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AI and Avoiding Ethical Jeopardy

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AI and Avoiding Ethical Jeopardy
By Adam S. Forman and Elizabeth Martin

Lawyers have incorporated technological capabilities into their legal practices for decades. Online legal research, e-discovery, and document management services have created ease for attorneys to complete tasks that were significantly more difficult to manage in a pre-digital world. While these technological developments have had little impact on attorneys' compliance with the ethical rules, using artificial intelligence ("AI") in the practice could change that.

In the early years of this century, AI was considered by most to be a theoretical form a technology, or in the preliminary stages of development at a few top technological research facilities. Yet in less than a decade AI transitioned from an experimental coding project in a college computer lab to thousands of programs used by consumers and businesses on a daily basis.

AI developers and service providers have particularly identified the legal field as an industry that could benefit from AI capabilities. From intelligent document review and predictive outcome analysis to assisted legal research and predicting witnesses' truthfulness using facial recognition, AI could greatly assist an attorney's practice and success rate.

But lawyers must also be aware of the potential ethical risks of utilizing AI in their practices, particularly where they implicate an attorney's professional responsibilities and ethical duties. To use AI technology properly, lawyers must understand how their ethical duties may intersect with AI usage, and the required steps to practice law in accordance with the rules.

A. What is AI?

Defining AI is actually tricky. With ongoing development and research of AI, both in the theoretical and practical spaces, there is no universally accepted definition and theorists disagree on the best one.¹ Under a proposed federal law, AI would be defined as "systems that think and act like humans or that are capable of unsupervised learning."² Encyclopedia Britannica defines AI as "the ability of a digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings" and notes that the term is frequently applied "to the project of developing systems endowed with the intellectual processes characteristic of humans, such as the

¹ See Chris Chambers Goodman, *AI/ESQ: Impacts of Artificial Intelligence in Lawyer-Client Relationships*, 72 OKLA. L. REV. 149, 150-151 (2019).

² Tom Krazit, *Updated: Washington's Sen. Cantwell Prepping Bill Calling for AI Committee*, GEEKWIRE (July 10, 2017, 9:51 AM), <https://www.geekwire.com/2017/washingtons-sen-cantwell-reportedly-prepping-bill-calling-ai-committee/>.

ability to reason, discover meaning, generalize, or learn from past experience.”³ Thomson Reuters describes AI, cognitive computing, and machine learning as “generally interchangeable terms that all refer to how computers learn from data and adapt with experience to perform tasks.”⁴

B. Using AI in the Legal Field

Some AI technology products are currently available to lawyers as tools to improve their legal practice. Below is a non-exhaustive list of some of the more common uses.

1. *Legal Research*

Intelligent legal research is unsurprisingly one of the most common attorney uses of AI. Intelligent search engines can learn and predict, based on a user’s current search terms, which other legal sources would be relevant, and make suggestions based on those predictions. One particularly advanced AI research engine, ROSS, built on IBM’s Watson platform, is said to be able to understand an entire legal question and perform the research necessary to derive an answer.⁵

2. *Document Review and Electronic Discovery*

AI technology seeks to improve the e-discovery process of reviewing thousands of pages of documents using predictive coding, among other methods, to review and classify documents as relevant or irrelevant to the user’s specified criteria. Such AI programs can prioritize documents by relevancy and flag documents for privilege, personally identifiable information, or even reputationally damaging information.⁶

3. *Predicted Litigation Outcomes*

Developers have created AI algorithms that gather case outcome data from rulings, jury verdicts, dismissals, and settlements, and use that data to predict the likely outcome of a pending case based on the facts, procedural history, jurisdiction, etc. AI litigation prediction tool Lex Machina, created by Lexis Nexis, can review millions of pages of publicly available court records and extract information on the parties, attorneys, law firms, judges, subject matter, rulings, outcomes, damage awards, and settlement data.⁷ Lex Machina then applies the extracted data to create outcome predictions and litigation strategies for the user’s current case.

³ B.J. Copeland, *Artificial Intelligence*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/technology/artificial-intelligence> (last visited Oct. 20, 2020).

⁴ *Ready Or Not: Artificial Intelligence And Corporate Legal Departments*, THOMSON REUTERS (2017), https://static.legalsolutions.thomsonreuters.com/static/pdf/S045344_final.pdf.

⁵ Katherine Medianik, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1497, 1499 n.6 (2018) (“The following is an example of a “Boolean” search term-and-connector that is required on research engines such as Lexis, Westlaw, and Bloomberg: ‘judge court /s discret! authori! /s reduc! lessen! /s sentence judgment.’ ROSS, on the other hand, will understand the following natural language search question: ‘Does a judge have the authority to reduce a sentence?’”).

⁶ Brett Tarr, *Transforming Responsive And Privilege Reviews With AI*, TODAY’S GENERAL COUNSEL (March 14, 2019), https://issuu.com/todaysgc/docs/tgc_win19_issuu/62?e=33025304/66517001.

⁷ *How it Works*, LEX MACHINA, <https://lexmachina.com/how-it-works/> (last visited Oct. 22, 2020).

4. *Due Diligence and Contract Compilation*

Similar to the technology of e-discovery platforms, AI due diligence technology offers lawyers an electronic review of documents by searching, highlighting, and extracting relevant information for further analysis.⁸ Certain AI tools have the capability to review agreements by the thousands and extract information relating to the most common terms and other provisional standards in such agreements.⁹ Some of these contract review tools even have additional AI-based software that uses the information it gathered in its review to draft a new form of contract for the user.¹⁰

C. Ethical Rules Potentially Implicated by an Attorney’s Usage of AI

Attorneys are required to practice law in accordance with the ethical rules set forth by their state’s respective bar association. Most states’ ethical rules are modeled on the American Bar Association’s (“ABA”) Model Rules of Professional Conduct (“Model Rules”). The following are some of the Model Rules which AI technology may affect.

1. *Rule 1.1 – Competence*

Pursuant to Model Rule 1.1, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹¹ The ABA has noted that a lawyer’s duty of competence under Rule 1.1 includes the requirement that lawyers must keep abreast of developments with relevant technology (including the benefits and risks associated with its use).¹² While Rule 1.1 does not require attorneys to use AI technology, it is reasonable to conclude that lawyers should at least know what AI technologies are available to them as those capabilities expand further into the legal field.¹³

Furthermore, a lawyer’s understanding of the risks and benefits associated with its AI technology must also include an understanding of “capabilities and limitations of the tool.”¹⁴ Thus, a lawyer’s duty of competency under Rule 1.1 includes an expectation that any lawyer who uses AI technology will understand the basics of how the technology operates and yields results.

2. *Rule 1.4 – Consent*

⁸ Daniel Faggella, *AI in Law and Legal Practice – A Comprehensive View of 35 Current Applications*, EMERJ (last updated Mar. 14, 2020), <https://emerj.com/ai-sector-overviews/ai-in-law-legal-practice-current-applications/>.

⁹ Beverly Rich, *How AI Is Changing Contracts*, HARVARD BUS. REV. (Feb. 12, 2018), available at <https://hbr.org/2018/02/how-ai-is-changing-contracts>.

¹⁰ Faggella, *supra* note 8.

¹¹ MODEL RULES OF PROF’L CONDUCT R. 1.1 (AM. BAR ASS’N 2014).

¹² *Id.* at Comment 8.

¹³ Faggella, *supra* note 8.

¹⁴ David Lat, *The Ethical Implications of Artificial Intelligence*, ABOVE THE LAW: LAW2020, <https://abovethelaw.com/law2020/the-ethical-implications-of-artificial-intelligence/>.

Lawyers have a duty to communicate with their clients and keep them reasonably informed.¹⁵ Model Rule 1.4(a)(2) further elaborates that a lawyer must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”¹⁶ This rule encompasses the notion that lawyers should discuss with their clients the technological services they intend to use in their representation, which would include the use of AI services or tools.

While not all instances of using AI may require a client’s consent, lawyers should obtain a client’s informed consent if using an AI tool will significantly increase the client’s costs, or usage (or non-usage) of the AI tool will materially alter the attorney’s proposed legal strategy. Furthermore, if an AI tool could benefit a client but the lawyer nevertheless decides not to use it, such a decision may need to be communicated.

3. *Rule 1.5 – Reasonable Fees*

Model Rule 1.5 requires an attorney’s fees to be reasonable.¹⁷ As more legal research companies begin to offer AI services that improve a lawyer’s efficiency in researching and reviewing case citations, the question of whether a lawyer chooses to use such services could implicate Rule 1.5. An attorney’s decision to *not* use AI technology that could significantly reduce the client’s costs could constitute an “unreasonable fee” under Model Rule 1.5.¹⁸

4. *Rule 1.6 – Confidentiality*

Lawyers owe a general duty of confidentiality to their clients pursuant to Model Rule 1.6, which states a lawyer must “not reveal information relating to the representation of a client unless the client gives informed consent.”¹⁹ Due to the nature of many legal AI services—such as due diligence / document review software or e-discovery review / predictive coding software—an attorney may need to share confidential client information in order to use such service. To comply with Rule 1.6, a lawyer must obtain the client’s informed consent *prior* to providing any of the client’s confidential information to an AI service provider.²⁰ A lawyer should inform the client of the risks of using the AI technology, what information the AI service provider will have access to and what safeguards the provider has in place to protect the client’s information. Most importantly an attorney should not use any AI technology unless sure that the client’s confidential information will be secure.

The duty to protect a client’s confidential information extends into situations where a data breach has occurred. Lawyers and law firms could be held responsible if their client’s confidential information is leaked from an AI-related cyber breach, even if the breach occurred with a third-

¹⁵ MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(2) (AM. BAR ASS’N 2014).

¹⁶ *Id.*

¹⁷ MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (AM. BAR ASS’N 2014) (“A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.”).

¹⁸ See Taylor B. Schaefer, *The Ethical Implications of Artificial Intelligence in the Law*, 55 GONZ. L. REV. 221, 228 (2020) (“[T]he failure to use AI software that may cut down on costs to a consumer may potentially be argued as a form of overbilling leading to malpractice.”).

¹⁹ MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (AM. BAR ASS’N 2014).

²⁰ *Id.*

party AI service provider.²¹ A lawyer must therefore ensure that the AI service provider is taking steps to prevent cyber-attacks and has policies in place to mitigate damage in the event a cyber-attack occurs.

5. *Rule 3.3 – Candor*

Model Rule 3.3(a)(3) provides that a lawyer shall not knowingly “offer evidence that the lawyer knows to be false” and “[i]f a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”²² One area where AI could cause an upsurge in the submission of fraudulent evidence is in the increasing development of “deepfake” technology. Deepfakes are synthetic media in which a person in an existing video or image is replaced with someone else’s likeness.²³ While faking content is not new, deepfakes are derived from AI and machine learning to manipulate or generate visual and audio content with a high potential to deceive.²⁴ From changing the face of a person in a video to that of another person, to changing the audio and visuals of a person in a video to alter what they appear to be saying, deepfake technology has the ability to create life-like video content of events that never occurred.

In today’s world, where audio, video, picture, and text files can be so easily manipulated and altered, an attorney needs to be particularly vigilant to make sure that he or she is not relying on altered or fraudulent evidence to support his or her claim or defense.

6. *Rules 5.1 – 5.3 – Supervision*

Lawyers have an ethical obligation under Model Rules 5.1 and 5.3 to supervise lawyers and non-lawyers who assist in the provision of legal services and ensure that their conduct is in compliance with the Rules of Professional Conduct.²⁵ The title of Model Rule 5.3 was even revised in 2012 from “Responsibilities Regarding Non-lawyer Assistants” to “Responsibilities Regarding Non-lawyer Assistance” in order to clarify that the scope of Rule 5.3 extends to any kind of non-lawyer assistance—human or not.²⁶ Rules 5.1 and 5.3 impose a responsibility on attorneys to “supervise” the work produced by the AI technology and understand the technology and methodology of the AI tool well enough to ensure the AI tool complies with the attorney’s ethical rules and responsibilities. Attorneys should consider hiring experts to vet and explain the AI technology before implementing it.

²¹ See Am. Bar Ass’n Comm. on Ethics & Prof’l Responsibility, Formal Op. 483 (2018) (“Lawyers’ Obligations After an Electronic Data Breach or Cyberattack”).

²² MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (AM. BAR ASS’N 2014).

²³ “Deepfake” Definition, VIRTUAL HUMANS, <https://www.virtualhumans.org/term/deepfake> (last visited Oct. 24, 2020).

²⁴ Jan Kietzmann, Linda W. Lee, Ian P. McCarthy, Tim C. Kietzmann, *Deepfakes: Trick or Treat?*, 63 BUSINESS HORIZONS 135, 136 (2020).

²⁵ See MODEL RULES OF PROF’L CONDUCT R. 5.1 (AM. BAR ASS’N 2014); *Id.* at R. 5.3.

²⁶ *Id.* at R. 5.3.

D. Final Thoughts

AI tools will inevitably become a normal part of every attorney's practice. But until these tools become the norm, law firms and lawyers must keep an eye on the ethical rules to ensure their use of this new technology does not land them in hot water.