

Artificial Intelligence: Unlimited Potential or Too Good to be True? Positives and Pitfalls for Lawyers

By Hon. Marie E. Lihotz, PJAD (Ret.)

Attorneys are valued for their knowledge and skills. We gather and process facts, analyze a client's legal rights and responsibilities, then relate those position in briefs, contracts, memoranda, and other writings. Recent articles suggest publicly accessible AI tools give anyone the ability to match and exceed some of these skills—and the machine does so quickly, efficiently, and expertly. Possible uses of AI grow exponentially every day. Most notably, Large Language Model (LLM) generative AI — at times referred to as chatbots — offers the production and processing of human-like textual responses for speeches or essays, or even imitation of art, music, drama, literature, actors or people.

Recently, ChatGPT-4 passed the Uniform Bar Exam in the 90th percentile, with a score of 297, when measured against the February test takers of the Illinois Bar Exam.¹ This “success” makes the use of generative AI both celebrated and alarming. Does that mean chatbots will soon fulfill legal needs and replace attorneys? Before any legal services are performed by a machine, considerations—predominately ethical ones—need to crystalize. This article will review those concerns.

Rules of Professional Conduct and AI

Any discussion on an attorney's use of technology must review the state Supreme Court's mandate requiring New Jersey lawyers to abide all duties and responsibilities imposed by the Rules of Professional Conduct when undertaking representation of a client.² Our Court recently released “Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers,” designed “to inform and assist lawyers in navigating their ethical responsibilities in light of the current and anticipated effects of AI — in particular generative AI — on legal practice.”³ The guidelines, issued by the Supreme Court Committee on Artificial Intelligence and the Courts (AI Committee), offer broad parameters to highlight some of the ethical areas impacted when using Generative AI. Globally, the AI Committee concluded, “the core ethical

responsibilities of lawyers, as outlined in the Rules of Professional Conduct (RPCs) are unchanged by the integration of AI in legal practice, as was true with the introduction of computers and the internet.”⁴

Federal, as well as many state governments, commenced regulatory analysis impacting lawyers.⁵ The New York Assembly introduced legislation to ban as inadmissible in criminal proceedings evidence created in whole or in part by AI, “unless the evidence is substantially supported by independent and admissible evidence and the proponent of the evidence establishes the reliability and accuracy of the specific use of the artificial intelligence in creating the evidence.”⁶ The New Jersey Senate introduced S. No. 3876, which concerns “regulation of automated systems and artificial intelligence used by State agencies.”⁷ The proposed bill establishes the New Jersey Artificial Intelligence Advisory Board, which shall be part of the Legislative Branch⁸ and creates an Artificial Intelligence Officer, in the Office of Information Technology. The AI Officer will lead the examination of uses of AI and regulate its use in wide-ranging areas, one of which is “legal services, including, but not limited to, private mediation or arbitration.”⁹

The Supreme Court's AI Committee warns: “As with any disruptive technology, a lack of careful engagement with AI could lead to ethical violations, underscoring the need for lawyers to adapt their practices mindfully and ethically in this evolving landscape.”¹⁰ Does that mean lawyers wait and do nothing? No, attorneys and judges cannot ignore AI's development. AI is “neither a fad nor an apocalypse, but a tool in its infancy—and one that could radically change how lawyers work and law firms make money.”¹¹ Although many questions arise and some definitive answers remain elusive, certain boundaries are becoming clearer.

Competence and Diligence

The first rule of professional responsibility directly imposes an obligation of competence in the handling

of matters entrusted to counsel.¹² This encompasses professional competence with technology. Just like other advances, such as cloud or edge file storage, electronic calendars, conflict check systems, digital court filings with hyperlinks, e-discovery, Zoom and other internet-based video-communication programs for hearings, depositions or other legal events, responsible legal professionals must take technology competence seriously, including understanding possible pitfalls when relying on output from Generative AI Large Language Models chatbots such as Microsoft OpenAI GPT, xAI's Grok, or Google DeepMind Gemini (formerly Bard).

The ABA's code of conduct, presented by The ABA Commission on Ethics 20/20, expounds on competence to require an attorney to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. ..."¹³ New Jersey limits lapses to "gross negligence" or a "pattern of negligence or neglect" when handling legal matters.¹⁴ Query: if the ordinary reasonable lawyer would use technology such as AI, does a lawyer's duty of care in representing a client fall below the requisite standard if AI use is omitted? AI is very new and its applications are still being reviewed and analyzed. However, our Supreme Court, although reviewing a different digital issue, advised: "Lawyers must educate themselves about the commonly used forms of social media The defense of ignorance will not be a safe haven."¹⁵

Another aspect of diligence requires attorneys to understand possible abuses of AI. Because AI allows manipulation of images, a lawyer's familiarity must understand deepfakes in photography, videos, or digitally altered documents. Deepfake detection methods lag behind the improvements in their creation. Attentiveness to the need to challenge admissibility if AI created evidence could become a focal point in litigation.

Equally implicated are professional standards directed to reasonable diligence and promptness,¹⁶ as well as the requirement mandating lawyers charge reasonable fees accounting for the time and labor involved.¹⁷ AI offers shortcuts to drafting documents, gathering and sorting information, possibly framing legal theories or arguments. It enables 'round the clock work without tiring. If properly used, AI increases productivity and aids workload management, freeing time to concentrate on more difficult file aspects. But lawyers cannot compromise speed for accuracy. Sometime soon, certain tasks may commonly be performed by machines, so

appropriate and accurate use must be mastered.

The AI Committee identifies circumstances necessitating an obligation to notify clients about the use of AI when handling their matters. Citing lawyers must "abide by a client's decisions concerning the scope and objectives of representation,"¹⁸ and requirements for client communication,¹⁹ the Committee reached the overarching conclusion: the Rules of Professional Conduct "do not impose an affirmative obligation on lawyers to tell clients every time that they use AI."²⁰ Nevertheless, if a client asks directly about the use of AI or "if the client cannot make an informed decision about the representation without knowing that the lawyer is using AI, then the lawyer has an obligation to inform the client of the lawyer's use of AI."²¹

Additionally, should an attorney advise a client when their matter may benefit from AI use, under counsel's supervision? Knowing lawyers must charge "reasonable fees," is it necessary to engage a chatbot, which can sort voluminous information in minutes, avoiding the cost of an attorney to provide the same service? This might suggest there is a duty to explain the benefits and pitfalls of using AI, giving the client to option of undertaking or rejecting its use.

Speaking of supervision, any use of AI by any lawyer requires supervision by the senior members of the firm.²² Public confidence in lawyers and the justice system erodes with outbreaks of irresponsible conduct. Accordingly, experienced attorneys must mentor associates and supervise chatbot use in their work, assuring such use conforms to our rules of professional conduct. Similarly, the Court requires judges to supervise technology use by law clerks and interns.

Truthfulness

A lawyer's duties include responsibility for accuracy because professional responsibility mandates "truthfulness in statements to others."²³ This obligation extends to the Court.²⁴ Consequently, "mak[ing] a false statement of material fact or law to a third person," or to the court²⁵ is prohibited. Unfortunately, machines only know and learn from what is inputted; they do not access information in real time. And, updating seems to occur annually, creating a lag in current information. This deficit in the available information used to respond to inquiries leaves gaps in accuracy.

Highly concerning, generative text chatbots hallucinate— that is they make up information, including

creating fake references for sources from books and journal articles or generating details or quotes from sources that do not actually exist. Two recent matters in the District Court of New York concluded with imposed sanctions against lawyers who submitted AI-prepared briefs, replete with created citations of non-existent court opinions and fake quotes.²⁶ Similar hallucinations were found in queries submitted in areas like health care or business. Some opinions go even further and argue machine-generated legal briefs or documents, submitted without attorney correction, rise to the level of the unauthorized practice of law.²⁷

Equally disconcerting, an AI model trained on a dataset comprising biased or unrepresentative data, produce hallucinations or responses reflecting these biases.²⁸ When someone inputs information intentionally or unintentionally infused with bias or even false information, the machine uses those inputs as if they were fact when generating responses to other inquiries. Google paused Gemini's image generation tool when it created historically or factually inaccurate "diverse" images — "such as black Vikings, female popes and Native Americans among the Founding Fathers."²⁹ Another example, Georgia Tech's research on object recognition by self-driving cars found pedestrians with dark skin were "hit" about 5% more than people with light skin, because the data used to train the AI model contained about 3.5 times as many examples of people with lighter skin, which the AI model recognized better.³⁰

Confidentiality

Perhaps the most serious ethical concern strikes at the heart of every attorney-client relationship: maintaining confidentiality.³¹ Open AI chatbots operate by ingesting data – then the machine "learns" or "teaches itself" how to use that data to generate and enhance future outputs when responding to new inquiries. Using a client's confidential information in an open AI inquiry allows that data to remain stored as publicly accessible information, available to be revealed in response to a different inquiry requesting similar or related data. This seems to breach the attorney-client privilege designed to protect such confidential communications and could possibly expose the information to third-party discovery.³² Thus, a written client consent, replete with full disclosure of possible risks, must precede use of confidential client information in an open AI system.³³

Conclusion

The benefits of using AI in the legal field continue to unfold. The machines sort and process large amounts of data or provide a raw framework for legal theories or legal arguments. This amazing digital technology complements and enhances legal professionals but should not replace them. Lawyers serve clients as advisors. When "representing a client, a lawyer shall exercise independent professional judgment and render candid advice."³⁴ In rendering advice, "a lawyer may refer not only to law, but to other considerations, such as moral, economic, social and political facts, that may be relevant to the client's situation."³⁵ Machines cannot replicate human empathy, emotion, judgment, and discernment. Machines adhere to predetermined norms and procedures to sort available data in order to offer most common outcomes. But, machines do not possess the ability to navigate the nuances of the law or consider compassion often necessary to weigh evidence and reasonably judge what to do for a specific client. This limitation would thwart the development of public policy and the creative adaptation of legal principles. Accordingly, unchecked reliance on generative AI technology could easily lead to errors with serious legal consequences for a client, and possibly stagnation in our legal precedents.

"Because the practice of law inherently refines the skills necessary for discernment — which include the capacity to listen, awareness of ethical principles, a sense of purpose and discipline — the legal community can offer a tremendous benefit in considering and weighing the benefits versus risks of AI, and lawyers should be at the ready to act as advocates and counselors as artificial technology advances."³⁶

As a profession, our challenge is clear. We must use our human brain power to adapt the benefits of machines so lawyers perform tasks in a robust efficient way, that is responsible and safe, assuring accountability, confidentiality, and full transparency to clients and courts. ■

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Endnotes

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3. See Rabner, “Notice to the Bar,” njcourts.gov/sites/default/files/notices/2024/01/n240125a.pdf (January 24, 2024).
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13. ABA, *Model Rules of Professional Conduct Rule 1.1: Competence*, cmt. (8), (americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/).
14. See Pressler & Verniero, RPC 1.1 (a), (b).
15. *Matter of Robertelli*, 248 N.J. 293, 319-20 (2021).
16. *Id.* at RPC 1.3.
17. *Id.* at RPC 1.5 (a)(1).
18. *Id.* at RPC 1.2 (a).
19. *Id.* at RPC 1.4.
20. Rabner, “Notice to the Bar,” at p.4.
21. *Id.* at p.5 (quoting RPC 1.4 (c)).
22. See Pressler & Verniero, RPC 5.1.
23. *Id.* at RPC 4.1.
24. *Id.* at RPC 3.3.
25. *Id.* at RPC 3.3, 4.1.
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