

Rise of the Machines

By Thomas Lurie
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Implications of Artificial Intelligence in the Legal Field

Artificial intelligence (or “AI”) is rapidly rising across the globe as companies like OpenAI and Google are making it publicly available for use. AI refers to the use of a computer system to perform a task that normally requires human intelligence. The most popularized AI system today is ChatGPT, a Large Language Model (“LLM”) program where a user inputs a prompt, and the system generates an output relying on a large set of language from historical internet sources. This means that an LLM, like ChatGPT, will essentially run an internet search (limited to recent history) and its algorithm (a fancy word for the code supporting a program that acts like a mathematical formula) will use the information it gathers and deems relevant to concoct a coherent response for the user. Other examples of AI include virtual assistants (Siri, Cortana, Alexa, etc.) and autonomous driving programs where the computer-controlled vehicle analyzes real-time data and makes driving decisions. AI is also known for generating “deep fake” photographs and voice-recognition to produce podcasts imitating public figures, such as Joe Rogan (see, *The Joe Rogan AI Experience - YouTube*), or new music sounding as if it was created by your favorite artist, like Drake. AI is changing the world as we know it quickly, and the legal industry is not immune. For example, the impact of AI can have either a direct impact on the legal community (e.g., legal AI software) or an indirect impact (e.g., creation of videos or audio whose authenticity could not be confirmed in legal proceedings).

Competency

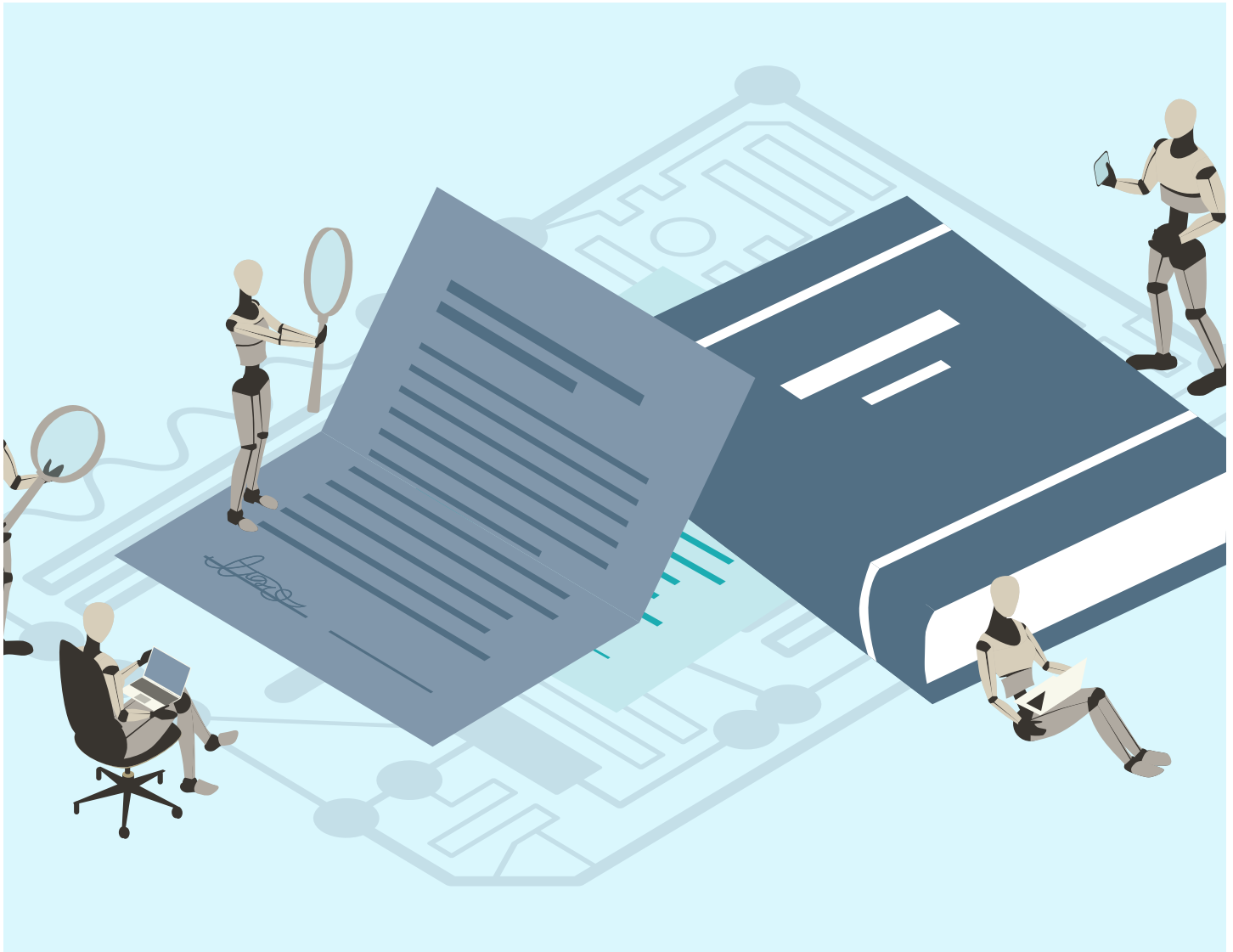
Of course, keeping abreast of the ever-changing technological landscape is difficult and is easier said than done. However, learning about emerging technologies such as AI is necessary to competently represent a client. Model Rules of Professional Conduct (“MRPC”) MRPC Section 1.1, explains how “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Comment 8 specifically provides that, to maintain the requisite knowledge and skill, “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology...” MRPC Section 1.1, Comment 8. Thus, it is our duty as lawyers to understand the benefits and risks associated with AI - as technology relevant to the practice of law - so that we competently represent our clients.

Understanding AI is not only necessary to maintain competency but is also imperative to the future of the civil-defense litigator’s practice. AI tools vastly improve legal research; for example, legal research tools have the functionality to write a legal memorandum based upon a prompt using a legal database. AI interprets the prompt (e.g., write a memorandum on the sanctions available to a defendant for the spoliation of evidence in Michigan), quickly provides the lawyer with relevant cases and statutes, and can even summarize the supporting authority to include in a legal brief or memorandum. AI tools can analyze voluminous documents in an incredibly short time and assist with determining

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relevancy and pertinent information. AI will revolutionize the practice of law and our everyday lives by generating efficiencies in the lawyer's workflow saving time and, ultimately for clients, money. Developing competency with AI will help the practitioner become familiar with tools to aid in the practice of law instead of falling behind. Every practitioner can attest to the advent of electronic mail, electronic discovery tools, and recently virtual video conferencing and its impact on the legal industry. AI is simply the next greatest set of tools to help lawyers be successful and efficient.

While keeping up with these changes can be daunting, a few legal practitioners have begun speaking on the topic of AI in the context of the legal field and what practitioners should do to stay up to date. See, Black, Nicole, *The Case for ChatGPT: Why Lawyers should embrace AI*, ABA Jour-

nal, February 21, 2023, available at: *The Case for ChatGPT: Why lawyers should embrace AI* (abajournal.com). Attending continuing legal education classes on the topic, listening to informational podcasts (see, State Bar of Michigan: *On Balance Podcast*, Episode 86 feat. Nicole Black, available at *AI and ChatGPT's Impacts on the Legal Profession - Legal Talk Network*), and trying the technology (without divulging confidential information) can help defense lawyers get ahead of the AI technological curve.

Confidentiality

It is no secret that members of the legal profession increasingly rely on AI tools such as ChatGPT, CARA by Casetext, or LexCheck to assist with legal research, legal writing, and document review. However, while these tools may appear to bring ease and

efficiency to the profession, they are not without risk. Not only can sensitive information potentially be used by the AI maker to improve their services, AI tools—just like other technical tools—can experience data breaches thereby exposing potentially sensitive information to unintended recipients. Indeed, here is what ChatGPT says in response to the prompt: “Should I enter sensitive information in ChatGPT?”:

It is not recommended to share sensitive information with ChatGPT or any other online platform as there is always a risk of data breaches or unauthorized access. While I am programmed to handle sensitive information with confidentiality, it is still better to be cautious and use secure communication channels for

sharing sensitive information, such as encrypted messaging or secure email platforms. It is important to protect your personal information and be mindful of the potential risks associated with sharing sensitive information online.

As AI tools become ubiquitous, it is critical that lawyers comply with rules of ethics and professional conduct governing confidentiality—a core aspect of the legal profession. Of course, prior to admission to the bar, aspiring lawyers must pass the Multistate Professional Responsibility Examination (“MPRE”) in almost every US jurisdiction (or complete some sort of equivalent class). Topics tested by the MPRE derive from the MRPC. One such core topic is client confidentiality under the American Bar Association’s Rule 1.6: *Confidentiality of Information*. Pursuant to Rule 1.6(a):

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

MRPC 1.6(a)

Inputting confidential client information into AI programs raises significant confidentiality concerns. Lawyers consistently handle vast amounts of sensitive, privileged, and confidential information provided by clients including, but not limited to, personally identifiable information, protected health information, trade secrets, and financial information. To avoid breach of client confidentiality, lawyers should be vigilant in their use of AI tools and have a full understanding of the tool they are using. This will require extra time to research the AI tool itself and its potential, as well as reading all the warnings and fine print. Additionally, before entering or submitting confidential client information and data into any AI tools, lawyers should redact sensitive protected information just as they would when providing protected information to opposing counsel or the courts through document production. Likewise, if the specific AI tool being utilized contains protection controls, a lawyer must ensure those controls are used properly to ensure sensitive information is

not inadvertently revealed with the incorrect person or entity. On the other hand, if the client is an active user of AI, the client should similarly proceed with caution to not inadvertently divulge confidential information that may become discoverable as communicating with an AI tool could be deemed a third-party communication outside the attorney-client relationship and destroy the protections of privilege.

Lawyers should always communicate with clients about potential use of these tools in their practice and obtain consent, when necessary “to prevent the inadvertent or unauthorized disclosure, or unauthorized access to, information relating to the representation of a client.” MRPC 1.6(c). For example, if a lawyer wants to use the assistance of an AI tool to complete a voluminous document review of documents containing proprietary trade secrets of a client, the client should likely be advised that these documents will be reviewed by a third-party AI tool. Unless a lawyer has confirmed that a client or potential client’s confidential information will be secure, he or she should refrain from using AI tools in the client’s representation. Maintaining confidentiality is a cornerstone of our profession and must be protected wherever possible, and informed consent can be obtained where absolute confidentiality cannot be maintained.

Unauthorized Practice of Law

In addition to confidentiality concerns, the rapid growth of AI brings about a legitimate concern that platforms such as ChatGPT will be used to practice law. Almost every state has a rule that prohibits the unauthorized practice of law, which can result in a fine and/or misdemeanor. See, e.g., Michigan Compiled Law § 600.916. Since AI is not an attorney, and in some instances it is being used instead of a human being, utilizing such a platform in the legal field brings up the issue of whether its use is an unauthorized practice of law. Even though ChatGPT claims it can pass the bar exam in the 90th percentile, where does the line get drawn, if individuals are “hiring” ChatGPT to address their legal issues. See, Weiss, Debra Casens, [Latest version of ChatGPT acs bar exam with score nearing 90th percentile](#), ABA Journal, March 16, 2023, available at [Latest version of ChatGPT acs bar exam](#)

[with score nearing 90th percentile \(abajournal.com\)](#).

At least at this point, while legal entities like LLCs, Corporations, Non-Profit Corporations, and other organizations are considered “persons” in the legal context, it is unclear whether AI programs could be considered a legal person. One way to address the issue of unauthorized practice of law by an AI tool would be to treat it the same way as a natural person, requiring it to obtain a license to practice law like any other human. Obviously, this would be impractical as the natural person is required to take a rigorous examination without accessing the internet. Allowing an AI tool access to its historical database at the time of the examination is the equivalent of an open book test where the test taker has a photographic memory and can instantly recall the entire text. So, if an AI tool cannot practically take and pass a bar examination, it falls on lawyers to prevent the public from being potentially misled about the capabilities of such tools.



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Recently, in *In re Peterson*, Docket No. 19-24045 (Bankr. D. Md. June 1, 2022), an unpublished opinion totaling 116 pages from the United States District Court for the District of Maryland Bankruptcy Court, Judge Stephen C. St. John embarked on a comprehensive analysis on the use of a website called Upsolve, Inc. that assists persons in filing Bankruptcy petitions in various jurisdictions, including Maryland. The Bankruptcy Court exercised jurisdiction in a unique way by the Court entering Orders to Show Cause against Upsolve, Inc.

after it was apparent debtors were using the tool, which contains AI to aid debtors in certain aspects of the application, to determine if Upsolve, Inc. engaged in the unauthorized practice of law. Ultimately, Judge St. John did not find Upsolve, Inc. and its AI algorithm engaged in the unauthorized practice of law but did direct Upsolve, Inc. to perform a complete review of its software to identify anything on the “precipice” of the practice of law and cautioned Upsolve, Inc. to distance its program from any questionable behavior (such as AI analyzing user data to select the exemptions under the Bankruptcy Code). The opinion also contains an in-depth analysis of AI (or other computer programs tools like LegalZoom) across the country with a compendium of decisions by courts across the country on the issue. While there is not a definitive answer from courts on whether AI tools engage in the unauthorized practice of law, courts typically look to the humans that designed the program (and the companies behind the program) to analyze whether the unauthorized practice of law occurred.

The lack of a definitive ruling on the ethical nature of AI in the legal context did not stop people from using ChatGPT and other similar LLMs that are now publicly available and widely accessible. Individuals who otherwise could not afford an attorney, or who simply believe they do not need to retain an attorney, can use LLMs to craft arguments in legalese with a few strokes of the keyboard. Recent examples of this include a woman in the State of New York who used ChatGPT to draft a letter filled with legalese, and sent it to her landlord, in an attempt to lower her rent.

Colton, Emma, *Woman turns to ChatGPT after landlord tries to hike rent despite broken washing machines*, Fox News, April 23, 2023, available at: [Woman turns to ChatGPT after landlord tries to hike rent despite broken washing machines | Fox News](#). Further, the Twitter account operated by Eric Pacifici (@SMBAcquisitionAttorney) posted a thread explaining how to use specific prompts in ChatGPT to help an individual represent themselves in smaller value business disputes. See, Salao, Colin, *How ChatGPT Can Replace Lawyers, According to a Lawyer*, TheStreet, April 18, 2023, available at: [How ChatGPT Can Replace Lawyers According to a Lawyer - TheStreet](#). At a minimum, lawyers need to educate the general public on the inherent risk associated with relying only on ChatGPT (or other LLMs) instead of consulting with legal counsel. These tools are still wrought with errors and confirmation biases that humans are capable of acknowledging and looking past when providing analysis.

Today, using AI to [attempt] to practice law in a courtroom setting would be wildly impractical. Many judges and courthouses across the country prohibit the use of cell phones when in front of the judge, let alone having access to reliable high-speed wireless internet. Also, it bears explaining that ChatGPT and similar LLMs released functions so humans can identify whether text was generated from the AI (to curb students from plagiarizing their assignments off LLMs). This same function can be used to identify whether another lawyer is using AI to write their briefs or even by judges to identify whether attorneys are accurately representing the law. Further, it would be

ill-advised to rely solely on technology. Much like an operator of an autonomous vehicle being required to pay attention and take over the driving task at a moment’s notice, a lawyer should not solely rely on AI to practice law *for them*. The practice of law is as much an art as it is a skill, using persuasion in not only written advocacy, but also in-person oral arguments requiring last-minute improvisation and conveying a message with body language. At least for now, AI is merely a tool to aid the practitioner in efficiently, effectively, and accurately practicing law.

Conclusion

AI is rapidly expanding with no signs of it slowing down. In this fast-paced environment, it is imperative to remember the requirements of the profession. The MPRC generally addresses important topics that AI will call into question. Lawyers are required to competently represent their clients and learn about evolving technologies. Further, lawyers owe their clients a duty of confidentiality that requires one to carefully contemplate utilizing AI tools. While AI will not replace attorneys quite yet, solely relying on AI to practice law can call into question the serious implications of the unauthorized practice of law. When contemplating AI in the legal context, remember the requirement of competency, the duty of confidentiality, and be cautious to stay within the limits of the authorized practice of law.



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