

Straight & Narrow

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The Terminator Argument²

The Duty of Competence in Using Artificial Intelligence



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Key players in the bankruptcy system are inundated with daily sets of data on debtors, creditors, assets and liabilities. Reviewing and analyzing this data can take hours of an attorney's day. Bankruptcy software and related programs with artificial intelligence (AI) components can aid attorneys in processing the deluge of information, but as AI is incorporated into the legal world with increasing frequency, attorneys must consider the ethical ramifications of using such programs.

In August 2019, the American Bar Association adopted a resolution that "urges courts and lawyers to address the emerging ethical and legal issues related to the usage of [AI] in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI."³ Attorneys must undertake an analysis of some of the ethical implications associated with the use of AI in their practice of law. This article plants the seed for discussion regarding the duty of competence.

What Is AI?

Although the term "AI" often conjures images of machines that ultimately turn on the humans who created them, it actually encompasses much simpler, modern programs, such as email filters, Roombas and Amazon's Alexa. Essentially, AI refers to a machine's ability to exhibit some form of human intelligence.

AI has infiltrated the legal profession, although many attorneys might not be aware of either the extent of their current AI usage or even that they are using it. Pattern recognition and natural language processing in particular have produced beneficial tools for legal research, discovery, contract management, compliance and due diligence.⁴ Bankruptcy lawyers often rely on AI through these methods when using various forms of software in their practices.

- 1 The views expressed in this article are those of the author and not of the U.S. Bankruptcy Court for the Western District of Virginia.
- 2 Also known as the "Terminator scenario" and named after the 1984 classic film *The Terminator*, the Terminator argument is basically the concept that AI could become "self-aware machines taking over the world and destroying humanity in the process." Armin Krishnan, *Killer Robots: Legality and Ethicality of Autonomous Weapons* 154 (2009).
- 3 American Bar Association, House of Delegates Resolution 112, 2019 Annual Meeting (adopted Aug. 12-13, 2019).
- 4 Janine Cerny, Steve Delchin and Huu Nguyen, "Legal Ethics in the Use of Artificial Intelligence," available at [squirepattonbogs.com/~media/files/insights/publications/2019/02/legal-ethics-in-the-use-of-artificial-intelligence/legalethics_feb2019.pdf](https://www.squirepattonbogs.com/~media/files/insights/publications/2019/02/legal-ethics-in-the-use-of-artificial-intelligence/legalethics_feb2019.pdf) (discussing how AI is changing the law and how it is being used in the practice of law) (unless otherwise specified, all links in this article were last visited on Sept. 27, 2019).

Competence

Despite rapid advances in technology, the current ethical rules⁵ and duties of an attorney still govern and fortunately might provide a solid framework to address the ethical use of AI. Model Rule of Professional Conduct 1.1, which governs competence, mandates that "competent representation to a client requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment 8 to the Rule directs attorneys to maintain competence by "keep[ing] abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."⁶ It follows that an attorney who uses AI must have some level of skill — although not necessarily expertise — with the technology.

Competence is central to the adoption and utilization of AI because an attorney's competence (or lack thereof) might have implications on his/her other ethical duties.⁷ While it is clearly necessary for an attorney to have at least some understanding of AI to assess the risks and benefits of using a particular program, the question remains as to how much knowledge is sufficient to fulfill one's ethical obligation. Stated differently, what level of technological understanding is "reasonably necessary for the representation"?

In overly simplistic terms, most AI interprets input data to formulate responses through a process called "supervised learning." To begin, the system receives training examples of input and related output data, which helps it learn how to make decisions. For an AI to learn to generate even basic responses, however, it requires a large volume of data.⁸ A basic level of competence might therefore

5 For simplicity, this article will use the American Bar Association's Model Rules of Professional Conduct.

6 Thirty-six states have adopted a version of this comment or otherwise require a duty of technological competence. Robert J. Ambrogi, "Tech Competence," *Lawsites*, available at lawsitesblog.com/tech-competence.

7 See, e.g., Jason Tashea and Nicolas Economou, "Be Competent in AI Before Adopting, Integrating It into Your Practice," *ABA Journal* (April 23, 2019), available at [abajournal.com/lawscribbler/article/before-lawyers-can-ethically-adopt-and-integrate-ai-into-their-practices-they-must-first-be-competent](https://www.abajournal.com/lawscribbler/article/before-lawyers-can-ethically-adopt-and-integrate-ai-into-their-practices-they-must-first-be-competent) (citing as examples Model Rule 1.4(b) (Communications), Rule 1.5 (Fees), Rule 3.3 (Candor to the Tribunal) and Rule 3.4 (Fairness to Opposing Party and Counsel)); Cerny, et al., *supra* n.4 (discussing use and non-use of AI on duty of competency, duty to communicate, duty of confidentiality and duty to supervise).

8 See, e.g., Andrew Ng, "What Artificial Intelligence Can and Can't Do Right Now," *Harvard Bus. Review* (Nov. 9, 2016), available at hbr.org/2016/11/what-artificial-intelligence-can-and-cant-do-right-now ("Today's supervised-learning software has an Achilles' heel: It requires a huge amount of data. You need to show the system a lot of examples of both A and B. For instance, building a photo tagger requires anywhere from tens to hundreds of thousands of pictures (A) as well as labels or tags telling you if there are people in them (B). Building a speech recognition system requires tens of thousands of hours of audio (A) together with the transcripts (B).").

be found in being aware of the data used in the creation of the technology.

A primary issue that an attorney confronts in seeking out the underlying processes is the “black box” challenge, in which “a lawyer submits a query to an AI-powered tool, it goes into a ‘black box,’ and the AI-based solution provides an answer.”⁹ Attorneys may not need to understand every detail of the algorithm that led to the AI’s determination, but they should know what information underlies the system and what specifically constitutes the programmed goal.

Transparency aids in this quest. Developers should provide detailed information on how the AI is intended to work. If the information is not provided, or if the information proves insufficient, it is incumbent on the attorney to seek out the information¹⁰ that he/she needs in order to evaluate whether using the program comports with the goal of the client.

In addition, while AI is a useful tool for the attorney, it is expected that the lawyer will review the draft product for both accuracy and completeness. The AI provides a recommendation, but the attorney must make the ultimate decision after reviewing the underlying data and considering the programmed objective.

Fortunately, the “black box” might be opening up at least enough so that users of the AI know how determinations are reached. This shift arises from a need among professionals (not just lawyers!) to have trust in the AI being used.¹¹ An increased need for explainability in making decisions that are important for clients is imperative to guarantee that the decision being reached is the right one given that client’s circumstances. The more that an attorney understands how the AI’s determination is reached, the more trust he/she may have in its use. Ultimately, this results in an increased assurance and confidence in the outcome.

Competence Combats Bias

Bias is a particular risk for AI, as the results from an inquiry might be skewed. The results from an AI inquiry might suffer from the bias of its creator or the data used in its creation. Because of this, attorneys might have an ethical obligation to understand the data underlying the machine learning to account for such bias. Specifically, Model Rule of Professional Conduct 8.4(g) makes it “professional misconduct for a lawyer to ... engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”

Biased AI is a proven reality.¹² One often-cited example in the legal world is the Correctional Offender Management

Profiling for Alternative Sanctions (COMPAS) tool. It is an algorithm used to help judges with sentencing by predicting the likelihood that a given individual will reoffend. While the program is often able to predict the subsequent recidivism of many offenders, it is not foolproof and frequently evidences the bias of its data. By comparing the recidivism predicted by COMPAS with the actual recidivism rate of more than 10,000 criminal defendants in one Florida county in 2013 and 2014, a 2016 *ProPublica* study “found that black defendants were far more likely than white defendants to be incorrectly judged to be at a higher risk of recidivism, while white defendants were more likely than black defendants to be incorrectly flagged as low risk.”¹³

AI presents an opportunity to provide legal services more quickly and more efficiently, thus leading to a decrease in costs.

Recognizing potential bias and investing in comprehensive training should result in improved awareness of the AI and its data, and hopefully aid an attorney in sidestepping this potential pitfall. By being aware of implicit and unconscious bias, an attorney is in a better position to acknowledge, identify and subsequently address it.¹⁴ Narrow data sets might lead to skewed or flawed results, so a diverse data set is important in the production of a better-fitting analysis for a broader spectrum of clients. An attorney who understands how the AI produces results is better suited to achieve the intended goal.

Governing Bodies

As the interaction between technology and the practice of law intensifies, state bar associations and courts will need to address the parameters of competence in their own jurisdictions.¹⁵ For example, the State Bar of California has issued a legal ethics opinion addressing a lawyer’s competence during the e-discovery process.¹⁶ The opinion reinforces that competence requires at least “a basic understanding of, and facility with, issues relating to” the technology used, which in the opinion was the discovery of electronically stored information.¹⁷ This mandate remains uncontroversial. What makes

13 Jeff Larson, Surya Mattu, Lauren Kirchner and Julia Angwin, “How We Analyzed the COMPAS Recidivism Algorithm,” *ProPublica* (May 23, 2016), available at propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm.

14 See Jason Bloomberg, “Bias Is AI’s Achilles Heel. Here’s How to Fix It,” *Forbes* (Aug. 13, 2018), available at forbes.com/sites/jasonbloomberg/2018/08/13/bias-is-ais-achilles-heel-heres-how-to-fix-it (highlighting how to combat “garbage in, garbage out” problem of programming).

15 Earlier this year, the Louisiana Bar Association issued a legal ethics opinion noting that “[t]he consensus is that if a lawyer is going to use technology, that lawyer has a duty to comply with” the Rules of Professional Conduct. La. Bar Ass’n, Public Opinion 19-RPCC-021 (“Lawyer’s Use of Technology”), available at lsba.org/documents/Ethics/EthicsOpinionLawyersUseTech02062019.pdf. Although commentators have criticized this statement for seemingly suggesting that a lawyer in 2019 even has the option not to use technology, the sentiment that the Rules of Professional Conduct govern that use rings true. See Robert J. Ambrogio, “Ethics Opinion Misses the Mark on Tech Competence,” *Above the Law* (May 20, 2019), available at abovethelaw.com/2019/05/ethics-opinion-misses-the-mark-on-tech-competence; Nicole Black, “Lawyers and Technology Competency: Louisiana Weighs In,” *Sui Generis* (April 25, 2019), available at nylawblog.typepad.com/suigeneris/2019/04/lawyers-and-technology-competency-louisiana-weighs-in.html.

16 State Bar of California, Standing Comm. on Prof’l Responsibility and Conduct, Formal Opinion No. 2015-193, available at [calbar.ca.gov/Portals/0/documents/Ethics/Opinions/CAL%202015-193%20%5B11-0004%5D%20\(06-30-15\)%20-%20FINAL.pdf](http://calbar.ca.gov/Portals/0/documents/Ethics/Opinions/CAL%202015-193%20%5B11-0004%5D%20(06-30-15)%20-%20FINAL.pdf).

17 Id.

9 David Lat, “The Ethical Implications of Artificial Intelligence,” *Above the Law*, available at abovethelaw.com/law2020/the-ethical-implications-of-artificial-intelligence.

10 Help might also eventually come in the form of transparency laws. See, e.g., Elizabeth Zima, “Could New York City’s AI Transparency Bill Be a Model for the Country?,” *Gov’t Tech* (Jan. 4, 2018), available at govtech.com/policy/Could-New-York-Citys-AI-Transparency-Bill-Be-A-Model-for-the-Country.html. Such communication might even prove mutually beneficial for the AI developer and the legal community. See Tashea and Economou, *supra* n.7 (“Opening this door can lead to improved interdisciplinary communication between legal and technical fields, while bettering the science behind AI and its application in legal systems.”).

11 Jason Bloomberg, “Don’t Trust Artificial Intelligence? Time to Open the AI ‘Black Box,’” *Forbes* (Sept. 16, 2018), available at forbes.com/sites/jasonbloomberg/2018/09/16/dont-trust-artificial-intelligence-time-to-open-the-ai-black-box.

12 See, e.g., Daniel Cossins, “Discriminating Algorithms: Five Times AI Showed Prejudice,” *NewScientist* (April 12, 2018), available at newscientist.com/article/2166207-discriminating-algorithms-5-times-ai-showed-prejudice.

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this opinion particularly noteworthy is the warning that cases requiring a heightened standard of competence might come to an attorney. For “an attorney lacking the required competence,” the Standing Committee on Professional Responsibility and Conduct offers three options: “(1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation.”¹⁸

Although this opinion was issued in the context of e-discovery, it is easily analogized to the use of AI. Since the duty of competence entails learning and skill, attorneys should start acquiring familiarity with and knowledge of AI as soon as possible, or associate themselves with someone who will. No attorney wants to turn away a client in need, but a failure to take one of the three options espoused by the State Bar of California may subject the practitioner to sanctions.

No bankruptcy court wants to hear an attorney blame his/her paraprofessionals for the attorney’s error or misconduct, much less see an attorney point the finger at his/her computer. Outside of the legal profession, liability might be able to be shared among many parties, including the developer, the vendor and the user. However, sanctions for breaches of an attorney’s ethical duties and obligations resulting from inap-

propriate use of AI could (and perhaps should) fall squarely and solely on the attorney.

Conclusion

Legal technology continues to advance rapidly, and bankruptcy practitioners must eventually utilize AI to compete. As the “outside world” embraces AI technology, clients will come to expect that their counselors understand and use the same. AI presents an opportunity to provide legal services more quickly and more efficiently, thus leading to a decrease in costs, which may be passed on to clients and therefore enable the attorney to make his/her services more available to those who most need them. In light of these benefits, attorneys should welcome these auxiliary effects of AI.

However, attorneys must remain mindful of the ethical considerations surrounding the programs that they use to maintain professional conduct in a rapidly advancing society. While complying with the professional rules of conduct, attorneys may utilize AI to accomplish certain time-consuming tasks so that they can better focus on the human element. Since bankruptcy courts do not yet permit robot lawyers to appear in court or represent parties-in-interest, practitioners should continue to strive for competence in all aspects of representation — at least until the machines attain sentience. **abi**

¹⁸ *Id.*

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