

PRESENTED AT

First Friday Ethics
Live Webcast

May 5, 2023

Real World Ethics in an Artificial Intelligence World

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REAL WORLD ETHICS IN AN ARTIFICIAL INTELLIGENCE WORLD

by Hon. John G. Browning

I. INTRODUCTION

If you've interacted with a chatbot while shopping online or marveled at the ability of Netflix to suggest new films and television shows tailored to your interests, then you've experienced some of the transformative influence that artificial intelligence has had on society. And in the legal profession, chances are that even if you haven't experienced the impact of artificial intelligence in one or more of the myriad ways in which it is revolutionizing the practice of law—doing everything from legal research to document analysis to the drafting of contracts, pleadings, and even briefs—you've at least seen the proliferation of articles and CLE courses with strident warnings about “robot lawyers taking our jobs.” However, regardless of whether your impression of artificial intelligence's impact runs closer to “time-saving practice aid” or “existential threat,” AI's impact can clearly be seen in the arena of ethical duties lawyers have.

Just as legal observers and academics have examined the different ways in which AI is shaping the practice of law, others have sought to analyze its impact on legal ethics. Some purport to look at AI and legal ethics in detail, and yet barely venture beyond a discussion of one or two Model Rules of Professional Conduct.¹ Others entice the reader with broad, sweeping titles, only to barely venture beyond a superficial treatment of the ethical duties they deign to discuss.² Admittedly, no state or national ethics body has yet issued an ethics opinion concerning the use of AI in the legal profession. As a result, there has been no comprehensive look at the various ethical duties that a lawyer's use of AI impacts. This article aims to fill this void in the scholarship.

This article will provide an overview of artificial intelligence and the various ways in which its use is disrupting the practice of law. It will then discuss each of the different Model Rules of Professional Conduct that are impacted by AI, beginning with a look at the most fundamental obligation of all—the duty to provide competent representation, an ethical responsibility that has been irrevocably altered by the Digital Age's dizzying array of emerging technologies. As this article will demonstrate, while AI offers game-changing advantages and benefits for lawyers, its use raises important questions regarding our ethical obligations. Lawyers

¹ See, e.g., Catherine Nunez, *Artificial Intelligence and Legal Ethics: Whether AI Lawyers Can Make Ethical Decisions*, 20 TULANE J. TECH. & INTELL. PROP. 189 (2017); Victoria Hudgins, *Lawyers Run Into Legal Ethical Risks Using—and Not Using—AI Technology*, LAW.COM (Oct. 14, 2021), <https://www.law.com/legaltechnews/2021/10/14/lawyers-run-into-legal-ethical-risks-using-and-not-using-ai-technology/?slreturn=20220122121631>.

² See, e.g., Mark L. Shope, *Lawyer and Judicial Competency in the Era of Artificial Intelligence: Ethical Requirements for Documenting Datasets and Machine Learning Models*, 34 GEORGETOWN J. LEGAL ETHICS 191 (2021); David Lat, *The Ethical Implications of Artificial Intelligence*, ABOVE THE LAW (June 15, 2018), <https://abovethelaw.com/law2020/the-ethical-implications-of-artificial-intelligence/#:~:text=Artificial%20intelligence%20is%20transforming%20the,and%20that%20includes%20legal%20ethics.&text=%E2%80%9CWhen%20using%20tools%20in%20their,of%20supervision%20and%20independent%20judgment.%E2%80%9D>.

(and courts) need to be aware of the issues involved in using—and not using—AI, including the potential for situations where their use of AI may be flawed or biased. These same ethical issues have been faced before with other new technologies, and no doubt will be confronted in the future. The Rules of Professional Conduct are adaptable to new advances in technology, and AI is no exception to this.

II. AI AND ITS IMPACT ON THE PRACTICE OF LAW

A. WHAT IS AI?

Artificial intelligence has been defined as “the capability of a machine to imitate intelligent human behavior.” Others have used the terms “machine learning” or “cognitive computing.”³ When you were a baby, just learning how to talk, you observed thousands of conversations. You noticed that there was a cadence to the sounds being expressed, you noticed that some of those sounds were repeated over and over again, and you learned your first words. After thousands of hours of training, you pumped out a single word. From there, you probably started trying to string together “sentences” in a series of meaningless babbling, with an occasional coherent word thrown in. The sentence did not achieve the desired outcome, and you tried again. Over time and much trial and error, you learned to talk.

Machine learning works in much the same way. A program attempts to achieve an outcome by modeling its outputs against the data you provide it. To carry the analogy forward, you provide the program with thousands of hours of speech recordings for it to listen and model itself after. The program tries to match cadence with meaning, and it eventually “learns” to synthesize speech.

However, imagine that instead of providing the program with thousands of hours of actual speech recordings, you provided the program with mostly speech recordings, but maybe a quarter of the recordings were of chattering monkeys. As far as the computer is concerned, all of the recordings are equally valid, so it will attempt to model its synthesized speech after the entirety of the recordings, resulting in sentences that include the occasional monkey-based vocalization or “speech” structure. This would be an obvious error to any person listening to the synthesized speech, but the use of machine learning is often to remove the need for an individual to interact with the data: the program is likely to go on and on synthesizing monkey sounds into the outputs long before anyone notices.

This can lead to many problems when the machine learning tool is responsible for important decisions: (1) who to interview for a job; (2) who to loan money to; (3) what stocks to invest in; or (4) who to send to jail. All of those listed use cases to rely on the data fed into it, and the data can be problematic for a few reasons.

B. USE IN THE PRACTICE OF LAW

There are many different ways in which lawyers today are using AI to improve productivity, efficiency, and the quality of legal services for their clients. Traditionally, legal

³ Lisa Morgan, *4 Types of Machine Intelligence You Should Know*, INFO. WK. (Apr. 10, 2018); <https://www.informationweek.com/ai-or-machine-learning/4-types-of-machine-intelligence-you-should-know>.

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First appeared as part of the conference materials for the
2023 First Friday Ethics (May 2023) session

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