secondly, legal professionals and automated legal tools will coalesce with synergistic results. Legal professionals will perform better when

automated tools are incorporated into their work process, and automated legals tools will produce better results when wielded by talented legal professionals. Thirdly, the utility of automated legal tools will increase exponentially with their prevalence. The more ubiquitous and comprehensive legal automation tools become, the more effective it will be for lawyers to resort to such tools. Thus, the story of the MIT CLR's automated incorporation serves as a testament to the philosophical underpinnings of BLIP's emphasis on both the use and development of automated legals tools.

Interested in learning more about the BLIP Clinic?

More information on the Brooklyn Law Incubator & Policy Clinic can be found here.

Want to connect with the authors?

Reach out to Jonathan Askin on Twitter and LinkedIn, Revel Atkinson on LinkedIn, William Williams on LinkedIn

Citations

1. Dazza Greenwood, *Announcing the MIT Computational Law Report*, YOUTUBE (May 16, 2019), https://www.youtube.com/watch?v=M2-YaD_O6iM. ↩
2. For example, BLIP Clinic, in the context of a Legal Hackers Hackathon on Data Privacy back in 2013, built what might have been the first, very basic, Revenge Porn takedown site— http://takemyphotodown.herokuapp.com/. Since then, various law firms and public interest groups have built more user-friendly, more functional, more robust tools built on similar concepts. Today, such a tool would be very simple to build on any of the newfangled legal automation tools like NeotaLogic, Community.Lawyer, or DocAssemble. ↩
3. BLIP watched as a few other law schools embraced such tools as NeotaLogic to help law students build legal automation tools, but BLIP community shunned such tools for several years, thinking it best for students to learn without such technological training wheels. Now, BLIP Clinic openly embraces NeotaLogic and other products as a user-friendly toolsets to help lawyers build legal automation applications. ↩
4. *See* Docracy, https://www.docracy.com (last visited Nov. 18, 2019). ↩
5. *See* Alex Eriksen, *eversign Has Acquired Docracy!* eversign: Blog (Mar. 6, 2019), https://blog.eversign.com/eversign-has-acquired-docracy/ (noting in 2019, Docracy was acquired by eversign). ↩

6. BLIP Clinic served as corporate counsel to Community.lawyer—a Brooklyn-based venture relying primarily on open-source technology and committed to helping lawyers and law firms build legal automation tools and apps. *See* Community.lawyer, https://community.lawyer (last visited Nov. 18, 2019). BLIP Clinic, in fact, helped to establish Community.lawyer as one of Delaware's first Public Benefit Corporations and the first whose company charter explicitly commits the venture to promote access to quality legal help. ↩

7. Brooklyn Law School, like several other tech-forward law schools, has established a program in which law students and technologists collaborate to build access to justice tools. The "Justice Lab" at Brooklyn Law School hosts legal tech workshops to train students in computational law and legal automation, with an eye toward building access to justice apps, particularly to advance economic, environmental, and social justice, as well as to fill access to justice voids experienced by more vulnerable, marginalized individuals and communities. The objective is to leverage the skills and passions of students and professionals worldwide to create and sustain solutions that serve millions of people in need and to prepare students to excel in the modern, digitally-enabled workplace. The Justice Lab primarily uses no-code tools, AI, machine learning, and other automation software development platforms, to be used by people without programming skills to create apps that replicate the thinking and actions of lawyers. The law students work is to figure out how best to collaborate with the technology and how to apply their legal training to storyboard the law and to parse through statutes, regulations, standards, and other legal documents and then use the tech tools to automate applications around these statutes, regulations, standards, and other legal documents. Among the apps, sites, and tools in development by the Justice Lab are tools to help vulnerable families, immigrants, post-disaster victims, stateless individuals, day laborers, sex workers, gig economy workers, potential suicide victims, and felons reentering society. ↩

8. The 83(b) election, a provision under the Internal Revenue Code, essentially allows the founder to pre-pay his or her tax liability on a low valuation of the venture. If the venture is successful, this can spare the founder from a massive (potentially crippling) tax liability resulting from the vesting of his or her valuable but illiquid stock. *See* Julia Kagan, *83(b) Election*, Investopedia, https://www.investopedia.com/terms/1/83b-election.asp (last visited Nov. 16, 2019). ↩

9. *See Limited Liability Company Information*, Sec'y of the Commonwealth of Mass., http://www.sec.state.ma.us/cor/corpweb/corllc/llcinf.htm (last visited Nov. 16,

2019). ↩

10. *See* LawHelp Interactive, https://lawhelpinteractive.org/Interview/GenerateInterview/5977/engine (last visited Nov. 16, 2019). ↩

11. It should be noted that while Massachusetts does not require an LLC to have an operating agreement, it is best practice for any LLC to have one. ↩