TrialBarNews

IN THIS ISSUE

Ethical Implications in the Use of Artificial Intelligence in the Law

Everywhere you look, Artificial Intelligence (AI) is in the news, whether it's about science, entertainment, business, or law. AI is exciting and evolving. And for lawyers, AI presents new risks and opportunities, but also raises concerns about professional responsibility lawyers should keep in mind.

What is AI?

Richard Bellman—a renowned mathematician and AI pioneer—defines AI as "the automation of activities associated with human thinking, which include decision making, problem solving, and learning." (Bellman, *Artificial Intelligence: Can Computers Think?* (1978), cited in, Bowser, et al. *Artificial Intelligence: A Policy-Oriented Introduction* (Nov. 2017), The Wilson Center Briefs.) The federal government defines AI as an "artificial system ... designed to think or act like a human," defined by an ability to "perform tasks under varying and unpredictable circumstances without significant human oversight," "learn from experience and improve performance when exposed to data sets," or "achieve goals using perception, planning, reasoning, learning, communicating, decision-making, and acting." In other words, AI is software that programs machines to think and act like humans.

Arguably, the first AI was a 1956 computer program ("Logic Theorist"), that tried to mimic human problem-solving skills. AI has come a long way since: Today, it can now perform many tasks that, once, only humans could do, and is used in everyday life. Indeed, AI is used in facial recognition, translation software, predictive typing in your text and email, and medical diagnoses.

But the AI technology that has been making the news lately is so-called "Generative Artificial Intelligence" or "GAI." GAI describes algorithms that are used to create content, such as pictures, video, computer code, music (including voices), images, paintings, and text (such as newspaper articles and legal briefs). Even today, AI can generate just about anything: For example, you can instruct the AI program to create images of "a lawyer and cockatoos" and it will oblige in seconds with several options:

And AI is only getting better: The latest iterations of AI software have been programmed to learn from experience, known as "deep learning." The difference is that the computers go through the trial and error at a much higher rate than humans. Thus, something that might take humans years to learn might take mere seconds for a computer. To the surprise of researchers (but not science fiction authors), the machines have even started learning things outside the coding.

Many people express fears about AI, ranging from AI becoming our overlords, to AI replacing workers.

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The first fear has been a science-fiction staple for over 100 years, from E.M. Forster's *The Machine Stops* from 1909, and Isaac Asimov's *Robot* series in the 1950s, to the *Matrix* franchise in the 2000s. But those fears may not be fanciful: Many leading AI innovators—including Google's CEO Sundar Pichai, Geoffrey Hinton (widely regarded as the "godfather" of AI), and Elon Musk—warn that AI may be dangerous. And a survey found that 42% of CEOs believe AI could destroy humanity in 5 to 10 years. (Egan, *Exclusive: 42% of CEOs say AI could destroy humanity in five to ten years* (June 14, 2023), CNN Business <https://www.cnn.com/2023/06/14/business/artificial-intelligence-ceos-warning/index.html> [as of Sept. 1, 2023].)

The second fear—replacing jobs—has already been realized and is accelerating: From automation in factories, to writing articles and websites, AI learns to do new things that previously only humans could do. Estimates show that, by 2030, nearly 40 million Americans could lose their jobs due to a shift toward automation. (Finances Online <https://financesonline.com/jobs-lost-to-automation-statistics/> [as of Sept. 1, 2023].)

AI Implications for Lawyers

Naturally, many legal professionals wonder if AI will replace them. After all, they use words to convey ideas, often in written documents that GAI might create. And to some, the law might look like "a series of algorithms," nothing more than "[c]odified instructions proscribing dos and don'ts," or "ifs and thens," ideal fodder for a computer programmer. (Sahota, *Will AI Put Lawyers out of Business* (Feb. 9, 2019), Forbes, <https://www.forbes.com/sites/cognitiveworld/2019/02/09/will-a-i-put-lawyers-out-of-business/?sh=33dbaf9731f0> [as of Sept. 1, 2023].) Several studies have found that AI could automate 44% of legal work. (Joseph Briggs, et al., Goldman Sachs Economics Research, The Potentially Large Effects of Artificial Intelligence on Economic Growth, (March 25, 2023)

But legal professionals should not start looking for new work just yet. Many predicted that the personal computer would replace attorneys, and that Microsoft Word would replace paralegals. Neither proved true. And "[t]he legal system ... is not as straightforward as coding." (Sahota, *supra*.) So while there will certainly be shifts in the practice of law, there is no indication any significant number of law jobs will be lost in the foreseeable future.

But AI advancements in the law are not all bad. AI technology that performs tasks that only lawyers could otherwise do may improve access to justice for laypersons who cannot afford counsel.

And AI can assist lawyers in many ways. Traditionally, there were six ways that AI was used in law offices: (1) e-discovery, (2) expertise automation, (3) legal research, (4) document management, (5) contract and litigation document analytics and generation, and (6) predictive analytics.

But AI can now do many other tasks for lawyers' tasks. For example, writing blogs, emails, or preparing legal briefs, and creating graphics for marketing or demonstratives with DALL-E. It is easy to envision AI being used to conduct artificial focus groups, analyze responses from human focus groups, select the best experts for a case, select themes in cases, spot witnesses who are lying, or come up with questions during depositions,

As a new and powerful technology, AI presents a variety of issues regarding professional responsibility. In a meeting of the State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, when a discussion of ethics of AI came up, some in attendance doubted any attorneys would blindly rely on AI to practice law.

But in a case in federal court in New York, a plaintiff's attorney filed a brief written by ChatGPT replete with lengthy quotes from 12 seemingly published cases. But when the judge went to read the cases, none could be found. It turned ChatGPT made up the cases, the quotes, and even the citations. The lawyer who filed the brief confessed he did not know that the AI program could make up citations.

While any responsible attorney would have at least checked the citations, until this case hit the news, most attorneys probably did not know that fakery was part of the AI algorithms. But we do now.

And courts have responded. A federal judge in the Northern District of Texas issued an order entitled "Mandatory Certification Regarding Generative Artificial Intelligence." It requires attorneys to file that they either did not use AI or that any use of AI was checked by a human. In June 2023, the Court of International Trade issued an order requiring attorneys to provide "[a] disclosure notice that identifies the program used and the specific portions of text that have been so drafted," and "[a] certification that the use of such program has not resulted in the disclosure of any confidential or business proprietary information to any unauthorized party." Attorneys should be on the lookout for more of these certification requirements in the future.

In addition, there are several ethical duties of attorneys that should be considered when using AI.

Protecting Client Confidential Information. Lawyers are legally and ethically bound to protect their clients' confidential information. (Rules Prof. Conduct, rule 1.6; Bus. & Prof. Code, § 6068, subd. (e).) One method of using AI is to upload data from a case and to have it analyzed and reviewed. For example, facts can be found by searching for particular words used in emails or other documents. Anytime you have client information, you must make sure whoever has access to the information, including third party AI companies, must be bound by the attorney-client privilege and that their data is secure. (See, e.g., Cal. Com.

Prof. Resp. & Cond., Formal Opn. 2015-193 Ethical Duties Handling Stored Electronic Data; Cal. Com. Prof. Resp. & Cond. Formal Opn. 2020-203, Attorneys' Duties For Cyber-Security.)

Competence. California Rules of Professional Conduct rule 1.1, and the standards of care, require attorneys to act competently. This includes knowledge of technology, including its limitations. See CRPC 1.1, comment 1. It was predictable that as soon as the technology existed for researching and writing briefs, a lawyer would take what AI spit out and use it in a brief. And if it was not clear before, it should be abundantly clear that anything AI produces must be reviewed and checked by humans. But "competency" does not mean swearing off AI either. The standard of care does not -- yet -- require attorneys to use AI. But that is likely to change.

Duty to Supervise. California Rules of Professional Conduct rules 5.1 and 5.3 require attorneys to supervise lawyer and non-lawyer staff. Where employees, co-counsel, or others are using AI, the supervising attorney needs to know about and make certain that their supervisees are not violating any ethical rules in their use of AI.

Unconscionable Fees. Attorneys may not charge an unconscionable fee. (Rules Prof. Conduct, rule 1.6; Bus. & Prof. Code, § 6068, subd. (e).) If the use of AI can reduce attorney fees, for example, to save time, in research, brief writing, preparing answers to discovery, writing discovery, investigation, or brief writing, it might render an otherwise valid fee unconscionable. On the flip side, if AI can save time and money, it presents the question of whether the failure to use such tech-

nology makes the attorney's fee unconscionable.

Client Communication. Attorneys have ethical obligations to communicate with their clients, including to "reasonably consult with the client about the means by which to accomplish the client's objectives in the representation." (Rules Prof. Conduct, rule 1.4.) The question then arises, must the attorney consult with the client about the use or non-use of AI? For example; Must clients be informed their information will be uploaded for e-discovery or other purposes, or that an attorney is using AI to write briefs, do research, compile data, or other use on client's case? Currently, it is an open question. Lawyers may want to think proactively by disclosing their current or potential use of AI in the retainer agreement.

Bias/Discrimination. California Rules of Professional Conduct rule 8.41 prohibits discrimination and the notes to the rule comment that this includes "bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." Attorneys should be aware that the algorithms of the AI developers may have biases that may affect the output.

Aiding and Abetting the Unauthorized Practice of Law. A lawyer may not assist others in the unauthorized practice of law. (Rules Prof. Conduct, rule 5.5(a)(2)) Does developing AI software that helps other practice law violate this rule? For example, a company called "DoNotPay" claims to use artificial intelligence to help consumers "fight big corporations, protect your privacy, find hidden money, and beat bureacraucy [*sic*]." As part of their services, DoNotPay developed a way to fight traffic tickets: The user would wear headphones at traffic court proceedings, the AI software would monitor the proceedings in real-time, and then give the wearer ideal responses to the court's questions. Several state bar associations contacted the company and threatened to prosecute.

Conclusion

What AI can do now is nothing less than amazing. What AI will be able to do a year from now will be even more incredible. What AI will be able to do in five or 10 years is unimaginable. Smart legal professionals should start thinking seriously about ways to incorporate AI in their practice, while being mindful of the ethical implications of this exciting, evolving technology. **TBN**