The Wild West of Artificial Intelligence

Ethical Considerations for the Use of A.I. in the Practice of Law

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Seldom a day goes by when a newspaper prints without an A.I. headline inking its pages.[1] Are we close to a time where RoboCop is testifying on the witness stand, while Terminator hangs his head at the defense table? No… at least not yet. But we are close to a time where A.I. is destined to disrupt and transform industries, the legal field included. In a career where risk aversion is lifeblood, even promising changes in legal practice can be met with mule-like resistance. This article aims to encourage attorneys to consider how they can navigate and capitalize upon A.I. developments, while maintaining ethics as their shining polestar.

Staking Out What We Mean By A.I.

Although it is beyond the scope of this article to provide a comprehensive analysis of A.I. and its uses, it's worth pausing for a moment to establish a working definition and round up some examples. So, what is A.I.? The most accurate answer is an unsatisfying "it depends." This is not only because A.I. takes many forms and constantly transmutes, but also because the term can refer to multiple things: a scientific field, a technology or method, or concrete applications of A.I. systems.[2] With that major caveat, for our purposes we will define A.I. as "intelligence displayed or simulated by code (algorithms) or machines."[3]

A.I. in its current state really distills down to mathematics.[4] Data serves as the fuel for the mathematical engine, and it is a hungry one. As explained by Olga Megorskya, the Founder and CEO of Toloka A.I., "[y]ou collect large amounts of data, then using the methods of machine learning, algorithms learn to find inter-dependencies among these pieces of data and then reproduce this logic on every new piece of data they meet."[5]

The demand for massive quantities of data is unsurprising once you understand that A.I. systems don't "know" anything. A.I. doesn't have real-world experience or "the human elements of common sense or quick thinking" [6]; it must determine connections and relationships based on patterns. For example, let's imagine what it would take for an A.I. program to learn how to identify a buffalo. A.I. does not have the background knowledge or language that one would use in explaining how to pinpoint such a creature -- think size, color, shape, and comparison to other animals. As a result, the model must learn the distinguishing characteristics through trial, error, and feedback. This task can be extra tricky

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[1] The discordance of referencing hardcopy newsprint here is acknowledged.

[2] Pascal D. König, Tabias D. Krafft, Wofgang Schulz, & Katharina A. Zweig, *Essence of AI: What is AI?, in* THE CAMBRIDGE HANDBOOK OF ARTIFICIAL INTELLIGENCE GLOBAL PERSPECTIVES ON LAW AND ETHICS 18, 18 (Larry A. DiMatteo, Cristina Poncibò, & Michael Cannarsa eds., 2022).

[3] MARK COECKELBERGH, AI ETHICS 64 (2020).

[4] Christophe Bianchi, *Artificial Intelligence 101: It's Math, not Magic*, SEMICONDUCTOR ENGINEERING (Sept. 13, 2022), https://semiengineering.com/artificial-intelligence-101-its-math-not-magic/.

[5] Olga Megorskaya, *Training Data: The Overlooked Problem of Modern AI,* FORBES (JUNE 27, 2022, 6:00 AM), https://www.forbes.com/sites/forbestechcouncil/2022/06/27/training-data-the-overlooked-problem-of-modern-ai/?sh=48f3e52d218b.

[6] Bianchi, *supra* note 4.

when presented with other large, brown, four-legged, cranial-appendaged creatures (e.g., moose, cattle, oxen, or elk).

Even A.I.-powered programs that use large language models to generate human-like text (e.g., ChatGPT), use "next-word prediction, unrelated to any real understanding of language."[7] Again, these programs don't "know" anything and, unlike Google or Bing, they're not going out and retrieving information. The program is trained on enormous amounts of data to determine the statistical likelihood of "next words." The conversational interface and the (seemingly) authoritative form of the outputs can make this important backdrop easy to forget.

Out of the A.I. Rabbit Hole and Back into the Legal Field

The majority of us are using A.I. regularly without thinking twice; when you use WestLaw's predictive research suggestions, ask Alexa to play a song by Willie Nelson, unlock your iPhone using facial recognition, or employ an Outlook spam filter, you are using A.I. And the majority of us are comfortable with these technologies, considering them welcome guests in our everyday lives. Heartrates tend to elevate, however, when new technologies like ChatGPT mosey into town. The warning shots fired by the New York District Court in *Mata v. Avianca, Inc.* still ring loudly in many ears.

A slight digression for those of you who missed the aforementioned case: Attorneys Steven Schwartz and Peter LoDuca represented the plaintiff in a lawsuit against Columbian airline Avianca. Schwartz used ChatGPT to identify legal precedent in support of an opposition to a motion to dismiss. While ChatGPT did indeed provide citations, there was one catastrophic problem: the cases were hallucinations (i.e., they did not exist). Without cross-checking ChatGPT's output, Schwartz included the fictitious citations in his filing. LoDuca read the filing, but did not cite check the document. Despite receiving a brief from opposing counsel questioning the existence of the cases, as well as court orders requiring production of the cases, Schwartz and LoDuca "doubled down and did not begin to dribble out the truth" until after the court issued an order to show cause as to why sanctions should not be imposed.[8]

The court sanctioned both attorneys for "submit[ing] non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continu[ing] to stand by the fake opinions after judicial orders called their existence into question."[9] The opinion and order on sanctions noted specifically that while "[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance… existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings."[10]

A similar set of circumstances arose in *People v. Crabill*, Colo. O.P.D.J., No. 23PDJ067 (Nov. 23, 2023), resulting in a one-year-and-one-day suspension for a Colorado attorney. Attorney Zachariah Crabill used ChatGPT to locate case law, which he included in his motion to set aside judgment without cross-checking the citations. As in *Mata v. Avianca, Inc.*, the cases produced by ChatGPT were non-existent. After filing the motion, Crabill discovered the problem, but he failed to withdraw the motion and did not notify the court at the motion hearing. Instead, when questioned about the accuracy of the

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[7] *What's the next word in large language models?*, 5 NAT. MACH. INTELL. 331, 331 (2023), https://doi.org/10.1038/s42256-023-00655-z.

[8] Mata v. Avianca, Inc., No. 22-CV-1461 (PKC), 2023 WL 4114965, at *1 (S.D.N.Y. June 22, 2023) (opinion and order on sanctions).

[9] *Ibid*.

[10] *Ibid*.

cases by the judge, Crabill falsely claimed that they reflected mistakes made by a legal intern. Six days following the hearing, however, Crabill in an affidavit admitted his use of ChatGPT in generating the motion contents. As summarized in the stipulated suspension, "[t]hrough this conduct, Crabill violated Colo. RPC 1.1 (a lawyer must competently represent a client); Colo. RPC 1.3 (a lawyer must act with reasonable diligence and promptness when representing a client); Colo. RPC 3.3(a)(1) (a lawyer must not knowingly make a false statement of material fact or law to a tribunal); and Colo. RPC 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation)."[11]

While the conduct in *Mata v. Avianca, Inc.* and *People v. Crabill* telegraphs failures in competence, diligence, good faith, and honesty, it also highlights (perhaps counterintuitively) the potential of A.I. to help legal practitioners. Attorneys dedicate enormous amounts of time to panning through irrelevant precedent and performing redundant administrative work. If some of this time could be recaptured, it arguably could be spent performing more valuable tasks, and/or assisting new, unserved clients. A.I.-powered programs for the legal field attempt to address these inefficiencies, and they are popping up like prairie dogs. Program functions range from contract management, to legal research, to predictive analytics, to virtual assistants.

So, how should we as legal practitioners navigate the A.I. goldrush? While the Massachusetts Rules of Professional Conduct alone cannot provide a turn-by-turn map -- especially given the rate at which technology is evolving -- they can serve as a valuable compass for traversing the A.I. landscape. Furthermore, you will find that many features of A.I. can be analogized to familiar, longstanding technologies of the legal field.

A Tour of the Most Pertinent Rules of Professional Conduct

Rule 1.1 Competence & Rule 1.3 Diligence

Competent representation requires "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[12] As illuminated by Comment [8] to Rule 1.1, maintaining competence involves "keep[ing] abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."[13] Attorneys must also employ reasonable diligence and promptness in representing clients. While a distinct responsibility, a "lack of diligence almost always constitutes less-than-competent representation and, therefore, usually violates Rule 1.1 as well."[14]

At this juncture, let's consider as an example the topic of legal research. Most practicing attorneys have abandoned hardbound reporters for online legal research tools (e.g., LexisNexis, Westlaw, etc.). Given the abilities and efficiencies associated with these electronic tools, there may be instances in which conducting online research is necessary to meet standards of competence and diligence. While Massachusetts currently does not have any disciplinary decisions addressing failures in the competent and diligent use of A.I., matters involving other technologies provide relevant guidance.

Matter of Smith, 35 Mass. Att'y Disc. R. 554 (2019), for example, involved the use of social media. Smith represented a grandmother in petitioning for guardianship of her minor grandson. During the representation, Smith made several posts on his Facebook page that revealed confidential information

[11] *People v. Zachariah C. Crabill*, Colo. O.P.D.J., No. 23PDJ067 (Nov. 23, 2023).
[12] Mass. R. Prof. C. 1.1.
[13] *Id.* at cmt. 8.
[14] The Board of Bar Overseers, MASSACHUSETTS BAR DISCIPLINE: HISTORY, PRACTICE, AND PROCEDURE 117 (2018).

about his client, without actually naming her. While Smith was disciplined for violating Rule 1.6(a) (confidentiality of information), the decision highlighted Comment [8] to Rule 1.1, noting that "[h]aving chosen to use Facebook, the respondent was required to follow the rules for maintaining client confidences on its platform."[15] As will be discussed later, this case also provides important language on attorneys' duties to maintain confidential information when using technology.

In *Matter of Hochman*, 31 Mass. Att'y Disc. R. 295 (2015), the respondent used commercially available software to prepare various bankruptcy documents for his clients. Hochman was aware that the program was capable of producing miscalculations, but he nevertheless failed to ensure that output totals were accurate. As a result of his failure to review the totals, Hochman generated an unfeasible bankruptcy plan. The respondent's conduct thereby violated Rules 1.1 and 1.3.

In *Matter of An Attorney*, 20 Mass. Att'y Disc. R. 525 (2020*)*, the respondent defended a client against allegations that she had removed confidential documents from her employer. The client provided the respondent with a flash drive containing relevant records, but the respondent did not know how to access the information stored on the device. Instead of seeking assistance with the flash drive, the respondent relied upon representations by his client. Some of the client's representations proved inaccurate (in light of documents on the flash drive), causing the respondent to file pleadings containing false statements of fact. The respondent's conduct in this matter violated Rules 1.1 and 1.3.

In *Matter of Doyle*, 26 Mass. Att'y Disc. R. 143 (2010), the respondent, over the course of four months, reviewed and indexed over 400 pages of a client file, researched pertinent law, exchanged letters, and abstracted documents. Doyle saved all of this work into a database that he maintained on his laptop computer, but he did not back it up elsewhere. His computer then crashed in an irretrievable fashion, causing his work to be permanently lost. Doyle's failure to back up the documents saved on his computer violated Rule 1.3.

How do the aforementioned cases apply to competent use of A.I.? Just like any other technology, when using A.I., you should familiarize yourself with the associated risks and limitations.[16] While you are not expected to run out and get degrees in engineering and computer science, you should understand generally how a technology operates, including what information (if any) it is collecting. Read terms and conditions, consult reliable sources of information, and seek the expertise of others if you have questions. You also must take adequate measures to maintain authority, oversight, and control over any A.I. employed.[17] Finally, keep your eye fixed on the horizon and your ear to the ground; as mentioned before, advances in technology may shift the standards of competent and diligent representation.

Rule 1.6 Confidentiality of Information

Rule 1.6 demands that you refrain from revealing confidential information relating to the representation of a client unless you have obtained their informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by an enumerated exception. As discussed above, the *Matter of Smith*, is an example of how heedless use of technology can result in disclosure of confidential client information. Smith's Facebook post was discovered by a friend

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[15] *Matter of Smith*, 35 Mass. Att'y Disc. R. 554, 563 (2019).

[16] For further discussion of technology competence, *see* Heather LaVigne, *From Technophobe to Technolawyer: A Lawyer's Duties Related to Technology Competence and Prevention of Inadvertent Disclosure* (Mar. 2018), https://www.massbbo.org/Files?fileName=TechCompetence.pdf.

[17] *See* A.B.A. Resolution 604, 2 (2013), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2023/604-midyear-2023.pdf.

of the client, who viewed his posts and instantly realized who he was talking about. The friend notified the client's daughter, who in turn notified the client. While this was a case where recognition occurred, the decision provided the following clarification:

> Even if there were no evidence that a third party actually recognized the client in the post, we would still conclude that the respondent had violated Rule 1.6(a). There is no requirement that a third party actually connect the dots. If it would be reasonably likely that a third party could do so, the disclosure runs afoul of the rule. In addition to her daughter knowing about the case, Doe could have mentioned to a friend that the respondent was representing her in a case (perhaps in connection with making a referral). If the friend looked up the respondent on Facebook, the friend would learn about the "grandmother" and her litigation with DCF. There are numerous other reasonable scenarios.[18]

While there currently are no Massachusetts cases about confidentiality breaches by attorneys employing A.I., mistakes in other industries show how easily the horse can slip the barn. For example, it was recently reported that Samsung banned the use of ChatGPT after several instances of employees uploading confidential and proprietary information for tasks like solving coding problems and generating meeting minutes.[19] These types of risks have prompted companies like Verizon, JPMorgan, and Amazon to ban or restrict employee use of the software.[20]

An Australian health service organization issued a directive to its member hospitals to avoid entering confidential information into A.I. technology, after a doctor used ChatGPT to generate a patient discharge summary.[21] Similarly, the National Institute of Health (NIH) recently issued a guide notice about the use of A.I. by those involved in the peer review process. The notice declares that "uploading or sharing content or original concepts from an NIH grant application, contract proposal, or critique to online generative AI tools violates the NIH peer review confidentiality and integrity requirements."[22]

As noted above, A.I. is about data, training, and evolution; applications may maintain, use, and incorporate information entered by users. Therefore, as a best practice, don't enter confidential information when you are using a non-private system. The good news is that many times the input of details that would constitute a disclosure isn't necessary for getting a helpful, relevant output. In addition, many A.I.-powered legal practice programs (e.g., case management software) allow for private accounts and provide robust security measures for hosted information.

Even in the context of private A.I. applications, however, you must ensure that adequate confidentiality protections are in place, just as you would do when selecting something like a cloud-based backup program. An article published in the American Bar Association's (ABA) journal, *The*

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[18] *Matter of Smith*, 35 Mass. Att'y Disc. R. at 560.

[19] Siladitya Ray, *Samsung Bans ChatGPT Among Employees After Sensitive Code Leak*, FORBES (May 2, 2023, 7:17 AM), https://www.forbes.com/sites/siladityaray/2023/05/02/samsung-bans-chatgpt-and-other-chatbots-for-employees-after-sensitive-code-leak/?sh=107aabd76078.

[20] Sam Sabin, *Companies are struggling to keep corporate secrets out of ChatGPT*, AXIOS (Mar. 10, 2023), https://www.axios.com/2023/03/10/chatgpt-ai-cybersecurity-secrets.

[21] Claire Moodie, *Australian Medical Association calls for national regulations around AI in health care*, AUSTRALIAN BROADCASTING CORPORATION (May 27, 2023), https://www.abc.net.au/news/2023-05-28/ama-calls-for-national-regulations-for-ai-in-health/102381314.

[22] NAT'L INST. OF HEALTH, NO. NOT-OD-23-149, THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE TECHNOLOGIES IS PROHIBITED FOR THE NIH PEER REVIEW PROCESS (June 2023), https://grants.nih.gov/grants/guide/notice-files/NOT-OD-23-149.html.

Professional Lawyer, explains when a lawyer uses a third-party to incorporate A.I. into their legal practice, reasonable care in maintaining confidentiality includes the following:

> [E]nsuring that the third-party provider has an enforceable obligation to preserve confidentiality and security and that the provider will notify the attorney if the disclosure of client information is ever required; investigating the provider's security measures, policies, and recovery methods to ensure that they are adequate under the circumstances; employing technology to guard against reasonably foreseeable attempts to access the client's data without authorization, and; investigating the storage provider's ability to purge and wipe the client's data.[23]

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers & Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

Partners and lawyers with comparable managerial authority in a law firm, must make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers' and nonlawyers' conduct is compatible with the managerial lawyer's professional obligations. Law firms must make sure that lawyers and nonlawyers are trained, monitored, and provided with adequate resources to ensure compliance with the Rules of Professional Conduct. This includes having clear policies and procedures in place for technology use.[24]

Rule 1.4 Communication and Rule 1.5 Fees

If you want to implement A.I. into your practice, there are instances in which the client should be consulted both as to the means and the associated fees. Under Rule 1.4, your duty to communicate with your client includes reasonable consultation about the means by which the client's objectives are to be accomplished. Consultation should be in a manner that allows your client to make informed decisions regarding the representation.

Because Rule 1.4 employs a reasonableness standard, and because the A.I. spectrum is so large, your duty to communicate usage of A.I. may vary. For example, you usually do not need to consult with your client about your choice to use LexisNexis legal research software, even though the system may incorporate A.I. elements. Conversely, imagine you are representing a client accused of second-degree murder. Your client is vacillating between a jury trial and a bench trial. You want to use a new, predictive A.I. program to determine your client's likelihood of acquittal in each scenario, and plan to base your recommendation upon the results. While you believe in your software, it carries risks and is not being used by any other colleagues. In this instance, the client should be consulted on and informed about the use of the A.I. system, including the associated risks and benefits.

On a related note, under Rule 1.5, you also have a duty to inform your client in writing before or within a reasonable time after commencing representation of the basis or rate of fees and expenses.[25] Rule 1.5 further requires that fees be reasonable, with Comment [1B] clarifying that you "may seek reimbursement for the cost of services performed in-house, such as telephone charges, either by charging

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[23] Daniel W. Linna Jr., Wendy J. Muchman, *Ethical Obligations to Protect Client Data When Building Artificial Intelligence Tools: Wigmore Meets AI*, 27 No. 1 PRO. LAW. 27, 32 (2020), https://www.americanbar.org/content/dam/aba/publications/professional_lawyer/27-1/pln-27-1-issue.pdf.

[24] *See* LaVigne, *supra* note 16.

[25] Rule 1.5(b)(2) provides the following exceptions: "The requirement of a writing shall not apply to a single-session legal consultation or where the lawyer reasonably expects the total fee to be charged o the client to be less than $500. Where an indigent representation fee is imposed by a court, no fee agreement has been entered into between the lawyer and client, and a writing is not required."

a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the costs incurred."[26] If you choose to bill for technology-related costs, take care when determining the fees, as the charges should reasonably reflect the costs for the services rendered.[27]

Rule 1.7 Conflict of Interest: Current Clients, Rule 1.8 Conflict of Interest: Current Clients Specific Rules, & Rule 1.9 Duties to Former Clients

Rules 1.8 and 1.9 forbid you from using confidential information relating to a representation to the disadvantage of the current/former client, to the lawyer's advantage, or to the advantage of a third person, unless the client has provided informed consent in writing. This being so, you should beware of potential conflicts of interest if your firm seeks to utilize an A.I. tool that is trained with or otherwise incorporates current and/or former clients' confidential information.[28]

Other Important Considerations

In 2022, Massachusetts amended Rule 4.4 to prohibit lawyers in representing a client from "engag[ing] in conduct that manifests bias or prejudice against such a person based on race, sex, marital status, religion, national origin, disability, age, sexual orientation, or gender identity."[29] While Massachusetts' rule is not as expansive as ABA Model Rule 8.4(g), which encompasses harassing and discriminatory "conduct related to the practice of law,"[30] abstaining from this behavior should be a goal of all practitioners.[31]

In a time where inequities and inequalities in the legal system are salient topics, A.I. and its reliance on math and data seems like a promising path toward taking live human bias and discrimination out of decisions. It is important to acknowledge, however, that there is potential for bias to leach into the system at multiple stages. A.I. programs are designed, trained, and implemented by people, and every one of us carries biases. Furthermore, human bias can infect A.I. even before a program is designed, as A.I. feeds on data, and datasets themselves can embody and perpetuate bias. While it is beyond the scope of this article to provide a detailed description and analysis of these problems -- there are entire books dedicated to this topic -- we should be aware of A.I.'s potential to perpetuate bias and discrimination. Indeed, ABA Resolution 112 highlights that "the need for lawyers to understand how AI generates outputs is important for combatting bias and providing good counsel to clients," and in some instances "may be required by legal ethics."[32]

<u>Ending on a Canteen-Half-Full Note</u>

Since much of the discussion above stresses the risks of A.I., now seems like a good time for a deep breath and an acknowledgement that A.I. has enormous prospects to augment lawyering by

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[26] Mass. R. Prof. C. 1.5, Cmt. 1B.
[27] See ABA Formal Op. 93-379; Alex Braun, *How and When to Bill Through Technology Costs to Your Client*, LAW PRACTICE TODAY (Oct. 16, 2021), https://www.lawpracticetoday.org/article/how-and-when-to-bill-through-technology-costs-to-your-client/.
[28] *See* Linna & Muchman, *supra* note 23, at 33.
[29] Mass. R. Prof. C. 4.4(a)(3).
[30] Model R. Prof. C. 8.4(g).
[31] Note that engaging in discriminatory conduct in an illegal fashion could result in discipline under Massachusetts Rule 8.4 (e.g. a hiring practice or program that discriminates based on race, violating the laws enforced by the Equal Employment Opportunity Commission).
[32] A.B.A. Resolution 112, 9 (2019), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/112-annual-2019.pdf.

improving efficiency and increasing accessibility to legal services. Furthermore, while there is potential for A.I. to be biased, the fact that A.I. is "much more predictable than humans" and that "[i]t is easier to remedy bias in machines than it is in humans," provides hope for its ability to augment equity and equality in the legal field.[33]

For those of us excited by the prospects of A.I., but concerned about our ability to adapt, remember back to life before high-speed internet, email, and cell phones; change has happened and we've grown and adjusted. Furthermore, given that widespread, complex A.I. is a relatively new phenomenon, we have the opportunity to jump on the train before it completely leaves the station; the sooner we take time to learn, the easier it will be to absorb changes down the tracks.

The Massachusetts Law Office Management Assistance Program (LOMAP), a Lawyers Concerned for Lawyers (LCL) program, is a great starting point for lawyers seeking to improve the operation of their practices.[34] LCL hosts a website full of attorney-tailored information, and LOMAP provides free and confidential consultations on technology usage (among many other topics). In addition, if you're concerned about ethical missteps, you can also give our office a call; every Monday, Wednesday, and Friday, from 2:00-4:00pm, the Office of Bar Counsel Ethics Helpline is available to provide guidance. Finally, if you have lingering questions, seek the advice of an expert in the field. In sum, don't be afraid to hop into the saddle, but make sure you've prepared for the ride!

[33] *Ibid*.

[34] For more information on LOMAP visit the website at https://www.masslomap.org/.