How Technology Impacts the Role of Lawyers: A FinTech GC's Perspective

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Background on BitOoda

- BitOoda Holdings, LLC
  - Global financial services platform
  - Agency-only broker
  - Digital assets only
- Regulated by:
  - CFTC/NFA as a registered introducing broker
  - SEC/FINRA as a registered broker-dealer
  - NY DFS under the bitlicense (pending)
- Example of projects:
  - BitOoda recently successfully executed the first BitOoda Hash™ contract, which optimizes the settlement and delivery process, and enables seamless transacting of hashpower in the over-the-counter markets.

Topics to be covered:

- Blockchain
- Digital Assets
- Smart Contracts
- Artificial Intelligence and Big Data
- Cybersecurity

Blockchain – Practical Implementation

◦ Payment system without an intermediary

◦ Temper-proof records (real estate, medical info, bills of lading, etc.)

◦ Smart contracts (but not all blockchains – Bitcoin vs. Ethereum ERC20)

◦ Use of blockchain tech for payment settlements and credit support management (i.e., margining terms)

◦ Public vs. Private Blockchains:

  ◦ https://www.blockchain-council.org/blockchain/public-vs-private-blockchain-a-comprehensive-comparison/
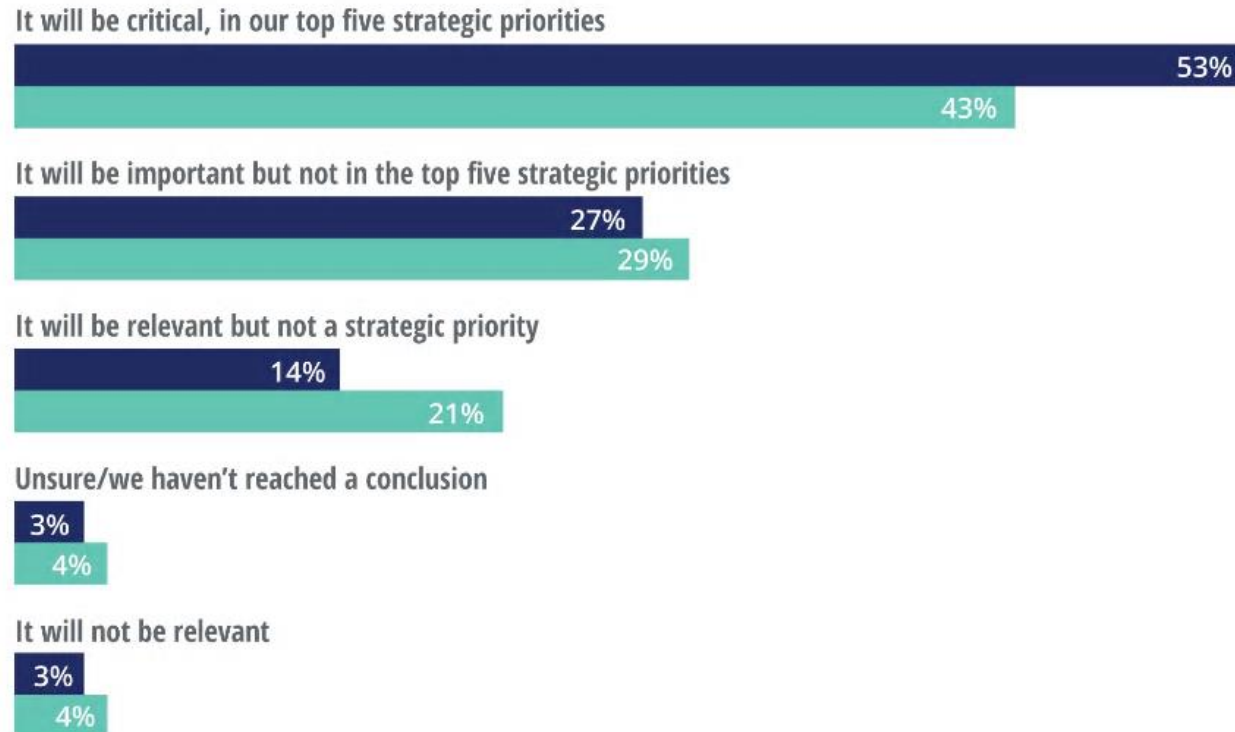
◦ Why do I need to understand blockchain technology?

FIGURE 1

Views of blockchain's relevance within organizations (2019 vs. 2018)

Most respondents now see blockchain as a top-five strategic priority, a jump of 10 percentage points over 2018

Survey question: Which of the following best describes how you currently view the relevance of blockchain to your organization or project in the coming 24 months?

■ 2019 ■ 2018

It will be critical, in our top five strategic priorities
53%
43%

It will be important but not in the top five strategic priorities
27%
29%

It will be relevant but not a strategic priority
14%
21%

Unsure/we haven't reached a conclusion
3%
4%

It will not be relevant
3%
4%

N=1,386 (2019 global enterprise); N=1,053 (2018 global enterprise)
Note: Some percentages may not total 100 percent due to rounding.
Source: Deloitte's Global Blockchain Survey, 2018 and 2019.

Deloitte Insights | deloitte.com/insights

Blockchain Relevance

"Though blockchain hasn't reached its full potential, savvy executives surveyed for Deloitte's 2019 global blockchain survey are confident about new and evolving use cases; they continue to see the technology as a connecting platform that can enable many business processes." *Deloitte's 2019 Global Blockchain Survey*

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Digital Assets

- Types:
  - Payment medium
  - Utility
  - Investment Instrument
  - Compare to: Digitized assets
- Issues:
  - Lack of consistency as to how these various tokens are defined by the various regulators and industry participants – no common definition creates legal uncertainty
  - Lack of certainty as to classification

Digital Assets (cont.)

"In the United States, the CFTC, the SEC, FinCEN, the IRS, and state regulators such as the DFS have issued guidance or interpretations concerning digital asset products and market participants." (ABA White Paper)

Digital Assets (Cont.)

Commodities Futures Trading Commission:

- LabCFTC
- Guidance and a merits-based approach
  - Bitcoin is a commodity –

    "Section 1a(9) of the Act defines "commodity" to include, among other things, "all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(9). The definition of a "commodity" is broad. See, e.g., Board of Trade of City of Chicago v. SEC, 677 F. 2d 1137, 1142 (7th Cir. 1982). **Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities**." (emphasis added - *Coinflip, Inc., d/b/a Derivabit, and) Francisco Riordan*)

    (https://www.cftc.gov/PressRoom/PressReleases/pr7231-15)

  - Actual delivery of assets (https://www.cftc.gov/PressRoom/PressReleases/8139-20)
  - Many other guidance notes as well as enforcement actions can be found on CFTC website
- Launch of Bakkt and CME options

Digital Assets (Cont.)

Securities and Exchange Commission:

- The DAO Report: SEC asserts jurisdiction over the digital assets (https://www.sec.gov/news/press-release/2017-131)
  - The Howey test
  - Financial Intermediaries = "ICO promoters"
  - Investment companies and investment advisors
- Relevant Cases:
  - Kik
  - Telegram
  - Block.one
- The Safe Harbor proposal by Hester Pierse (https://www.sec.gov/news/speech/peirce-remarks-blockress-2020-02-06)
- The state of bitcoin exchange-traded fund (ETF)
- Alerts to investors are available on SEC website
- Product taxonomy remains murky (https://www.sec.gov/files/dlt-framework.pdf)

Digital Assets (Cont.)

Other Regulators:

◦ FinCEN

  Issued guidance regarding "the applicability of the regulations implementing the Bank Secrecy Act ("BSA") to persons creating, obtaining, distributing, exchanging, accepting, or transmitting virtual currencies" (*FIN-2013-G001*)

◦ IRS

  Issued *Notice 2014–21 (IRS Virtual Currency Guidance), which* "describes how existing general tax principles apply to transactions using virtual currency."

◦ State Regulators – focus on NY DFS

  23 NYCRR 200.3(a) states: "No Person shall, without a license obtained from the superintendent …, engage in any Virtual Currency Business Activity."

Rising Self-Regulatory Organizations:

◦ Association of Digital Assets Markets (ADAM)

Digital Assets (Cont.)

What are some of the major issues?

- Token Taxonomy
- Title Transfer / Delivery / Custody
- Digital Assets Derivatives – new terms and issues
  - Payment settlement
  - Price Source
  - Forks, airdrops and other nomenclature
- Lack of Market Infrastructure

Smart Contracts

What is a "smart contract"?

A "Smart contract" is self-executing computer code. Smart contracts use blockchain or other technology to automatically enforce the conditions of an agreement. Once an agreement's conditions are met, the contract self-executes without the need for a manual execution by the parties or a middleman such as a broker or escrow agent to ensure performance.

Smart Contracts (Cont.)

ISSUES

◦ A smart contract is only as "smart" as the code that it's built upon

◦ "garbage in, garbage out"

◦ Limitations of "if, then" logic

◦ Must be binding to be enforceable

◦ Which jurisdiction applies?

◦ Who are the oracles?

◦ Computer code cannot act in "best" or "reasonable" efforts

Smart Contracts (Cont.)

Why do we want smart contracts to work?

◦ Efficiency

◦ Standardization

◦ Certainty

◦ Can work within "fluid system"

◦ Project Example:

International Swaps and Derivatives Association (ISDA) has a workstream that is developing smart contracts for use within derivatives space. See more info on their website: https://www.isda.org/2019/10/16/isda-smart-contracts/

Artificial Intelligence (AI) and Big Data

◦ AI is a computer code capable of performing functions that normally require human intelligence

◦ AI is coded in – use of logical rules to analyze data, establish patterns, and identify insights from the data as per predetermined code

◦ Examples of implementation within legal industry:
  ◦ e-discovery
  ◦ due diligence
  ◦ contract review
  ◦ legal research

Artificial Intelligence (AI) and Big Data

◦ Big Data:
  ◦ What is Big Data?
  ◦ How does Big Data relate to the functions of AI?
◦ Some of issues with Big Data and AI:
  ◦ Privacy
  ◦ Discrimination
    ◦ Example: Illinois legislators pass the HB 2557, *The Artificial Intelligence Video Interview Act*
  ◦ Patentability
    ◦ Under 35 U.S. Code § 100(f), "The term "inventor" means the **individual** or, if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention.

Cybersecurity

◦ Digital Assets and Blockchain

  ◦ Custody: hot storage / cold storage

  ◦ 51% attack

◦ Compliance Requirements

  ◦ Who are my regulators and what do they require?

  ◦ Can my vendors comply?

  ◦ How can I manage my vendors' compliance?

◦ Virtual Working (use cases during the COVID-19 crisis)

  ◦ Zoom troubles

QUESTIONS?

Resources and Articles:

○ ABA White Paper: *Digital and Digitized Assets: Federal and State Jurisdictional Issues* (https://www.americanbar.org/content/dam/aba/administrative/business_law/buslaw/committees/CL620000pub/digital_assets.pdf)

○ Deloitte's 2019 Global Blockchain Survey (https://www2.deloitte.com/us/en/insights/topics/understanding-blockchain-potential/global-blockchain-survey.html)

○ Digital Assets: In a Realm With No Clear Answers, Lawyers Must Ask Better Questions (https://www.law.com/legaltechnews/2019/11/07/digital-assets-in-a-realm-with-no-clear-answers-lawyers-must-ask-better-questions/)

○ Smart Contracts Won't Displace Lawyers—But They Will Require a Smarter Approach (https://www.law.com/legaltechnews/2019/12/11/smart-contracts-wont-displace-lawyers-but-they-will-require-a-smarter-approach/)

○ Artificial Intelligence Won't Displace the Human Intelligence of Lawyers Anytime Soon (https://www.law.com/legaltechnews/2020/01/29/artificial-intelligence-wont-displace-the-human-intelligence-of-lawyers-anytime-soon/)

Ksenia Sussman - Bio

Ksenia Sussman is a legal counsel and compliance leader with over 14 years of experience. She has experience in handling a wide variety of cross-functional legal and compliance matters in regards to commercial and regulatory activities relating to the business of regulated financial services entities. She is an expert negotiator of trading and commercial agreements. Ksenia is an advisor in laws and regulations governing derivatives trading, securities issuances and trading, and financial technology. She is also familiar with other relevant areas of law, including general corporate, employment, cyber and intellectual property. In her current role, she serves as the General Counsel of BitOoda Holdings, LLC, a FinTech startup that focuses on digital assets (BTC, ETH, etc.) execution services, risk management, and market analysis. Ksenia oversees all legal and compliance matters of the business across all entities falling within the jurisdictions of the SEC, the CFTC, and the NY DFS. Ksenia worked on the first Bitcoin derivative transaction that was reported by BitOoda on the Intercontinental Exchange's (ICE) Trade Vault. She spearheaded discussions and helped with the legal documentation in setting up industry groups, including the Association of Digital Asset Markets (ADAM). Prior to BitOoda, Ksenia was a Vice President at Barclays PLC, where she advised on a broad spectrum of transactional and regulatory matters of the investment banking business. During her tenure at Barclays, she structured, negotiated, and documented complex derivatives and structured transactions, was primarily responsible for the legal coverage of the structured commodities index trading business, and helped with the setup of Barclays Rise Accelerator program. She structured bespoke strategic investment deals in FinTech companies, focusing specifically on payment processing and blockchain technologies. Ksenia is an avid philanthropist and dedicates a lot of time to pro bono. She is currently on the Associate Board of Immigration Equality.

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