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Ethical Considerations in the Use of Artificial Intelligence in the Practice of Law

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The legal profession is experiencing an influx of artificial intelligence tools meant to make the practice of law more efficient. While artificial intelligence can perform a variety of legal tasks efficiently and often accurately, it has a significant shortcoming: artificial intelligence does not *think*. It cannot sense the ways that a certain piece of evidence might play to the sympathies of certain jurors. It cannot implore a judge to depart from the guidelines for a client with a unique set of circumstances. It cannot understand the complexities of human relationships in order to predict and avoid challenges to an estate plan or a custody order. Artificial intelligence has neither ethics nor empathy. It is unregulated, unexplored, and unbound by the duties lawyers owe to their clients, to the court, and to the profession.

Nevertheless, artificial intelligence has arrived to the practice of law, and it is here to stay. As lawyers, we have an ethical and professional duty to develop competence in the technologies that are used in our practice. (*See* Comment [1] to Rule 1.1, "[t]he duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.") When it comes to AI, we also have competing duties: a duty to supervise the legal work we produce; a duty to prepare our legal work with competence and within the ethical rules and boundaries of our profession; a duty to maintain the security of our clients' information; and a duty to operate in an environment free of bias and conflicts of interest.

While perhaps making the *work* of lawyering easier or more efficient, AI can complicate lawyers' ability to comply with ethical and professional responsibilities. This article discusses the duties implicated by the use of AI for legal analysis and drafting and offers some suggestions for implementing AI tools while staying within the lawyers' code of ethics.

Duties of Competence and Supervision

Of paramount importance to the practice of law is the duty to perform with competence. Rule 1.1 provides that a lawyer shall not intentionally, recklessly, repeatedly, or with gross negligence, fail to provide legal services with competence. (Rules Prof. Conduct, Rule 1.1.) The rule defines "competence" to mean the application of (i) the learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of the lawyer's legal services. (*Id*.)

Choosing to use AI in the practice of law places additional burdens on lawyers to ensure work is performed with competence. Even with safeguards in place, AI-generated legal work may be incorrect, incomplete, or lacking in thoughtful analysis. Use of presently-available AI-generated content without attorney supervision, review, and revision is likely to fall below all applicable standards of care.

First, we do not yet know exactly *how* AI works. When we ask ChatGPT a legal question, for example, we do not know whether it has evaluated all the relevant case law and selected the controlling results, or whether it has chosen to discount law that might be relevant because it is infrequently cited. Another significant issue with the use of AI in legal analysis and drafting is "hallucinations." "Hallucination in AI refers to the generation of outputs that may sound plausible but are either factually incorrect or unrelated to the given context. These outputs often emerge from the AI model's inherent biases, lack of real-world understanding, or training data limitations."[1] Indeed, ChatGPT has been known to simply make up facts, such as

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[1] Barnard Marr, "ChatGPT: What Are Hallucinations And Why Are They A Problem For AI Systems" https://bernard-marr.com/chatgpt-what-are-hallucinations-and-why-are-they-a-problem-for-ai-systems/22 March 2023

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polling data, which it then relies upon to generate content.[2]

While direct supervision and human interaction with AI can ameliorate some of these issues, there remains significant risk in relying on AI-generated legal work. As noted in the technical paper for GPT-4, the model "still is not fully reliable…Great care should be taken when using language model outputs, particularly in high-stakes contexts, with the exact protocol (such as human review, grounding with additional context, or avoiding high-stakes uses altogether) matching the needs of specific applications."[3] In short: lawyers would be wise to do their own fact-checking.

Relatedly, misuse of artificial intelligence, or, more nefariously, mis-*training* of AI, should be at the forefront of the collective consciousness when engaging with AI tools. As the creators of OpenAI disclosed earlier this year, OpenAI has "detected and stopped hundreds of actors attempting to misuse GPT-3 for a much wider range of purposes than producing disinformation for influence operations, including in ways that we either didn't anticipate or which we anticipated but didn't expect to be so prevalent…"[4] As misinformation and disinformation proliferate, it may become more challenging to differentiate misinformation and disinformation from accurate information in AI-generated legal work.

On the other hand, the duty of competence includes a duty to become competent in the technologies commonly used in the practice of law. The time is quickly approaching—if not already here—where litigators will have to be competent users of e-discovery artificial intelligence tools at a minimum. In the same way that lawyers who were previously accustomed to performing case research in official reporters gradually learned to use Lexis and Westlaw, lawyers accustomed to sorting through banker's boxes of documents are having to acknowledge that AI is vastly more efficient at document review and selection than a team of attorneys. Lawyers who cannot or will not learn to use artificial intelligence for e-discovery, legal research, and similar tasks will be left behind.

Practicing with competence requires supervision of AI-generated legal work. Performing keyword searches across vast repositories of documents for information that might be relevant, but is not privileged, requires understanding the language of machine-learned searching. Attorneys relying on these platforms must take reasonable steps to ensure that AI-based document reviews do not result in accidental production of privileged material. Attorneys must be well-trained on first- and second-level review of AI-assisted document productions, which fall under the umbrella of "reasonable steps" attorneys must take to avoid inadvertent disclosure. (Fed. R. of Evid., Rule 502(b); *Regents of Univ. of Cal. v. Superior Court*, 165 Cal. App. 4th 672, 681-82 (2008).) Attorneys must also be familiar with clawback procedures for inadvertent production of privileged material.

In summary, the duty of competence requires lawyers to develop facility with the technological tools commonly used in the practice of law. Equally, the duty of competence requires lawyers to closely supervise, review, and ensure the accuracy of any work generated by artificial intelligence.

Duty to Maintain Client Confidentiality

ChatGPT is based on a language model that is trained on user-inputted content. That means ChatGPT stores all content inputted into the model, analyzes it, and 'learns' the information for future use. ChatGPT acknowledges its collection and storage of user-inputted content: "When you use our Services, we may collect Personal Information that is included in the input, file uploads, or feedback that you provide to our Services."[5] Such "input" could easily include sensitive client information, legal strategies, or privileged communications. There is *no safeguard at all* to prevent ChatGPT from providing content provided by one user directly to another user in response to a question.

This poses significant risks in light of Rule 1.6(a), which states "A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent," subject to certain exceptions. The lawyer's duty to maintain client confidences and safeguard the confidentiality of client information extends

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[2] Amelia Thompson-DeVeaux and Curtis Yee, ChatGPT Thinks Americans Are Excited About AI. Most Are Not., (February 24, 2023, 6:00 AM EST), https://fivethirtyeight.com/features/chatgpt-thinks-americans-are-excited-about-ai-most-are-not/.

[3] https://cdn.openai.com/papers/gpt-4.pdf

[4] https://openai.com/research/language-model-safety-and-misuse#fn-D

[5] https://openai.com/policies/privacy-policy

to information that is processed or stored electronically. (Cal. State Bar Formal Opn. No. 2015-193 [Lawyers must understand the "benefits and risks associated with relevant technology" before engaging with that technology].) One of the obvious risks with AI is that it operates by storing—and ultimately exposing—the information it receives from users.

Duty to Avoid Bias and Discrimination

Bias and discrimination are perhaps the most insidious concern with the growing use of AI models for the practice of law. The California Rules of Professional Conduct prohibit unlawful discrimination in the course of representing a client and in the operation of a law firm. (Rules of Prof. Conduct, Rule 8.4, 1(a), (b).) Accordingly, attorneys must consider the extent to which artificial intelligence technologies implicitly incorporate the biases of their human trainers.

According to OpenAI, which released ChatGPT earlier this year, "We trained an initial model using supervised fine-tuning: human AI trainers provided conversations in which they played both sides—the user and an AI assistant."[6] The problem is that *people* teach the machine, and people are full of explicit and implicit biases. Human trainers of the language model may inadvertently teach the model to distrust information that does not comport with the person's viewpoint. This leads to a scenario where true information is disregarded as disinformation and the falsehood is perpetuated and reinforced through subsequent engagements with the language model.

Just as the squeaky wheel gets the grease, so too the loudest and most prolific of content contributors see their positions reflected in the content generated by AI. Lawyers must use great caution in relying upon AI tools in the practice of law to ensure that no explicit or implicit bias or discrimination is reflected in the content they solicit.

Conclusion

As the use of AI tools becomes more prevalent in the practice of law, attorneys must use caution to ensure that any use of AI tools is done with care, supervision, competence, and with an eye toward maintaining their clients' confidential information in a safe and private manner. Expect lawyer's professional liability insurance carriers to ask whether and how their insureds employ AI tools and what safeguards are in place to ensure the competence of the attorneys relying on these tools. Artificial intelligence is an exciting tool that has the potential to make the practice of law more efficient, but attorneys must carefully weigh the risks of its use.

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[6] https://openai.com/blog/chatgpt

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