AI, ETHICS, AND AUGMENTED LAWYERING

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INTRODUCTION

Developments in artificial intelligence ("AI") impact clients, lawyers, and society. With all its promise and peril, AI raises several considerations for modern lawyers, including how AI makes decisions, how AI is being regulated, and what AI means for the future of work. With these considerations in mind, lawyers must incorporate AI in their advice to clients—and in the way they render legal services. Fundamentally, AI is not quite replacing human lawyers, but it is augmenting them. This augmented lawyer—who embraces AI without over-relying on it—must incorporate AI in client advice while also considering the ethical constraints on lawyer use of AI.

This Article explores the impact AI is having on lawyering, both from the aspect of client advice and the practice of law itself. Part I explores AI as a possible revolution and the issues it raises in law, policy, and society. Part II includes special AI considerations for the modern lawyer, including AI decision-making, AI regulation, and the future of work. It then proceeds in Part III with practical tips for advising clients and maintaining legal ethics when adopting AI in the practice of law.

I. AN AI REVOLUTION, PERHAPS

In 1930, economist John Maynard Keynes wrote an essay on *Economic Possibilities for our Grandchildren*.[1] In it, he identifies the discontents of innovation, namely our "suffering… from the growing-pains of over-rapid changes, from the painfulness of readjustment between one economic period and another."[2] Change-fatigue in the face of new technology may trigger skepticism and resistance.[3] But change also brings growth and new possibilities—and so is true for AI and its impact on our legal structures and the practice of law.

Technological innovation may occur incrementally, in small developments not felt in our daily lives. But in key points in human history, we identify technological change so radical we call it a *revolution*. Take, for example, the Agricultural Revolution beginning over 10,000 years ago, which some have characterized as the first economic revolution, in which we shifted human labor

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1. JOHN MAYNARD KEYNES, ESSAYS IN PERSUASION 358-73 (W.W. Norton & Co. 1963).
2. *Id.* at 358.
3. *See id.* at 358-60.

from hunting and gathering to cultivating land and farming.[4] In the Eighteenth Century, the Industrial Revolution brought new means of production, allowing for machine manufacturing of goods and leading to large-scale changes across society.[5] And now, the rise of AI is being called the next revolution by some.[6]

What makes the rise of AI significant is its rapid development and growth. In the last seventy-five years, computers have automated some processes previously limited to human intelligence.[7] The capacity to create, store, and process large amounts of data, coupled with increased processing power, have made this rapid development possible.[8] Just as the Industrial Revolution relied on machinery to overcome the limitations of human physical ability, the AI Revolution harnesses computers that appear to surpass the limitations of human intelligence.[9]

No doubt, these economic revolutions disrupt labor, markets, and society. They also disrupt existing legal structures. On the other hand, the law also shapes and facilitates revolution. In the Agricultural Revolution, novel legal concepts of private property and ownership may have played an important role in the shift to farming.[10] In the Industrial Revolution, free markets and a lack of regulation of working conditions and environmental impacts led to unfettered development.[11]

Now, on the precipice of an AI revolution, lawyers must grapple with how to advise clients and ethically use AI in rendering legal services—while also playing a role in shaping the future of the law. Several considerations become crucial for modern lawyers, including AI decision-making, regulation, and impact on the future of work.

II. AI CONSIDERATIONS FOR THE MODERN LAWYER

New technology, like AI, may very well create new problems. But these new problems rarely eliminate old problems; instead, they bring to light flaws and issues existing in our current systems.[12] Simply automating the status quo will

4. Samuel Bowles & Jung-Kyoo Choi, *The Neolithic Agricultural Revolution and the Origins of Private Property*, 127 J. POL. ECON. 2186, 2187 (2019).

5. *See* Dave Maney, *The Biggest Story of Our Lives: Economic Revolution*, FORBES, https://www.forbes.com/sites/economaney/2013/03/01/the-biggest-story-of-our-lives-economic-revolution/ (Mar. 4, 2013, 7:58 PM) (identifying the Agricultural Revolution as the shift from humans as hunter-gatherers to farmers and the Industrial Revolution as the rapid adoption of machines for manufacturing).

6. Mustafa Suleyman, *How the AI Revolution Will Reshape the World,* TIME (Sept. 1, 2023, 7:05 AM), https://time.com/6310115/ai-revolution-reshape-the-world/.

7. Ryan Calo, *Artificial Intelligence Policy*: *A Primer and Roadmap*, 51 U.C. DAVIS L. REV. 399, 432 (2017).

8. *Id.* at 406.

9. *See id.* at 432; *see also* Maney, *supra* note 5.

10. Bowles & Choi, *supra* note 4.

11. *See* Ron Harris, *Government and the Economy, 1688-1850, in* THE CAMBRIDGE ECONOMIC HISTORY OF MODERN BRITAIN 204, 204-37 (Roderick Floud & Paul Johnson eds., 2004).

12. Harry Surden, *Ethics of AI in Law: Basic Questions, in* THE OXFORD HANDBOOK OF ETHICS OF AI 719, 720 (Markus Dubber et al. eds., 2020) (noting how AI raises issues in the law "are not truly new, but rather exist already, in one form or another, in the current legal structure"); *see also* Bryant Walker Smith, *Ethics of Artificial Intelligence in Transport, in* THE OXFORD HANDBOOK OF

perpetuate and ossify the shortcomings of the status quo.[13] This is true in all areas where AI may be deployed, from the criminal justice system[14] to hiring decisions[15] to autonomous vehicles.[16] For the legal system, core concepts of fairness, due process, and equal protection may be undermined by AI when safeguards are not in place.[17] Several considerations come into play, including the extent to which decisions can be made by AI, the landscape of ever-evolving AI regulation, and the future of work.

A. AI Decision-Making

AI tools ultimately make predictions by recognizing patterns in data.[18] Those predictions or outcomes may then be used to make important decisions that have a profound impact on people.[19] In some ways, AI can be seen as augmenting human decision-making by providing an efficient and comprehensive data analysis, but it also runs the risk of automating decision-making in a way that undermines fairness and justice.[20] Quite simply, automation cuts out the human element, which may be appropriate in some sectors and quite risky in others.

Bias and flawed decision-making is a legitimate concern. Because AI trains on datasets, flawed inputs may result in flawed outputs.[21] Historical information may capture bias and systemic issues within society, and datasets lacking adequate representation may train AI tools that perpetuate bias by replicating biased results.[22] Even if unintentional, AI bias may undermine legal protections and perpetuate injustice.[23]

ETHICS OF AI 669, 670 (Markus Dubber et al. eds., 2020) ("Progress—whether in technology or in policy—necessarily involves replacing and old set of problems with a new set of problems and hoping that, in the aggregate, the new problems are less than the old ones.").

13. *See* Walker Smith, *supra* note 12.

14. Mathis Schwarze & Julian V. Roberts, *Reconciling Artificial and Human Intelligence: Supplementing Not Supplanting the Sentencing Judge in* SENTENCING AND ARTIFICIAL INTELLIGENCE 206, 217 (Jesper Ryberg & Julian V. Roberts eds., 2022).

15. Jeffrey Dastin, *Insight - Amazon Scraps Secret AI Recruiting Tool that Showed Bias Against Women,* REUTERS (Oct. 10, 2018, 8:50 PM), https://www.reuters.com/article/world/insight-amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK0AG/.

16. In the context of U.S. transport, AI use for driverless cars perpetuates the current system that privileges cars over pedestrians, driver autonomy over safety, and passenger cars over mass transit. *See* Walker Smith, *supra* note 12, at 671.

17. *See* Surden, *supra* note 12, at 719.

18. *See id.* at 723 (describing that although AI is often characterized as displaying cognitive abilities like that of humans, it instead learns patterns and rules to make approximations, producing "'intelligent results without intelligence'"); Calo, *supra* note 7, at 405.

19. Calo, *supra* note 7, at 413-15 (discussing the issues of using AI for "consequential decision-making").

20. *See id.* at 415.

21. REVA SCHWARTZ ET AL., NAT'L INST. OF STANDARDS & TECH., TOWARD A STANDARD FOR IDENTIFYING & MANAGING BIAS IN ARTIFICIAL INTELLIGENCE 15-17 (2022), https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf.

22. *Id.*; *see* Calo, *supra* note 7, at 412 (describing some flawed models that were trained on data that underrepresents a particular demographic).

23. Surden, *supra* note 12, at 720.

One approach to mitigate the potential bias in AI is to use AI as but one tool for human decision-making. In other words, AI does not make (or automate) decision-making, it merely supplements or augments human cognitive ability.[24] The idea of augmentation, instead of automation, plays an important role in how we think about AI use. For example, in the medical field, some AI tools surpass human ability to detect cancers or perform complicated procedures.[25] Nonetheless, it is still a human doctor who advises patients and dictates treatment plans.[26]

Augmentation does not solve all bias problems, particularly when AI tools lack transparency and explainability. If humans do not have adequate insight into how an AI tool works, it becomes difficult to truly scrutinize the output for fairness, especially when an AI tool is designed to be neutral.[27] For example, Amazon tested an AI tool for reviewing resumes.[28] Its inputs were resumes from current, model employees.[29] Based on patterns the AI tool recognized in these inputs, the program categorically excluded resumes that indicated the applicant was a woman.[30] Fortunately, this unintended gender-based bias was detected by humans, and the tool was scrapped.[31] But this example helps demonstrate how AI can unintentionally produce bias outcomes, and humans cannot simply automate processes without scrutiny. Unfortunately, even with augmentation, humans may rely on AI outputs too heavily, without having a way to fully ascertain how an AI tool ultimately made its predictions.

Within the legal system, AI already augments, if not automates, some tasks by administrators or government officials. For example, criminal sentencing and bail determinations sometimes involve an AI calculation of factors like recidivism risk.[32] Courts have recognized that such AI systems run the risk of being biased and should only be used as one tool in making sentencing and bail determinations, effectively only augmenting judicial decision-making without automating it.[33] More broadly, use of AI in administrative and governmental decision-making should consider accuracy, equal treatment under the law, fairness, accountability, transparency, and explanation. Flawed systems can have severe consequences that

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24. *See* Ya-Wen Lei & Rachel Kim*, Automation and Augmentation: Artificial Intelligence, Robots, and Work*, ANN. REV. SOCIO., 2024, at 251, 261-62.

25. W. Nicholson Price II, *Artificial Intelligence in the Medical System: Four Roles for Potential Transformation*, 21 YALE J.L. & TECH. (SPECIAL ISSUE) 122, 125 (2019).

26. *See id.*

27. *See* Dastin, *supra* note 15 (describing how there is "still much work to do" in determining the fairness of AI algorithms).

28. *Id.*

29. *Id.*

30. *See id.*

31. *See id.*

32. Surden, *supra* note 12, at 724-25; Julia Angwin et al., *Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

33. *See* State v. Loomis, 881 N.W.2d 749, 754 (2016) (discussing the Compass AI tool).

undermine individual rights, such as by extending prison time or denying benefits to someone based on race.[34]

For practitioners, predictions are an important aspect of a lawyer's work, and AI is enhancing and disrupting this aspect of lawyering. Clients want to know if they will prevail in their legal arguments, how long it will take to resolve their matters, and how much it will all cost. New AI tools provide granular quantitative outcome prediction, with detailed data on law firms, companies, and judges.[35] Westlaw and other tools, for example, provide detailed data on how judges rule in particular cases and lawyer success rates.[36]

Taken together, AI decision-making can augment human cognitive functions in positive ways, as long as humans remain in the loop and think critically about the fairness and accuracy of AI outputs. Automating decision-making with AI, on the other hand, poses greater risks on individual rights and justice. Some of these issues, along with others, have spawned attempts to regulate AI.

B. AI Regulatory Landscape

The landscape of AI rules and regulations is ever-evolving with state, federal, and international dimensions. Notably, it is debatable whether AI can be regulated as a distinct technology, given that many of the problems attributed to AI may relate more broadly to the shortcomings of privacy or other laws.[37] Nonetheless, numerous laws have been passed targeting AI and its risks.

The EU AI Act, the first comprehensive AI law, was passed in 2024.[38] The Act creates a framework for analyzing and classifying AI tools based on the risks they pose. Its goal is to make AI "safe, transparent, traceable, non-discriminatory and environmentally friendly."[39] These risk levels include unacceptable risk, which are tools that are "considered a threat to people and will be banned."[40]

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34. *See* Lei & Kim, *supra* note 24, at 256.

35. Liam 'Akiba' Wright, *AI Tool 86% Accurate in Predicting Judge Verdicts Without Evidence, Only Bias in Past Judgments*, CRYPTOSLATE (Sept. 15, 2023, 8:05 AM), https://cryptoslate.com/ai-tool-86-accurate-in-predicting-judge-verdicts-without-evidence-only-bias-in-past-judgments/.

36. *See id.*; *Litigation Analytics,* THOMAS REUTERS, https://legal.thomsonreuters.com/en/products/westlaw-edge/litigation-analytics (last visited Feb. 7, 2025).

37. Daniel J. Solove, *Artificial Intelligence and Privacy*, 77 FLA. L. REV. 1, 21-22 (2025).

38. *EU AI Act: First Regulation on Artificial Intelligence,* EUR. PARLIAMENT, https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence (June 18, 2024, 4:29 PM).

39. *Id.*

40. *Id.* Some scholars have noted that most AI regulation requires investigation and regulation after wrongdoing is suspected, rather than requiring justification of AI use before it is implemented; Gianclaudio Malgieri & Frank Pasquale, *From Transparency to Justification: Toward* Ex Ante *Accountability for AI* 15 (Brooklyn L. Legal Studies, Paper No. 712, 2022), http://dx.doi.org/10.2139/ssrn.4099657. These scholars have proposed alternate frameworks that focus on justification of the use of a particular AI tool before it is permissible, rather than merely demanding transparency, notice, and consent. *See id.* On the other hand, some point out that ex ante regulations may stifle innovation, and U.S. technology policy should balance top-down regulations with policies that promote innovation and competition. *See* Adam Thierer, *Flexible, Pro-Innovation Governance Strategies for Artificial Intelligence* 1 (R St. Pol'y Study, Paper No. 283, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4423897.

Examples of unacceptable-risk AI include some AI systems that involve cognitive behavioral manipulation, social scoring, and biometric identification.[41] High-risk AI includes systems that "negatively affect safety or fundamental rights."[42] These systems include ones failing product safety standards or involving critical infrastructure, educational training, employment, access to benefits, law enforcement, migration and border control, and legal interpretation and application of the law.[43] While high-risk AI is not banned, it will be subject to assessment before it can be available on the market and will be held to other requirements.[44]

Unlike the EU, the United States lacks a comprehensive national AI regulation. While some national laws have been proposed,[45] the most notable development to date is the Biden Administration's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.[46] Issued on October 30, 2023, the Executive Order aims to balance innovation with risk mitigation.[47] It contemplates new standards for AI safety and security, privacy protection, advancement of equity and civil rights, promotion of innovation and competition, and protection of consumers, patients, workers, and students.[48] It also seeks to advance U.S. leadership abroad and ensure responsible and effective government use of AI.[49] While the Executive Order contains broad-sweeping goals around U.S. AI policy, it relies on numerous agency and other action to craft the parameters of meaningful rules and regulations over several months or years.[50]

In addition to the Executive Order, the White House Office of Science and Technology Policy released a white paper in October 2022 called the *Blueprint for an AI Bill of Rights*.[51] It contains five principles "that should guide the design, use, and deployment of automated systems to protect the American public in the age of artificial intelligence."[52] These five principles include safe and effective systems, algorithmic discrimination protections, data privacy, notice and explanation, and human alternatives, consideration, and fallback.[53] In essence, the framework aims

41. *EU AI Act: First Regulation on Artificial Intelligence*, *supra* note 38.

42. *Id.*

43. *Id.*

44. *Id.*

45. *See, e.g.*, *Algorithmic Accountability Act of 2023*, RON WYDEN U.S. SENATOR FOR OR., https://www.wyden.senate.gov/imo/media/doc/algorithmic_accountability_act_of_2023_summary.pdf (last visited Oct. 30, 2024).

46. Exec. Order No. 14,110, 88 Fed. Reg. 75,191 (Oct. 30, 2023).

47. *Fact Sheet: Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, WHITE HOUSE (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Blueprint for an AI Bill of Rights*, WHITE HOUSE, https://www.whitehouse.gov/ostp/ai-bill-of-rights/ (last visited Oct. 30, 2024).

53. *Id.*

to promote fairness in the exercise of rights, opportunities, and access to mitigate potential harms—but is not binding and provides general guidance only.[54]

In addition to the Executive Order and white paper, U.S. federal law and policy has evolved in a sector-specific approach, with some AI regulations in place as to certain industries only. For example, the Federal Aviation Administration Reauthorization Act covers AI in aviation[55] and the John McCain National Defense Authorization Act covers AI in national defense matters.[56] In this way, AI regulation is paralleling the patchwork of U.S. laws addressing privacy and data security—an approach that has been criticized as inadequate and as a contributing cause of AI bias and fairness concerns.[57] But as with U.S. privacy law, it is state law that has been a more fruitful avenue for AI regulation.

By mid-2024, about one-third of states had some sort of AI law in place, either as stand-alone legislation or as a provision within a broader data privacy law.[58] Some of these laws specifically address profiling to curtail the use of or to add fairness to technology that categorizes people.[59] Other laws focus on biometric data, labeling of AI-generated works, restrictions on use of AI in political campaigns, or limitations on use of AI to determine access to insurance or other benefits.[60]

More broadly, traditional doctrinal areas of law, like tort and contract, are being impacted by AI. Challenges around AI accountability permeate civil liability schemes. When AI augments human activity, defendants responsible for the AI can point fingers at the AI user to shift blame to them.[61] For example, Tesla has escaped liability for its Autodrive feature in some cases because, per the Tesla manual, drivers are ultimately responsible for maintaining control of the vehicle and otherwise monitoring vehicle activity.[62] Entities involved in developing, manufacturing, and selling AI tools also attempt to shift liability by contract, ultimately insulating themselves from liability.[63] Quite simply, when AI augments human decisions and behaviors, the entities responsible for the AI may be using tort and contract law to shift liability to the human.[64]

The law will need to evolve to address new complexities brought on by AI, whether through enacted law on the international, federal, or state level or through evolution of other doctrines and common law. One area heavily impacted by AI is labor—and the law will also need to adapt to handle the impact of AI on the future of work.

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54. *Id.*

55. H.R. 302, 115th Cong. (2018) (enacted).

56. H.R. 5515, 115th Cong. (2018) (enacted).

57. Solove, *supra* note 37, at 22-23.

58. Robert Freedman, *16 States Have AI Laws, Most of Them to Curb Profiling,* INDUS. DIVE (Mar. 20, 2024), https://www.legaldive.com/news/16-states-have-ai-laws-curb-profiling-BCLP-interactive-compilation-state-AI-laws/710878/.

59. *Id.*

60. *Id.*

61. Charlotte A. Tschider, *Humans Outside the Loop*, 26 YALE J.L. & TECH. 324, 382-83 (2024).

62. *Id.* at 383-86.

63. *Id.* at 330.

64. *Id.* at 330-32.

C. AI and the Future of Work

Keynes' 1930 essay notes that the early Twentieth Century was "only a temporary phase of maladjustment"[65] and that progressive countries in 100 years will see a new world of economic possibilities.[66] In particular, Keynes foresaw a world of leisure and abundance, in which less work will be needed to sustain life and more of our time can be occupied with leisure.[67] He even noted three-hour shifts or fifteen-hour work weeks will suffice for some, while others will remain free to pursue money as a virtue rather than money as a means to enjoy life.[68] Nearly 100 years later, it is clear we have not risen to the economic possibilities envisioned by Keynes. Instead, some fear the future of work is uncertain in the face of technology displacing human labor, and AI-enabled surveillance is degrading worker protections and quality of life.

The impact of AI on the workforce is often viewed in terms of job displacement and the fear of entire professions being rendered obsolete. Economic growth necessarily changes the types of work performed by humans instead of machines—elevator operators, telephone switchboard workers, and even lamplighters are all examples of jobs that have been automated by technology.[69] AI is now displacing and automating workers in manufacturing, transportation, and clerical work.[70] But many jobs are not susceptible to automation and will continue to require human labor, such as jobs that require dexterity, flexibility, or empathy.[71] And augmentation of some jobs may streamline and improve working conditions in some sectors.

Although displacement is a concern for some, AI's impact on work may be most felt in risk reallocation and degradation of worker autonomy and privacy. After the Industrial Revolution, labor laws and other legal protections emerged to limit workdays, ensure fair wages, provide greater safety, and curtail child labor and other abusive practices.[72] AI is threatening some of these protections. For example, AI tools allow companies to surveille their own employees to police their productivity and deter theft.[73] With these tools, some employers are redefining compensable work and penalizing employees for slow or inactive periods in the

65. KEYNES, *supra* note 1, at 364.

66. *Id.* at 364-65.

67. *Id.* at 368-69.

68. *Id.* at 369-70.

69. Carolynn Bruce, *51 Jobs That Don't Exist Anymore (and What to Do About It),* INDEED, https://www.indeed.com/career-advice/career-development/jobs-that-don%27t-exist-anymore (May 13, 2023).

70. *See* Pegah Moradi & Karen Levy, *The Future of Work in the Age of AI: Displacement or Risk-Shifting?*, *in* THE OXFORD HANDBOOK OF ETHICS OF AI 271, 274-75 (Markus Dubber et al. eds., 2020).

71. *See generally* Carl Benedikt Frey & Michael A. Osborne, *The Future of Employment: How Susceptible Are Jobs to Computerisation?*, TECH. FORECASTING & SOC. CHANGE, Jan. 2017, at 254 (explaining the likelihood of a variety of career fields and the probability of them being vulnerable to computerization).

72. Moradi & Levy, *supra* note 70, at 275-76.

73. *Id.* at 285.

workday.[74] Other AI tools allow more granular assessment of labor needs throughout the day, which is leading to segmented shifts and the risk of downtime being shifted to the employees.[75] In other words, the standard workday created in response to the Industrial Revolution is being undermined in the AI Revolution.

For the legal profession, current AI technology will not eliminate the need for humans to provide nuanced legal analysis and client advice. But some tasks traditionally performed by lawyers may be shifted to AI tools. Software for contract review can be far more efficient and accurate than human lawyers when assigned a narrow task.[76] Basic estate planning or other documents can be generated through AI.[77] Generative AI will streamline routine legal writing.[78] Thus, while displacement of lawyers is not an immediate concern, augmentation of legal work, or automation of some lower-level tasks, is a reality for the legal profession.

The impact of AI on work must be considered by lawyers in two distinct ways. The first is the impact of AI on their clients. The second is the impact of AI on lawyers and the lawyer's role.

III. AI AND THE LAWYER'S ROLE

For lawyers, it is sometimes difficult to zoom out and reflect on one's role in shaping the world. We may recognize our impact through the work we do for individual clients—those small, sometimes mundane steps towards bettering a particular person's life. By helping people and companies resolve legal disputes, we move society forward. Lawyers also shape the world through law reform activities, by devoting some, or all, of their time to changing the law and facilitating progress. But aside from serving our clients and the public interest, lawyers more broadly advance the legal profession and society through nuanced and thoughtful consideration of the larger contexts of our work.

Take, for example, reflections on the lawyer's role contained in the American Bar Association's ("ABA") Model Rules of Professional Conduct. Lawyers are representatives of clients, but also officers of the legal system and public citizens with "special responsibility for the quality of justice."[79] While our primary duty is to our clients, that duty is constrained by the need to maintain the integrity of the law, fairness of judicial processes, and trust in the legal profession. But even within our roles as client representatives, we serve multiple functions, namely lawyer as advisor, advocate, negotiator, or evaluator.

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74. *Id.* at 280-81.

75. *Id.* at 281.

76. *See Comparing the Performance of Artificial Intelligence to Human Lawyers in the Review of Standard Business Contracts*, LAWGEEX 20 (Feb. 2018), https://images.law.com/contrib/content/uploads/documents/397/5408/lawgeex.pdf.

77. *See* Gerry W. Beyer & Natalie M. Perry, *Use of Artificial Intelligence (AI) in Creating an Estate Plan*, AM. COLL. OF TR. & EST. PLAN. ESSENTIALS, https://www.actec.org/resource-center/video/use-of-ai-in-creating-an-estate-plan/ (last visited Feb. 5, 2025).

78. Benjamin Alarie et al., *How Artificial Intelligence Will Affect the Practice of Law*, 68 U. TORONTO L.J. (SUPPLEMENT 1) 106, 114-15 (2018).

79. MODEL RULES OF PRO. CONDUCT Preamble 1 (AM. BAR ASS'N 1983).

The lawyer as advisor not only advises clients on their rights and obligations under the law, but they also explain practical implications of client decisions.[80] Advising means rendering candid advice, referring "not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[81] As an advocate, the lawyer's goal of zealous representation is limited by overarching rules such as those requiring meritorious claims and contentions,[82] candor to the tribunal,[83] fairness to opposing party and counsel,[84] impartiality,[85] and decorum.[86]

Lawyer as negotiator involves what are often called soft skills—the human ability to navigate delicate emotions and show empathy and understanding to facilitate conflict resolution.[87] Indeed, alternative dispute resolution is a crucial aspect of our justice system, and lawyers are empowered to serve as third-party neutrals in addition to guiding clients through negotiations.[88] And lawyer as evaluator may involve providing assessment of legal issues for non-clients, once again emphasizing the expertise and nuance lawyers may bring to matters.[89]

With these various duties and roles, lawyers should consider AI in its broader context. While lawyers may narrowly advise clients about the legality of an AI tool, perhaps lawyers should also refer to economic and social considerations like the long-term impact of adopting AI. Lawyers should also scrutinize the fairness and reliability of AI, noting the pitfalls of automation and overreliance on technology. In this way, lawyers must balance their role in facilitating their clients' desire to further technological change with their role of serving the public interest.

Keeping the lawyer's many roles in mind, some practical approaches for advising clients emerge.

A. Advising Clients about AI

While lawyer advice to clients varies case to case, some general principles emerge for addressing AI in the client context. These include the lawyer staying abreast of relevant technology, being aware of AI regulations and legal developments, and advising on the broader contexts of AI, particularly bias and fairness concerns.

First, as to staying abreast of relevant technology, a lawyer's duty of competence encompasses a duty of technological competence.[90] Staying current with technology not only impacts the lawyer's own use of AI in the practice of law, but

80. *Id.* at 2.

81. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2023).

82. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2023).

83. MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS'N 2023).

84. MODEL RULES OF PRO. CONDUCT r. 3.4 (AM. BAR ASS'N 2023).

85. MODEL RULES OF PRO. CONDUCT r. 3.5 (AM. BAR ASS'N 2023).

86. *Id.*

87. *See* Frey & Osborne, *supra* note 71, at 262.

88. MODEL RULES OF PRO. CONDUCT r. 2.4 (AM. BAR ASS'N 2023); MODEL RULES OF PRO. CONDUCT r. 2.4 cmt. 1 (AM. BAR ASS'N 2023).

89. *See* MODEL RULES OF PRO. CONDUCT r. 2.3 (AM. BAR ASS'N 2021).

90. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2023).

also affects the lawyer's ability to meaningfully consider clients' use of AI in rendering legal advice.

Second, as to being aware of AI regulations and legal developments, few clients are not impacted by some AI law and policy issues, whether it be state, federal, or international laws. Business clients will need to be advised about the ever-changing landscape of AI regulation and how it impacts their business strategies, data practices, and insurance, hiring, or other broad-ranging decisions.[91] Sector-specific rules may apply, and cross-jurisdictional concerns also arise for companies doing business across state lines or internationally. Criminal law lawyers should consider AI's role in investigation, predictive policing, and sentencing. In addition to advising clients about traditional doctrinal areas of law, they also must consider and advise about the overlay of sector- or technology-specific AI regulations. Because the landscape of AI regulation changes quickly, lawyers must be aware of AI law and policy and how it interacts with their clients' causes.

Lastly, the broader economic and social context of AI should be considered. Lawyers, as advisors, are not limited to strictly legal matters. Rather, lawyers can include economic and social considerations in their rendering of candid legal advice.[92] Fundamentally, lawyers should recognize the way AI tools may be automating the existing status quo—a status quo that is systemically flawed. Access to beneficial AI, in the legal profession, medical field, or other areas, may also be unequal and a topic for broader consideration by lawyers.[93] Lawyers can recognize the ways risk and liability is being shifted in the age of AI and advise clients on the broader implications of the AI tools they use. But lawyers must also consider their own ethical obligations as they augment their legal practice with AI tools.

B. Ethical Use of AI by Lawyers

In addition to advising clients on the legal, moral, ethical, or social implications of using AI tools, lawyers must ensure their own use of AI comports with legal ethics. This includes the lawyer's duty of competence, confidentiality, and other important obligations.

Competency requires staying abreast of relevant technology not only to advise clients about its benefits and risks, but also to ensure lawyers are using relevant technology appropriately in their own practice.[94] From using online research databases to natural language processing tools for document review, technology is already integrated into the practice of law, and this trend will only continue with new AI tools.[95]

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91. *See* Calo, *supra* note 7 (noting how industry has also been at the forefront of developing AI).

92. *See* MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2023).

93. *See* Price, *supra* note 25, at 126-28; Drew Simshaw, *Access to AI Justice: Avoiding an Inequitable Two-Tiered System of Legal Services,* 24 YALE J.L. & TECH. 150, 165-67 (2022).

94. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023).

95. *See* Alarie et al., *supra* note 77, 115-16; *see also* Agnieszka A. McPeak, *Disruptive Technology and the Ethical Lawyer*, 50 U. TOL. L. REV. 457, 461-62 (2019).

Further, competency also requires responsible AI use. Generative AI, for example, may become a necessary tool for lawyers who draft routine documents. But generative AI, at least in its current iteration, is prone to hallucinate, and over-reliance on generative AI outputs in legal documents can be an ethical violation.[96] In *Mata v. Avianca*,[97] a lawyer used ChatGPT to draft a legal brief that cited to fake cases as precedent. The lawyer, who failed to disclose to the court his use of ChatGPT and never actually checked the sources in the AI-generated brief, was ultimately sanctioned by the court.[98] While generative AI may have a proper place in law practice, it is ultimately the lawyer who must ensure competency and accuracy.[99]

The ethics of AI use, particularly generative AI, have been addressed in some legal ethics opinions. For example, the California Bar has issued a *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law*,[100] which flags ethical concerns and outlines some best practices. Similarly, Florida Bar Ethics Opinion 24-1 offers similar guidance on the ethics of AI use by practitioners.[101] Read together, it is clear AI use touches upon most aspects of lawyer professional responsibility:

Competence. Lawyers should know the basics about relevant technology, for their own use and for advising their clients on its risks and benefits. At the same time, overreliance on AI poses its own risks, particularly when automating decision-making or substituting for the lawyer's professional judgment.[102] It is the lawyer's duty to scrutinize AI, including for bias, to ensure its use comports with the lawyer's duty of competence and diligence.

Communication and Control. Communication about the benefits and risks of relevant technology will be necessary to meet the lawyer's duty of technological competence. Further, disclosure of the lawyer's own use of AI may be required, particularly when a client might object to information relating to the representation being used as AI inputs.

Confidentiality. Confidential information should not be used for AI inputs unless the system has adequate security and confidentiality protections. Informed consent is recommended when AI tools use confidential information.

Compliance with Other Rules and Laws. As noted above, AI regulation, privacy law, and other rules govern the use of AI, and lawyers should ensure that both their clients' use, and their own use, complies with applicable law. Additionally, lawyers must avoid misrepresentation through inaccurate AI outputs, and

96. *See* Fla. Bar, Ethics Op. 24-1 (2024) (referencing AI "hallucinations" when discussing the *Mata* case) [hereinafter Opinion 24-1].

97. Mata v. Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

98. *Id.* at 464-65.

99. *See id.*

100. The State Bar of California Standing Committee on Professional Responsibility and Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law*, STATE BAR OF CAL., https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf (last visited Oct. 30, 2024).

101. *See* Opinion 24-1, *supra* note 96.

102. *See generally* Lei & Kim, *supra* note 24.

candor to the tribunal and procedural rules may require disclosure of AI use to the court.

Ethical Billing Practices. AI may make a lawyer more efficient, and lawyers cannot inflate bills when their work is streamlined by AI. Additionally, failure to use commonly accepted AI—and billing for manual work that takes much longer—may also be unethical.

Supervision and Oversight. The standards that apply to lawyer supervision of non-lawyers are useful in ascertaining the lawyer's ethical duties when using AI tools. Lawyers thus should make reasonable efforts to make sure the AI tool is compatible with the lawyer's own professional obligations, and the lawyer is ultimately responsible for the quality and accuracy of the output. However, some lawyer functions are non-delegable, even to AI.

It is clear lawyer ethical duties extend to use of AI tools, particularly generative AI. As the augmented lawyer continues to embrace new technology, its adoption and use must fit within existing professional responsibility obligations.

CONCLUSION

With a well-rounded understanding of AI and its impact on clients, the economy, and society, lawyers can be more effective advisors, advocates, negotiators, and evaluators. In this way, lawyers can augment their work in beneficial ways while staying within the bounds of the law. And, by bringing this nuanced, human perspective to the practice of law, lawyers can resist being displaced by AI—at least for a little bit longer.