

Legal Ethics in the Use of Artificial Intelligence

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Lawyers increasingly are using artificial intelligence (“AI”) in their practices to improve the efficiency and accuracy of legal services offered to their clients. But while AI offers cutting-edge advantages and benefits, it also raises complicated questions implicating professional ethics. Lawyers must be aware of the ethical issues involved in using (and not using) AI, and they must have an awareness of how AI may be flawed or biased.

Section I of this article provides an overview of AI and the different AI tools used in the practice of law. Section II, in turn, analyzes a lawyer’s ethical duties in connection with AI technology. Finally, Section III explores how bias can affect AI and the importance of using diverse teams when developing AI technology.

I. OVERVIEW OF HOW ARTIFICIAL INTELLIGENCE IS CHANGING THE LAW

Artificial intelligence promises to change not only the practice of law but our economy as a whole. We clearly are on the cusp of an AI revolution. But what does all this mean, as a practical matter, for lawyers? What is AI? And how is it being used in the practice of law?

A. Defining AI.

Artificial intelligence has been defined as “the capability of a machine to imitate intelligent human behavior.”¹ Others have defined it as “cognitive computing” or “machine learning.”² Although there are many descriptive terms used, AI at its core encompasses tools that are trained rather than programmed. It involves teaching computers how to perform tasks that typically require human intelligence such as perception, pattern recognition, and decision-making.³

B. How AI Is Being Used In The Practice Of Law

There are many different ways that lawyers today are using AI to improve productivity and provide better legal services to their clients. Below are several of the main examples. As AI becomes even more advanced in the coming years, it fundamentally will transform the practice of law. Lawyers who do not adopt AI will be left behind.

1. Electronic Discovery/Predictive Coding.

Lawyers, predictably, use AI for electronic discovery. The process involves an attorney training the computer how to categorize documents in a case. Through a method of predictive coding, the AI technology is able to classify documents as relevant or irrelevant, among other classifications, after extrapolating data gathered from a sample of documents classified by the attorney.⁴

2. Litigation Analysis/Predictive Analysis.

AI also is being used to predict the outcome of litigation through the method of predictive analytics. AI tools utilize case law, public records, dockets, and jury verdicts to identify patterns in past and current data.⁵ The AI then analyzes the facts of a lawyer's case to provide an intelligent prediction of the outcome.⁶

3. Contract Management.

AI tools are being used by lawyers to assist with contract management. This is particularly valuable to inside counsel who quickly need to identify important information in contracts. For example, AI tools can flag termination dates and alert the lawyer about deadlines for sending a notice of renewal. The AI tools also can identify important provisions in contracts, such as most favored nation clauses, indemnification obligations, and choice of law provisions, among others.⁷

4. Due Diligence Reviews.

AI is being used to assist in automated due diligence review for corporate transactions to reduce the burden of reviewing large numbers of documents.⁸ Similar to contract management, due diligence review involves the computer identifying and summarizing key clauses from contracts.⁹

5. "Wrong Doing" Detection.

AI is being used to search company records to detect bad behavior preemptively. AI is able to see beyond attempts to disguise wrongdoing and identify code words.¹⁰ AI can also review employee emails to determine morale, which may lead to identification of wrongdoing.¹¹ For example, in one test using emails of Enron executives, the AI was able to detect tension amongst employees that was correlated with a questionable business deal.¹²

6. Legal Research.

AI traditionally has been used to assist with legal research, but it increasingly is becoming more sophisticated. With AI, lawyers can rely on natural language queries—rather than simple Boolean queries—to return more meaningful and more insightful results.¹³ AI also can be used to produce basic legal memos. One AI program called Ross Intelligence, which uses IBM's Watson AI technology, can produce a brief legal memo in response to a lawyer's legal question.¹⁴ Over time, such AI technology will become more and more powerful.

7. AI to Detect Deception.¹⁵

Finally, as AI becomes more advanced, it will be used by lawyers to detect deception. Researchers, for example, are working on developing AI that can detect deception in the courtroom. In one test run, an AI system performed with 92 percent accuracy, which the researchers described as "significantly better" than humans.¹⁶ While AI is still being developed for use in courtrooms, it already is being deployed outside the practice of law. For example, the

United States, Canada, and European Union have run pilot programs using deception-detecting kiosks for border security.¹⁷

C. It is Essential for Lawyers to be Aware of AI.

The bottom line is that it is essential for lawyers to be aware of how AI can be used in their practices to the extent they have not done so yet. AI allows lawyers to provide better, faster, and more efficient legal services to companies and organizations. The end result is that lawyers using AI are better counselors for their clients. In the next few years, the use of AI by lawyers will be no different than the use of email by lawyers—an indispensable part of the practice law.¹⁸

Not surprisingly, given its benefits, more and more business leaders are embracing AI, and they naturally will expect both their in-house lawyers and outside counsel to embrace it as well. Lawyers who already are experienced users of AI technology will have an advantage and will be viewed as more valuable to their organizations and clients. From a professional development standpoint, lawyers need to stay ahead of the curve when it comes to AI. But even apart from the business dynamics, professional ethics requires lawyers to be aware of AI and how it can be used to deliver client services. As explored next, a number of ethical rules apply to lawyers' use and non-use of AI.

II. THE LEGAL ETHICS OF AI.

To date, neither the American Bar Association nor any of the state bars have published formal ethics opinions addressing the use of AI by lawyers. Given the transformative nature of AI, it is perhaps not surprising that there are no ethics opinions. But even so, there are several ethics rules that apply to the use of AI.

A. Several Ethics Rules Apply To Lawyer's Use (And Non-Use) of AI.

There are a number of ethical duties that apply to the use of (and non-use of) AI by lawyers, including the duties of: (1) competence (and diligence), (2) communication, (3) confidentiality, and (4) supervision. These duties as applied to AI technology are discussed below.

1. Duty of Competence

Under Rule 1.1 of the ABA Model Rules, a lawyer must provide competent representation to his or her client. The rule states that “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹⁹ The duty of competence requires lawyers to be informed, and up to date, on current technology. In 2012, this was made clear when the ABA adopted Comment 8 to Rule 1.1 which states that “[t]o maintain the requisite knowledge and skill, lawyers should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology”²⁰

As one author points out, there does not appear to be any instance “in which AI represents the standard of care in an area of legal practice, such that its use is necessary.”²¹ Nonetheless, lawyers generally must understand the technology available to improve the legal services they

provide to clients. Lawyers have a duty to identify the technology that is needed to effectively represent the client, as well as determine if the use of such technology will improve service to the client.²²

Under Rule 1.1, lawyers also must have a basic understanding of how AI tools operate. While lawyers cannot be expected to know all the technical intricacies of AI systems, they are required to understand how AI technology produces results. As one legal commentator notes, “[i]f a lawyer uses a tool that suggests answers to legal questions, he must understand the capabilities and limitations of the tool, and the risks and benefits of those answers.”²³

2. Duty to Communicate

ABA Model Rule 1.4 governs a lawyer’s duty to communicate with clients and requires a lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”²⁴ A lawyer’s duty of communication under Rule 1.4 includes discussing with his or her client the decision to use AI in providing legal services. A lawyer should obtain approval from the client before using AI, and this consent must be informed. The discussion should include the risks and limitations of the AI tool.²⁵ In certain circumstances, a lawyer’s decision *not* to use AI also may need to be communicated to the client if using AI would benefit the client.²⁶ Indeed, the lawyer’s failure to use AI could implicate ABA Model Rule 1.5, which requires lawyer’s fees to be reasonable. Failing to use AI technology that materially reduces the costs of providing legal services arguably could result in a lawyer charging an unreasonable fee to a client.²⁷

3. Duty of Confidentiality

Under ABA Model Rule 1.6, lawyers owe their clients a generally duty of confidentiality. This duty specifically requires a lawyer to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”²⁸ The use of some AI tools may require client confidences to be “shared” with third-party vendors. As a result, lawyers must take appropriate steps to ensure that their clients’ information appropriately is safeguarded.²⁹ Appropriate communication with the client also is necessary.

To minimize the risks of using AI, a lawyer should discuss with third-party AI providers the confidentiality safeguards in place. A lawyer should inquire about “what type of information is going to be provided, how the information will be stored, what security measures are in place with respect to the storage of the information, and who is going to have access to the information.”³⁰ AI should not be used in the representation unless the lawyer is confident that the client’s confidential information will be secure.

4. Duty to Supervise

Under ABA Model Rules 5.1 and 5.3, lawyers have an ethical obligation to supervise lawyers and nonlawyers who are assisting lawyers in the provision of legal services to ensure that their conduct complies with the Rules of Professional Conduct.³¹ In 2012, the title of Model Rule 5.3

was changed from “Responsibilities Regarding Nonlawyer Assistants” to “Responsibilities Regarding Nonlawyer Assistance.”³² The change clarified that the scope of Rule 5.3 encompasses nonlawyers whether human or not. Under Rules 5.1 and 5.3, lawyers are obligated to supervise the work of the AI utilized in the provision of legal services, and understand the technology well enough to ensure compliance with the lawyer’s ethical duties. This includes making sure that the work product produced by AI is accurate and complete and does not create a risk of disclosing client confidential information.³³

There are some tasks that should not be handled by today’s AI technology, and a lawyer must know where to draw the line. At the same time, lawyers should avoid underutilizing AI, which could cause them to serve their clients less efficiently.³⁴ Ultimately, it’s a balancing act. Given that many lawyers are focused on detail and control over their matter, it is easy to see why “the greater danger might very well be underutilization of, rather than overreliance upon, artificial intelligence.”³⁵

B. Key Practical Takeaways Relating to The Ethics of AI.

There clearly are a number of ethical rules that apply to lawyers’ use and non-use of AI technology, and they have real-world application. Lawyers must be informed about AI’s ability to deliver efficient and accurate legal services to clients while keeping in mind the ethical requirements and limitations. Ultimately, lawyers must exercise independent judgment, communicate with clients, and supervise the work performed by AI. In many ways, the ethical issues raised by AI are simply a permutation of ethical issues that lawyers have faced before with regard to other technology. It shows that the legal ethics rules are adaptable to new technologies, and AI is no exception.

III. BIAS IN THE AI CONTEXT.

There is a final, often overlooked consideration in a lawyer’s use of AI technology, and that is the problem of bias. For all the advantages that AI offers for lawyers, there also is a genuine concern that AI technology may reflect the biases and prejudices of its developers and trainers, which in turn may lead to skewed results. It is critical for lawyers using AI to understand how bias can impact AI results.

The problem of bias in the development and use of AI potentially implicates professional ethics. In August 2016, the ABA adopted Model Rule 8.4(g), which prohibits harassment and discrimination by lawyers against eleven protected classes.³⁶ Rule 8.4(g) states that it is professional misconduct for a lawyer to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”³⁷ About 20 states already have some variation of ABA Model Rule 8.4 on the books, and several other states are considering whether to adopt ABA’s new expansive rule. Lawyers in jurisdictions that have adopted some form of Rule 8.4 must consider whether their use of AI is consistent with the rule. Moreover, even in jurisdictions that have not adopted some form of Rule 8.4, lawyers must consider how bias in the use of AI could create risks for clients.

Bias in AI technology stems from the nature of AI tools, which involve machine training rather than programming. If the data used for training is biased, the AI tool will produce a biased result. Microsoft, for example, recently launched an AI tool that could have text-based conversations with individuals.³⁸ The tool continuously learned how to respond in conversations based on previous conversations. Unfortunately, the tool began to mimic the discriminatory viewpoints of the people it previously engaged in conversation.³⁹

As yet another example, the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) software used by some courts to predict the likelihood of recidivism in criminal defendants has been shown by studies to be biased against African-Americans.⁴⁰ For these reasons, it is important to have diverse teams developing AI to ensure that biases are minimized. The data used for training AI should also be carefully reviewed in order to prevent bias.

In the AI world, there has been a movement away from “black box” AI, in which an AI model is not able to explain how it generated its output based on the input.⁴¹ The preferred model is now “explainable AI,”⁴² which is able to provide the reasoning for how decisions are reached. The importance of transparency in the use of AI is being recognized by governments. New York City, for example, recently passed a law that requires creation of a task force that monitors algorithms used by its government, such as those used to assign children to public schools.⁴³ One of the task force’s responsibilities is to determine how to share with the public the factors that go into the algorithms.⁴⁴

Ultimately, the need for lawyers to understand how AI generates outputs is important for combatting bias and providing good counsel to clients. And it may be required by legal ethics. As detailed above, lawyers have a duty to communicate with clients, and explaining why AI generates a particular outcome may be included as part of that duty. The good news is that while AI has the potential to be biased, AI is much more predictable than humans. It is easier to remedy bias in machines than it is in humans. Given their role as officers of the court, it is critical for lawyers to be on the forefront of understanding how bias in the use of can impact outcomes achieved by the legal profession and society as a whole.

CONCLUSION

Without a doubt, AI promises to fundamentally transform the practice of law. AI holds out the promise of freeing lawyers from mundane tasks and allowing them to devote more of their time to counseling clients, which after all is the core of what lawyers do. Lawyers should not fear AI, but rather should embrace it. Professional ethics requires them to do so.

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³ Sterling Miller, *Artificial Intelligence – What Every Legal Department Really Needs To Know*, Ten Things You Need to Know as In-House Counsel (Aug. 15, 2017), <https://hilgersgraben.com/blogs/blogs-hidden.html/article/2017/08/15/ten-things-artificial-intelligence-what-every-legal-department-really-needs-to-know>

⁴ David L. Gordon & Rebecca L. Ambrose, *The Ethics of Artificial Intelligence*, The Jackson Lewis Corporate Counsel Conference (2017), https://www.jacksonlewis.com/sites/default/files/docs/Final_The%20Ethics%20of%20Artificial%20Intelligence_Gordon%20and%20Ambrose.pdf.

⁵ *Supra*, note 3.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Lauri Donahue, *A Primer on Using Artificial Intelligence in the Legal Profession*, Harvard Journal of Law and Technology (Jan. 3, 2018) <https://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession>.

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¹¹ Frank Partnoy, *What Your Boss Could Learn by Reading the Whole Company's Emails*, The Atlantic (Sep. 2018) <https://www.theatlantic.com/magazine/archive/2018/09/the-secrets-in-your-inbox/565745/>.

¹² *Id.*

¹³ *Supra*, note 3.

¹⁴ Steve Lohr, *A.I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet*, New York Times (Mar. 9, 2017) <https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html>.

¹⁵ Shivali Best, *The Robot That Knows When You're Lying*, DailyMail (Dec. 20, 2017), <http://www.dailymail.co.uk/sciencetech/article-5197747/AI-detects-expressions-tell-people-lie-court.html>.

¹⁶ *Id.*

¹⁷ Jeff Daniels, *Lie-detecting Computer Kiosks Equipped with Artificial Intelligence Look Like the Future of Border Security*, CNBC (May 15, 2018) <https://www.cnbc.com/2018/05/15/lie-detectors-with-artificial-intelligence-are-future-of-border-security.html>.

¹⁸ *Supra*, note 3.

¹⁹ ABA Model Rule 1.1

²⁰ Hedda Litwin, *The Ethical Duty of Technology Competence: What Does it Mean for You?*, National Association of Attorneys General, <https://www.naag.org/publications/nagri-journal/volume-2-issue-4/the-ethical-duty-of-technology-competence-what-does-it-mean-for-you.php>.

²¹ James Q. Walker, *What's Artificial About Intelligence? The Ethical and Practical Considerations When Lawyers Use AI Technology*, Bloomberg Law (2018), <https://www.rkollp.com/newsroom-publications-443.html>.

²² *Supra*, note 4.

²³ David Lat, *The Ethical Implications of Artificial Intelligence*, Above the Law: Law2020, <https://abovethelaw.com/law2020/the-ethical-implications-of-artificial-intelligence/>.

²⁴ ABA Model Rule 1.4.

²⁵ *Supra*, note 4.

²⁶ *Id.*

²⁷ *Ethical Use of Artificial Intelligence in the Legal Industry: The Rules of Professional Conduct*, Emerging Industries and Technology Committee Newsletter, (March 2018), <https://insolvencyintel.abi.org/bankruptcyarticles/ethical-use-of-artificial-intelligence-in-the-legal-industry-the-rules-of-professional-conduct>.

²⁸ ABA Model Rule 1.6.

²⁹ *Supra*, note 4.

³⁰ *Id.*

³¹ *Id.*

³² *Variations of the ABA Model Rules of Professional Conduct*, ABA CPR Policy Implementation Committee (Sep. 29, 2017) https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_3.pdf.

³³ *Supra*, note 4.

³⁴ *Supra*, note 22.

³⁵ *Id.*

³⁶ *ABA Rule 8.4 Finding Few Followers, but Sparking Lots of Encouraging Discussion*, ABA (Aug. 3, 2018) https://www.americanbar.org/news/abanews/aba-news-archives/2018/08/aba_rule_8_4_finding/.

³⁷ ABA Model Rule 8.4(g).

³⁸ Jonathon Vanian, *Unmasking A.I.'s Bias Problem*, Fortune (June 25, 2018) <https://www.fortune.com/longform/ai-bias-problem/>.

³⁹ *Id.*

⁴⁰ Julia Angwin, et. al., *Machine Bias*, ProPublica (May 23, 2016) <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

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⁴⁴ *Id.*