Using Artificial Intelligence as Part of Your Practice: When and How to Effectively Use It

- Judge Xavier Rodriguez
- Litigation Section Webcast
- January 2024

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AI – Good or Bad (or both)

"I think if this technology goes wrong, it can go quite wrong. And we want to be vocal about that." "We want to work with the government to prevent that from happening." Sam Altman

Mark Zuckerberg sees a future in which virtual worlds are generated by AI and filled with AI characters that accompany real people

Artificial Intelligence (AI)

- AI "refers to computer systems and applications that are capable of performing functions normally associated with human intelligence, such as abstracting, reasoning, problem solving, learning, etc."

AI

- "AI applications employ algorithmic models that receive and process large amounts of data and are trained to recognize patterns, thus enabling the applications to automate repetitive functions as well as make judgments and predictions."

There are many types of AI

- "Machine learning is a subset of AI. It refers to humans training machines to learn based on data input . . . .   [M]achine learning looks for patterns in data to draw conclusions. Once the machine learns to draw one correct conclusions it can apply those conclusions to new data."

- Machine Learning tools don't think – they predict missing words.

- When humans review those predictions, they are given a score for accuracy. The machine then uses the scores to improve future predictions.

NLP

Sentiment Analysis

- "Natural language processing (NLP) is another subfield of AI . . . . NLP enables computers to read text or hear speech and then understand, interpret, and manipulate that natural language . . . . Using NLP, computers are able to analyze large volumes of text data . . . to identify patterns and relationships . . . . This type of AI in law can be applied to help complete tasks like document analysis, eDiscovery, contract review, and legal research."
  - Common applications of NLP include sentiment analysis, chatbots, machine translation and speech recognition.

Generative AI (GenAI)

- "Generative AI is a specific subset of AI used to create new content based on training on existing data taken from massive data sources in response to a user's prompt, or to replicate a style used as input. The prompt and the new content may consist of text, images, audio, or video."

- https://www.youtube.com/watch?v=vVfCuth-lcg

GenAI in the Legal Space – Risks and Opportunities

- Legal work primarily consists of drafting – words, documents and data.

- Generative AI is useful for finding, analyzing and creating text and documents.

- Yet, there is a tension between accuracy, privacy, confidentiality, and costs.

- Generative AI errors or hallucinations, without adequate attorney oversight may be unacceptable.

RAG in Legal-specific GenAI tools may hold promise

- Retrieval Augmented Generation (RAG) tailored for specialty areas (e.g. legal) may help reduce GenAI errors.

- In RAG systems the user's prompts or queries do not pass directly through the LLM; the query is first run against a curated database (e.g. legal content from trusted sources).

- Documents relevant to the query are retrieved first from the curated database, and that content is then sent to the LLM for processing.

How AI might be used in the legal space

E-Discovery

Document drafting (memorandum, motions, briefs, discovery requests, contracts)

Deposition outlines and questions

Document/deposition/meeting summaries

Analyzing and comparing documents

Preparation for oral argument (e.g. ChatGPT-4, Claude)

Due diligence reviews

Legal research (e.g. Lexi's+AI, Westlaw Precision, Harvey)

Marketing (Newsfeed, social media, head shots)

Billing/Spend Management/Budgeting

Client communications

It is expected that AI tools will be able to:

- facilitate alternative dispute resolution (ADR) by providing early insights into disputes

- predict case outcomes and engage in scenario planning

- assist with case management and calendaring/deadlines

- conduct contract review and due diligence tasks

- automate the creation of forms and other legal documents

- assist with the ability to detect personal identifying information, confidential health information, or proprietary or trade secret information

- enhance marketing and social media presence

- translate data into another language

- automate billing

- expedite and lower the cost of legal research and regulatory compliance

Used responsibly AI tools may increase productivity

- AI platforms have been developed for:
  - legal writing, contract management, due diligence reviews, litigation forecasting, predictions of judicial rulings, and juror screening
- Nonprofit legal organizations have been experimenting with how to implement bots to complete legal forms.
- Sullivan & Cromwell recently announced that it has been investing in LAER.AI to develop an AI Discovery Assistant. The intent is to bring an AI product to market that will accompany an attorney to depositions and trials, having already "digested" the case, "listened" to the testimony, and then suggests questions

Will lawyers disappear?

Unlikely any time soon

Some number of workers overall in the economy may need to be "re-skilled"

Yet the concerns centering around accuracy, privacy, cybersecurity, and regulatory compliance will remain and require humans
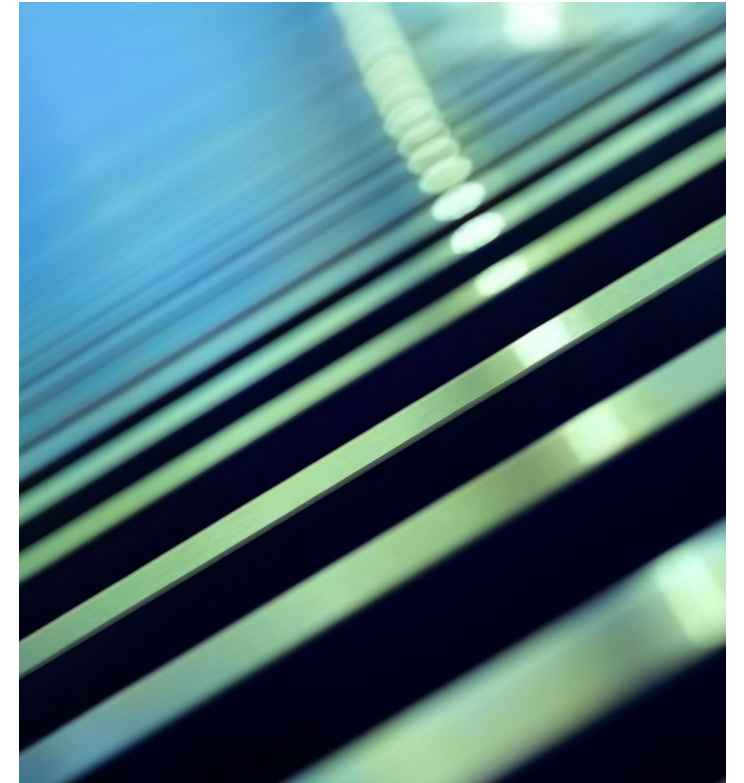
Humans will still need to draft and enter the prompts/queries, and do the fact checking

Most planning still requires experience, intuition and knowledge of internal/external pressures and opportunities

Clients still need creative solutions

AI raises several legal questions

- In July 2023, the Federal Trade Commission began to investigate OpenAI, creator of ChatGPT,3 to determine whether the tool has harmed consumers through its collection of data and how personal data is used.

- The Securities and Exchange Commission has likewise begun to propose new regulatory requirements to address risks associated with the use of AI.

- To "what extent should AI be considered a legal person and for what purposes?"

- Who (if anyone) owns a patent for a device designed by AI?

- Who is liable in tort for damages caused by an AI system?

- Will the ubiquitous use of AI facial recognition devices on public streets trigger a violation of the Fourth Amendment?

- Does the "scraping" of data from the internet and other sources violate any copyright works?

- Can an AI company be sued for defamation if its product manufactures a defamatory statement about a person or entity?

Current Limitations to AI to consider

- **Label bias** - If an NLP model is trained on a dataset that contains more examples of male pronouns than female pronouns, the model may be biased towards male pronouns and produce less accurate results for female pronouns.

- **Representation bias** - If an NLP model is trained on a dataset that contains more examples of white people than people of color, the model may be biased towards white people and produce less accurate results for people of color.

- **Sample bias** - If an NLP model is trained on a dataset that contains more examples of formal language than informal language, the model may be biased towards formal language and produce less accurate results for informal language.

ABA Resolution 112 (2019)

- Courts and lawyers are urged to address emerging ethical issues surrounding AI, including:
  - Bias, Explainability, and Transparency of automated decisions made by AI
  - Ethical and beneficial usage of AI; and
  - Controls and oversight of AI and the vendors that provide AI

Getting answers to these questions may prove difficult

- "Was the data used to train the system skewed or complete?

- Is it representative of the target population on which the system will be used?

- If the AI system was trained with historical data that reflects systemic discrimination, how was this addressed?

- Were variables incorporated that are proxies for impermissible characteristics (e.g., zip code or arrest records, which may correlate with and therefore incorporate race)?

- What assumptions, norms, rules, or values were used to develop the system?

- Were the people who did the programming themselves sufficiently qualified, experienced and/or diverse to ensure that there was not inadvertent bias that could impact the output of the system?

- Did the programmers give due consideration to the population that will be affected by the performance of the system?"

- Most importantly, was the AI system specifically designed to be used by lawyers and the legal profession?

Getting answers to these questions may prove difficult

- The AI provider is likely to consider its training methodology to be proprietary

- Consider evaluating the training data

- Test for accuracy

- Engage with experts and consider the use of tools that are evaluating AI systems

- Proposed governmental calls for transparency may help here

eDiscovery & AI

- It is expected that the natural language search capabilities of LLMs will be incorporated into eDiscovery platforms at some point. This will allow AI to recognize patterns and identify relevant documents. Unstructured data (e.g., social media and collaborative platforms like Slack or Teams) can be reviewed by the AI tool.

- Theoretically, collection and review costs could be dramatically lessened, and attorney fees reduced.

- Another possibility is that AI will be used to augment the document gathering and review process, as well as assist with privilege review.

AI & Ediscovery

- TAR is a supervised machine learning system – human classifies a document as relevant/not relevant, then TAR "learns" to classify the remaining documents based on an automated analysis of the human decisions.

- TAR is a rules-based system. Humans provide the "rules" explicitly and transparently.

- Unsupervised machine learning refers to AI systems that can operate independently of, or prior to, human involvement (e.g. concept search or clustering or translation of foreign languages)

Ediscovery Wars TAR vs. "new" AI Tools

- Sidney did a review of docs with GPT-4 and compared its ability to find responsive documents to TAR.

- They provided GPT-4 with the same review instructions given to the attorneys in an earlier anti-kickback case they handled and was now closed.

- Based on the initial output, the prompt for GPT-4 required some modifications.

- After that, GPT-4 identified most of the responsive documents, but performed at a slower pace compared to current TAR tools; but coding was more consistent

More Issues to Consider

- Duty to Protect Client Confidential Information. Model Rule Prof. Conduct 1.6
  - Some AI tools could repeat information in a user's query when a different user asks a similar question
- Privacy Issues (State and Global)
- Cybersecurity

Evidentiary Concerns - Deepfakes

https://www.youtube.com/watch?v=zCTL5bz0W7U

Rules of Evidence & AI

- Generally, relevant evidence is admissible.

- Lawyers who intend to offer AI evidence, however, may encounter a challenge to admissibility with an argument that the AI evidence fails the requisite authenticity threshold.

  - Paul Grimm and Maura Grossman have advocated for amending Fed. R. Evid. 901(b)(9) – to require that tendered exhibits must not only be accurate, but that any AI system that created the exhibit must consistently produce results which are valid when applied to a variety of different data sets under substantially similar circumstances

- More *Daubert* challenges ahead?

- A January 6 defendant sought to argue that video footage was inadmissible due to "recent technological advances." Some argue that this is the "liar's dividend." An attempt to argue that even real evidence is fake.

AI & Judicial decision-making

- Pros
  - Accelerate timetables for adjudication
  - Eliminate intentional or extraneous bias (hungry, irritable syndrome)

- Cons
  - AI tool may be biased (data biased, historical data set, lack of recent data) (all factors that may disadvantage women and minorities)
  - Judging is a skill that includes not only mastery of the law and procedure, but intuition, common sense and emotional intelligence
  - AI decision-making may promote stagnation in the law
  - AI fails to allow for discretion in judicial decisions
  - AI could be used to co-opt the judicial process for political ends

AI & the Judicial Dockets

- Expect pro se litigants to use GenAI tools (that are non-legal specific)
  - Pro se litigants may cite to non-existent authority and have an unsupported belief in the strength of their case

- With the greater speed in which motions can be drafted and the reduction in costs, will motion practice increase?

- Courts will likely be hearing more cases regarding the use of AI, breaches of state and federal regulations (e.g. Privacy breach, employment discrimination)

Some courts are requiring disclosure of the use of GenAI

- I generally think this is a bad idea
- Many reputable platforms now have incorporated GenAI
  - Westlaw Precision
  - Lexis+AI
  - Bloomberg

AI in the U.S. Courts now

- Derek Mobley v. Workday (D.D. Calif.)
  - Workday Inc.'s artificial intelligence systems and screening tools allegedly disqualify applicants who are Black, disabled, or over the age of 40 at a disproportionate rate, according to a lawsuit.
  - Rule 12(b)(6) motion granted with leave to amend (Jan. 19, 2024)

AI in the U.S. Courts now

- Estate Gene B. Lokken v. UnitedHealth Group (D. Minn.)
  - Insureds of UnitedHealth prior to their deaths unitedHealth Group Inc. uses a flawed AI model, called naviHealth predict, to determine coverage criteria for patients.

AI in the U.S. Courts now

- Jacqueline Huskey and Riian Wynn v. State Farm (N.D. Ill.)
  - Plaintiffs allege claims processing algorithms create discriminatory outcomes for Black homeowners in violation of the Fair Housing Act. In a 2022 putative class action, Husky and Wynn claim that State Farm's automated claims review process incorporates "historically biased housing and claims data" that led to their property damage claims being delayed, scrutinized more heavily and ultimately covered to a lesser degree than those of their white neighbors.
  - Rule 12(b)(6) motion granted in part and denied in part (Sept. 11, 2023)

Guidance to Judicial Officers

- United Kingdom
    - AI tools can be used for summarizing large bodies of text, yet must be checked for accuracy
    - AI may be used for writing presentations and administrative tasks
    - AI tools may be used as a secondary tool in preparing opinions/judgments
    - Legal research should not be done on non-legal/public LLM sets
    - Judicial officers and staff should not enter any information into a public AI chatbot that is not already in the public domain

Guidance to Judicial Officers

- Use care in drafting queries into public/free AI chat bots because the tool may remember queries
- Disable the chat history
- Quality of answers/responses depends on the quality of the prompts
- Check the accuracy of the response for errors or biases
- Utah and West Virginia
  - May use for legal research, but not to decide the outcome of a case

European Union –
AI Act
(Likely to become
effective in 2025)

Developers must demonstrate their technology does not pose a threat to health, safety and fundamental rights

Requires human oversight and transparency

Requires reporting of serious incidents

State of AI Laws

A useful summary of laws that have recently been enacted can be found at:

https://epic.org/the-state-of-state-ai-laws-2023/

NO AI
Fraud Act

Introduced in January 2024, it would protect American's rights to their likeness and voice against artificial intelligence generated fakes.

The bill comes as worries grow about how new personalized generative AI cloning models can be used for impersonation and and can allow for users to make fakes using a person's image and voice.

The No AI FRAUD Act would establish a federal framework of protections by reaffirming that an individual's likeness and voice is protected. It also gives them the right to bring a lawsuit against those who use AI frauds without their permission.

But wait, it may not all be bad news . . .

AI and Access to Justice (from the ABA)

- AI can be used for the public good. AI offers the potential to scale solutions to reduce the justice gap. It could dramatically improve the efficiency of legal aid lawyers, allowing them to rely on AI for administrative tasks and serve many more clients more efficiently and effectively. It could make accurate, reliable, and understandable legal information readily available to people who don't have access to a lawyer. It could simplify court forms and processes. Its utility, however, will depend on its accuracy, its ability to preserve privacy and confidentiality, and its avoidance of biases.

State Bars around the country are beginning to provide guidance (CA, FL, NJ)

- Florida
  - Rules Committee to consider whether the attorney certification requirement should be modified to address filings that incorporate AI
  - Bar to strengthen educational resources re AI, privacy and security
  - Annual meeting to include 5 hours of AI content
  - Bar to develop AI/Tech-related resource webpage

State Bars around the country are beginning to provide guidance (CA, FL, NJ)

- Recommends that lawyers obtain a client's informed consent prior to using a third-party generative AI program if the utilization involves the disclosure of confidential information
- Lawyers using an AI tool should ensure that the provider preserves the confidentiality and security of information, has adequate security measures, and determine whether the provider retains any information during and after the discontinuation of services

State Bars around the country are beginning to provide guidance (CA, FL, NJ)

- Lawyers must review the work product of a generative AI tool, verify the accuracy and sufficiency of all research, and are ultimately responsible for the work product
- Cautions that using chat bots for client intake must not render any legal advice and may wish to consider immediately identifying the chatbot and include disclaimers that an attorney-client relationship is not being established.
- Regarding billing, it is recommended that a lawyer inform the client in writing of any intent to charge for the actual costs of using generative AI, and the lawyer may not engage in any billing practices that falsely inflate the number of hours worked.

State Bars around the country are beginning to provide guidance (CA, FL, NJ)

- California
  - Lawyers must not input any confidential information into a GenAI tool that lacks adequate confidentiality and security protections
  - Lawyers should anonymize client information and avoid entering details that can be used to identify the client
  - Lawyers who intend to use confidential information in the AI tool should ensure that the provider does not share any inputted information with third parties
  - AI tools are a starting point and should be critically analyzed for accuracy and bias
  - A lawyer's professional judgment cannot be delegated to an AI tool
  - A lawyer may charge a client for actual time spent using an AI tool, but may not charge for fees for time saved using the tool
  - A lawyer must review all GenAI outputs, including analysis and citations for accuracy before submission to a court

UK - Considerations when using ChatGPT and generative artificial intelligence
software based on large language models

- [Considerations when using ChatGPT and Generative AI Software based on large language models January 2024 (barcouncilethics.co.uk)](barcouncilethics.co.uk)

Concluding Remarks

- Despite the infancy that AI is currently in (so far as the legal market is concerned), it has been around for years.

- The medical profession has embraced it, with appropriate caution.
  - To analyze medical images, such as X-rays, CT scans, and MRIs, to help diagnose and treat medical conditions
  - To identify new drug candidates and predict their efficacy, which can help accelerate the drug discovery process.
  - To provide clinical decision support to healthcare professionals, such as predicting the likelihood of readmission or identifying patients at risk of developing sepsis.
  - To monitor patients remotely, such as detecting falls or predicting hospital readmissions.
  - To analyze patterns and trends in patient data, which can help improve patient outcomes and reduce costs.

- The legal profession will need to embrace as well, with appropriate caution.