

# LET'S CHAT ABOUT CHATGPT

Presented for the Computer and Technology Section of the State Bar of Texas

September 29, 2023

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by Hon. John G. Browning

In May, I spoke at a technology law conference. Even though only one of the speakers was there to “officially” speak about ChatGPT, virtually every other speaker found some way to work in glowing references to ChatGPT and how artificial intelligence tools are going to transform the legal profession. As the last speaker of the day, I waited patiently for someone—anyone—to take off their rose-colored glasses and discuss some of the ethical problems with ChatGPT’s use. When no one did, I felt compelled to mention some of the myriad problems with this AI tool, including its occasional habit of “hallucinations”—giving convincingly worded answers with fabricated information. “Mark my words,” I said, “before too long, lawyers will be in trouble for ChatGPT-researched briefs with made up cases.” I had no idea just how prophetic those words would be.

The following day, I saw that Twitter and national media were abuzz with the story of New York lawyer Steven Schwartz, who represents plaintiff Roberto Mata against Avianca Airlines in a suit stemming from a personal injury in 2019. Schwartz, a lawyer for more than thirty years, submitted a brief “supported” by six “bogus judicial decisions with bogus quotes and bogus internal citations,” according to Judge Kevin Castel’s Order to Show Cause. Among the false cases cited were *Varghese v. China South Airlines*, *Martinez v. Delta Airlines*, *Shaboon v. Egypt Air*, *Petersen v. Iran Air*, *Miller v. United Airlines*, and *Estate of Durden v. KLM Royal Dutch Airlines*. Saying that “The court is presented with an unprecedented circumstance,” Judge Castel has set this matter for a June 8 sanctions hearing.

It’s not just that the cases themselves were entirely made up, complete with fake citations; they also contained internal citations to similarly non-existent cases and fabricated quotes. And apparently there was even a “false notarization” on an affidavit submitted by one of Mr. Schwartz’s colleagues—so now he’s facing sanctions as well. For his part, Mr. Schwartz accepted responsibility for not confirming the chatbot’s sources, and said that he had never used ChatGPT for legal research before and so “was unaware of the possibility that its content could be false.” He also “greatly regrets having utilized generative artificial intelligence to supplement the legal research performed herein and will never do so in the future without absolute verification of its authenticity.” Here’s a question to pose to ChatGPT: “what’s the quickest way to lose my law license?”

I want to be more sympathetic to Mr. Schwartz, but it’s difficult because of the multiple ethical lapses here. First of all, in an era characterized by our ethical duty of technology competency, the “caveman lawyer defense” of “I didn’t know this could happen” just doesn’t wash anymore. In New York and the other 39 states with this duty, you have three choices when it comes to technology and your cases: (1) understand the technology and its limitations before using it; (2) have someone on your team who does understand it; or (3) don’t accept the engagement. Another ethical duty that may have been compromised is the duty to supervise other lawyers. Regardless of who should have been supervising whom, the failings of both lawyers could have been prevented by adequate supervision. Both of these combined led to yet another ethical lapse in the lawyers’ duty of candor to the tribunal.

Bearing on this is the fact that ChatGPT's vulnerabilities are hardly a secret. In March, the New Zealand Law Society warned its members of the dangers of using ChatGPT for legal research. It seems that the AI tool was providing lawyers with "cases" that didn't actually exist, even to the point of creating convincingly worded—but utterly false—case notes. As the Law Society's publication pointed out, the well-intentioned chatbot "will fabricate facts and sources where it does not have access to sufficient data." The authors behind the highly reputable *SCOTUSblog* decided to see if ChatGPT could answer common questions about the Supreme Court that covered important rulings, justices from both past and present, etc. Yet out of fifty questions, ChatGPT answered only 21 correctly. In one bizarre exchange, when asked if any justices had ever been impeached, ChatGPT confidently proclaimed that "Justice James F. West" was impeached in 1933. However, no one was impeached in 1933, and there's never been a "James F. West" serving on the Court.

Blind faith in ChatGPT may even get you sued for defamation. UCLA law professor Eugene Volokh asked ChatGPT to compile a list of law professors who had engaged in sexual harassment. The list included George Washington University law professor Jonathan Turley and referred to a 2018 *Washington Post* article about Turley being accused of groping law students on a trip to Alaska. But there were glaring problems, such as the fact that no such *Washington Post* article existed, there was never any Alaskan trip, and Professor Turley (misidentified as working at Georgetown) has never been accused of sexual harassment. How does an AI tool make up a quote, cite a nonexistent article, and reference a false claim? AI and AI algorithms can be every bit as biased as the humans who program them.

The danger of ChatGPT errors leading to lawsuits is more than just conjecture. After ChatGPT generated false statements maintaining that an Australian politician, Brian Hood, had been accused of bribing officials in several countries and had been sentenced to thirty months in prison, Hood sent notice to OpenAI (developer of ChatGPT) of his intent to sue. Not only was Hood never found guilty of bribery, in reality, he was the one who had alerted authorities to the bribes in the first place.

There are other ethical risks that using ChatGPT poses that lawyers need to be aware of. At least one large legal malpractice carrier, ALAS, has issued a warning to lawyers, calling ChatGPT "not ready for prime time." A number of large firms have adopted AI/ChatGPT policies, warning their attorneys not only about ChatGPT's "hallucinations," but also about the risk that the chatbot poses to confidential information. Consider it this way: when you input confidential information for ChatGPT to consider in arriving at a response to your query, you not only lose control of that data but it loses its status as confidential information. Recently, Samsung employees inadvertently leaked trade secrets (including confidential source code and valuable strategy that was in certain meeting notes that were uploaded to ChatGPT). Once the AI genie is out of the bottle, it's impossible to put back.

ChatGPT (the GPT stands for "generative pretrained transformer") launched last November, and quickly acquired one million users; that figure now exceeds 100 million users. The latest iteration, ChatGPT 4, was released in March and is already way ahead of its predecessor. It's true that AI tools are being used not only for legal research, but for contract

review and drafting, brief analysis and drafting, drafting discovery, and predictive analytics. In fact, judges in Colombia and India have already used ChatGPT to help draft opinions. How much ChatGPT and other AI tools can do can be staggering; in March, a report by Goldman Sachs estimated that AI tools could automate 44% of the legal tasks in the United States.

Clearly, generative AI and ChatGPT are capable of doing feats once thought astonishing. In an April Thomson Reuters survey of lawyers asking about the potential risks and the opportunities of using ChatGPT and generative AI, an overwhelming 82% said they believed that such tools *can* be applied to legal work, while only 51% responded that it *should* be. But before we lose ourselves in the conversation about whether “robot lawyers” can do our jobs, let’s be mindful of whether ChatGPT can perform these tasks *ethically*. For the moment, at least, we need to keep a close eye on the ethical risks of using ChatGPT.

Other than generative AI, the use of AI by attorneys presents a whole host of other ethical risks. As the following article reflects, AI impacts many other dimensions of our ethical duties as attorneys.

## I. INTRODUCTION

If you’ve interacted with a chatbot while shopping online or marveled at the ability of Netflix to suggest new films and television shows tailored to your interests, then you’ve experienced some of the transformative influence that artificial intelligence has had on society. And in the legal profession, chances are that even if you haven’t experienced the impact of artificial intelligence in one or more of the myriad ways in which it is revolutionizing the practice of law—doing everything from legal research to document analysis to the drafting of contracts, pleadings, and even briefs—you’ve at least seen the proliferation of articles and CLE courses with strident warnings about “robot lawyers taking our jobs.” However, regardless of whether your impression of artificial intelligence’s impact runs closer to “time-saving practice aid” or “existential threat,” AI’s impact can clearly be seen in the arena of ethical duties lawyers have.

Just as legal observers and academics have examined the different ways in which AI is shaping the practice of law, others have sought to analyze its impact on legal ethics. Some purport to look at AI and legal ethics in detail, and yet barely venture beyond a discussion of one or two Model Rules of Professional Conduct.<sup>1</sup> Others entice the reader with broad, sweeping titles, only to barely venture beyond a superficial treatment of the ethical duties they deign to discuss.<sup>2</sup> Admittedly, no state or national ethics body has yet issued an ethics opinion concerning

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<sup>1</sup> See, e.g., Catherine Nunez, *Artificial Intelligence and Legal Ethics: Whether AI Lawyers Can Make Ethical Decisions*, 20 TULANE J. TECH. & INTELL. PROP. 189 (2017); Victoria Hudgins, *Lawyers Run Into Legal Ethical Risks Using—and Not Using—AI Technology*, LAW.COM (Oct. 14, 2021), <https://www.law.com/legaltechnews/2021/10/14/lawyers-run-into-legal-ethical-risks-using-and-not-using-ai-technology/?sreturn=20220122121631>.

<sup>2</sup> See, e.g., Mark L. Shope, *Lawyer and Judicial Competency in the Era of Artificial Intelligence: Ethical Requirements for Documenting Datasets and Machine Learning Models*, 34 GEORGETOWN J. LEGAL ETHICS 191 (2021); David Lat, *The Ethical Implications of Artificial Intelligence*, ABOVE THE LAW (June 15, 2018), <https://abovethelaw.com/law2020/the-ethical-implications-of-artificial-intelligence/#:~:text=Artificial%20intelligence%20is%20transforming%20the,and%20that%20includes%20legal%2>

the use of AI in the legal profession. As a result, there has been no comprehensive look at the various ethical duties that a lawyer's use of AI impacts. This article aims to fill this void in the scholarship.

This article will provide an overview of artificial intelligence and the various ways in which its use is disrupting the practice of law. It will then discuss each of the different Model Rules of Professional Conduct that are impacted by AI, beginning with a look at the most fundamental obligation of all—the duty to provide competent representation, an ethical responsibility that has been irrevocably altered by the Digital Age's dizzying array of emerging technologies. As this article will demonstrate, while AI offers game-changing advantages and benefits for lawyers, its use raises important questions regarding our ethical obligations. Lawyers (and courts) need to be aware of the issues involved in using—and not using—AI, including the potential for situations where their use of AI may be flawed or biased. These same ethical issues have been faced before with other new technologies, and no doubt will be confronted in the future. The Rules of Professional Conduct are adaptable to new advances in technology, and AI is no exception to this.

## II. AI AND ITS IMPACT ON THE PRACTICE OF LAW

### A. WHAT IS AI?

Artificial intelligence has been defined as “the capability of a machine to imitate intelligent human behavior.” Others have used the terms “machine learning” or “cognitive computing.”<sup>3</sup> When you were a baby, just learning how to talk, you observed thousands of conversations. You noticed that there was a cadence to the sounds being expressed, you noticed that some of those sounds were repeated over and over again, and you learned your first words. After thousands of hours of training, you pumped out a single word. From there, you probably started trying to string together “sentences” in a series of meaningless babbling, with an occasional coherent word thrown in. The sentence did not achieve the desired outcome, and you tried again. Over time and much trial and error, you learned to talk.

Machine learning works in much the same way. A program attempts to achieve an outcome by modeling its outputs against the data you provide it. To carry the analogy forward, you provide the program with thousands of hours of speech recordings for it to listen and model itself after. The program tries to match cadence with meaning, and it eventually “learns” to synthesize speech.

However, imagine that instead of providing the program with thousands of hours of actual speech recordings, you provided the program with mostly speech recordings, but maybe a quarter of the recordings were of chattering monkeys. As far as the computer is concerned, all of the recordings are equally valid, so it will attempt to model its synthesized speech after the entirety of the recordings, resulting in sentences that include the occasional monkey-based vocalization or “speech” structure. This would be an obvious error to any person listening to the synthesized

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0ethics.&text=%E2%80%9CWhen%20using%20tools%20in%20their,of%20supervision%20and%20independent%20judgment.%E2%80%9D.

<sup>3</sup> Lisa Morgan, *4 Types of Machine Intelligence You Should Know*, INFO. WK. (Apr. 10, 2018);

<https://www.informationweek.com/ai-or-machine-learning/4-types-of-machine-intelligence-you-should-know>.

speech, but the use of machine learning is often to remove the need for an individual to interact with the data: the program is likely to go on and on synthesizing monkey sounds into the outputs long before anyone notices.

This can lead to many problems when the machine learning tool is responsible for important decisions: (1) who to interview for a job; (2) who to loan money to; (3) what stocks to invest in; or (4) who to send to jail. All of those listed use cases to rely on the data fed into it, and the data can be problematic for a few reasons.

## B. USE IN THE PRACTICE OF LAW

There are many different ways in which lawyers today are using AI to improve productivity, efficiency, and the quality of legal services for their clients. Traditionally, legal research is one of the earliest and most obvious areas for AI adoption. With AI, lawyers can rely on natural language queries—rather than simple Boolean queries—to achieve more meaningful and more insightful results. AI can also be used to generate basic legal memos. The ROSS Intelligence AI tool, for example, uses IBM’s Watson AI technology to produce a brief memo in response to a lawyer’s legal question. Another popular use of AI is in e-discovery and predictive coding, in which lawyers essentially train the technology how to categorize documents in a case. The AI assists in classifying documents after extrapolating data gathered from a sample of documents classified by the attorney. Yet another natural fit for the efficiencies that AI offers is predictive analytics, in which AI products are used to predict the outcome of litigation (or particular aspects of a litigated matter). AI tools utilize case law, public records, dockets, jury verdicts, and more to identify patterns in past and current data. The AI then analyzes the facts of a lawyer’s case to provide an intelligent prediction of the outcome. If, for example, you wanted to know how Judge Smith in a particular federal district has tended to rule in *Markman* hearings in patent infringement cases that have come before her, AI could be employed to analyze every such case she has ever had and to compare facts, patterns, and relevant law in those cases to the matter you are litigating.

Each of these areas—legal research, document review and analysis, and predictive analytics—seems to be a natural, even expected, use of AI technology and its strengths. Vast amounts of data are “fed” to the computer, analysis takes place with greater speed, efficiency, and accuracy than humans could do, and conclusions are reached. But AI is also being used to do what many attorneys have traditionally regarded as work requiring “the human touch”—contract review, management, and drafting. AI tools are increasingly being used in these areas. They can flag termination dates and alert the lawyers about deadlines for sending a notice of renewal, and identify important provisions in agreements (such as indemnity clauses and choice of law provisions). AI is also being utilized in automated due diligence review for corporate transactions, sharply reducing the cost and burden of reviewing vast quantities of documents. One AI tool offered by LawGeex, for example, provides contract analysis and review using algorithms and crowdsourced data to generate a summary, contract “score,” and information including sample language for missing clauses.

A number of in-house legal departments have even turned to AI for contract drafting. At Coca-Cola, for example, AI-based tools have streamlined the contract-drafting process for a

variety of matters, reducing the time that lawyers had been spending from as much as ten hours to about 15 minutes.<sup>4</sup> The result is not just increased efficiency, but more consistent agreements while freeing up in-house counsel for more strategic, challenging tasks.<sup>5</sup> JP Morgan Chase even invested in its own proprietary AI platform, COIN (short for Contract Intelligence) in 2017 to review commercial loan agreements. The move has reaped significant dividends for the financial giant, with Chase estimating that “its automation of such work has saved it 360,000 hours of work by lawyers and loan officers annually.”<sup>6</sup>

Beyond corporate law departments, large law firms are setting up AI practice groups and proudly touting their use of cutting edge technology. For example, on the firm website for Baker Donelson, the law firm points out how it has used Kira (an AI resource) for contract review and another AI tool, Drafting Assistant, “to draft documents faster and with greater accuracy through the use of model documents and automated templates.”<sup>7</sup> The firm goes on to highlight the how it uses AI to improve contract management, “enhance and expedite M&A due diligence,” mitigate risks and ensure compliance, employ more effective lease abstraction for real estate projects, and “increase consistency across financial services deals.”<sup>8</sup> Taking one of these areas (compliance) as an example, Baker Donelson explains that it uses its AI technology to “identify FCPA [Foreign Corrupt Practices Act], export control, or other regulatory issue clauses across large volumes of contracts” in order to “identify potential areas of noncompliance quickly.”<sup>9</sup>

While lawyers’ varied use of AI offers great efficiency, these tasks must still be carried out in a manner consistent with our ethical obligations as attorneys. As the following section explains, multiple Rules of Professional Conduct are impacted by how lawyers are using—and not using—AI.

### III. TECHNOLOGY COMPETENCE

#### A. GENESIS

Perhaps the most significant ethical obligation impacted by the advent of artificial intelligence is the duty to provide competent representation. Long before it became the 39<sup>th</sup> state to adopt a duty of tech competence, the California State Bar observed that “Legal rules and procedures, when placed alongside ever-changing technology, produce professional challenges that attorneys must meet to remain competent.”<sup>10</sup> This statement reflects the sea change that occurred in the legal profession in 2012 with the ABA’s adoption of an amended Comment 8 to Model Rule of Professional Conduct 1.1. Prior to August 2012, being “competent” for most lawyers meant staying abreast of recent case law and statutory or code changes in one’s area of concentration. But in August 2012, the American Bar Association—following the

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<sup>4</sup> John G. Browning, *Will Robot Lawyers Take Our Jobs?*, D MAG. (Mar. 11, 2019), <https://www.dmagazine.com/publications/d-ceo/2019/march/will-robot-lawyers-take-our-jobs/>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *How Are We Using AI?*, BAKER DONELSON, <https://www.bakerdonelson.com/artificial-intelligence>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Gavin Broady, *California Bar Wants More Input on E-Discovery Ethics*, LAW360 (Jan. 6, 2015), <https://www.law360.com/legaethics/articles/608651/california-bar-wants-more-input-on-e-discovery-ethics>.

recommendations of its Ethics 20/20 Commission—formally approved a change to Rule 1.1 to make it clear that lawyers have a duty to be competent not only in the law and its practice, but to be conversant in technology impacting it as well.

Specifically, the ABA’s House of Delegates voted to amend Comment 8 to Model Rule 1.1, which deals with Maintaining Competence, to read as follows:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.<sup>11</sup>

Of course, the ABA Model Rules are precisely that—a model. They provide guidance to states in formulating their own rules of professional conduct, and each state is free to adopt, ignore, or modify the Model Rules. For a duty of technology competence to apply to lawyers in a given state, that state’s particular rule-making body (often the state’s highest court) would have to adopt it. And since late 2012, 39 states have adopted this duty of technology competence, most incorporating the ABA’s language verbatim.<sup>12</sup> For some states, even before the adoption of a formal technology competence requirement, there were clear indications that lawyers would be held to a higher standard when it came to technology impacting the practice of law. For example, in a 2012 New Hampshire Bar Association ethics opinion on cloud computing, the Bar noted that “[c]ompetent lawyers must have a basic understanding of the technologies they use. Furthermore, as technology, the regulatory framework, and privacy laws keep changing, lawyers should keep abreast of these changes.”<sup>13</sup>

Even one state that has not adopted the ABA Model Rules (and which was the last to embrace the duty of tech competence)—California—didn’t hesitate to acknowledge the importance of technology competence. In a 2015 formal ethics opinion regarding e-discovery, the California Bar made it clear that it requires attorneys who represent clients in litigation to either be competent in e-discovery or to get help from those who are competent.<sup>14</sup> Its opinion even expressly cited Comment 8, stating that “[m]aintaining learning and skill consistent with an attorney’s duty of competence includes keeping ‘abreast of changes in the law and its practice, including the benefits and risks associated with technology.’”<sup>15</sup>

What consequences has this sea change had for practitioners? While it didn’t mandate that confirmed Luddites transition overnight into coders and Geek Squad members, the new duty of tech competence does mean that lawyers need to understand the basics of the technology they use, and to become conversant in how that technology impacts their practice as well as how it functions. This includes law practice management technology, such as e-mail, document creation, and document management software. It can also include the use of e-discovery and

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<sup>11</sup> MODEL RULES OF PROF’L CONDUCT, r. 1.1 cmt. 8 (AM. BAR ASS’N 2012).

<sup>12</sup> Bob Ambrogio, *California Becomes 39<sup>th</sup> State to Adopt Duty of Technology Competence*, LAWSITES (Mar. 24, 2021), <https://www.lawnext.com/2021/03/california-becomes-39th-state-to-adopt-duty-of-technology-competence.html>.

<sup>13</sup> N.H. Bar Ass’n, Advisory Op. 2013 13/4 (2013).

<sup>14</sup> Cal. State Bar, Formal Op. 2015-193 (2015).

<sup>15</sup> *Id.*



technology-assisted review (TAR) for litigators. With the use of file-sharing sites like Dropbox and Box becoming commonplace, lawyers also need to be conversant in cloud computing and the ethical questions implicated by its use. In addition, given the importance of cybersecurity for both law firms and the clients they serve, having at least a basic working knowledge of cybersecurity measures (such as encryption for confidential communications) and risks (such as ransomware and phishing schemes) is a vital part of being technology competent.

This duty of tech competence in representing one's clients inevitably impacts other ethical obligations as well. For example, an opinion from the ABA Standing Committee on Ethics and Professional Responsibility called for lawyers to use "reasonable efforts" (such as encryption) to ensure that communications with clients are secure, and highlighted how these efforts spring from not only the ethical duty to preserve client's confidences, but the duty of competence as well.<sup>16</sup> It states that a lawyer must "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."<sup>17</sup>

## B. CAUTIONARY TALES

Courts have not been shy about reminding lawyers that the failure to live up to the duty of tech competence can have devastating consequences, particularly in the realm of e-discovery. In *James v. National Financial, LLC*, the Delaware Court of Chancery was not sympathetic to the defense counsel's explanation for failures to produce requested electronically-stored information—the excuse was that he was "not computer literate."<sup>18</sup> The case involved class action claims against a payday loan lender for violating the Delaware Consumer Fraud Act as well as the Federal Truth in Lending Act.<sup>19</sup> National Financial had been ordered to produce electronically-stored information about each of its loans between September 2010 and September 2013.<sup>20</sup> After multiple deficient discovery responses and several court orders, the court's patience was at an end and it sanctioned the defense with deemed admissions and monetary sanctions.<sup>21</sup> The judge also turned a deaf ear to defense counsel's protests that "I am not computer literate. I have not found presence in the cybernetic revolution . . . This was out of my bailiwick."<sup>22</sup> Pointing out that "[t]echnological incompetence is not an excuse for discovery misconduct[.]" the court reminded counsel that technology competence was specifically included in Rule 1.1 of the Delaware Lawyers' Rules of Professional Conduct.<sup>23</sup> The court further stated that "[d]eliberate ignorance of technology is inexcusable . . . [i]f a lawyer cannot master the technology suitable for that lawyer's practice, the lawyer should hire tech-savvy lawyers tasked with responsibility to keep current, or hire an outside technology consultant[.]"<sup>24</sup>

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<sup>16</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477 (2017).

<sup>17</sup> *Id.*

<sup>18</sup> 2014 Del. Ch. 254 LEXIS (Del. Ch. Dec. 5, 2014).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

And as another court has recently observed in another e-discovery sanctions ruling, tech competence demands not only “a reasonable understanding of ESI and the law relating to identifying, preserving, collecting, and producing ESI,” it also requires that counsel acquire a reasonable understanding of their client’s information infrastructure so as to meaningfully take part in discovery planning and responding to ESI requests.<sup>25</sup> For lawyers, in other words, technology competence when it comes to artificial intelligence encompasses not only the lawyer’s own use of AI, but having a sufficient understanding of whatever AI tools her client may be using and that are implicated in discovery.

But e-discovery is just one area in which a lawyer’s lack of tech competence can lead to court sanctions, disciplinary problems, and even malpractice exposure. A failure to become proficient in e-filing can get a lawyer disbarred. In 2016, thanks to his admitted “lack of expertise in computer skills,” veteran Oklahoma bankruptcy court practitioner James Edward Oliver lost his right to practice before a bankruptcy court and received a public censure.<sup>26</sup> Licensed since 1967, Oliver repeatedly failed to properly submit documents electronically (even with assistance from court staff). After being suspended twice (once for 30 days, and then for 60 days) by Judge Sarah Hall of the U.S. Bankruptcy Court for the Western District of Oklahoma, and failing nine “homework” assignments given by Judge Hall, Oliver was permanently suspended from practice before the bankruptcy court on June 15, 2015 after it was learned that he’d paid another lawyer to “ghost write” his assignments.<sup>27</sup> After failure to report this discipline to the Oklahoma Bar, Oliver wound up in front of the Oklahoma Supreme Court. In its March 29, 2016 opinion, the Court imposed a public censure but stopped short of harsher discipline (a vigorous dissent, however, called for a 2 year and one day suspension).<sup>28</sup> The Court also encouraged Oliver “to continue to improve his computer skills, or better, to hire an adept administrative assistant to do his pleadings.”<sup>29</sup>

Even the failure to adopt a properly functioning e-mail spam filter can spell disaster for unwary lawyers. After the Florida law firm of Odom & Barlow lost an eminent domain case for their client Emerald Coast Utilities Authority, the trial court rendered a judgment on March 18, 2014, granting approximately \$600,000 in attorney’s fees to the prevailing party, Bear Marcus Pointe LLC.<sup>30</sup> The court’s order was sent via e-mail, starting the clock running on a thirty-day window to appeal the ruling. Odom & Barlow missed the deadline, and later filed a motion for relief on the grounds that the failure to timely file was the result of excusable neglect. The appellate court affirmed the trial court’s ruling that the law firm had inexcusably relied on a questionable e-mail system, and found no excusable neglect. The court held that the firm “made a conscious decision to use a defective e-mail system without any safeguards or oversight in order to save money,” violating its duty to have sufficient procedures and protocols in place.”<sup>31</sup>

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<sup>25</sup> Memorandum Opinion, *DR Distributions, LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324 (N.D. Ill. Jan. 2021).

<sup>26</sup> *State ex rel. Okla. Bar Ass’n v. Oliver*, 369 P.3d 1074 (Okla. 2016).

<sup>27</sup> *Id.* at 1075–76.

<sup>28</sup> *Id.* at 1078.

<sup>29</sup> *Id.* at 1077.

<sup>30</sup> *Emerald Coast Utilities Authority v. Bear Marcus Pointe, LLC*, 227 So.3d 752 (Fla. Dist. Ct. App. 2017).

<sup>31</sup> *Id.* at 757.

With the passage of time on appeal, the attorneys fee award at issue had grown to over \$1 million.<sup>32</sup>

Failure to adequately monitor e-mail was the undoing of a lawyer representing a personal injury litigant against Home Depot.<sup>33</sup> After Home Depot filed a motion for summary judgment, the plaintiff's lawyer did not receive notification of it (and therefore failed to file a response), since "by all accounts his computer's email system placed that notification in a folder that he does not regularly monitor. Nor did he check the docket after the deadline for dispositive motions had elapsed."<sup>34</sup> Calling it "a cautionary tale for every attorney who litigates in the era of e-filing," the Fifth Circuit denied plaintiff counsel's efforts to overturn the summary judgment, saying there was no "manifest injustice" to correct, just a case of attorney lack of tech competence.<sup>35</sup>

### C. AI AND TECH COMPETENCE

As AI adoption becomes more widespread among both law firms and the businesses they represent, a failure to use AI tools for a variety of lawyerly tasks can certainly constitute a breach of the duty of tech competence. As attorney and AI entrepreneur Andrew Arruda (founder of ROSS Intelligence) once observed:

It does not make sense to have one person look through a thousand binders for a combination of words. Not only does this not make sense from a time perspective, think about it in terms of accuracy. Who do you trust more? A human who read through a thousand binders—and probably became fatigued—or a computer's "find" feature? The computer does not get tired, and it does not forget what it has read, so technology's efficiency clearly produces the best results for the client.<sup>36</sup>

Lawyers adhering to their duty of tech competence are expected to be sufficiently familiar with AI to effectively consult with their clients and third party experts or vendors regarding AI's use—whether for their own practices or an AI application to be used by or for their client in connection with a matter. A lawyer who uses a particular AI tool must understand not only the capabilities and limitations of that tool, but also the benefits—and risks—that accompany use of that tool.

The duty of tech competence necessarily involves knowing enough about the client, nature of the engagement, and the specific AI technology to advise the client not only when AI use will be beneficial and appropriate, but also when it will not be. A lawyer needs to be sufficiently conversant to recommend AI use where it may make sense from an efficiency or cost standpoint, such as in its use for document review, predictive analytics, legal research, and other tasks. At the same time, an attorney should also be cognizant of the risks that use of the AI might

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<sup>32</sup> *Id.* at 758.

<sup>33</sup> *Rollins v. Home Depot*, 8 F.4th 393(5th Cir. 2021).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Andrew Arruda, *An Ethical Obligation to Use Artificial Intelligence? An Examination of the Use of Artificial Intelligence in Law and the Model Rules of Professional Responsibility*, 40 AM. J TRIAL ADVOCACY 443, 456 (2017).

entail, including the AI's own limitations and potential biases. As will be explored in greater depth later, the very real potential for bias in an AI product can not only jeopardize the desired results for a client, but can also expose the attorney to violating yet another Rule of Professional Conduct—in this instance, Model Rule 8.4(g), which prohibits lawyers from engaging in conduct that is discriminatory on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. Hypothetically, a firm whose advice and counsel to a financial services industry client involving use of an AI whose lending approval decisions are found to exhibit racial bias can find itself in an ethically uncomfortable situation.

Have we reached a point at which to be considered competent in representing clients, lawyers must use AI? Certain engagements may certainly warrant the use of AI, but as at least one author has observed, there does not appear to be any instance “in which AI represents the standard of care in an area of legal practice, such that its use is necessary.”<sup>37</sup> However, while that day may not have arrived in an American courtroom, it has already become reality for our neighbors to the north.

The 2018 Canadian case of *Cass v. 1410088 Ontario Inc.* was a premises liability case, involving personal injuries sustained by Kristen Cass when she slipped and fell at a bar called My Cottage BBQ and Brew, operated by 1410088 Ontario Inc.<sup>38</sup> After summary judgment was granted in favor of the defendants, and the plaintiff was held liable for costs and attorney's fees, the plaintiff appealed what her counsel considered to be excessive fees, particularly with regard to legal research. In ruling that the costs and fees awarded by the trial court were excessive, particularly in “this day and age of boiler plate pleadings and the instant applicability of drafting precedent,” appellate Judge Whitten was particularly dubious about the time and expense for legal research. Whitten noted “There was no need for outsider or third party research. *If artificial intelligence sources were employed, no doubt counsel's preparation time would have been significantly reduced.*”<sup>39</sup> As a result, the fee and cost request was slashed.

Another 2018 case from Canada similarly dealt with the issue of costs and also encouraged the use of AI as a legal research tool. In *Drummond v. The Cadillac Fairview Corp., Ltd.*, Cadillac Fairview objected to the award of costs for Westlaw research to the prevailing party, arguing that it constituted simply “a lawyers' overhead expense that is not recoverable as a disbursement.”<sup>40</sup> On appeal, the Ontario Superior Court of Justice found that the expenditure was “reasonable and appropriate for the particular legal problem,” both “in terms of lawyer time and computer time.”<sup>41</sup> The court went on to observe that “The reality is that computer-assisted legal research is a necessity for the contemporary practice of law and computer-assisted legal research is here to stay *with further advances in artificial intelligence to be anticipated and to be encouraged.*”<sup>42</sup>

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<sup>37</sup> James Q. Walker, *What's Artificial About Intelligence? The Ethical and Practical Considerations When Lawyers Use AI Technology*, BLOOMBERG LAW (2018).

<sup>38</sup> *Cass v. 1410088 Ontario Inc.*, 2018 ONSC 6959 (Nov. 22, 2018).

<sup>39</sup> *Id.* (emphasis added).

<sup>40</sup> *Drummond v. The Cadillac Fairview Corp, Ltd.*, 2018 ONSC 5350 (Sept. 13, 2018).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (emphasis added).

While these Canadian courts calling for the implementation of AI—at least in the context of legal research—to be an expected use by lawyers have not yet been followed by their American counterparts, it is just a matter of time. As use of artificial intelligence become more commonplace in the legal profession and as client expectations drive this adoption, the expectation that a lawyer will make use of AI tools—and not just for legal research—will become standard. And just as lawyers have faced sanctions, disciplinary action, and even malpractice exposure for other “tech fails” resulting from their lack of tech competence, the failure to embrace AI under appropriate circumstances will undoubtedly be the undoing of some lawyers in the not too distant future.

#### IV. AI AND THE DUTY TO NOT ENGAGE IN BIAS

Another ethical duty impacted by adoption of AI is one of the newest adopted by the ABA, but it comes with a caveat: it has not been widely embraced by states. The obligation in question is the duty to not engage in bias, as reflected in Model Rule of Professional Conduct 8.4(g). In 2016, the ABA amended Rule 8.4 to add paragraph (g), making it professional misconduct 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.”<sup>43</sup> The Comments to this Model Rule make it clear that paragraph (g) can be violated by either verbal or physical conduct, and in fact broadly extends to any conduct related to the practice of law, including bar association, business, or even social activities in connection with the practice of law.

Not surprisingly, Model Rule 8.4(g) has been met with widespread criticism, largely based on First Amendment concerns, and most states have declined to adopt its language.<sup>44</sup> As of the end of 2021, only Vermont, Maine, Pennsylvania, Connecticut, the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands had adopted some version of Rule 8.4(g).<sup>45</sup> A handful of federal district courts, such as the Northern District of Illinois, have adopted it as well. More than 13 states have rejected Rule 8.4(g), including Texas, South Dakota, Illinois, Arizona, Tennessee, Montana, and Nevada.<sup>46</sup> Several states, such as New York and New Jersey, still have the Rule under consideration.<sup>47</sup>

The debate over Rule 8.4(g) was so intense that, in July 2020, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 493 clarifying the purpose, scope, and application of the Rule.<sup>48</sup> Part of the Opinion is devoted to addressing First Amendment concerns, and it insists that 8.4(g) “promotes a well-established state interest by prohibiting conduct that reflects adversely on the profession and diminishes the public’s

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<sup>43</sup> MODEL RULE OF PROF’L CONDUCT 8.4(g) (AM. BAR ASS’N 2020).

<sup>44</sup> Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68:4 CATH. U.L. REV. 629 (2019).

<sup>45</sup> Nellie Q. Barnard & Christopher Heredia, *Efforts Toward Improved Diversity and Inclusion Through the Anti-Bias Rule*, FED. BAR ASS’N (Dec. 15, 2021); <https://www.fedbar.org/blog/efforts-toward-improved-diversity-and-inclusion-through-the-anti-bias-rule/>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 493 (2020).

confidence in the legal system and its trust in lawyers.”<sup>49</sup> Yet not long after this Opinion was released, the U.S. District Court for the Eastern District of Pennsylvania issued an injunction blocking enforcement of the amendments to Pennsylvania’s Rules of Professional Conduct, including 8.4(g), finding that the amendments constituted viewpoint discrimination and were therefore unconstitutional.<sup>50</sup> The court noted:

There is no doubt that the government is acting with beneficent intentions. However, in doing so, the government has created a rule that promotes a government-favored viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to decide what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance.<sup>51</sup>

In an effort to address these concerns, in July 2021, the Pennsylvania Supreme Court approved revisions to the rule; the current version of 8.4(g) now prohibits “knowingly engaging in conduct constituting harassment or discrimination.”<sup>52</sup> And one of the few states to join Pennsylvania in passing a version of Rule 8.4(g), Connecticut, explicitly includes a provision addressing First Amendment concerns.<sup>53</sup>

Despite the opposition to the original expansive version of Rule 8.4(g), about 20 states have some version of Rule 8.4 on the books. Consequently, lawyers in these jurisdictions that have adopted some form of this Rule need to consider whether their use of AI is compliant with it. Consideration of potential bias in the use of AI is important even for lawyers whose jurisdictions have not passed some form of 8.4 simply because of other risks, such as industry-specific laws prohibiting bias and promoting transparency in AI decision-making. Counsel who represent actors in such fields need to understand how these laws, and their AI context, can impact their clients. For example, in the financial services sector, the Fair Credit Reporting Act mandates that any financial institution that uses a credit report or some other form of consumer report to deny a consumer’s application for credit, insurance, or employment (or as a basis for an adverse action taken against the consumer) now must inform the consumer and must present the consumer with the name, address, and telephone number of the credit reporting agency that supplied the information. Upon request by a consumer, a credit reporting agency must furnish the consumer with a statement and a notice that includes “all of the key factors that adversely affected the credit score of the consumer in the model used.”<sup>54</sup> The Equal Credit Opportunity Act also addresses unlawful discrimination, stating that it is unlawful for any creditor to discriminate against applicants:

- (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

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<sup>49</sup> *Id.*

<sup>50</sup> *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020).

<sup>51</sup> *Id.* at 30.

<sup>52</sup> Pa. Rule of Prof’l Conduct 8.4(g) (2021).

<sup>53</sup> Conn. Rule of Prof’l Conduct 8.4(7) (2021).

<sup>54</sup> 15 U.S.C. § 1681g(f)–(g); *see also* § 1681(m).

- (2) because all or part of the applicant’s income derives from any public assistance program;  
or
- (3) because the applicant has in good faith exercised any right under this chapter.<sup>55</sup>

Financial services is not the only sector in which it is critical for lawyers to understand how AI generates outputs, so that lawyers can combat bias while providing sound advice to clients. The employment and human resources sector is another. Lawyers, in order to communicate with and advise clients, need an understanding of the potential for AI to be biased and to impact outcomes in hiring and promotion. Recognizing this potential and how it can expose employment industry clients is important, especially in light of how a growing number of jurisdictions are now taking aim at bias in AI. For example, in late 2021, New York City passed a law (taking effect January 2023) that prohibits employers from using AI and algorithm-based technologies for recruiting, hiring, or promotion unless these tools have first passed an audit for bias.<sup>56</sup> The law defines automated employment decision tools as “any computational process, derived from machine learning, statistical modeling, data analysis, or artificial intelligence,” that scores, classifies, or otherwise makes a recommendation concerning job candidates, and which either assists in or replaces an employer’s decision-making process.<sup>57</sup> The law also mandates that employers provide advance notice to job candidates and explain how the tool analyses different characteristics or traits being evaluated.<sup>58</sup> Candidates who object to the technology may request an “alternative process or accommodation.”<sup>59</sup>

New York is hardly alone in its concerns about AI bias in candidate screening. In 2019, Illinois passed the Artificial Intelligence Video Interview Act, which requires companies using AI-enabled video-interviewing technology to give candidates prior written notice that they are using AI to analyze video interviews; to explain to candidates how the AI works and what it is used to assess; and to obtain affirmative consent from candidates before using AI for such analysis.<sup>60</sup> In late October 2021, the U.S. Equal Employment Opportunity Commission (EEOC) announced a new initiative aimed at ensuring that AI tools used in hiring and other employment decisions comply with federal anti-discrimination laws.<sup>61</sup> Even some of the companies that drove the use of AI in employment screening are concerned about compliance in a new, more transparent environment. In January 2021, HireVue—an established video interview and assessment vendor—announced that it was removing the facial analysis component from its screening assessments.<sup>62</sup>

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<sup>55</sup> § 1691(a)(1), (2), & (3).

<sup>56</sup> Roy Maurer, *New York City to Require Bias Audit of AI-Type HR Technology*, SHRM NEWSLETTER (Dec. 20, 2021); <https://www.shrm.org/resourcesandtools/hr-topics/technology/pages/new-york-city-require-bias-audits-ai-hr-technology.aspx#:~:text=New%20York%20City%20passed%20a,first%20being%20audited%20for%20bias>.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Artificial Intelligence Video Interview Act, Pub. A. No. 101-260 (R.B. 2557) (Ill. 2019) (codified at 820 Ill. Comp. Stat. 42/1).

<sup>61</sup> Roy Maurer, *EEOC Announces Focus on Use of AI in Hiring*, SHRM NEWSLETTER (Nov. 2, 2021); <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/eec-launches-focus-use-of-ai-in-hiring.aspx>.

<sup>62</sup> Roy Maurer, *HireVue Discontinues Facial Analysis Screening*, SHRM NEWSLETTER (Feb. 3, 2021); <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/hirevue-discontinues-facial-analysis->

The troubling history of bias and AI is not surprising. Because machine learning algorithms are trained using historical data, they can serve to perpetuate the very biases they are often intended to prevent. Bias in data can occur because the training data is not representative of a target population to which the AI system will later be applied. One high profile example of this occurred when Google Photo’s imperfect AI dataset led it to mistakenly identify two Black persons as gorillas.<sup>63</sup> Another cautionary tale came from Amazon and its abortive attempt in 2014 to create an AI to rate job candidates better so as to improve its success in hiring women. The engineers used the data to train these machine-learning algorithms, employing terms from the resumes of successful past applicants. Given the tech sphere’s notorious gender imbalance, successful past applicants tended overwhelmingly to be men. In essence, the Amazon AI taught itself that male candidates were preferable, downgrading resumes that contained female-associated words and prioritizing candidates who used “macho verbs” like “executed” and “captured.” In 2015, the Amazon team realized that its creation was biased against female tech talent, including software developers. After futile attempts to fix its biased AI, Amazon abandoned the project altogether in 2017.<sup>64</sup>

For lawyers concerned about their ethical duty to avoid bias—particularly in the context of criminal justice—there is perhaps no more sobering lesson than that associated with the use of risk assessment algorithms, artificial intelligence-based tools used by a number of U.S. jurisdictions to determine a defendant’s or convicted offender’s risk to reoffend and the factors contributing to that risk. These assessment tools are intended to help courts with decisions regarding sentencing and offender supervision. The best known of these tools is COMPAS—the Correctional Offender Management Profiling for Alternative Sanctions. Despite widespread criticism, including a 2016 investigation by ProPublica revealing that the tool was biased against African Americans, legal challenges to COMPAS’ lack of transparency have been unsuccessful. The best known of these challenges, pitting an individual’s right to be sentenced based on reliable, accurate information against the developer’s trade secret privilege, came in a 2016 Wisconsin Supreme Court case, *Loomis v. Wisconsin*.<sup>65</sup>

During the 1990s, the company Northpointe, Inc. worked on the development of COMPAS, an intelligent algorithm designed to assess the risk that a given defendant will commit a crime after release. It uses a number of factors, including a defendant’s own responses to a lengthy questionnaire, to generate a recidivism risk score between 1 and 10 by comparing a given defendant’s traits to those of known high-risk offenders. It then classifies the risk of recidivism as low risk (1–4), medium risk (5–7), or high risk (8–10). The score is then included as part of a defendant’s presentence investigation (PSI) report for the sentencing judge.<sup>66</sup>

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screening.aspx#:~:text=HireVue%2C%20a%20well%2Dknown%20video,intelligence%20in%20employment%20decisions%20grow.

<sup>63</sup> Pete Pachal, *Google Photos Identified Two Black People as Gorillas*, MASHABLE (July 1, 2015); <https://mashable.com/archive/google-photos-black-people-gorillas>.

<sup>64</sup> Jordan Weissmann, *Amazon Created a Hiring Tool Using AI. It Immediately Started Discriminating Against Women*, SLATE.COM (Oct. 10, 2018); <https://slate.com/business/2018/10/amazon-artificial-intelligence-hiring-discrimination-women.html>.

<sup>65</sup> 881 N.W.2d 749 (Wis. 2016), cert. denied, 137 S. Ct. 2290 (2017).

<sup>66</sup> Andrew Lee Park, *Injustice Ex Machina Predictive Algorithms in Criminal Sentencing*, U.C.L.A. L. REV. (2019).



In 2012, Wisconsin implemented COMPAS into its state sentencing procedures. In 2013, 35 year-old Eric Loomis was arrested for his involvement in a drive-by shooting in La Crosse, Wisconsin. No one was hurt, but Loomis was driving the getaway vehicle, a stolen car. He pled no contest to two lesser charges—“attempting to flee a traffic officer” and “operating a motor vehicle without the owner’s consent.” The trial judge sentenced Loomis to 7 years, based in part on a COMPAS score assessing him as a “high risk.” Loomis filed a motion for post-conviction relief seeking a new sentencing hearing, arguing that the court’s consideration of the COMPAS risk assessment violated his constitutional rights to due process. He further argued that the trial court erred by improperly assuming that the factual bases for the risk assessment were true.

The case went all the way to the Wisconsin Supreme Court, as Loomis challenged the lack of transparency with the algorithm used to sentence him.<sup>67</sup> Loomis argued that while the sentencing judge could view the risk score itself and the inputs affecting it, no one—not even the judge—knew what decisions the software had been programmed to make. Loomis contended that Northpointe (and the software company that had written the algorithm, Equivant) should be required to divulge its source code. Because the companies steadfastly refused to do so, citing its proprietary nature and invoking the trade secrets privilege, Loomis asserted that because the scientific validity of the tool could not be determined, his due process rights had been violated. As an expert for Loomis testified, “There’s all kinds of information that the court doesn’t have,” and because too little is known about how the risks are analyzed, “COMPAS should not be used for incarceration decisions.”

But the Wisconsin Supreme Court disagreed, stating “[W]e conclude that if used properly, observing the limitations and cautions set forth herein, a circuit court’s consideration of a COMPAS risk assessment at sentencing does not violate a defendant’s right to due process.”<sup>68</sup> The court also considered that because COMPAS uses only publicly available data and data provided by the defendant himself, Loomis could have denied or explained any information that went into the making of the report.<sup>69</sup>

However, the Court also ruled that courts should proceed with caution, and not make an assessment report the sole basis for its sentencing decision. It further held that the use of a COMPAS risk assessment must be subject to certain cautions. Specifically, PSIs accompanying COMPAS assessments must include five written warnings for judges: (1) that the “proprietary nature of COMPAS” prevents the disclosure of how risk scores are calculated; (2) that COMPAS scores are unable to identify specific high-risk individuals because the scores themselves rely on group data; (3) that although COMPAS relies on a national data sample, there has been “no cross-validation study for a Wisconsin population”; (4) that studies have “raised questions” about whether COMPAS scores disproportionately classify minority offenders as having a higher risk of recidivism; and (5) that COMPAS was developed specifically for a different purpose—to assist the Department of Corrections in making post-sentencing determinations.<sup>70</sup>

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<sup>67</sup> *Loomis*, 881 N.W.2d 749.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 761–62.

<sup>70</sup> *Id.* at 769–70.

In a concurring opinion, Justice Shirley Abrahamson expressed concern with “the court’s lack of understanding of COMPAS,” calling it a “significant problem” and bemoaning the fact that “few answers were available” to the questions that judges had directed to Northpointe as the case wound its way through the courts. Greater explanation was needed, Justice Abrahamson wrote, in part because “the use of risk assessment tools like COMPAS has garnered mixed reviews in the scholarly literature and in popular commentary and analysis.”<sup>71</sup>

The *Loomis* opinion, with its urging of caution, its careful distinction that a court may “consider” rather than “rely” on such risk assessments, and its requirement of written disclaimers for PSIs, suggests that perhaps enthusiasm for algorithmic risk assessments may wane over time. However, COMPAS remains the most widely used algorithm for risk assessment. At least nine states—Arizona, Colorado, Delaware, Kentucky, Louisiana, Oklahoma, Virginia, Washington, and Wisconsin—use its assessments during criminal sentencing hearings.<sup>72</sup>

Whether one is a criminal or civil attorney, the ethical obligation not to engage in bias can also be impacted by use of AI-driven jury selection software. Momus Analytics, based in Coral Gables, Florida, maintains that its application uses algorithms to help lawyers select favorable juries. It scrapes such sources as publicly available records and jurors’ social media posts, then feeds the data into algorithms that assess scores for traits like “leadership,” “personal responsibility,” “social responsibility,” and others.<sup>73</sup> According to the company’s patent application for its AI, a number of characteristics are tied to race: people of Asian, Central American, and South American descent are more likely to be leaders, and thus more able to influence other jurors. Those who identify their race as “other,” in contrast, are less likely to be leaders according to Momus. Recommendations, including those based on such purported race-based traits, are then made to the attorney.<sup>74</sup>

Use of AI tools to aid lawyers conducting voir dire is hardly a novelty. Companies like Voltaire and Vijilent, for example, both employ a similar database-scraping process before running the data collected through variations of IBM Watson’s Personality Insights AI tool. This AI uses natural language processing algorithms to categorize jurors within the “big five” personality traits mold (openness to experience, agreeableness, introversion and extraversion, conscientiousness, and neuroticism). However, there is no race-based component to the recommendations made by these tools.<sup>75</sup>

Momus was named by the *National Law Journal* as one of its 2020 emerging legal technologies, and the company claims its program’s methodology has led to more than \$940

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<sup>71</sup> *Id.* at 774–75.

<sup>72</sup> See generally Rhys Dipshan, Victoria Hudgins & Frank Ready, *The United States of Risk Assessment: The Machines Influencing Criminal Justice Decisions*, LAW.COM (July 13, 2020); <https://www.law.com/legaltechnews/2020/07/13/the-united-states-of-risk-assessment-the-machines-influencing-criminal-justice-decisions/?slreturn=20220120223411>.

<sup>73</sup> Todd Feathers, *This Company is Using Racially-Based Algorithms to Select Jurors*, VICE.COM (Mar. 3, 2020); <https://www.vice.com/en/article/epgmbw/this-company-is-using-racially-biased-algorithms-to-select-jurors>.

<sup>74</sup> *Id.*

<sup>75</sup> *Warning, Bias Detected: AI in Voir Dire*, THINKING ABOUT JURIES BLOG (Mar. 1, 2020); <http://juryclass.blogspot.com/2020/03/warning-bias-detected-ai-in-voir-dire.html>. Incidentally, Momus takes its name from Greek mythology’s personification of mockery and blame.

million in verdicts. But racially-based peremptory strikes of jurors was declared unconstitutional back in 1986 with the U.S. Supreme Court’s milestone decision in *Batson v. Kentucky*.<sup>76</sup> Given the importance of providing a racially-neutral reason for striking a juror when faced with a *Batson* challenge, can an ethical lawyer employ an AI tool such as Momus’ product, which admittedly makes recommendations based on purported race-based characteristics? The answer is obvious. Moreover, it is just one example of the AI-related ethical traps awaiting unwary lawyers.

## V. AI, PROFESSIONAL JUDGMENT, AND THE UNAUTHORIZED PRACTICE OF LAW

ABA Model Rule of Professional Conduct 2.1 states that “in representing a client, a lawyer shall exercise independent professional judgment and render candid advice,” which potentially can involve referring “not only to law but other considerations as moral, economic, social, and political factors, that may be relevant to the client’s situation.”<sup>77</sup> As previously discussed, the breadth of legal tasks currently being performed using AI tools is significant—from legal research and document review to predictive analytics, document drafting, compliance review, and more. AI is being used to generate briefs, patent applications, and even judicial opinions. While the time-saving, economic temptation of simply signing off on an AI-generated work product may sound appealing, Rule 2.1 directly addresses a lawyer’s ethical responsibility not to yield to such temptation. Independent professional judgment must supplant any conclusions that might have been directly rendered by an AI. As 2.1 reminds us, considerations of a variety of factors outside the scope of an algorithm may be in the clients’ interests, including moral, social, political, and economic factors.

For example, an AI tool can assist a lawyer with conducting prior art research for an invention, and even the drafting of the patent application itself. Certain jurisdictions abroad have even recognized an AI as the inventor of an invention, although the U.S. and the U.K. have remained steadfast that only a person can be an inventor.<sup>78</sup> But in terms of advising the client of other considerations—say, for example, the moral or political dimensions of patenting a device that will eliminate thousands of jobs—only a lawyer can exercise that independent professional judgment, not an AI.

AI has impacted another ethical obligation for lawyers: Model Rule of Professional Conduct 5.4, which deals with unauthorized practice of law. As the only “self-regulated” profession, the law has traditionally enjoyed the status of a monopoly immune to threat from outside challengers. Non-lawyers may not practice law or own interests in law firms. The rationale has always been to shield lawyers, their independent professional judgment, and their safeguarding of client interests from the influence of non-lawyer owners. With the advent of AI and the proliferation of traditional “lawyer” tasks being performed by this latest technological

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<sup>76</sup> 476 U.S. 79 (1986).

<sup>77</sup> ABA MODEL RULE OF PROF’L CONDUCT 2.1 (AM. BAR ASS’N 2020).

<sup>78</sup> The USPTO, in a 2020 decision, ruled that an AI could not be considered an “inventor.” *In re Application of Application 16/524*, 350. The UK followed suit later the same month, in a case involving the same AI developer, Stephen Thaler. Thaler’s “artificial neural system” DABUS fared better, however, in courts in Australia and South Africa in 2021, which recognized DABUS as an inventor.

disruption, legal observers have been sounding the “robot lawyers are coming to take our jobs” alarm for years.<sup>79</sup>

And while cracks are beginning to appear in the façade of banning non-lawyer ownership of law firms,<sup>80</sup> the citadel of keeping AI tools from truly engaging in the practice of law appears secure—at least for the moment. In October 2021, the Florida Supreme Court found that TIKD, an app that linked traffic ticket defendants with lawyers to represent them, was engaged in the unauthorized practice of law.<sup>81</sup> TIKD users would upload a picture of their traffic ticket to the app and then would be charged a percentage of the ticket’s value to connect them to a licensed attorney; this fee covered all costs of the lawyer’s representation. The attorneys TIKD contracted with were paid a flat rate per case, regardless of the case’s outcome.

The Florida Supreme Court acknowledged that TIKD is not a law firm, and its CEO is not a lawyer. However, the majority noted the services the app provided had the potential to “substantially affect whether a driver timely receives legal representation and the quality of the representation he or she receives.”<sup>82</sup> Not only did TIKD lack “the skill or training to ensure the quality of services provided to the public” (potentially harming clients), the court found that with TIKD collecting money up front, “there are no protections in place to safeguard the money of those legal clients and thereby assure that the money is actually available to satisfy the future legal obligations associated with the legal matter.”<sup>83</sup>

Critics have argued that decisions like this will stifle legal innovation and keep routine legal services from being financially accessible for low income litigants, and that the legal profession is clinging to the status quo when it should be embracing change. Of course, courts necessarily serve as the gatekeepers of the legal profession. In that role, they sometimes view the technology in question as constituting the practice of law, and therefore impermissible when done by non-lawyers. However, in other circumstances, courts may examine the service or task in question and determine that it does not fall under the rubric of the practice of law.

Consider, for example, the case of *Lola v. Skadden, Arps, Slate, Meagher & Flom, LLP*.<sup>84</sup> David Lola was a contract attorney working on a long-term document review project (a multi-district litigation case) for Skadden Arps. Lola brought an FLSA complaint alleging that he was owed overtime (time and a half) for hours worked in excess of forty hours a week. Lola claimed that his work consisted of reviewing documents for certain search terms after they had been “pre-marked” by a document review software, Relativity, for predictive coding purposes. The defendants filed a motion to dismiss, arguing that Lola was “engaged in the practice of law”

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<sup>79</sup> See, e.g., Dana Remus & Frank S. Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law* (Nov. 27, 2016); [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2701092](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2701092); John G. Browning, *Will Robot Lawyers Take Our Jobs?*, D MAG. (Mar. 2019), <https://www.dmagazine.com/publications/d-ceo/2019/march/will-robot-lawyers-take-our-jobs/>.

<sup>80</sup> Arizona has instituted the creation and regulation of “alternative business structures,” which allow businesses to provision lawyers in administering legal services. Meanwhile, Utah’s Office of Legal Services Innovation has started a “regulatory sandbox” with the goal of testing different legal business structures.

<sup>81</sup> Florida Bar v. TIKD Services, LLC and Christopher Riley, No. SC18-149 (Fla. S. Ct. Oct. 14, 2021).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> 620 F. App’x 37 (2d Cir. 2015).

while doing document review, and therefore exempt from the FLSA.<sup>85</sup> Lola responded by arguing that his work was rote, mechanical tasks like the technology-assisted review, that did not invoke the use of any legal judgment or discretion.

The trial court ruled in favor of Skadden Arps, holding that “Even undisputedly legal services like the drafting of motion briefs and the negotiating of documents require the performance of tasks . . . that require little to no legal judgment” (such as cite-checking and proofreading).<sup>86</sup> The dismissal was appealed to the Second Circuit, which vacated and remanded the trial court’s dismissal.<sup>87</sup> In doing so, the Second Circuit became the first court to hold that the practice of law must be innately human and therefore beyond what a machine can do:

The parties themselves agreed at oral argument that an individual who, in the course of reviewing discovery documents, *undertakes tasks that could otherwise be performed entirely by a machine cannot be said to engage in the practice of law*.<sup>88</sup>

The *Lola* court, in other words, took the first judicial step in distancing the work of lawyers from the work of machines. If a computer (or, for that matter, an AI) could perform the same function as a contract attorney, could that work truly be considered the “practice of law” when performed by a human instead? Under this approach, as machine learning and AI continue to evolve, more and more traditionally “lawyer tasks” may become removed from what we consider the practice of law. As the range of tasks performed by increasingly sophisticated AI tools grows in number and complexity, the boundaries that have traditionally sheltered the profession from disruption may be eroding. As a result, AI is impacting not only what can be considered the practice of law, but what cannot be considered solely the province of lawyers.

## VI. AI AND THE DUTY TO SUPERVISE

Under both ABA Model Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer) and Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance), lawyers have an ethical obligation to supervise lawyers and nonlawyers who are assisting attorneys in providing legal services, in order to ensure that their conduct complies with the Rules of Professional Conduct.<sup>89</sup> It is significant to note that in 2017, the title of Model Rule 5.3 was changed from “Responsibilities Regarding Nonlawyer Assistants” to “Responsibilities Regarding Nonlawyer Assistance”—a recognition that the scope of 5.3 encompasses all nonlawyer help—human or not. This clearly brings such things as TAR (technology-assisted review) and AI tools within the purview of the Rules. Accordingly, both 5.1 and 5.3 obligate lawyers to supervise the work of AI being utilized in the provision of legal services by not only more junior lawyers, legal assistants, and staff, but also vendors outside the law firm who may be working with or providing AI tools. As a result, lawyers are charged under both Rules 5.1 and 5.3 with having a sufficient understanding of the AI technology at issue to make sure the work product is accurate and that it does not create a risk of disclosing client confidential information or communications. In a world

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<sup>85</sup> 2014 WL 162 6228 (S.D.N.Y. Sept. 16, 2014).

<sup>86</sup> *Id.*

<sup>87</sup> *Lola*, 620 F. App’x 37.

<sup>88</sup> *Id.* at 45 (emphasis added).

<sup>89</sup> ABA MODEL RULES OF PROF’L CONDUCT 5.1, 5.3 (AM. BAR ASS’N 2020).

in which the legal profession historically lags behind other fields in terms of technology adoption and AI in particular, the result is a precarious balancing act for lawyers in which the greater concern may be the risk of underutilization of artificial intelligence rather than overreliance upon it.<sup>90</sup>

Practically speaking, the ethical duty of supervision overlaps with the duty of tech competence. A supervising lawyer must have sufficient knowledge about any AI tools that are in use by the lawyers and nonlawyers under her supervision, while simultaneously “knowing what she doesn’t know” so that the lawyer can ask the right questions regarding the AI and its use. Most of the time, this will necessarily entail engaging an expert to check out the AI tool or product. Is its developer reputable? Is the tool compatible with other technology being used by the law firm? Is it free of malware that could expose sensitive client data, or from other cyber vulnerabilities? Recall, if you will, the panic when it was learned that Kaspersky, a popular antivirus software program, had been modified by Russian government actors to turn it into an espionage tool.<sup>91</sup> Answering questions like these will likely be beyond the technology skills of most lawyers, so expert advice is required. Lawyers should hire someone with the requisite knowledge to vet any AI tool that the firm uses or is considering using.

In addition, the duty to supervise involves learning an AI tool’s capabilities as well as its limitations—what it can and cannot do. For example, a lawyer might use a legal research AI tool, such as CARA by CaseText or WestCheck by Westlaw. Some AI products can not only verify whether the authorities you’ve cited in your brief are still good law and whether you’ve missed any cases that should have been cited, but will also suggest any additional authorities and/or prepare a memo based on the facts in your case. Knowing the features and limitations is critical not only for one’s own use of an AI tool, but also for supervising the work of another who is using it. And don’t be hesitant to double check the work performed by or with the aid of an AI tool. Obviously, duplicating the entire task defeats the purpose of the AI in the first place, just as it would be to start from square one in reviewing the work product of a clerk or junior lawyers. But review of the finished work product and making sure it is organized, relevant, and complete is still necessary; after all, it’s you (not the AI) who has a law license that could be at stake.

## VII. AI AND OTHER ETHICAL DUTIES

Applying the Model Rules of Professional Conduct in an “AI world” involves other ethical duties to varying degrees. For example, ABA Model Rule 1.4 governs a lawyer’s duty to communicate with clients and to keep them reasonably informed about the matter in question.

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<sup>90</sup> For example, among the 1,000 senior U.S. executives from industries such as health care, insurance, banking, and government surveyed in RELX’s 2019 Emerging Tech Executive Report, 72 percent indicated they were already using AI in their businesses. Contrast this with the 10 percent of lawyers who are using AI-based tech tools for their legal work according to the ABA’s 2018 Legal Technology Survey Report, or the only one in four people in law firms and corporate legal departments using AI-based legal technology, according to a 2019 Bloomberg Law survey. See Sam Skolnik, *Lawyers Aren’t Taking Full Advantage of AI Tools, Survey Says*, BLOOMBERG LAW (May 14, 2019); <https://news.bloomberglaw.com/us-law-week/lawyers-arent-taking-full-advantage-of-ai-tools-survey-shows>.

<sup>91</sup> Shane Harris & Gordon Lubold, *Russia Turned Kaspersky Software Into Global Spying Tool*, Wall St. J. (Oct. 16, 2017); <https://www.wsj.com/articles/russian-hackers-scanned-networks-world-wide-for-secret-u-s-data-1507743874#:~:text=WASHINGTON%E2%80%94The%20Russian%20government%20used,with%20knowledge%20of%20the%20matter>.

Rule 1.4 requires a lawyer to ‘reasonably consult with the client about the means by which the client’s objectives are to be accomplished.’<sup>92</sup> Pursuant to this duty, a lawyer would be obligated to discuss with the client the prospect of using and any decision or recommendation to use AI in providing legal services. This would entail obtaining the client’s approval or consent to use AI, after the lawyer has discussed the features, limitation, benefits, and risks of using the AI tool in question. If a lawyer believes that using a given AI tool or resource would be helpful in meeting the client’s needs, she needs to make sure the client has all the information necessary to make his decision an informed one. For example, if the client has a high stakes patent infringement case pending in a particular jurisdiction, a lawyer may consider communicating with the client about the potential benefit of using AI resources that offer predictive analytics in order to gain insight into how a specific judge historically rules in similar cases in that venue. AI services such as those offered by Lex Machina use vast data sets from prior cases before the judge in order to analyze and predict the likelihood of the judge ruling a certain way under similar circumstances or facts. The cost of such predictive analytics may not be appropriate for, say, a garden variety premises liability case, but they may be a shrewd investment in a case where the future of a client’s product line (or even the client itself) hinges on the outcome of the case.

And speaking of cost issues, AI also necessarily impacts yet another Rule of Professional Conduct: namely, Model Rule 1.5(1), which requires lawyers to refrain from charging fees that are “unreasonable” or seeking an “unreasonable” amount for expenses.<sup>93</sup> AI triggers this duty in two ways. First, if a lawyer feels that use of an AI resource or tool would benefit the client’s interests, the lawyer must communicate such an expense to the client. Perhaps use of a predictive analytics solution, like that discussed earlier will result in a substantial added expense in the short run, but offer the client a costs savings or strategic advantage later in the case. Or perhaps AI-driven legal research will represent a higher than anticipated upfront cost, but will yield a cost savings in terms of attorney time later on—or significantly enhance the chances of a successful dispositive motion that brings about an early end to the lawsuit. Under either scenario, the lawyer has an ethical obligation to communicate this option to the client.

Second, as the two Canadian cases discussed previously in the section on tech competence illustrate, the legal system’s grasp of AI’s value is reaching the point where, under Rule 1.5(a), it may be unreasonable under certain circumstances not to use AI in order to reduce attorney time and the client’s bill. In April 2016, national labor and employment law firm Ogletree Deakins announced a deal with legal AI company LegalMation, under which LegalMation would provide an AI product designed to analyze a plaintiff’s lawsuit, prepare appropriate responsive pleadings for later review by an attorney, and also draft a set of discovery responses to the plaintiff’s initial requests. The law firm estimated a cost savings to its clients of \$3,000 per case.<sup>94</sup>

Under the right circumstances, it may be a violation of Rule 1.5(a) to not use AI. Consider this: would a lawyer who charges an hourly fee be charging an “unreasonable” fee if he or she conducted their legal research using bound books instead of services like Westlaw, Lexis,

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<sup>92</sup> ABA MODEL RULES OF PROF’L CONDUCT 5.1, 5.3 (AM. BAR ASS’N 2020).

<sup>93</sup> ABA MODEL RULE OF PROF’L CONDUCT 1.5(a) (Am. Bar Ass’n 2020).

<sup>94</sup> John G. Browning & Christene Krupa Downs, *The Future is Now: The Rise of Artificial Intelligence in the Legal Profession*, 82:7 TEX. B.J. (July 2019).

Fastcase, or even an AI legal research tool? Almost certainly yes, given how much longer the research would take. Is the same lawyer charging an “unreasonable” fee if she types out her pleadings on a manual typewriter that takes longer, instead of using a word processing/document creation software? Again, the answer is yes. In the not too distant future, a lawyer’s failure to use AI tools may be regarded as a violation of the Rules of Professional Conduct, if not viewed with the same mixture of pity and sadness that might have once been reserved for the lawyer toiling away with onionskins and an Underwood typewriter, or for a scrivener and his quill and inkpot.

Finally, another ethical rule impacted by the advent of AI is Model Rule 1.6 (confidentiality of information). Under ABA Model Rule 1.6, lawyers owe their clients a general duty of confidentiality, and 1.6(c) specifically instructs lawyers to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”<sup>95</sup> Confidentiality risks can arise from using an AI solution from a vendor that is not in-house (such as electronic document review being conducted off site by a third party), as well as from confidential client information being shared even with an in-house vendor.

Lawyers need to get the answers to questions that a client will want to know, including who at the AI vendor has access to the information that is shared, and what kind of security do they have? Do they, in turn, share data with others? What does your contract (or your client’s contract) with an AI vendor provide? If the AI vendor is subpoenaed, is it required to notify you and/or your client before turning over information? If the AI vendor is sold, ceases operations, or goes bankrupt, what happens to the client’s confidential data? In addition, AI is not perfect; what happens if, during the e-discovery process, attorney-client privileged communications are inadvertently produced?

There have been, to date, no national or state ethics opinions to offer guidance for questions such as these. However, a useful analogue to dilemmas involving AI and confidentiality concerns can be found in the context of attorney use of cloud computer/cloud storage platforms. To date, that subject has spawned roughly 30 state ethics opinions but no ABA Formal Ethics Opinions. Lawyers should take reasonable precautions in the adoption and use of AI technology that requires client confidential information. Such reasonable precautions include:

- (1) acquiring a general understanding of how the technology works;
- (2) reviewing the contract and/or terms of service to which the lawyer or client are agreeing when using the AI provider;
- (3) learning what data security measures the AI provider already has in place;
- (4) determining whether additional steps (such as the encryption of client confidential information) may be warranted before submitting the client confidential information to the AI provider;
- (5) remaining vigilant as to whether the AI provider has experienced any data security incidents; and
- (6) educating the lawyer, staff, and client about appropriate protections and precautions.

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<sup>95</sup> ABA MODEL RULE OF PROF’L CONDUCT 1.6(c) (AM. BAR ASS’N 2020).



In short, lawyers have an ethical obligation to inquire about the confidentiality safeguards that will be in place when dealing with AI providers, including how information will be stored and who will have access. Unless an attorney has confidence that her client’s confidential information will be secured, AI tools should not be used in the representation.

## VIII. CONCLUSION

One commentator opining on artificial intelligence and ethics sagely noted, “[n]othing about advances in the technology, per se, will solve the underlying fundamental problem at the heart of AI, which is that even a thoughtfully designed algorithm must make decisions based on inputs from a flawed, imperfect, unpredictable, idiosyncratic real world.”<sup>96</sup> Because of these limitations, it becomes all the more important to address ethical issues (such as bias) in the AI development phase, and it is just as important to ensure that lawyers using AI technology do so in a manner consistent with our profession’s ethical obligations. Artificial intelligence is making it possible for lawyers to make stunning improvements in the efficiency and accuracy of the legal services offered to clients. Yet while this cutting edge technology and the advantages it yields are new, the ethical principles we must adhere to remain the same. The technology permeating the field of artificial intelligence will continue to evolve, but attorneys will always need to provide competent representation, supervise those assisting them, protect confidential information, communicate responsibly with clients, charge reasonable fees for their services and expenses, and render legal services free of bias.

At its annual meeting in August 2019, the American Bar Association House of Delegates passed the following resolution:

RESOLVED, That the American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence (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.<sup>97</sup>

It will indeed be critical for all stakeholders in the justice system to address all of these issues, particularly ethics. AI’s presence in society is only going to grow; demand for AI products have grown at a rate of 46% annually since 2019, and the global market for AI solutions is anticipated to reach almost \$400 billion by 2025. Using AI to improve how legal services are provided, and doing so while complying with our profession’s ethical obligations, will no doubt be a challenge—but with every technological advance of the last century, lawyers have demonstrated that they are up to that challenge.

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<sup>96</sup> Jonathan Shaw, *Artificial Intelligence and Ethics: Ethics and the Dawn of Decision-Making Machines*, HARV. MAG. (Jan./Feb. 2019).

<sup>97</sup> Resolution 112, Am. Bar Ass’n House of Delegates (adopted Aug. 12–13, 2019).