Ethics and AI

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What comes to your mind when you hear the phrase, "Artificial Intelligence?"

Some predict AI will become a potential threat to humanity and imagine a future dystopian world with dangerous robots, like Skynet, as dramatized in the "Terminator" films. Some have a more utopian outlook. They believe AI may solve major global issues like disease, poverty, and climate change. As AI becomes more prevalent, its influence will be much harder to ignore, including effects on the legal industry.

While the overall moral repercussions of advanced AI are outside the scope of this article, we believe that its growing role within the legal profession is inevitable. If you have not started thinking about the ethical use of AI in your legal practice, now is the time.

Because of the power and transformative nature of advanced AI, it is important to evaluate ethical considerations associated with its use to maintain the integrity of the legal profession and the public's trust in the judicial system. Our aim in this article is to provide guidance on those ethical considerations. By contemplating these ethics in advance, the legal community can thoughtfully adopt AI in ways that uphold our legal community's commitment to the ethical practice of law.

Why all the sudden talk about AI? Hasn't AI been around for decades? Well, yes it has. Recall the chess-playing computers who defeated their human grandmaster counterparts in the 90s? Then there was Watson, the "Jeopardy-" playing AI that won a million dollars by defeating two champion human contestants in 2011. These game-playing robots were a type of AI, programmed by engineers to only accomplish specific applications or tasks.

Today's AI is different. Sophisticated natural language processing algorithms, called large language models (LLMs,) are trained on vast amounts of data, which allows them to generate surprisingly human-like writing and dialogue. These recent advancements have allowed technology companies to develop remarkably capable text-generation agents, including chatbots, virtual assistants, and other AI systems. One of the most popular LLMs is ChatGPT, created by the company OpenAI.

To understand the transformative nature of LLMs, it is necessary to understand what they do. In basic terms,

an LLM is a type of AI that has been trained on a large collection of text. This text may come from the internet or a tailored set of text and data for a specific purpose. The LLM algorithm processes all this text, called training, and along the way, it learns about words, phrases, and how the words relate to one another to make sentences. The algorithm doesn't understand the text as a human would, but it learns patterns, like how sentences are structured, and which words often come together. The algorithm develops the probabilities that certain words will be sequenced in a particular order. After learning these relationships, it can "communicate" based on prompts given to it by its human users. For example, when someone asks ChatGPT a question or gives it a prompt, it uses what it learned to generate a response. If you ask, "What's the capital of France?" The algorithm remembers from the patterns it learned that "Paris" often comes after this question, so it will reply, "The capital of France is Paris."

What makes LLMs so effective for legal work is that they can synthesize and parse through large amounts of information and text. In seconds or minutes, LLMs digest case law, statutes, contract provisions, deposition transcripts, medical records, and documentary evidence, and it generates lawyer-like writing in the form of medical and legal summaries, or contracts provisions. Some LLMs can even formulate legal arguments. Legal technologists predict that ChatGPT and other LLMs will allow lawyers to save time on tedious tasks, while increasing their productivity with higher quality work.

In April, Stanford Center for Legal Informatics and legal technology company, Casetext, announced what they claim to be a watershed moment for AI and the legal industry. Researchers deployed GPT-4, the latest generation LLM produced by OpenAI, to sit for and take the Uniform Bar Exam. GPT-4 not only passed the exam, it smoked it, scoring in the 90th percentile of human test takers on the multiple-choice and written portions.

The New York Times later proclaimed the following in an article titled "A.I. Is Coming for Lawyers, Again:"

Law is seen as the lucrative profession perhaps most at risk from the recent advances in A.I. because lawyers are essentially word merchants. And the new technology can recognize words and generate text in an instant. It seems ready and able to perform tasks that are the bread and butter of lawyers.[1]

Some may dismiss this article and claim that AI is a fleeting trend or niche concept unlikely to gain traction in the legal profession. Adoption by major law firms suggests otherwise. Firms like Latham & Watkins, Baker McKenzie, DLA Piper, Clifford Chance, Allen & Overy, and Norton Rose Fulbright have revealed plans, or are already integrating, AI tools into their practices.[2]

The AI revolution is already happening in many industries, including in the legal field. But lawyers must balance that revolution with existing ethical duties. This technology is unlike any other, and that balance may be tough for those who have not taken the time to educate themselves on AI. In fact, some lawyers recently made headlines for their use of AI in legal briefs—and not the good kind of headlines.

These lawyers used ChatGPT to conduct legal research, and ChatGPT fabricated, or hallucinated, decisions that the lawyers then cited in their filings. The headlines would have you believe the lawyers were sanctioned for their use of ChatGPT, but headlines do not tell the whole story.

In a case in federal court in New York, *Mata v. Avianca, Inc.*, lawyers for the plaintiff submitted an opposition to a motion to dismiss. The defendants filed a reply and noted that they could not find several of the decisions cited by the plaintiff. The court ordered the plaintiff lawyers to submit an affidavit with copies of those decisions.

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The lawyers submitted an affidavit with what appeared to be copies or excerpts of the decisions. The lawyers claimed that the attached decisions might not be inclusive and contained what was made available by online database; they did not identify the online database.

The decisions cited in the opposition and attached to the affidavit were fabricated by ChatGPT. After the lawyer was ordered to submit the affidavit, he returned to ChatGPT and asked it to provide the text of the decisions. At some point, the lawyer also asked ChatGPT, "is [this case] a real case," and "are the other cases you provided fake."

The court ultimately sanctioned the lawyer, but not for using AI for legal research. In fact, the sanctions order opens by noting that "technological advancements are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance."

Rather, the court found that the lawyers advocated for fake cases and legal arguments even after being informed that the citations were non-existent. The court sanctioned the lawyers under Rule 11, finding they acted in bad faith.[3]

During the pendency of the New York case, a few judges across the country issued standing orders regarding the use of AI. A judge in Texas now requires lawyers to certify that they did not use AI to draft their filings without having a human review the work. A U.S. Court of International Trade judge requires lawyers to disclose their use of AI tools in creating legal documents. The judge requires lawyers to file a notice disclosing the programs used and the portions of text drafted by AI. The judge also requires certification that the use of AI has not resulted in disclosure of any confidential information to unauthorized parties.[4]

Some jurisdictions have started the process to adopt rules pertaining to the use of AI. Regulations are on the way. Earlier this year, the California Board of

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Trustees formally asked the Committee on Professional Responsibility and Conduct to work on guidance for using AI and to make recommendations for regulating its use in the legal profession. The committee's findings are due to be released this month.[5] Recently, the New York State Bar Association formed a task force to explore the benefits and risks of artificial intelligence. The Texas State Bar also announced a workgroup to examine ethical issues around AI and provide policy recommendations for the state bar.[6] In 2020, the American Bar Association already urged practitioners to address the emerging ethical and legal issues related to the use of AI in the legal industry.[7]

Our position is that Nevada's Rules of Professional Conduct (NRPC) provide a robust ethical framework covering competence, diligence, confidentiality, and truthfulness that offers guidance for the responsible use of AI by lawyers. Additional rules or regulations are unnecessary. The following rules can be applied to the ethical use of AI.

- **NRPC 1.1** requires lawyers to provide competent representation. This means having the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Competently using AI requires understanding the capabilities and limitations of the technology. The American Bar Association says competence includes keeping abreast of the "benefits and risks associated with relevant technology." Under this rule, lawyers should be familiar with generative AI and the risks of hallucination.

- **NRPC 1.3** mandates lawyers act with reasonable diligence and promptness. While AI can enhance speed and efficiency, lawyers remain responsible for ensuring adequate time and attention is devoted to matters. AI should not be used as a shortcut that compromises thorough, careful work. However, if AI can be used to improve efficiency and save clients' time and money, it should be carefully considered and implemented.

- **NRPC 1.6** requires lawyers to reasonably safeguard confidential information of clients. Using AI may implicate this duty if confidential client data is used to train models. Many AI programs use information submitted by users to further train the language model. Lawyers must be careful not to submit confidential information.

- **NRPCs 3.3, 3.4, and 4.1** require candor to the tribunal, fairness to opposing parties and counsel, and prohibit false statements of material fact or law to third persons. These rules require lawyers to submit legal filings truthful in the facts and the law. Lawyers must ensure their legal research is accurate and truthful, no matter how that research is conducted, whether by a human legal researcher or by an AI legal researcher.

- **NRPC 5.3** governs nonlawyer assistants. With proper supervision, nonlawyers can assist lawyers in ethically permissible ways. The same principle applies to AI as a form of nonlawyer assistant. Appropriate supervision is required, and the lawyer remains accountable for the AI's work product.

Finally, as the lawyers in *Avianca* learned, Rule 11 has the teeth to ensure lawyers review what they submit to the court. By signing pleadings, lawyers certify that the filing is not being presented for improper use, does not contain frivolous arguments, and the factual contentions or denials have evidentiary support.

As AI capabilities improve, lawyers have an obligation to thoughtfully integrate these emerging technologies into their practices. By staying vigilant of risks and applying existing ethical standards, the legal community can adopt AI responsibly. With responsible and ethical use, we believe that AI can augment lawyers' abilities to efficiently serve clients and society.

ENDNOTES:

1. Steve Lohr, *A.I. Is Coming for Lawyers, Again, N.Y. Times,* Apr. 10, 2023, https://www.nytimes.com/2023/04/10/technology/ai-is-coming-for-lawyers-again.html?auth=login-google1tap&login=google1tap

2. Sara Merken, *Legal AI Race Draws More Investors as Law Firms Legal Up*, Reuters, Apr. 26, 2023, https://www.reuters.com/legal/legal-ai-race-draws-more-investors-law-firms-line-up-2023-04-26/

3. *Mata v. Avianca, Inc.*, 22-cv-1461 (June 22, 2023).

4. *Id.*

5. Cheryl Miller, *California State Bar to Craft Guidance on AI in the Legal Profession*, May 22, 2023, https://www.law.com/therecorder/2023/05/22/california-state-bar-to-craft-guidance-on-ai-in-the-legal-profession/?slreturn=20230716135455

6. Nicole Black, *Never Fear, AI Guidance for Lawyers is Near,* https://nydailyrecord.com/2023/08/11/never-fear-ai-guidance-for-lawyers-is-near/

7. ABA H.D. Resol., Aug. 12-13, 2019, https://www.americanbar.org/content/dam/aba/administrative/news/2023/mym-res/604.pdf

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