



# Artificial Intelligence in Legal Practice

## Benefits, Considerations, and Best Practices

DRI Center for Law and Public Policy Artificial Intelligence Working Group



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# EXECUTIVE SUMMARY

Artificial Intelligence (AI) has become an increasingly important topic in the legal industry in the last few years following the introduction of ChatGPT and other generative systems. But AI is not new to the legal industry. In fact, there are many legal support programs that use AI to improve functionality and efficiency. Any system that makes decisions autonomously—as opposed to being human operated—is AI. It has been incorporated into legal research platforms, document review programs, e-discovery systems, Microsoft Word and Outlook, and yes, chatbots like ChatGPT. While AI has come a long way, it is continuing to develop, and it is by no means a replacement for legal analysis and reasoning employed by experienced lawyers. Rather, it should be seen as a tool to be used by lawyers to perform tasks with a higher level of efficiency and quality.

Because AI is not a replacement for legal training and experience, lawyers must remember that our ethical obligations to our clients and the courts require that we review any work product from AI for completeness and accuracy. Additionally, lawyers must carefully consider the confidentiality and privacy concerns that come with the use of AI. Text generators and chatbots like ChatGPT initially did not have any privacy restrictions for information entered into the system. Developers have started to institute confidentiality restrictions for these systems, including building generative systems that are exclusive to the law firm for which the system is developed. However, even when exclusive to a law firm, these systems are designed to use the information entered by users to learn and respond to future questions from users. Similarly, there are significant questions about who owns the work product from AI, further complicating the confidentiality and privacy issues. The ABA has started to analyze the confidentiality and privacy questions posed by AI and has provided some initial guidance. Lawyers using AI must carefully consider what information can appropriately be entered into these systems without deviating from our obligation to keep our clients' information confidential.

AI is also not immune from bias. AI learns from data entered by humans, which can result in AI unintentionally developing biases based upon historical inequalities. For example, a company may train an AI resume scanner to identify the best candidate for a position based on previous recruiting patterns. In that case, the AI may learn that certain candidates from similar schools and life experiences are the best candidates while overlooking qualified nontraditional candidates. Legal challenges may arise when biased AI systems violate antidiscrimination laws or ethical principles. While significant efforts are being made to address the potential problem of bias with AI, for now, lawyers must be aware of the potential for biased outcomes from AI systems.

There are several outstanding action items that must be addressed with respect to the integration of AI into legal practice. First, how does the use of AI in legal practice impact the ethical rules applicable to our practices, if at all? Do courts have to start regulating the use of AI in litigation, or do the existing rules appropriately account for its use? When mistakes are made, who should be held liable for the mistakes: the lawyer, the AI developer, or both? Next, does the billable hour model need to be modified in some way to account for the efficiencies we are already anticipating and expect to see in the future? Finally, there are significant confidentiality, privacy, and bias issues that need to be addressed before AI becomes more prevalent in our practice.

AI is nevertheless becoming more useful—and potentially indispensable—for legal practice. Its integration into legal practice cannot be avoided, nor should it be. To be clear, the authors of this white paper do not believe AI is going to replace lawyers, particularly in litigation. As will be discussed in this white paper, AI will not replace the necessary legal judgment and discretion that is exercised by lawyers every day in furtherance of our clients' respective goals. Rather, we hope that this white paper will demonstrate that AI should be seen as a boon to the practice of law; it is something that will make us more productive, not obsolete.

# INTRODUCTION



Since the fall of 2022, the use of Artificial Intelligence (AI) in the legal industry has become a surging topic of importance. The situation today is akin to the early days of the COVID-19 pandemic: AI is quickly spreading within the practice of law, and your team members, clients, adversaries, competitors, and others have diverse risk tolerance levels. Stakes are high and coordination is critical, yet making and enforcing uniform policies is controversial and the timeline is short. But the continued growth of AI in the legal industry is a time of opportunity for attorneys and our clients. For attorneys to use AI responsibly in their practices and to advise their clients competently, it is elemental for attorneys to learn about AI, how it has been and can be used in the future, and what the use of AI in legal practice will require from both practical and ethical standpoints. A deeper understanding of AI, including its benefits and potential pitfalls, will help our profession find productive means for effectively incorporating AI into our practice.

Firms might be inclined to institute an immediate ban against the use of all AI on company property, but there are several potential ramifications to such a ban. Will such a ban work? Will it simply drive lawyers to use AI underground? Does a ban inadvertently chill some lawyers from using low-risk productivity software or make the team less competitive and less attractive in the legal marketplace? An absolute ban on AI is likely unworkable in today's market.

General Counsel . . . say that they are under pressure to reduce the number of lawyers in their teams, . . . reduce the amount they spend on external law firms . . . [a]nd yet, at the same time, . . . they have more legal and compliance work to undertake than ever before, and that the work is riskier too. Many General Counsel tell me that they are being required to **reduce their overall legal budgets by between 30 per cent and 50 per cent.**<sup>1</sup>

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<sup>1</sup> Richard Susskind, *TOMORROW'S LAWYERS* 3d Ed. at 12 (2023).

Plaintiffs' firms, such as Morgan & Morgan, have shared their enthusiasm for incorporating AI to optimize their processes:

We do embrace efficiency. **We do embrace tools as a weapon that allows our lawyers to be more effective in representing clients.** . . . We've done a really good job of creating an environment to structure data [and generative AI tools could help with] thinking through other ways for us to organize that data.<sup>2</sup>

Tech startups are also entering the legal market, with the explicit aim of using AI to aid lay people with legal issues. Joshua Browder, founder of DoNotPay, a self-professed "general counsel for consumers,"<sup>3</sup> recently said:

Lawyers love rules and they love accusing people of breaking the rules and I think they're scared of this technology. **It's like the dinosaurs suing to stop the ice age.** Lawyers really don't want this technology to move forward that much because they realize that a lot of their jobs is copying and pasting documents. Not all lawyers are like that but some of them are. If AI can just do that and replace them, it puts a lot of them out of work.<sup>4</sup>

As lawyers learned during the rise of e-discovery, doing things the traditional way can lead to costly results. There is no one-size-fits-all policy for use of AI in law firms. Those that can craft a nuanced AI policy and strategy to embrace the time- and efficiency-saving aspects of generative AI will thrive.

This paper offers a broad discussion of AI affecting all civil defendants. It discusses what technology is currently in use by legal practitioners and how machine learning is being developed for review of common legal documents. This paper examines and recommends how the use of AI will impact or potentially change the practice of law moving forward. This paper also examines the challenges and limitations of implementing the use of AI in legal practice and ethical considerations that attorneys must review prior to using AI. This paper is intended as an introduction, to promote discussion and provoke thought among attorneys and their clients regarding the use of AI within legal practice. The DRI Center for Law and Public Policy and its Artificial Intelligence Working Group are committed to tracking the landscape of AI use in the legal industry, and to continue to develop best practices and responses to assist all who seek to improve their use of technology like AI in their practices. As a follow up to this white paper, the Center for Law and Public Policy and its Artificial Intelligence Working Group plan to publish more detailed analyses of AI issues on discrete topics within the legal profession.

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<sup>2</sup> Christine Schiffner, National Law Journal, <https://www.law.com/nationallawjournal/2023/07/06/plaintiffs-firms-cant-ignore-efficiency-prospects-of-generative-ai/?slreturn=20240219125443#:~:text=Plaintiffs%20firms%20are%20increasingly%20exploring,for%20greater%20efficiency%20slip%20by>.

<sup>3</sup> <https://youtu.be/AmVdYPTdw2c?si=XHqk3E3wadQqTJsu&t=349>.

<sup>4</sup> <https://youtu.be/AmVdYPTdw2c?si=XHqk3E3wadQqTJsu&t=1366>.

# BACKGROUND

## What Is Artificial Intelligence?

To represent clients who increasingly rely upon AI in their offices or provide AI-based products and services to customers and expect their lawyers to do the same (i.e., to increase productivity and reduce costs), counsel need to have a strong understanding of what AI is, what kinds of AI are available in the legal profession, and what AI can do.

Many in the legal industry first gave AI serious consideration in November 2022, when OpenAI released ChatGPT, a general-purpose AI chatbot. But that's not the first time we have experienced AI. AI encompasses a very wide range of products and services—many of which we have been using for years. The fleets of self-driving cabs in San Francisco or the autopilot feature in Teslas are AI. The predictive text feature we use to complete our sentences in texts is AI. The recommendation algorithms of Netflix and Amazon are AI. In the legal industry, technology-assisted review (TAR) of company documents or medical records used during e-discovery is AI. The online searching, sorting, and recommendation platforms of Westlaw or LexisNexis—not to mention the recently launched AI-assisted research features of these platforms—are AI.

### **Any system that makes decisions autonomously—as opposed to being human operated—is AI.<sup>5</sup>**

On the simplest end of the AI spectrum is an elevator. Today's elevator is not helmed by a human driver operating the motors and doors; instead, it plans and executes trips to pick up and drop off passengers on different floors by itself on the fly based on an algorithm. An algorithm is just a set of “if-then” rules that govern how a machine or system behaves. Given a little bit of time, you can probably come up with the algorithm for a basic elevator.

It is important to understand the products that draw upon AI, particularly as the legal profession considers whether, and in what form, to institute rules governing the use of AI. If you draft contracts, policies, or regulations governing the use of AI and do not specify what kind of AI you are talking about, you could inadvertently cause confusion about the scope of your rules. If you use AI, you may inadvertently violate intentionally or unintentionally wide-reaching rules. For example, several courts have instituted standing rules mandating disclosure when AI is used by lawyers to develop pleadings filed in a case. Given the broad language of these new rules, any legal research performed in preparation of a pleading would arguably mandate that a lawyer disclose the use of AI because the primary legal research platforms employ AI to enhance searches.

## What Is Machine Learning?

An AI can be manually programmed or employ machine learning (or “ML”). For example, the basic elevator may be programmed to standby on the first floor if it has no calls. But a smart elevator may be programmed to standby on the first floor at 8:00 in the morning but standby on a middle floor at 5:00 in the afternoon. Further, the elevator could factor in the day of the week, the outside weather, the tenants' idiosyncratic elevator needs, and so forth to develop a more specific sched-

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<sup>5</sup> One definition, among many, comes from the National AI Initiative Act of 2020:

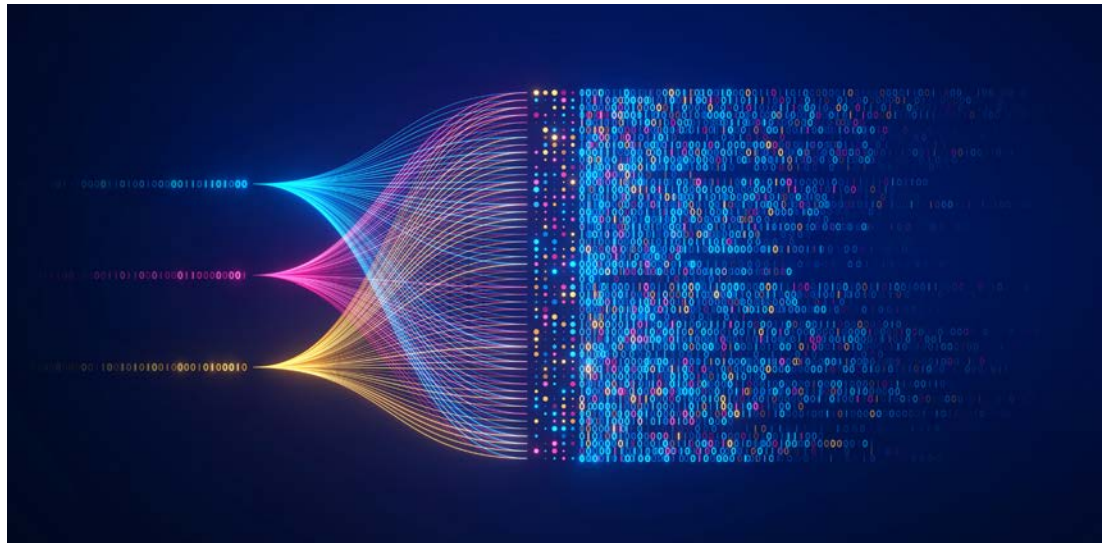
The term “artificial intelligence” means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to perceive real and virtual environments, abstract such perceptions into models through analysis in an automated manner, and use model inference to formulate options for information or action.

15 U.S.C. (SS) 9401(3).

ule. A highly sophisticated smart elevator may look like it is predicting the future by using these data points to anticipate demand. You might assume that a human engineer needs to provide the rules that govern the elevator. In early AI, even complex decision trees were written by humans. But modern AI tools use machine learning to write their own rules.

For example, instead of the engineer programming the elevator to standby on the first floor, the engineer programs the elevator to standby on the floor with the highest statistical usage, and the elevator collects the data to determine what floor that is. That data is usually referred to as the training set, but some AI continue to learn and refine its programming over time based on live data that it has been programmed to collect continually.

An even more sophisticated elevator may be programmed with a definition of “utility” (e.g., shortness of passenger wait times) and instructed to learn to respond to user input in a way that improves utility. The actual rules that govern how the elevator behaves are learned and refined during its operation as it accumulates data and updates the programmed algorithm based on the data findings.



The job of the engineer may be to design the factors (also referred to as “inputs” or “variables”) that the elevator can consider (such as time of day, day of week, month, weather, and an events calendar), the model (the kind of rules the AI can learn), and the technique by which the elevator learns (which might affect learning and output performance).

Generative AI refers to AI, like ChatGPT or Midjourney, that creates content like briefs, emails, images, audio, and video. Like the learning elevator, Generative AI uses training data to build a large language model or large multimodal model (the set of rules the AI will use to predict outputs). Then, it takes inputs (prompts in the form of text, picture, voice, or video) and outputs more text, picture, voice, or video. It is important to note that generative AI is not merely memorizing content and regurgitating accumulated information, but it attempts to abstract discrete pieces of data into a generally applicable model in training and then predict output in all kinds of previously unseen conditions.



## Does AI Make Mistakes?

An important aspect of the use of AI is understanding that AI can behave in such ways that appear to be mistakes. Hallucinations and emergent behavior are two kinds of AI behavior that appear as though the generative AI has made an error. Perhaps the most infamous case of a “hallucination” is the case of generative AI providing lawyers with “fake” case law, which they used in their briefs.<sup>6</sup> ChatGPT has also been accused of lying about a law professor’s sexual harassment scandals, even citing a fake Washington Post news article.<sup>7</sup>

“Hallucination” is a misnomer, however. Generative AI are not really search engines. Their purpose is literally to “make up” appropriate text responses to prompts, not to “look up” information. The viral image of the Pope in a fashionable white puffer jacket was not a hallucination to the “author” who prompted Midjourney to generate the image.<sup>8</sup>

Further, ChatGPT, for example, relies on a training set of information that it was fed by the engineers of the AI. The information and data that ChatGPT uses to develop responses includes a wide variety of internet sources, including Google Patents, Wikipedia articles, Reddit comments, and many more seemingly random pages that may have been included for engineering or cost reasons, such as Grace to You (a Californian Christian megachurch website), RT (Russian’s state-controlled news network), and the Motley Fool (an investing advice website).<sup>9</sup> ChatGPT, therefore, learned how to speak using stale, inaccurate, and biased sources—albeit considered by some to be one of the best training sets available today.

So, while “hallucination” implies defective behavior by the AI, the term unfairly shifts the blame from the user to the AI.<sup>10</sup> Some AI vendors are making attempts at fact-checking, providing users the source materials for its responses, or generating outputs with the assistance of live sources (known as Retrieval Augmented Generation). For now, AI users must understand the features of the tools they are using, especially a tool as potent as generative AI. When using generative AI, as is the case with reviewing any draft material, it is important to check the accuracy of statements made.

Another bug or feature of AI is emergent or unpredictable behavior, which has sometimes come with appalling consequences.<sup>11</sup> Not all emergent behaviors are horrifying, though. Emergent behaviors have discovered untapped markets, pharmaceutical advancements, and creative breakthroughs in a board game that has been studied for thousands of years.<sup>12</sup>

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<sup>6</sup> Jon Brodtkin, Lawyers have real bad day in court after citing fake cases made up by ChatGPT, *Ars Technica* (June 23, 2023), <https://arstechnica.com/tech-policy/2023/06/lawyers-have-real-bad-day-in-court-after-citing-fake-cases-made-up-by-chatgpt/#:~:text=Lawyers%20fined%20%245K%20and,chatbot%20%22gibberish%22%20in%20filings.&text=A%20federal%20judge%20tossed%20a,intelligence%20tool%20made%20by%20OpenAI>.

<sup>7</sup> Pranshu Verma & Will Oremus, ChatGPT invented a sexual harassment scandal and named a real law prof as the accused, *Wash. Post* (Apr. 5, 2023), <https://www.washingtonpost.com/technology/2023/04/05/chatgpt-lies/>.

<sup>8</sup> Dani Di Placido, Why Did ‘Balenciaga Pope’ Go Viral?, *Forbes* (May 27, 2023), <https://www.forbes.com/sites/danidiplacido/2023/03/27/why-did-balenciaga-pope-go-viral/?sh=420f8b2b4972>.

<sup>9</sup> Kevin Schaul, Szu Yu Chen and Nitasha Tiku, Inside the secret list of websites that make AI like ChatGPT sound smart, *Wash. Post* (Apr. 19, 2023), <https://www.washingtonpost.com/technology/interactive/2023/ai-chatbot-learning/>.

<sup>10</sup> Benj Edwards, Why ChatGPT and Bing Chat are so good at making things up, *Ars Technica* (Apr. 6, 2023), <https://arstechnica.com/information-technology/2023/04/why-ai-chatbots-are-the-ultimate-bs-machines-and-how-people-hope-to-fix-them/>.

<sup>11</sup> Jin Yoshikawa, *Sharing the Costs of Artificial Intelligence: Universal No-Fault Social Insurance for Personal Injuries*, 21 *VAND. J. ENT. & TECH. L.* 1152, 1162 (2019).

<sup>12</sup> Rizwan Qureshi et al., AI in drug discovery and its clinical relevance, *Heliyon* (2023).

AI vendors often lock their AI or place guardrails to try to prevent undesirable or unpredictable behavior. The tradeoff is that such AI cannot adapt to changing circumstances and entrench human limitations on creativity. Further, unpredictable behavior is not necessarily caused by user abuse. A locked AI can still behave in unpredictable ways if it is sufficiently complex.

The key takeaway is this: Today's AI learn from such enormous, nuanced, and multimodal datasets and make such complex decisions (such as driving a car, writing a brief, or generating a "photograph" or video) that there is no way to predict every output—unexpected results (within reason) should be anticipated and even desired at times. Lawyers need to develop an appropriate understanding of the capabilities, limitations, benefits, and risks of AI tools that may assist them and should be careful not to allow such AI tools to replace their own judgement.

## **What AI Services Are Being Offered Today?**

Many vendors are already offering law teams AI products or services for a variety of purposes and with varying degrees of sophistication. Each of these AI services aims to enhance the legal industry's efficiency, accuracy, and productivity, allowing legal professionals to focus more on strategic aspects and client interactions while automating and optimizing routine and labor-intensive tasks.

### **Brief Generators and Chatbots**

Vendors are now offering text generators and chatbots, like ChatGPT, that are tailored to meet the specific needs of legal teams. Some of these products are plugins, which are add-on features to Word, that help complete sentences and suggest citations. Some converse in plain English with lawyers much like ChatGPT. Some services summarize large documents, transcripts, or audio/video recordings.

As discussed above, critical to the quality and reliability of the output is the data that the AI is trained on. One feature that some vendors tout is the ability to learn from the company or firm's file management system. This would allow the AI to mimic the firm's voice or style, as well as take advantage of any institutional knowledge from prior work product.

In addition to training data, a key concern is whether the AI is connected to live legal databases and can properly and accurately identify and include key case citations. Some vendors, such as the industry stalwarts Thomson Reuters and LexisNexis, emphasize their advantage in access to granular data, allowing them not only to provide the operative law but also to generate nuanced text catered to specific judges, highly local practices, and timely trends.

### **Legal Research**

AI is revolutionizing the traditional methods of legal research, turning it into a more dynamic and precise discipline. The AI-powered tools for legal research come equipped with various features that help simplify the many complexities encountered by legal professionals. These tools use technologies like natural language processing (NLP), machine learning (ML), and data analytics to facilitate a more organized, comprehensive, and expedited research process. Some tools also help in tracking litigation histories or judge rulings, and in predicting legal outcomes based on historical data.

AI tools with NLP capabilities understand and interpret the legal queries posed by the researching lawyer in natural language. They analyze the context and semantics behind each search, going beyond keyword-based searches, and fetch more relevant and precise legal texts, case laws, and statutes. This nuanced understanding allows lawyers to find more accurate information that aligns with their specific, case-based concerns more quickly and, therefore, more efficiently.<sup>13</sup>

AI services in legal research often come integrated with extensive legal databases. This integration provides seamless access to a wealth of legal knowledge, enhancing the breadth and depth of research. These tools also continuously update and refine their database contents, ensuring access to the most accurate and recent information.

Another facet of AI-driven legal research are predictive analytics. AI services employ predictive analytics to forecast legal outcomes and possible judicial rulings based on historical case data and trends. These insights help guide lawyers in making informed and strategic decisions in their cases, helping to optimize their approach and enhance the possibility of success. Some examples of common legal questions predictive analytics can answer are (1) Should the matter be litigated or settled?; (2) Is it likely our motion will prevail?; (3) What is the valuation of a particular entity that is central to the matter I'm working on?; (4) How much in fees should a particular matter cost a client?; and (5) Can the matter I'm working on be pursued more efficiently?<sup>14</sup>

## Drafting of Routine, Common Legal Documents

One of the more efficient uses of AI in the legal space is that of automated legal drafting. Several vendors have introduced services that leverage AI to automate the drafting of legal documents. These tools can generate standard legal documents such as contracts, agreements, and letters based on the input and preferences of the user. These services improve efficiency by saving time, reducing errors, and maintaining consistency in legal drafting.<sup>15</sup>

### E-discovery

E-discovery, or electronic discovery, is a critical phase in the litigation process where parties involved exchange information and evidence in electronic formats such as emails, documents, databases, and other electronic records. The proliferation of digital data has made e-discovery harder, but AI has emerged as a powerful ally, greatly enhancing the efficiency and effectiveness of the process. E-discovery tools powered by AI are becoming increasingly popular in the legal industry. These tools assist legal professionals in identifying, collecting, and analyzing electronic data relevant to legal cases, such as emails, documents, and databases. AI-enhanced e-discovery tools improve the accuracy and speed of data retrieval and analysis, making the litigation process more efficient.<sup>16</sup>

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<sup>13</sup> Haya Al-Thani, et al., *Improving conversational search with query reformulation using selective contextual history*, Data and Information Management, Volume 7, Issue 2 (June 2023) <https://www.sciencedirect.com/science/article/pii/S2543925122001231>.

<sup>14</sup> *Five common legal questions that predictive data analytics can help answer*, Thomson Reuters <https://legal.thomsonreuters.com/en/insights/articles/five-common-legal-questions-that-predictive-data-analytics-can-help-answer>.

<sup>15</sup> *AI-generated content for legal document drafting*, AIContentfy <https://aicontentfy.com/en/blog/ai-generated-content-for-legal-document-drafting#:~:text=AI%2Dgenerated%20legal%20documents%20ensure,legal%20analysis%20and%20strategy%20development>.

<sup>16</sup> Nick Inglis, *The Rise of Artificial Intelligence in eDiscovery and Information Governance*, ACEDS Blog, Sep. 6, 2023 <https://aceds.org/artificial-intelligence-in-ediscovery-and-information-governance-aceds-blog/>.

## *Due Diligence and Compliance*

AI services have reshaped due diligence and compliance tasks within the legal domain, introducing a level of automation and sophistication that was previously unattainable. Leveraging various technologies such as natural language processing, machine learning, and data analytics, these AI-powered tools are transforming how legal professionals approach due diligence and compliance across various legal practices, including mergers and acquisitions, real estate transactions, and corporate governance. For example, there are available products that can quickly scan, analyze, and categorize data from large document productions, and there is even AI that can review transactional documents for potential red flags such as discrepancies in terms.

Incorporating AI in due diligence and compliance tasks augments the legal professionals' ability to uncover, assess, and mitigate risks effectively. It fosters a more rigorous, informed, and strategic approach to legal practices, contributing significantly to the enhancement of legal outcomes and decision-making processes.

## *Litigation Tracking and Analysis*

AI tools can also monitor and track ongoing litigations, providing up-to-date information on case statuses, court rulings, and legal developments. They help legal professionals stay abreast of the latest trends and changes in law, ensuring that they are always equipped with the most current and relevant information. AI-powered litigation tracking and analysis tools are modernizing the way legal professionals monitor ongoing lawsuits and access essential case-related information. These tools offer a blend of robust features, including real-time updates, comprehensive analyses, and predictive insights, which help keep lawyers and legal teams at the forefront of litigation developments.

By leveraging AI in litigation tracking and analysis, legal professionals can access a powerful suite of features that elevate their capacity for informed decision-making, strategic planning, and proactive case management. These tools not only optimize the workflow but also enrich the legal practice with data-driven insights and precision.

*"Lawyers need to develop an appropriate understanding of the capabilities, limitations, benefits, and risks of AI tools that may assist them and should be careful not to allow such AI tools to replace their own judgement."*

## *Enhancing Deposition Strategies*

Two areas where AI can help in deposition strategies are witness preparation and question optimization. AI can facilitate a meticulous preparation process for witnesses, analyzing past deposition transcripts and identifying potential areas of vulnerability or questions likely to be posed. This allows for a targeted preparation strategy, helping witnesses to navigate the deposition process with increased confidence and coherence.<sup>17</sup> AI can also help craft strategic questions for depositions. Through NLP, AI can analyze historical deposition transcripts to determine effective questioning techniques, enabling attorneys to formulate questions that are precise, relevant, and conducive to eliciting vital information.<sup>18</sup>

## *Formulating Trial Strategies*

AI's role extends substantively into the trial phase, where its capabilities can be harnessed to formulate strategies that are both dynamic and fortified against uncertainties.

**Evidence analysis and presentation.** AI tools can efficiently analyze vast arrays of evidence, identifying patterns, inconsistencies, and strengths within the collected data. This enables legal professionals to prioritize and present evidence in a manner that optimally supports their case's narrative.

**Jury selection.** AI can be used to analyze prospective jurors' backgrounds and responses during voir dire, helping to identify individuals whose predispositions may be favorable or detrimental to the case.<sup>19</sup> This fosters a more informed jury selection process, contributing to a trial strategy that is more aligned with the case's nuances.<sup>20</sup>

The integration of AI within the legal strategy formulation processes offers an innovative pathway to enriching deposition and trial preparations. By leveraging AI's analytical prowess, legal professionals can navigate the complexities of legal proceedings with enhanced strategic acumen, thereby bolstering the likelihood of achieving favorable judicial outcomes.

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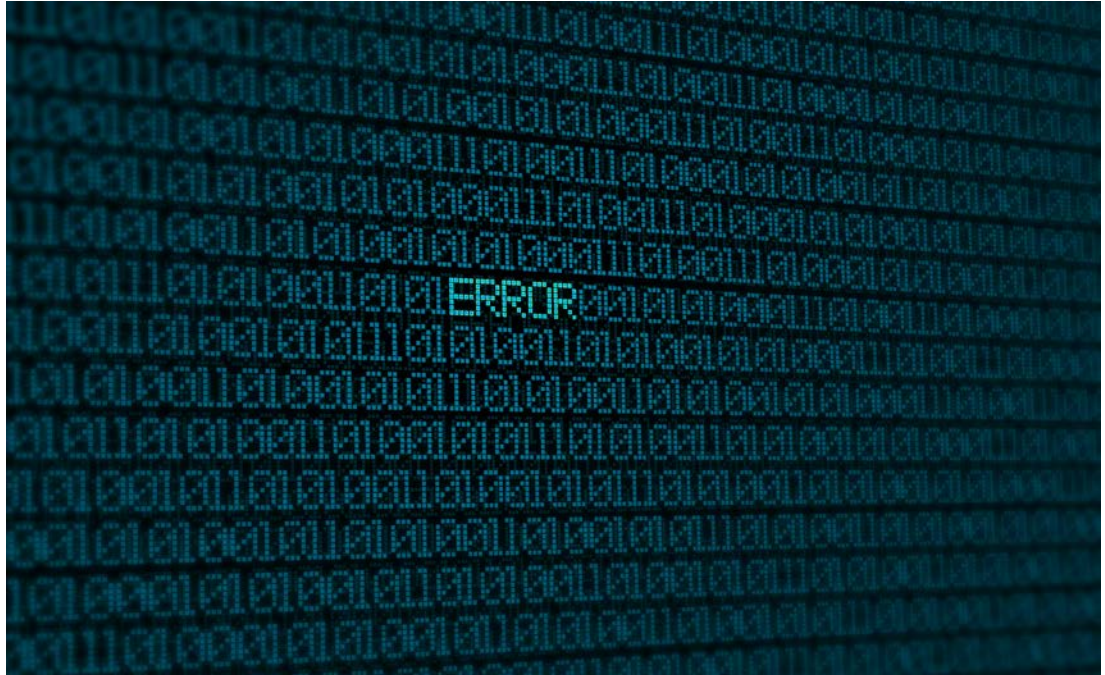
<sup>17</sup> Using AI to Prepare Depositions, Reveal <https://resource.revealdata.com/en/blog/using-ai-to-prepare-for-depositions>.

<sup>18</sup> Computer: Will ChatGPT Be Useful for Discovery Depositions?, Esquire Deposition Solutions <https://www.esquiresolutions.com/computer-will-chatgpt-be-useful-for-discovery-depositions/>.

<sup>19</sup> Mike Robinson, How AI is helping with jury selection and why some people are concerned, InfoTrack <https://www.infotrack.com/blog/ai-jury-selection/>.

<sup>20</sup> AI and the Future of Jury Trials, CLM <https://www.theclm.org/Magazine/articles/ai-and-the-future-of-jury-trials/2731>.

# EFFECT OF AI ON THE PRACTICE OF LAW



As explained in detail in the first section of this article, AI has grown exponentially since the turn of the century,<sup>21</sup> and with this growth has come curiosity and concern over what role AI currently plays in the legal field and how that role will evolve as AI technology advances.<sup>22</sup> For all members of the legal industry but especially attorneys, there is a real and present question that must be considered: Can AI get to a point where it is able to practice law? While such a question can lead to endless philosophical debate, for the purposes of this white paper we have three main areas of focus: (1) whether AI will ever be able to master the discretionary skills lawyers use every day; (2) what potential biases must lawyers and the public be on guard for when using AI; and (3) who can be pursued for malpractice if errors are made. From analyzing these questions, we conclude that while AI may be used as a helpful tool to increase efficiency in routine tasks, human discretion, judgment, and oversight will remain key functions in the practice of law that AI will not eradicate.

## Can AI Learn Human Discretion?

Much can be made of this question, which can be as general as “Will AI ever become as complex as human intelligence?” to as narrow as “Will AI ever be able to write a persuasive, error-free brief?” Entire fields of thought are devoted to the study of human intelligence, its base roots, and

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<sup>21</sup> See *Steering Committee, Artificial Intelligence Index 2019 Annual Report*, STANFORD UNIVERSITY, available at [https://hai.stanford.edu/sites/default/files/ai\\_index\\_2019\\_report.pdf](https://hai.stanford.edu/sites/default/files/ai_index_2019_report.pdf).

<sup>22</sup> See, e.g., Steve Lohr, *A.I. Is Coming for Lawyers, Again*, NEW YORK TIMES, <https://www.nytimes.com/2023/04/10/technology/ai-is-coming-for-lawyers-again.html> (Apr. 10, 2023); Niels Martin Brochner, *Will AI Replace Lawyers?*, FORBES.COM, <https://www.forbes.com/sites/forbestechcouncil/2023/05/25/will-ai-replace-lawyers/?sh=502428713124> (May 25, 2023).

how it can potentially be replicated in artificial form.<sup>23</sup> AI, as a human-made algorithm, necessarily requires human input at the outset to determine what decisions should be made and when. In essence, artificial intelligence acts as a complex, responsive set of logical processes: it takes in inputs (in a lawyer's practice, specific facts from a client interview or document) and through a pre-programmed set of processes, generates outputs (i.e., sifts out the legally significant facts for a given client's case and offers advice) based on that set of logical processes. This process, while seemingly complex, is generally routine, repeatable, and programmable. Indeed, there are already companies dedicated to using AI to make the process of document review in discovery faster and more efficient.<sup>24</sup> While appealing, these tools only scratch the surface of the "human aspect / human intelligence" of practicing law.

In practicing law, a lawyer does not simply sift through documents and information to find relevant facts—he or she separates these further into what are the most relevant facts for his or her client's case. This means strategizing on which relevant facts to highlight versus which to whistle on past—an argument that may work with one judge may land a lawyer in hot water with another. He or she, further, can parse out the credibility of each source of information, which is often as important as the information itself. A healthy sense of doubt can turn the tide in litigation, and a discerning, trained eye can tell whether opposing counsel is engaging in mere puffery in negotiations or if he or she is truly giving insight into his or her client's best offer. These are crucial tools in a lawyer's toolbox, and require a complex, and sometimes contradictory, set of decision-making processes in the lawyer's mind. This set of ever-changing considerations, given their complexity and organic nature, appears to be impossible for AI to attain. To some extent, though, AI can work to replicate them.

Human discretion, based on these examples, is largely based on game theory—a concept boiling down to the idea that every decision has certain consequences, and rational actors will act a certain way to achieve their desired goals. To generalize, a plaintiff injured in a car accident seeks to obtain recompense for her injuries, while a defendant in that same lawsuit seeks to avoid what he believes may be unfair liability. These decisions are based upon assumptions that, while not 100 percent accurate, are generally reliable (with the caveat that sometimes a party to a negotiation or a lawsuit may act irrationally for unrelated reasons), and thus a human programmer can theoretically create an AI tool able to make these decisions itself. AI can then act as the rational decision maker and discern which strategy may achieve a client's goals in a certain case.

The practice of law, though, is not always based on making a set of rational decisions to achieve a client's goals, nor should it be. A client's goal in a case may change, or the client's goals may be harmful to society (e.g., a murder defendant who asks their attorney to hide crucial evidence to make a not-guilty verdict more likely). A discerning attorney can tell which of a client's goals may be the most beneficial, and ethics rules sometimes require an attorney to ignore their client's goals. A lawyer can also "read the room," and determine whether to take certain witnesses at their word and when to push back. Human discretion requires this sense of strategy, combined with the sense of integrity that the legal profession cherishes, to succeed. This "gut-check," even given AI's exponential growth, is likely beyond its reach for now.

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<sup>23</sup> There are tomes dedicated to piecing together the puzzle of human intelligence, a multi-disciplinary study that is decades old. See, e.g., Daniel Dennett, *FROM BACTERIA TO BACH AND BACK: THE EVOLUTION OF MINDS*, Norton (2017); D.E. Berlyne, Jean Piaget, *THE PSYCHOLOGY OF INTELLIGENCE*, Routledge (2003).

<sup>24</sup> In 2019, IBM began marketing LegalMation, an AI tool meant to sift through a complaint and document review to generate, for example, an answer or discovery responses. See <https://www.ibm.com/blog/ai-speeds-document-discovery/>.

## What Potential Biases Exist in AI?

Even if AI cannot be counted on to practice law by itself, its relatively minor cost (compared to a discovery attorney's billable rate) combined with its speed and (general) accuracy is undoubtedly appealing to clients, and consequently, law firms. AI has already shown to be successful in completing rote and mundane tasks in efficient and reliable manners, and as such, it can be an invaluable tool for law firms seeking to stay ahead of the curve and decrease costs for completion of routine tasks. This use, however, requires a level of trust from the attorney using AI that it will act in a way it is "supposed" to act. For AI to be used effectively and safely by legal counsel, lawyers must be aware that "[i]t is well documented that AI can spread bias if the program's designer is biased. To combat this, lawyers need to recognize and guard against computer-generated bigotry to protect their clients and their professional reputations."<sup>25</sup>

AI, at its base, involves the use of data to "mimic the way in which humans learn to incrementally reduce the margins of error." This analysis, though, is only as good as (1) the data it takes in, and (2) the process by which it sifts through that information. Indeed, several recent studies have analyzed AI's use in government agencies and the potential for economic or racial bias in those algorithms.<sup>26</sup>

These concerns require serious efforts on the front end, by ensuring the algorithm is conscious to the potential for bias in the data it analyzes, as well as on the back end, with an attorney analyzing the outputs to correct an AI tool's decisions to the extent they reveal a previously hidden bias.

## Who Is Left Holding the Bag if Errors Are Made?

Another question attorneys may have regarding the use of AI in legal practice relates to the matter of malpractice. AI is far from perfect, and a cautious attorney need look no further than a recent Southern District of New York case, where an attorney relied upon faulty case law from ChatGPT and got his client's case dismissed.<sup>27</sup> The use of AI, though, is advancing exponentially, and it is foreseeable that as the technology advances, oversight from human attorneys will diminish. This oversight, which would be a critical juncture for human attorneys to correct potentially fatal mistakes in filings or advice to a client, could lead to clients finding themselves in hot water as their cases are dismissed or they rely upon faulty advice. In such instances, then, who will foot the bill should mistakes occur when an attorney uses AI in legal practice?

As AI currently stands, it is a support tool for technologically savvy attorneys to use in handling some of the more menial and rote tasks of an attorney's job. In these cases, AI is properly designated as a tool that the attorney is responsible for, in the same way docketing software might be. This is because attorneys using AI are still bound by the professional rules of conduct, which require maintaining competence in the "benefits and risks associated with relevant technology."<sup>28</sup> This requirement has been codified in the majority of states, and includes continuing education

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<sup>25</sup> Luca CM Melchionna, *Bias and Fairness in Artificial Intelligence*, NEW YORK STATE BAR ASSOCIATION <https://nysba.org/bias-and-fairness-in-artificial-intelligence/> (June 29, 2023).

<sup>26</sup> See Justin B. Bullock, *Artificial Intelligence, Discretion, and Bureaucracy*, THE AMERICAN REVIEW OF PUBLIC ADMINISTRATION, at 2 (Oct. 2019) (detailing studies examining the use of AI in predictive policing and its effects, as well as the disproportionate harm poor citizens face when states use algorithms to make decisions about government benefits); see also E. Martinez and L. Kirchner, *The Secret Bias Hidden in Mortgage-Approved Algorithms*, THE MARKUP, <https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms> (Aug. 25, 2021).

<sup>27</sup> See Larry Neumeister, *Lawyers Submitted Bogus Case Law Created by ChatGPT. A Judge Fined Them \$5,000*, AP NEWS, <https://apnews.com/article/artificial-intelligence-chatgpt-fake-case-lawyers-d6ae9fa79d0542db9e1455397aef381c> (June 22, 2023).

<sup>28</sup> See MODEL RULES OF PRO. CONDUCT r. 1.1, cmt. 8 (AM. BAR ASS'N 2021).



requirements to ensure that an attorney is aware of and competent in using relevant technology in his or her field of practice.<sup>29</sup> An attorney can use these tools to focus his or her time more on the critical legal analysis, substantive research, and drafting portions of his or her job, but he or she is ultimately responsible if a software bug causes him or her to miss an important deadline or make other, similar errors.<sup>30</sup> Even to the extent AI takes on substantive legal work that an attorney assigns to it, the attorney (and the attorney's malpractice insurance carrier) are likely responsible.<sup>31</sup> While this may create some particular issues with malpractice insurance rates relating to the use of AI, such issues can best be resolved by negotiations with an insurance adjuster. The far thornier issue is what happens when the AI is the one calling the shots—which is already happening in limited situations.

Tech companies have pushed the envelope in the legal field by developing algorithms they claim can replace lawyers, with one, DoNotPay, going as far as to try and represent a client in traffic court.<sup>32</sup> DoNotPay, understanding the potential for liability, seeks to get around the malpractice issue by requiring users to “agree to indemnify, defend, and hold harmless DoNotPay from and against any and all losses and threatened losses arising from, and in connection with . . . use of the Service [or] any claim that . . . use of the Service violates any applicable law.”<sup>33</sup> While beneficial for the company itself, these agreements are fraught with peril for clients who may not have the know-how to understand when their “robot lawyer” may be offering faulty advice. As such, public policy may require these types of agreements be unenforceable by doing away with malpractice insurance for “robot lawyers.” Requiring tech companies to hold potentially massive malpractice insurance policies, though, may move toward the other end of the extreme, by stifling innovation. In finding a workable solution, then, policymakers should consider the potential benefits “robot lawyers” may provide in expanding access to the justice system, and balance those against the drawbacks and concerns implicit in weighing how AI finds its place in the courtroom.<sup>34</sup>

Lawyers who employ AI technology in their practices must be aware of potential malpractice consequences and take several considerations into account. While AI can enhance efficiency and productivity, it also carries risks. Lawyers must ensure that the AI tools they use are reliable and accurate, as relying on flawed AI output could lead to erroneous legal advice or decisions. There are also significant confidentiality considerations that will be discussed later in this white paper. In cases of malpractice, lawyers may be held accountable for AI-generated errors, and their duty of competence extends to overseeing and verifying the AI's work. It is crucial to maintain transparency with clients about the use of AI and manage expectations regarding its capabilities.

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<sup>29</sup> Robert Ambrogi, Tech Competence, LAWSITES, <https://www.lawnext.com/tech-competence>.

<sup>30</sup> See, e.g., *Symbionics Inc. v. Ortlieb*, 432 F. App'x 216, 220 (4th Cir. 2011) (“Counsel’s total dependence on a computer application—the operation of which counsel did not completely comprehend—to determine the filing deadline for a notice of appeal is . . . precisely the sort of ‘run-of-the-mill inattentiveness by counsel’ that we have consistently declined to excuse in the past.” (quoting *Thompson v. E.I. DuPont de Nemours & Co., Inc.*, 76 F.3d 530, 535 (4th Cir. 1996)).

<sup>31</sup> See, e.g., *In re Hessinger & Assocs.*, 192 B.R. 211, 223 (Bankr. N.D. Cal. Jan. 22, 1996) (“The duty of competent representation includes the duty of adequately supervising non-attorney employees.”); *In re Stegemann*, 206 B.R. 176, 179 (Bankr. C.D. Ill. Mar. 3, 1997) (quoting Ga. State Disciplinary Bd., Advisory Op. 21 (1977)) (“[D]elegation of activities which ordinarily comprise the practice of law is proper only if the lawyer maintains a direct relationship with the client involved, supervises and directs the work delegated to the paralegal and assumes complete ultimate responsibility for the work product produced by the paralegal.”).

<sup>32</sup> See Bobby Allyn, *A Robot was Scheduled to Argue in Court, Then Came the Jail Threats*, NPR.ORG, <https://www.npr.org/2023/01/25/1151435033/a-robot-was-scheduled-to-argue-in-court-then-came-the-jail-threats> (Jan. 25, 2023). DoNotPay is currently facing a class action lawsuit in California due to alleged unauthorized practice of law allegations. See Sara Merken, *Lawsuit Pits Class Action Firm Against ‘Robot Lawyer’ DoNotPay*, REUTERS, <https://www.reuters.com/legal/lawsuit-pits-class-action-firm-against-robot-lawyer-donotpay-2023-03-09/> (Mar. 9, 2023).

<sup>33</sup> *Terms of Service and Privacy Policy*, DONOTPAY, <https://donotpay.com/learn/terms-of-service/> (August 22, 2023).

<sup>34</sup> For a source of potential policy solutions, see, e.g., Michael Loy, *Legal Liability for Artificially Intelligent ‘Robot Lawyers’*, 26 LEWIS & CLARK L. REV. 951 (2018); Katie Wolf, *AI and Mitigating Risks of Legal Malpractice*, FILEVINE.COM, <https://www.filevine.com/blog/ai-and-mitigating-risks-of-legal-malpractice/> (July 17, 2023) (discussing AI's impact on legal malpractice insurance); Grover, Lewis & Johnson, LLP, *Can Artificial Intelligence be Held Liable for Medical Malpractice* (June 15, 2021) (discussing malpractice in the medical field's use of AI).

# CHALLENGES AND LIMITATIONS FOR IMPLEMENTING AI INTO LEGAL PRACTICE

It is essential to employ AI tools with a nuanced understanding of legal ethics and procedural norms to ensure that the use of technology aligns with the fundamental tenets of justice and professional integrity. There are barriers to implementing AI fully into the practice of law. In this section, we will discuss what are seen as the primary barriers to the regular use of AI in legal practices. These barriers include (1) privacy concerns; (2) the accuracy of AI-generated work product; (3) cost; (4) job displacement; and (5) effect on the traditional billing model. Although these have been identified as barriers by commentators assessing the use of AI in the legal profession, they are certainly not insurmountable and should not detract from the benefits AI can provide legal professionals.

## The Ethical Considerations Regarding the Use of AI

Perhaps the biggest barrier to implementing AI into the legal profession is ensuring the confidentiality of information entered into the software. Model Rule of Professional Conduct 1.6 requires lawyers to maintain the confidentiality of information obtained as part of the attorney–client relationship. Attorneys using AI must confirm that each AI company they are using has appropriate technical, physical, and administrative security measures in place.

Attorneys using AI in practice should understand that entering client information into a generative AI system is disclosure of client information. Regardless of the AI system being used, it is something created and maintained by a third-party vendor. Because these systems are maintained by third-party vendors, the American Bar Association has indicated that it views entry of client information into an AI system to be a disclosure of client information. The ABA has concluded that attorneys must adhere to their ethical requirements in making these disclosures.<sup>35</sup> Model Rule 1.6 provides the following:

- (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



<sup>35</sup> "Ethical Obligations to Protect Client Data When Building Artificial Intelligence Tools: Wigmore Meets AI," D. Linna Jr. & W. Muchman, [https://www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/27/1/ethical-obligations-protect-client-data-when-building-artificial-intelligence-tools-wigmore-meets-ai/#6](https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/27/1/ethical-obligations-protect-client-data-when-building-artificial-intelligence-tools-wigmore-meets-ai/#6).

out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (6) to comply with other law or a court order; or
- (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

The ABA has stated that a lawyer must obtain informed consent from the client before the client's information may be entered into AI software, particularly because the information may be used by the system to learn and will be applied to future cases.<sup>36</sup> The ABA has commented that entering information into AI software likely would not meet the exception to Rule 1.6 where the "disclosure is impliedly authorized in order to carry out the representation."<sup>37</sup> Thus, express informed consent from the client will likely be required to enter information into AI software.<sup>38</sup> With respect to use of AI software, the ABA has specifically stated that a lawyer using the software "should also disclose if and how that tool may be used in the future for both the current client and other clients."<sup>39</sup> There is no requirement that this be done in writing, but the ABA has recommended written confirmation of this informed consent discussion.<sup>40</sup> It can be done in the original engagement letter.<sup>41</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

Rule 1.6(c) is also significant. Rule 1.6(c) provides that lawyers must exercise reasonable efforts to prevent the inadvertent or unauthorized disclosure of client information. It may be challenging for lawyers to meet this requirement when the information is being maintained by AI software and may likely be used by the AI to provide responses in future cases. For example, open AI software like ChatGPT learns by gathering information. When ChatGPT was initially launched, it did not have confidentiality protections. Rather, when users entered data into ChatGPT, it could use the data without restriction if needed when responding to queries submitted by other users. The developers of ChatGPT recognized that its lack of confidentiality protections limited its use by professionals. In April 2023, ChatGPT updated its privacy options and now allows users to select a private conversation option. When the private conversation option is used, the information entered cannot be used to train ChatGPT. The information is held for 30 days and then deleted.

Still, there is presently no audit system in place to examine how the data is being stored during that 30-day period to ensure that it is not being used by ChatGPT to respond to other inquiries and to ensure that the information is, in fact, being deleted after 30 days. Without an audit to ensure compliance with ChatGPT's privacy assurances, lawyers may not be able to state that they are exercising reasonable efforts to prevent the inadvertent or unauthorized disclosure of client information as required by Rule 1.6(c) and should be very cautious to put confidential client information into systems like ChatGPT. Commentators have also raised that there is still a risk of the information being exposed in the event of a data breach. This risk applies to all data storage systems. However, for lawyers to comply with the requirements of Rule 1.6(c), they must understand the protections employed to mitigate against the risk of data breach. Thus, when using open AI software like ChatGPT, a lawyer must understand the data security used by the software before entering client information into the software.

Some developers, like Microsoft and Harvey AI, have been developing generative AI platforms that are created specifically for individual law firms. These platforms may only be used by lawyers and other legal professionals within the law firm. They are protected by firewalls and permission requirements that are intended to prevent individuals outside of the firm from accessing the platform and the information stored within the platform. Some law firms have large IT departments that can manage these AI platforms once developed by the outside vendor. But many firms do not have the resources to manage and maintain the platforms, and the platforms continue to be maintained by the vendor. Per the ABA guidance to date, lawyers must still obtain consent from a client before entering the client's information into an AI platform that is internal to the firm.

The ABA has recommended "reasonable steps" that lawyers can take when sharing confidential client information with a third-party AI developer. These steps include investigating the developer's security measures and policies to ensure they are adequate, ensuring the developer has an enforceable obligation to maintain the security of the information, ensuring the information will not be used as data outside of a client's case, and understanding the developer's policy for purging information. When engaging a third-party AI developer in a client case, the lawyer should ensure that the agreement contains a term limiting use of the client's information to the express purpose of the agreement.

The ABA has also recommended steps that lawyers should take to minimize the risk that client information is disclosed or used by AI outside the client's case. First, a lawyer should carefully consider what information must be entered into the AI software to obtain the desired result.<sup>42</sup> For example, if asking the AI software to answer a legal question, the lawyer should enter only the facts needed for the software to evaluate the question appropriately. If asking the software to predict an outcome, the lawyer likely does not have to enter personal identifiers, such as an employer identification number or other sensitive data.

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<sup>42</sup> *Id.*

## Ensuring the Accuracy of AI-Generated Work Product

Another potential “barrier” to implementing AI into legal practice is accuracy and quality concerns with AI work product. While some commentators have raised this as a major barrier, the duty an attorney should undertake to review accuracy and quality of AI-generated work product is not significantly different from the existing duty placed on lawyers to ensure the quality and accuracy of work performed on behalf of clients. Experienced lawyers regularly review work performed by less experienced lawyers to ensure completeness and accuracy. The difference with AI that has been raised by some commentators is that AI software like ChatGPT does not have the years of legal education and experience that even first-year lawyers may possess. Additionally, open AI software learns as it takes in information. Thus, there is a concern that the software may miss important changes to a body of law if it has not “learned” the information before it is asked to respond to a legal query.

Another concern that has been raised is AI “hallucinations” when answering queries, as discussed earlier in this article. In other words, open generative AI software like ChatGPT has exhibited a tendency to make up facts or law when it has a gap in its knowledge, which is what happened to the lawyer in the Southern District of New York who was sanctioned for citing fake cases in a legal brief.<sup>43</sup> This was a “hallucination,” where the AI software invented case law out of whole cloth because it had not yet learned the necessary information to answer the question. In his order imposing sanctions against the lawyers, United States District Court Judge P. Kevin Castel wrote, “Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance. But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings.”<sup>44</sup>

The sanctions order in *Mata* is a cautionary tale for lawyers who are implementing AI into their practices. AI is an amazing tool that will undoubtedly benefit the legal profession. It will aid in document review, legal research, drafting legal documents, and predicting outcomes. But legal AI tools are relatively new and are continuing to develop. These tools are not infallible, and they cannot be treated as such by lawyers. The Rules of Civil Procedure and the Model Rules of Professional Conduct require that the lawyer using AI for document review, research, or legal drafting carefully review the work product to ensure accuracy. Aside from the requirements of Rule 11, Model Rule of Professional Conduct 3.3 requires that a lawyer shall not make a false statement of fact or law to a tribunal or offer false evidence to the tribunal.

Although it is not a true “barrier,” to implementing AI into practice, lawyers must understand the AI software they are using, understand how it functions, and, importantly, understand its limitations. The American Bar Association provided guidance on this topic more than ten years ago. In a new comment to Model Rule of Professional Conduct 1.1, the ABA reiterated that a lawyer’s duty of competent representation requires awareness of the “benefits and risks associated with relevant technology.”<sup>45</sup>

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<sup>43</sup> *Mata v. Avianca*, No. 22-CV-1461 (PKC) (S.D.N.Y.).

<sup>44</sup> *Id.* at 1–3.

<sup>45</sup> Comment 8 to Model Rule of Professional Conduct 1.1.

AI is a great tool that provides efficiency to our practice, but its use does not relieve lawyers of our ethical obligation to review pleadings for accuracy. But this type of software is still being developed, and it does not have the years of legal training and experience that allow a seasoned lawyer to spot information in documents that may be significant for the unique factual and legal issues of the case. The question then becomes how much supervision a lawyer exercise must over AI work product, such as its summary of a document production. This scenario is not much different from an experienced attorney delegating the task of document review to a paralegal or first-year attorney. The delegating attorney would still have an obligation to review the work product. A difference is that the delegating attorney can speak with the paralegal or first-year attorney to understand the process followed to review the documents, which will inform how the delegating attorney reviews the work product. Thus, when work is being delegated to AI, the attorney must similarly understand how the AI software functions to perform the document review. It is vital for attorneys to understand the functionality of an AI product before using it in practice.

## Cost of AI

The cost of AI software, including the perceived return on investment, is also a barrier to its implementation. This barrier is more applicable to generative AI like the open AI platforms being developed by Microsoft and Harvey AI. Platforms like Westlaw and Lexis Nexis offer different packages that include AI systems to perform legal research, document review, and even some generative drafting software that can be tailored to a specific firm's costs limitations. However, the generative AI software being developed by Microsoft and Harvey AI are still in the development stage, and thus these products are more expensive. Mid-size and smaller law firms, as well as in-house legal departments, continue to see the cost of AI software as the primary barrier to more rapid implementation of AI software.<sup>46</sup>

Managing attorneys also worry about the return on investment from implementing AI software even if the cost is within the firm's or department's budget. Many lawyers do not understand the different types of AI software available for use in the legal profession. Successful implementation will require intensive training on the software being implemented, its functionality, and how to use it. There will be a steep learning curve for many legal professionals before they can use AI software efficiently and effectively.<sup>47</sup> It is a real concern whether lawyers within firms or legal departments will have adequate time not only to learn the new software, but also to learn how to adapt their daily workflows to include new AI software effectively.

## Will AI Cause Job Displacement

AI and large-language models like GPT-4 are a threat for legal jobs due to their ability to perform critical legal tasks such as creating written documents and researching case law. The concern is that automation of those tasks will make many if not most lawyers obsolete if the work requires fewer lawyers, or if clients can have these tasks performed by nonlawyers, eliminating the need for lawyers at all. Lawyers are among the most exposed when it comes to advances in large-language modeling because the profession has higher wages and because generative AI has shown great potential to create written work.<sup>48</sup> That exposure does not necessarily mean that lawyers will be out of a job, rather the work that lawyers typically perform could be substituted or augmented

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<sup>46</sup> "What Are the Barriers to Entry for Using AI in Law?" J. White (<https://kirasystems.com/learn/barriers-to-entry-for-using-ai-in-law/>).

<sup>47</sup> *Id.*

<sup>48</sup> Felten, Edward W. and Raj, Manav and Seamans, Robert, How will Language Modelers like ChatGPT Affect Occupations and Industries? (March 1, 2023). Available at SSRN: <https://ssrn.com/abstract=4375268> or <http://dx.doi.org/10.2139/ssrn.4375268>.

by large-language models.<sup>49</sup> All legal jobs will be affected by AI. Assuming the legal industry responds to automation the same way that other industries have, worker displacement from automation will be offset by the creation of new jobs. Even still, demand for lawyers dropped in 2022 and there are no reasons to believe that this trend will reverse.

## AI May Cause Shift to More In-House Positions

Certain legal jobs that are focused primarily on drafting legal documents, such as simple wills and contracts, are in the crosshairs of those racing to implement AI and large-language modeling to drive efficiency and cost-savings. Chat GPT is believed to have the potential to create work product that is commensurate to what can be produced by an attorney and the ability to do it much faster and cheaper. According to a study by Goldman Sachs, 44 percent of all work in the legal field can be automated.<sup>50</sup> For most lawyers this means adaptation and implementation of AI in their existing jobs, but experts predict that 40 percent of jobs in the legal industry (which can include lawyers and other professionals) are at risk of total replacement.<sup>51</sup> For attorneys whose jobs are not at risk, there is concern that companies will avoid hiring outside counsel when they can spend on an in-house generative AI solution that can do the same work.<sup>52</sup> So, law firms could see a drop in headcount while in-house legal departments expand.

## Less-Experienced Lawyers Most at Risk to Be Displaced

While there is likely to be some job displacement, the displacement in the near future will be due to the automation of more routine tasks, which will affect less-experienced attorneys the most. More-experienced attorneys are less likely to be displaced for now, but as AI technology advances there will be even more potential for it to take on more complex work. The greater concern is that generative AI will displace younger attorneys, as tasks that cannot easily be outsourced are hoarded by more-experienced attorneys and less-experienced attorneys will have fewer opportunities to gain valuable experience by spending hours on important tasks.<sup>53</sup>

Companies are already implementing tools that automate tasks that are typically assigned to young lawyers. Legal tasks like research, drafting documents, and document analysis can be automated, to a degree, by AI.<sup>54</sup> Several new legal technologies have been created or integrated with AI specifically for those tasks. For example, Latch uses GPT-4 to simplify contract review and redlining, while Harvey focuses on legal research, drafting, and contract analysis.<sup>55</sup> Other technologies are poised to cut out outside counsel altogether with CoCounsel being implemented by Microsoft and Ford to prepare depositions, perform contract analysis, and conduct legal research.<sup>56</sup> Contract drafting in particular appears to be vulnerable to automation, with companies in the

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<sup>49</sup> *Id.*

<sup>50</sup> Hatzius, Jan and Briggs, Joseph, and Kodnani, Devesh, and Pierdomenico, Giovanni, The Potentially Large Effects of Artificial Intelligence on Economic Growth (March 26, 2023). Available at <https://www.gspublishing.com/content/research/en/reports/2023/03/27/d64e052b-0f6e-45d7-967b-d7be35fabd16.html#authors>.

<sup>51</sup> *Id.*

<sup>52</sup> Wolf, Jonathan, Do AI Large Language Models Like ChatGPT Make Law School Less Worth It as an Investment?, ABOVE THE LAW (July 5, 2023). Available at <https://abovethelaw.com/2023/07/do-ai-large-language-models-like-chatgpt-make-law-school-less-worth-it-as-an-investment/>.

<sup>53</sup> See footnote 4.

<sup>54</sup> Patrice, Joe, Attorneys Know AI Will Have Significant Impact...Aren't Sure What to Do About That, ABOVE THE LAW (August 22, 2023). Available at [https://abovethelaw.com/2023/08/lexis-nexis-generative-ai-survey/?utm\\_campaign=Above%20the%20Law%20Daily&utm\\_medium=email&hsmi=271404282&hsenc=p2ANqtz-8cTxPnwAG\\_DmUtlXr65h9DVU8-5efa0e5J5wJGIQFja5Ylvudncp1kYVfFgKCOOFIPcbwULKq3kFsmcmWHb-kvsc7fTdQ&utm\\_content=271404282&utm\\_source=hs\\_email](https://abovethelaw.com/2023/08/lexis-nexis-generative-ai-survey/?utm_campaign=Above%20the%20Law%20Daily&utm_medium=email&hsmi=271404282&hsenc=p2ANqtz-8cTxPnwAG_DmUtlXr65h9DVU8-5efa0e5J5wJGIQFja5Ylvudncp1kYVfFgKCOOFIPcbwULKq3kFsmcmWHb-kvsc7fTdQ&utm_content=271404282&utm_source=hs_email).

<sup>55</sup> Mulvaney, Erin and Weber, Lauren, End of the Billable Hour? Law Firms Get on Board with Artificial Intelligence (May 11, 2023), WALL STREET JOURNAL. Available at <https://www.wsj.com/articles/end-of-the-billable-hour-law-firms-get-on-board-with-artificial-intelligence-17ebd3f8>.

<sup>56</sup> *Id.*

private equity space using generative AI to generate complex contracts<sup>57</sup> and the development of Evisort, an existing contract management platform that now has a tool to accelerate drafting, redlining, and negotiating contracts.<sup>58</sup>

However, AI is not predicted to eradicate the need for lawyers. As discussed earlier in this white paper, much of the legal profession depends upon complex, and sometimes contradictory, reasoning to develop an appropriate legal strategy. For generative AI to be a threat to jobs of existing attorneys, it would need the capability to disrupt legal work that relies on a lawyer's expertise and professional judgment.<sup>59</sup> The briefs and contracts created with AI will require the review of experienced attorney.<sup>60</sup> Tasks more typically performed or closely supervised by experienced attorneys such as forming litigation strategies, handling new legal concepts, and performing due diligence are viewed as tasks having the least potential for generative AI because of the inherent need to exercise professional judgment.<sup>61</sup> The areas that are most vulnerable to job loss for experienced lawyers are practice areas with well-developed law, known problems, and known solutions—such as employment counseling or real estate—because the same work can be done with fewer attorneys.<sup>62</sup>

## **Effect on the Traditional Billing Model**

AI's ability to enable lawyers to produce work product and conduct legal analysis in a fraction of the time will necessitate that we reexamine the longstanding model of paying lawyers for their time. In-house counsel perceptions of AI will likely be a driver of this change, as 60 percent of in-house counsel expect firms will use generative AI tools.<sup>63</sup> Further, in-house counsel also expect that firms will disclose the use of AI. These factors could affect the viability of the billable hour as the standard because clients may expect AI to produce work product with minimal supervision. This underestimates the time it takes to guide the AI, review the work for accuracy, or exercise legal judgment to develop strategy based on the information provided by AI.<sup>64</sup> The challenge on both sides comes down to capturing the value of the intangible: a lawyer's intellectual output.

## **The Billable Hour May Be Eroding, but Not Disappearing**

The billable hour has persisted as the standard even as lawyers have implemented technology that has changed the way legal work is done, such as online legal research. Lawyers have a continuing duty to be competent in the benefits of using technology, and the duty to charge only a fair and reasonable fee.<sup>65</sup> Because the AI has the potential to reduce drastically the time it takes complete tasks, the prevailing thought is that the billing will have to change as well. There is a threat that it will be unethical to charge for the same work product multiple times when it is be-

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<sup>57</sup> Raisinghani, Vishesh, Do Not Go to Law School, ASSOCIATED PRESS (September 27, 2023). Available at [https://finance.yahoo.com/news/not-law-school-fund-manager-121500002.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly9hYm92ZXRoZWxhdy5jb20v&guce\\_referrer\\_sig=AQAAAB-JuZkkPXZIEpcqW3KC9EH2Y5vUP0XtJjvLfqrUtWQtY5VlhFKBUfKxYETPNp6F9ecMN2uBFiqbPkpy9J-dQPsxV1j\\_yjsD5XcbLfg\\_RbRbnMN4X5untPY-WdfqNEcRG3n4luH-aTD9vpKaxuU-ntK2vSjt6Ez-XyGy0KQTFVn74](https://finance.yahoo.com/news/not-law-school-fund-manager-121500002.html?guccounter=1&guce_referrer=aHR0cHM6Ly9hYm92ZXRoZWxhdy5jb20v&guce_referrer_sig=AQAAAB-JuZkkPXZIEpcqW3KC9EH2Y5vUP0XtJjvLfqrUtWQtY5VlhFKBUfKxYETPNp6F9ecMN2uBFiqbPkpy9J-dQPsxV1j_yjsD5XcbLfg_RbRbnMN4X5untPY-WdfqNEcRG3n4luH-aTD9vpKaxuU-ntK2vSjt6Ez-XyGy0KQTFVn74).

<sup>58</sup> Freedman, Robert, New Legal Tech Tools Showcased at CLOC 2023, LEGAL DIVE (May 16, 2023).

<sup>59</sup> Dipshani, Rhys, Is Generative AI Coming for Your Billable Hours?, THE AMERICAN LAWYER (September 26, 2023). Available at <https://www.law.com/2023/09/26/is-generative-ai-coming-for-your-billable-hours/>.

<sup>60</sup> Henry, Justin, Big Law Nixing ChatGPT for Legal Work, Seeks Secure AI Solution, THE AMERICAN LAWYER (August 3, 2023). Available at <https://www.law.com/americanlawyer/2023/08/03/big-law-nixing-chatgpt-for-legal-work-seeks-secure-ai-solution/>.

<sup>61</sup> International Legal Generative AI Report, LEXIS NEXIS (August 22, 2023). Available at <https://www.lexisnexis.com/pdf/lexisplus/international-legal-generative-ai-report.pdf>.

<sup>62</sup> *Id.*

<sup>63</sup> Lyle Moran, 60% of in-house counsel expect law firms to use generative AI, <https://www.legaldive.com/news/law-firms-generative-ai-use-cases-lexisnexis-survey/691913/>.

<sup>64</sup> See fn. 62.

<sup>65</sup> Comment 8 to Model Rule of Professional Conduct 1.1; Model Rule of Professional Conduct 1.5.



lieved to have been created with AI.<sup>66</sup> However, only charging for the work product based on the time it takes to supervise AI tools discounts the costs associated with gaining the expertise that lawyers add to the final work product. If lawyers (and law firms) do not find a way to capture the value of the strategy behind the work product, they risk pricing themselves out of profitability. If a move away from the billable hour is pending, then lawyers will have to figure out how to charge prices ethically based on value while maintaining efficiency and profitability.

Prior to AI, firms had already begun to adjust their business model to account for advances in technology, and in many ways the adjustment to AI will be no different. AI is already encroaching on some legal tasks like legal research and document review, but those tasks are not significant revenue drivers for law firms.<sup>67</sup> Even hours billed for research or review of documents, which is often done by less experienced attorneys or junior associates, are often written off or discounted.<sup>68</sup> In fact, a growing number of firms have already moved away from the billable hour for those tasks, allowing them to satisfy client demand for efficiency and to focus on more profitable work.<sup>69</sup> The move away from the billable hour will likely continue at a slow pace for the less profitable work, which has already been automated to some degree, while it persists for more specialized types of work.

## KEY LEGAL CONSIDERATIONS AND RISKS FOR LAWYERS IMPLEMENTING AI TECHNOLOGIES

In addition to the ethical implications for lawyers using AI, there are several legal considerations, some of which are not readily apparent, that lawyers must be cognizant of when using AI technologies in the practice of law like those described throughout this white paper.

Currently, the use of AI in the legal profession is largely unregulated. The rules lawyers use to guide their practice and decision-making, such as the Federal Rules of Evidence, Federal Rules of Civil Procedure, and the American Bar Association Model Rules of Professional Conduct, do not expressly account for lawyers' use of AI, although those rules do guide lawyers' use of AI as discussed earlier in this white paper. This is not unique to the legal profession. There are currently only a few laws and regulations governing the use of AI across all industries. Yet the use of AI is prevalent and only continues to grow.

Given this lack of guidance, this section delves into the critical legal implications that lawyers must consider when using AI technologies. In this era of rapid technological advancement, understanding the legal nuances and ramifications of AI is essential for lawyers.



<sup>66</sup> See fn. 18.

<sup>67</sup> See fn. 24.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

## Federal and State Laws and Regulations Regarding AI

Lawmakers at the state and federal levels are pushing AI initiatives and new laws that will, or already do, impact lawyers. For example, the White House issued the “Whitehouse Blueprint on AI Bill of Rights” in December 2022, which provides principles for the responsible use of AI and automated systems to protect civil rights, equal opportunities, and access to critical resources or services. The document emphasizes the importance of safeguarding the public from potential harm and discrimination while promoting the responsible use of AI technology. In August 2023, the United States Senate released a bipartisan framework for future legislation relating to artificial intelligence. Additionally, federal agencies, including the Equal Employment Opportunity Commission and the National Labor Relations Board, have issued guidance on the use of AI.

States have also developed legislation on AI. In Illinois, there is the Artificial Intelligence Video Interview Act, which regulates Illinois employers’ use of AI in the interview and hiring process;<sup>70</sup> and the Illinois Biometric Information Privacy Act in 2008, which governs the use, collection, and storage of biometric data, including retina or iris scans, fingerprints, voiceprints, and scans of hand or face geometry.<sup>71</sup> Maryland restricts the use of AI “facial template” absent applicant consent or waiver. New York City prohibits unaudited AI tools to screen candidates and employees. This list is not exhaustive. New law emerges all the time regarding the use of AI. Lawyers need to be aware of new and emerging laws and the associated risks these new laws create for their clients.

## Privacy and Confidentiality Concerns

Generally, information submitted to generative AI applications, such as ChatGPT, is not private or confidential. When using the technology, lawyers need to ensure that AI systems adhere to strict data privacy regulations. For example, lawyers using ChatGPT must become familiar with its Privacy Policy and Terms of Use before using the service. Additionally, they must make sure that the data is only used for the specific purposes for which it was collected. AI systems often rely on vast amounts of data, including highly sensitive and confidential information, and may store personal and conversation data.

A lawyer’s use of AI could implicate privacy laws in certain states if data input into an AI tool includes personal data. For instance, the California Consumer Privacy Act includes provisions affecting AI, such as limitations on data retention, data sharing, and use of sensitive personal information. Other states are developing laws to protect consumer privacy concerns related to the use of AI.

Accordingly, before using AI, lawyers must take necessary steps to ensure that their clients’ data is protected not only to meet their ethical obligations but also to comply with the law.

## Ownership Issues

Unprecedented ownership issues with generative AI arise due to the unique nature of the content generated by AI. Generative AI generates content from publicly available data online, meaning others created the content first. This creates questions as to who should hold ownership rights to the AI-generated content: the AI creator, the user of the AI, or the organization providing the AI platform. Resolving these questions often involves legal and ethical considerations, and regulations surrounding AI-generated content are evolving. There are currently no laws or regulatory guidelines in place that dictate who owns AI-generated content.

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<sup>70</sup> Illinois HB2557. <https://www.ilga.gov/legislation/BillStatus.asp?DocNum=2557&GAID=15&DocTypeID=HB&SessionID=108&GA=101>.

<sup>71</sup> 740 ILCS 14/. <https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3004&ChapterID=57>.

Generally, traditional copyright and intellectual property laws may not clearly define ownership because there is no human author involved. Notably, North Dakota enacted a law that amends the North Dakota Code to clarify that AI is not a person.<sup>72</sup> This raises several concerns for lawyers who are hired for their legal skills and expertise. Individuals and organizations must define ownership rights and responsibilities when using generative AI to avoid disputes and establish a clear framework for content created by these systems.

OpenAI, which operates ChatGPT, policy expressly provides:

You and End Users may provide input to the Services (“Input”), and receive output from the Services based on the Input (“Output”). We call Input and Output together “Customer Content.” As between you and OpenAI, and to the extent permitted by applicable law, you (a) retain all ownership rights in Input and (b) own all Output. We hereby assign to you all our right, title, and interest, if any, in and to Output.<sup>73</sup>

This means users retain all ownership rights of the AI-generated content to the extent permitted by applicable law. OpenAI is also quick to note that because of the nature of its services and artificial intelligence generally, “Output” may not be unique and other users may receive similar content, and that responses requested by and generated for other users are not considered your Output.<sup>74</sup>

The above is just one example of AI term of use regarding ownership. Before using AI technologies, lawyers should take the time to review the terms of use to understand any ownership implications.

## AI Technology Terms of Use

Generative AI technologies each have their own terms of use that outline the conditions and guidelines for using the service. Most specify that users are expected to comply with applicable laws and not use the service for unlawful or harmful purposes. For example, OpenAI maintains the right to restrict or terminate access for users who violate the terms, and user-generated content may be reviewed for safety and policy enforcement. The terms emphasize privacy and data handling, including the collection of user data for improving the service while respecting confidentiality. OpenAI’s use policy provides that users are responsible for anything put into the generative AI and represent and warrant that they have all rights, licenses, and permissions required to provide Input to the Services.<sup>75</sup> It further provides that users are solely responsible for all use of the AI-generated content and evaluating it for accuracy and appropriateness for use, including human review as appropriate.<sup>76</sup> It also states that users should not rely solely on ChatGPT for critical decisions and should use their judgment. This is key for lawyers. Lawyers should never solely rely on generative AI and must always review the content generated for factual and legal accuracy. OpenAI retains the intellectual property rights for the service. Overall, users need to read and understand these terms before using ChatGPT.

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<sup>72</sup> ND HB1361. [https://legiscan.com/ND/text/HB1361/id/2778500/North\\_Dakota-2023-HB1361-Enrolled.pdf](https://legiscan.com/ND/text/HB1361/id/2778500/North_Dakota-2023-HB1361-Enrolled.pdf).

<sup>73</sup> OpenAI Business Terms, 3.1 Customer Content, Updated August 28, 2023. <https://skaled.com/insights/who-owns-ai-generated-content/#:~:text=OpenAI's%20policy%20states%20that%20the,any%20purpose%2C%20including%20commercial%20ones>.

<sup>74</sup> OpenAI Business Terms, 3.4 Similarity of Output, Updated August 28, 2023. <https://skaled.com/insights/who-owns-ai-generated-content/#:~:text=OpenAI's%20policy%20states%20that%20the,any%20purpose%2C%20including%20commercial%20ones>.

<sup>75</sup> OpenAI Business Terms, 3.3 Your Obligations for Customer Content, Updated August 28, 2023. <https://skaled.com/insights/who-owns-ai-generated-content/#:~:text=OpenAI's%20policy%20states%20that%20the,any%20purpose%2C%20including%20commercial%20ones>.

<sup>76</sup> *Id.*

## Deepfakes and Voice Cloning

Lawyers need to be aware of the existence of deepfakes, how the technology works, and what issues it presents. Deepfake technology uses deep learning techniques, such as generative AI tools, to alter and simulate something real. Deepfake technology can create fictional videos, images, or audio from nothing. Bad deepfakes can be easy to spot. However, as generative AI technology has become more realistic, it is nearly impossible for viewers to know if what they are seeing or hearing is fact or fiction. As bad actors can use deepfakes for ill intentions or to scam unknowing consumers, deepfakes have been presented as evidence in lawsuits.

Deepfakes present significant concerns related to evidence in various contexts. These computer-generated, hyper-realistic videos and audio recordings can be used to manipulate or fabricate evidence, making it challenging to discern what is genuine and what is not. In legal proceedings, deepfakes could potentially be used to create false alibis or fabricate incriminating statements or images, raising concerns about the integrity of the justice system. Deepfakes are extremely difficult for courts to handle as they often look real, and the technology used to create them is complex, making it difficult for judges and juries to comprehend. Imagine the jury seeing a photo of your client engaging in the very thing they testified they did not. If fake, such an image can be tremendously damaging. Legal scholars and judges predict that courts will increasingly encounter deepfakes passed off as authentic evidence, claims that real pieces of evidence are deepfakes, and litigation over deepfakes created without a person's permission.<sup>77</sup> Legal scholars disagree about whether the current Federal Rules of Evidence are sufficient to deal with deepfake evidence. Addressing these evidence concerns requires the development of advanced detection methods and regulations to ensure the authenticity of digital content in an increasingly AI-driven world.

## Disclosure Requirements in Court and Regulatory Filings

Several courts and judges have implemented their own rules regarding the use of AI. Before filing, lawyers must check the court's local rules and any judge-specific rules as there may be new specific requirements, including disclosures or certifications, regarding the use of AI. Some judges require attorneys to disclose whether AI was used at all in preparation of the document that is filed, while others require more specific disclosures as to whether "generative AI" was used.

**"[...] it is undeniable that AI will be implemented into the legal profession. It should not be viewed as an enemy to our profession; rather, AI used effectively will improve the quantity and quality of our work.**

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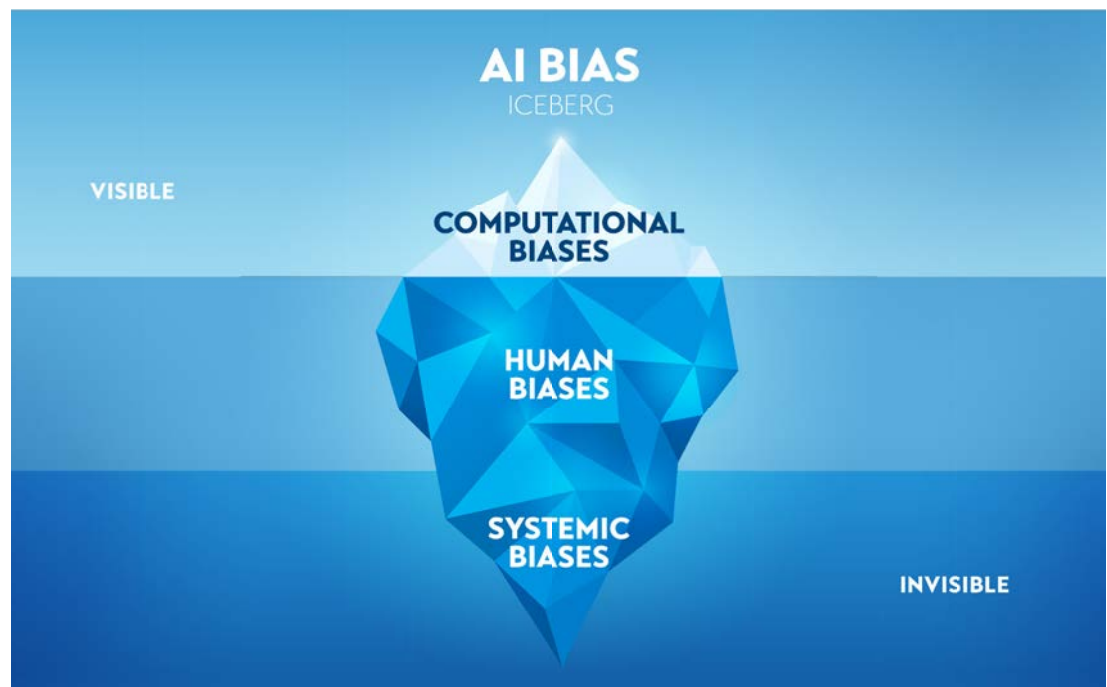
<sup>77</sup> Courts Need to Brace Themselves for Deepfake Evidence, By Sarah Martinson | 2023-09-19 15:52:07 -0400

## Bias

AI systems are not immune to bias, which can lead to unfair, discriminatory, and harmful outcomes. Recognizing and addressing bias in AI is essential for the responsible development and deployment of these technologies. Bias, whether unintentional or systemic, in AI is a critical issue that lawyers must be aware of and understand.

Bias in AI can arise from various sources. Data bias is biased training data that can result from historical inequalities, leading AI systems to perpetuate or amplify existing biases. For example, resume screeners can prioritize applicants who use certain keywords. Suppose a company trains an AI resume scanner to identify the best candidate for a position based on its most successful employees in the past who all happen to be white men from Ivy League schools. In that case, the AI may learn that white male candidates from similar schools and life experiences are the best candidates, while overlooking equally or better qualified female candidates or candidates of other races and backgrounds and thus perpetuate a lack of diversity at the company. Algorithmic bias occurs when the design and implementation of algorithms introduce bias because they rely on biased data or fail to account for all relevant factors. User interaction bias occurs when humans interact with AI systems and introduce bias through feedback loops and preferences. The context in which AI systems are deployed can also influence their outcomes, leading to unintended bias.

Bias in AI can have wide-ranging consequences, including discrimination, unfairness, economic and social inequities, and—relevant to the focus of this white paper—legal and ethical concerns. Legal challenges may arise when biased AI systems violate antidiscrimination laws or ethical principles. For example, the U.S. Equal Employment Opportunity Commission (EEOC) filed a lawsuit against iTutorGroup, a provider of English-language tutoring services in China. The lawsuit alleged violation of the Age Discrimination in Employment Act (ADEA) upon discovery that iTutorGroup allegedly programmed its tutor application software to reject female applicants aged 55 or older and male applicants aged 60 or older, resulting in over 200 qualified applicants in the United States being rejected based on age. The parties reached a settlement in which iTutorGroup agreed to pay \$365,000 and to nonmonetary measures to prevent future discrimination if iTutorGroup resumes its U.S. operations. This lawsuit demonstrates the possible legal ramifications AI bias can create.



# CONCLUSION

AI is becoming increasingly prevalent in the practice of law. However, it is still continuing to develop, and there are questions that need to be addressed in this relatively nascent stage. The authors of this white paper see the following as the major action items to be addressed:

1. Like any new technology, lawyers should familiarize themselves with the use of generative AI systems and begin to consider how such technology can be employed in their daily practice of law.
2. Lawyers should prepare for conversations with their clients about how their clients are using generative AI and what sort of legal protections may be needed for such use.
3. Lawyers should also prepare for conversations with their clients regarding their own use of generative AI technology, including how such technology will ensure the required levels of confidentiality and protection of client data.
4. More definitive protections are needed so that lawyers can comply with their ethical obligation to prevent confidential client information from being disclosed outside of the attorney–client relationship.
5. It must be determined how client information entered into AI systems is maintained, what protections to prevent breach should be in place, and how long the information can be maintained before it is destroyed.
6. A decision must be made about who owns the work product from AI systems being used to generate text for legal cases.
7. We need to consider whether the rules of ethics need to be revised to address the use of AI in legal practice, or if the existing rules are sufficient. It is the belief of this working group that the rules of ethics already in place are sufficient for the AI systems that are currently available.
8. The billable hour model needs to be reconsidered, and potentially revised, in response to the efficiencies we are starting to see and anticipate seeing as the use of AI becomes more prevalent.
9. AI developers need to determine how to address the risk of bias from these AI systems.

Even with these outstanding action items, it is undeniable that AI will be implemented into the legal profession. It should not be viewed as an enemy to our profession; rather, AI used effectively will improve the quantity and quality of our work. Lawyers should invest in learning how to take advantage of the available AI tools and begin implementing strategies to minimize the risks. This is what our clients demand and deserve.

*Beyond the publication of this white paper, the DRI Center for Law and Public Policy will continue to pursue opportunities to be a part of the conversation on the use of AI within the civil litigation defense community and to educate—in collaboration with DRI’s substantive law committees—DRI members on how artificial intelligence will continue to affect their practices and their clients’ businesses. The Center will also monitor activity within the plaintiffs’ bar and consider strategies for disclosing and countering adverse tactics that may develop.*