

The Ethical & Legal Issues Posed by Artificial Intelligence

Andy Wronski, Foley & Lardner LLP

Alexandra Suprise, Wisconsin Economic Development Corporation

Jesse Byam-Katzman, Foley & Lardner LLP

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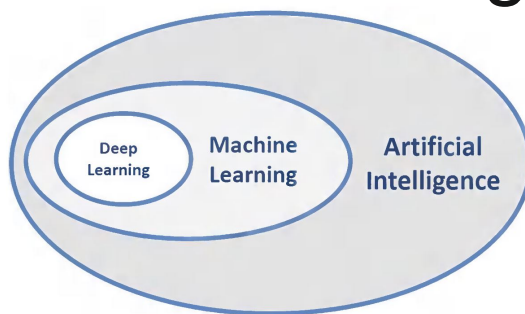


What is “AI”?

- “The theory and development of computer systems able to perform tasks that normally require human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages.” (The Oxford Dictionary)

AI: Learning to Learn

- Machine learning is the study of computer algorithms that allow computer programs to automatically improve through experience.
- There are several types of machine learning, including supervised learning, unsupervised learning, reinforcement learning, and deep learning.



AI: Deep Learning in Motion

Today

Driver assistance systems automate or enhance functions like navigation, lane control, collision avoidance, and parking.

Cars still require a human at the wheel.



Future

Deep learning technologies will leverage advanced sensor technology and real-time route mapping.

Cars will be fully autonomous and safer than those driven by humans.

The Rise of AI in the Legal Industry



Evolution of AI in the Legal Industry

- Legal Research
- Technology Assisted Review
- Litigation Outcome Analytics
- Recidivism Prediction
- Disputing Parking Tickets?
- Replacing Lawyers on Complex Tasks?

Evolution of AI in the Legal Industry

THE
DAILYSHOW
WITH TREVOR NOAH

The Reasons In-House Lawyers are Using AI

- When dealing with large volumes of documents or data, AI can identify errors or issues that a human might not
- AI can reduce the time and costs associated with searching for documents and information in large databases
- Delegating certain tasks to AI can create time for the type of legal tasks that will always require a human touch, such as analyzing legal issues, exercising judgment, and counseling clients

AI Applications for In-House Counsel

Common and emerging AI applications for corporate counsel include:

- Contract Drafting and Management
- Due Diligence
- Internal Fraud and Compliance Detection

AI: Contract Drafting and Management

- **Today:** Identify and assess potential drafting issues, reducing the time spent on quality control and proofreading
- **Today:** Identify conflicts in different contractual provisions (such as use of definitions) and harmonize within a single agreement or throughout multiple contracts
- **Today:** Flag termination and renewal dates and other legal or performance milestones across a contractual portfolio
 - Products: Thomson Reuters Contract Express (<https://legal.thomsonreuters.com/en/products/contract-express>); Determine Contract Management (<https://www.determine.com/software/contract-management>); eBrevia Contract Analyzer (<https://ebrevia.com/ebrevia-contract-manager>)
- **Tomorrow:** AI generated contracts, which use predictive coding to create a contract aimed to fit a client's needs

AI: Due Diligence

- Builds on technology used by litigators in TARs
- Current Features:
 - Identify key contracts and other significant documents for further review
 - Identify key contractual language, such as most favored nation clauses, indemnification obligations, and choice of law provisions
 - Products: Kira Systems (<https://kirasystems.com/>); LawGeex (<https://www.lawgeex.com/>); Luminance (<https://www.luminance.com/>)
- Future Features: Business due diligence, such as red flags on compliance matters or issues relating to international distributors

AI: Fraud and Compliance Detection

- Continuous review and analysis of company emails and records to detect “bad behavior” and circumstances that could lead to litigation
- Enron Redux: Reviewing the emails of company executives, AI detected tension among employees surrounding a questionable deal
- Minority Report? AI can review email and other communications to assess morale in order to identify potential conflict and wrongdoing
- Products: NexLP (www.nexlp.com/); Keencorp (keencorp.com/)

AI: The Ethical Overlay

- Familiar Ethical Duties
 - Competence (SCR 20:1.1)
 - Communication (SCR 20:1.4)
 - Confidentiality (SCR 20:1.6)
 - Supervision (SCR 20:5.2 and 20:5.3)
- New Application
 - “RESOLVED, That the American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence (“AI”) in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; (3) controls and oversight of AI and the vendors that provide AI.” ABA Resolution 2019-112.

Competence (SCR 20:1.1)

- “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” (SCR 20:1.1)
- “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.” (WI Supreme Court Rule 20:1.1, Comment 8)
- *James v. Nat'l Fin. LLC*, No. CV 8931-VCL, 2014 WL 6845560, at *12 (Del. Ch. Dec. 5, 2014) (awarding a discovery sanction where counsel for defendant bank admitted that he was technologically incapable of providing required data in form that court required)

Competence: Best Practices for AI

- Use of AI not yet the “standard of care” in any area of legal practice – not yet ethically required to use AI
- But the rules require that you inquire and ask whether and when AI is the best means of representing your client competently
 - Ask questions and keep abreast of developing technology
 - Designate someone (or a working group) in your department to perform this function and provide continuous learning to the team; consider a multi-disciplinary approach with IT
 - If you use AI, make sure you understand what it does (and does not do) – what are the relative risks and benefits that the technology offers
 - If you are using a third-party vendor, make sure the vendor has procedures in place to satisfy all of your ethical duties, like confidentiality
 - AI will not absolve you of your duty to exercise independent professional judgment – analyze and think about the data before you make decisions!

Communication (SCR 20:1.4)

- Among other things, the rule requires that a lawyer “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”
- “The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.” (SCR 20:1.4, Comment 8)

Communication: Best Practices for AI

- Affirmatively suggest AI applications that can increase efficiency or improve results – tell your client what's out there
- In specific applications, make sure your client understands what AI can and cannot do – for example, how the use of AI in due diligence would differ from the traditional method
- Engage IT and other relevant constituencies within the company for their views and suggestions and to ensure maximum performance and return on any AI investment

Confidentiality (SCR 20:1.6)

- Cannot reveal information relating to the representation of a client without the client's informed consent
- Must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client
- Ethical duty of confidentiality extends more broadly than the attorney-client privilege

Confidentiality: Best Practices for AI

- Many AI applications will require that confidential documents, data and other information be “shared” with a third-party vendor
- Similar to the data security challenges presented by “cloud” usage, AI should not be used unless the lawyer is confident that the client’s confidential information will be secure – ask questions
 - What type of information does the vendor need?
 - How and where will the information will be stored?
 - What security measures does the vendor have in place?
 - Who is going to have access to the information – anyone other than you?
 - Who owns the work product?
 - Does your vendor (in a deal or litigation posture) work for your adversary?
 - Does the vendor intend to “pool” your data with that of other clients in order to improve predictive results (or to refine its own algorithms) and, if so, is your data sufficiently masked in order to maintain confidentiality?

Supervision (SCR 20.5.1 and SCR 20.5.3)

- A lawyer having direct supervisory authority over another **lawyer** shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. (SCR 20.5.1(b))
- A lawyer having direct supervisory authority over **the nonlawyer** shall make reasonable efforts to ensure that the nonlawyer conforms to the Rules of Professional Conduct. (SCR 20.5.3(b))
- In 2012, the ABA changed the title of Rule 5.3 from “Responsibilities regarding nonlawyer **assistants**” to “Responsibilities regarding nonlawyer **assistance**” – the change made clear that the rule encompasses nonlawyers, whether human or not.
- Rules require supervision of functions performed by AI just as they would require supervision of a junior lawyer, contract lawyer, paraprofessional or other vendor
- *HM Elecs., Inc. v. R.F. Techs., Inc.*, No. 12CV2884-BAS-MDD, 2015 WL 4714908, at *25 (S.D. Cal. Aug. 7, 2015) (lead counsel’s delegation of ESI discovery to another firm and third-party vendor was an “abdication” and failure to supervise merited severe sanctions when relevant documents were not timely identified and produced)

Supervision: Best Practices for AI

- Duty of supervision relates closely to the duty of competence – you can't adequately supervise what you don't understand
- Maintain an active role in the implementation of AI tools
- Vet sample sets and other data used to “train” the AI and review preliminary output to refine
- Employ appropriate QC and audit procedures to ensure that AI work product is accurate and complete
- Exercise your professional judgment – a lawyer should review and analyze the results, not merely pass them along to the client

A Novel Issue: Imputed Knowledge & Reporting

- Your company implements a “fraud-monitoring” AI tool that analyzes email and other communications of the Company’s executives. The program generates a “suspicious activity” report each week that identifies potentially troublesome communications.
- You championed this initiative but the early reports were pretty boring. As you have gotten busy with other things, you have fallen behind in your review of the weekly reports.
- Some of the reports sitting on your desk suggest that a small group of executives may be “cooking the books” through a revenue-recognition scheme targeted at the upcoming earnings release. The reported results are by no means conclusive but, had you read them, you would have investigated further.
- After the earnings release, a whistleblower reveals the scheme and a securities class action is filed.
- Have you committed an ethical violation?

A Novel Issue: Imputed Knowledge & Reporting

- **SCR 20:1.13 Organization as client.**

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization **knows** that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, then the lawyer shall proceed as is reasonably necessary in the best interests of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer **shall refer** the matter to high authority in the organization

A Novel Issue: Imputed Knowledge & Reporting

- You didn't refer this. Have you committed an ethical violation?
- SCR 20:1.0(g): “Knowingly, known, or knows denotes ***actual knowledge*** of the fact in question. A person's knowledge may be inferred from circumstances.”
- Answer: No. Under the rule, you didn't “know” and did not commit an ethical violation.

A Novel Issue: Imputed Knowledge & Reporting

- What if you had read the reports but decided not to take action?
- “As defined in Rule 1.0 (f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.” ABA Comment 3 to Model Rule 1.13
- Answer: It depends.
 - What did the reports say and how much more work would have been required to connect the dots?
 - Why did you choose not to investigate?
- As companies (and in-house legal departments) have more and more data and predictive analytics at hand, complicated issues relating to “knowledge” and “notice” will arise in both the ethical and litigation contexts.

Best Practices: Mandatory Reporting and AI

- If you implement a “suspicious activity” program, read and analyze the reports regularly.
- Understand why the AI technology flagged certain documents or emails for suspected wrongdoing.
- Investigate (or hire outside counsel to investigate) the suspected fraud and wrongdoing where appropriate.
- Proceed as is reasonably necessary in the best interest of the organization.

The Upshot

- “Ultimately, lawyers must exercise independent judgment, communicate with clients, and supervise the work performed by AI. In many ways, the ethical issues raised by AI are simply a permutation of ethical issues that lawyers have faced before with regard to other technology. It shows that legal ethics rules are adaptable to new technologies, and AI is no exception.” Report of ABA House of Delegates on Resolution 2019-112

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- Questions?