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ABA Resolution: Caution with AI Use in Legal Practice

BY CHRISTOPHER ROURK

Artificial intelligence (AI) has been in use for over 60 years and has evolved from technology used to play checkers to technology that can perform complex tasks such as proofreading documents and creating advertising campaigns. While some people may unreasonably fear that the practice of law will be added to that list, the more likely scenario is that AI tools will help lawyers provide services to clients by automating simple tasks that would otherwise require attorney time to accomplish. To that end, the American Bar Association adopted a resolution on August 12, 2019, identifying the need to address the ethical and legal issues related to AI in the practice of law. The resolution identifies a number of important areas for all lawyers to be aware of in their practice.

First, the resolution notes that it is essential for lawyers to understand how AI is used in their practices. Even if a lawyer is not currently using commercial AI solutions, AI appears likely to become as ubiquitous as email, cell phones and other common technologies that were previously not in widespread use. While the resolution does not attempt to address the scope of AI technologies, which are rapidly developing, it does provide a list of questions for a lawyer to ask an AI solutions provider to be used as a starting point for understanding the potential risks.

Second, the resolution emphasizes the need for lawyers to be familiar with how ethics rules may apply to a new AI technology, such as the duty of competence, the duty to communicate, the duty of confidentiality and the duty to supervise. For example, the resolution notes the potential for a violation of the duty of confidentiality, as AI technology may require confidential client information to be shared with the third-party AI service provider. Some AI technology uses "deep learning," which could even incorporate client confidential information into the AI technology in a manner that would be difficult or impossible to remove. Such issues need to be identified before a new AI technology is used by a lawyer to provide services to clients.

Further, the application of every ethics rule should be considered regarding any new AI technology, since the technology might be based on a new principle not previously identified or applied, and which might implicate ethics rules not relevant to other AI technologies. For example, duties to former or prospective clients might be implicated by AI-based data mining. Any new AI technology should be approached with caution, and extensive due diligence should be performed to avoid inadvertently violating ethical duties.

The resolution also notes that there is a "genuine concern that AI technology may reflect the biases and prejudices of its developers and trainers." While that is true, it is also possible that a discriminatory effect may arise even without discriminatory intent. The initial problems with facial recognition technology provide a compelling example of this issue. Some of that technology suffered from an obvious and immediately apparent design defect—the inability to recognize the facial images of women and minorities. A defect like that would be fatal to a product using this technology, such as access control for an automatic door that opens based on image data. The misoperation arose without discriminatory intent, such as from use of a training database of facial images that only included some of the developers and not the general population. In some cases, the development team even included women and minorities. In hindsight, it is apparent that it is necessary to include a training database of all possible races and genders, and that standards of care must be discovered for nascent AI facial recognition technology. Every example of potential bias noted in the resolution involved cases where the discriminatory effect was inadvertent, although AI technology could also be subject to intentional abuses.

In conclusion, AI technology raises many new issues, and it is the duty of lawyers to ensure that adequate safeguards are implemented to identify problems, such as bias or errors. If corrective actions cannot be implemented, it might be necessary to suspend the use of such AI technology, at least until those problems are fixed. As such, a conservative approach to the adoption of AI technology for critical applications is prudent, using conventional practices as a backup and error check. **HN**

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