

Cutting Through the Mess: What Does AI Really Mean for Lawyers?

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Cutting Through the Mess: What Does AI Really Mean for Lawyers?

By Katherine B. Forrest

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Every day we read articles about what AI promises, how it falls short and whether it will prove to be our last great invention and destroy us all. If it's hard to know what to believe, it's because there are cross-currents on every topic.

I routinely hear "AI is over-hyped," and "AI will just be another tool and we will learn to use it," or "While AI may impact some white collar jobs, those people will just be trained into other occupations and the net impact will be very small."

I also hear "AI isn't really 'smart', it just predicts the next word and is mimicking humans," and "Don't talk to me about AI being sentient until it can smell a rose and appreciate the sublime beauty of a great opera."

It's my goal to give you my views, based on deep reading of significant academic research in this area and my own background as a former federal judge, about what AI's impact will be on the legal profession.

As a little added extra, I am throwing in some practical guidance about what ethical and professional obligations lawyers should keep in mind as we all enter this new era together.

First, for those who have tested some of the most advanced tools, as I have, it's clear that the capabilities of generative AI or large language models (LLMs) are mind-blowing.

They can write legal memos on complex topics; do 50-state surveys on whatever area of the law you want; analyze a complaint and give you the best bases for a motion to dismiss; analyze appeal briefs

and outline an argument that is pretty darn good, or give you the hardest questions an appellate panel is likely to ask you; create a cross-examination outline (after you upload some documents and give it a few sentences on what you are looking for from the witness); and create PowerPoint presentations for regulators—they can do all of this, in seconds.

Now I need to follow this up with a few caveats: the tools are still in development.

While incredibly impressive, there are a number of issues actively being worked on that lawyers need to be very aware of. There are, of course, a number of lawsuits pending in various jurisdictions about whether the material used to train the tools is infringing or whether those making the tools have or have not violated a variety of laws. Those cases will work their way through the court system but no one is suggesting that any result from these suits will cause the tools to go away.

In terms of the tools themselves, accuracy issues remain—not all the time, just sometimes—enough to keep you on your toes. These tools are not ready to be left alone to do the job of a lawyer; there needs to be a "human in the loop" (or rather, a licensed attorney in the loop).

There are also confidentiality issues that are different based on the technical environment. In some environments you can now get pretty good confidentiality, giving some comfort that you are not revealing your client's confidential information or information protected by a confidentiality order, attorney-client advice or work product.

In other environments, you may lack the level of protection you need and use of a tool could waive privilege, or reveal non-public information.



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My prediction, based on the research I have read, is that we will see tools that resolve these issues to a reasonable degree within a year to 18 months.

A year to 18 months: that means we are truly on the cusp of an absolutely transformative moment in the practice of law. There will be far less need for junior lawyers: the kind of tasks that they are typically assigned (research, writing memos, doing basic analysis) will be able to be done better and far, far faster by AI tools—and far more cheaply.

The pyramid of leverage that characterizes litigation—with many lawyers occupying the lower ranks of the pyramid and thinning out to a point at the top—will be gone. The shape will be narrow at the bottom, and form a rectangle up from there, leading to a final narrowing and the point at the top.

This has serious implications for law firm hiring, trickling down into law school admissions. Law firms will need to hire fewer young lawyers, and will be looking for the best of the best. The best of the best will be vying for far fewer available positions.

Quick work by fewer lawyers also means the billable hour may make even less sense. It depends. Some firms may have a model that the value provided in this environment is worth quite a lot from those remaining: the judgment, creativity and common sense that humans add to the work of the tool. The strategic vision of an experienced lawyer may still be worth paying for by the hour. But there will be, again a prediction of mine, a stronger and broader movement away from the billable hour.

Law firms will also face the difficult task of modifying the training of young lawyers to fit this new paradigm. There will be a need for lawyers with human judgment and strategic vision for some time to come—getting the right experience for young lawyers whose main tasks have been taken over by AI will take some different training considerations. True apprenticeship, direct mentoring and following more senior lawyers around (in person) may make a comeback.

All of this has implications for the ancillary facilities and services lawyers use today, from the footprint for office space to the number of legal assistants and support staff of all kinds.

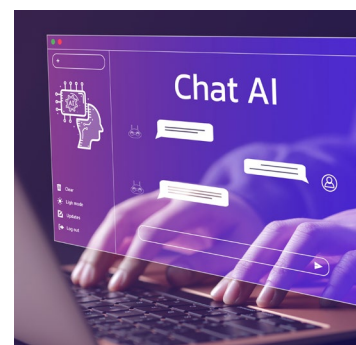
Along with all of these changes is an enhanced ability for groups who lack access to legal representation to have tools that enable them to better represent themselves.

An initial question that I assume will be overcome is how to make these tools available; this will depend on creative negotiations and arrangements by licensors and legal service organizations or governmental entities.

But assuming access, pro se litigants—so long disadvantaged by legal processes they did not have the training to spar with, or legal knowledge—will now be able to use natural language prompts to ask whether they have a claim and then, if they do, to draft it. The tools can help them with defenses in responding to a complaint or provide an understandable analysis of an otherwise complex brief.

These capabilities may raise questions as to whether someone up the chain (in tool design or deployment) has engaged in the unlicensed practice of law. If challenged in this way, courts

will be asked to balance legal and public policy questions. Given that prohibitions on the unlicensed practice of law concerned basic competencies, and since the tools may be more competent than large numbers of licensed practitioners, the answers are not clear.



So there is both good and scary coming our way. In the meantime, it is important to remember the ethical and professional obligations that exist today and don't suddenly disappear just because a tool is based on AI. Among these obligations is the duty of confidentiality: to make sure the tool being used does not disclose material and information a lawyer is obligated to keep confidential.

These tools are not ready to be left alone to do the job of a lawyer; there needs to be a “human in the loop” (or rather, a licensed attorney in the loop).

Lawyers have a duty of competency: this has a number of facets but includes at least knowing the capabilities and limits of any AI tools being used, ensuring that the output from the tool is correct and appropriate.

However, there is also a duty to learn about tools that can be used to advantage a client and that may provide a lawyer with new and good arguments that he or she may not have thought of.

There is the duty of candor that requires a lawyer comply with rules of court (more being passed every day) that either prohibit the use of AI tools or require disclosure of the use of AI tools. There is also the duty of loyalty to the client that comes into play when clients instruct lawyers not to use AI tools (in a number of Outside Counsel Guidelines, there are now provisions prohibiting such use or requiring disclosure of such use).

There is also a real potential that these new AI tools can, outside of the pro se area discussed above, engage in the unlicensed practice of law. This can come in several forms: an app that promises to “advise” on legal issues; a law firm that eliminates any human-in-the-loop and has the tool create legal documents that then get filed.

The tool is not a licensed lawyer; does the fact that a lawyer emailed the documents to the court mean that there has been sufficient human touch? I think not.

The legal profession is at the beginning of the most transformative moment in its history. We will not be practicing law in the same way in five years. Between now and then, it behooves us not to wish these changes away, not to become “AI deniers” but to find new ways to work with them and toward our new future.