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WHAT'S YOUR ETHICAL DUTY REGARDING AI? HERE'S WHAT THE ABA SAYS.

It's no secret that Artificial Intelligence (AI) is a part of our lives in many ways today. Whether it's Netflix suggesting other series and movies for you to watch or Spotify suggesting other songs or any online retailer ("e-tailer") suggesting items to buy based on your browser history, AI is influencing many of the decisions we make in our daily lives.

AI technology has also certainly extended to the practice of law to improve productivity and client services. But, what is the ethical duty for courts and lawyers regarding the use of AI? And, how should they address that ethical duty in their daily practice, especially when it comes to electronic discovery? Here's what the American Bar Association (ABA) says regarding the ethics of AI in the practice of law as well as recommendations in how to address them in your own legal and eDiscovery practices.

ABA Resolution 112

The ABA House of Delegates addressed the question of ethical responsibility regarding AI over a year ago when it passed [Resolution 112](#) in August 2019. That resolution states:

“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.”



Resolution 112 also comes with a terrific [15 page report](#) that, in addition to the Introduction (Section I) and Conclusion (Section VI), contains four sections, as follows:

- Section II:** provides an overview of AI and the different ways that AI tools can be used in the practice of law;
- Section III:** analyzes a lawyer's ethical duties in connection with AI technology;
- Section IV:** explores how bias can affect AI and the importance of using diverse teams when developing AI;
- Section V:** discusses questions to ask when adopting an AI solution or engaging an AI vendor.

Use of AI in the Practice of Law

As noted in the report, AI is already being used in these areas:

- **Predictive Coding in eDiscovery:** Classifying documents for relevance, privilege and other determinations;
- **Litigation Analysis/Predictive Analysis:** Using case law, public records, dockets, and jury verdicts to predict the outcome of cases;
- **Contract Management and Analysis:** Identifying deadlines and termination dates, as well as important provisions in contracts;
- **Due Diligence Review:** To automate review of documents in corporate transactions;
- **Detecting Dangerous or Bad Behavior:** Searching company records to identify bad behavior, such as racial discrimination or sexual harassment, to address it proactively;
- **Legal Research:** Use of natural language queries to improve search results and even produce basic legal memos.

Researchers are even working on AI algorithms to detect deception, including deception in the courtroom!

Another developing use of AI for compliance is the use of linguistic models to identify and classify potential Personally Identifiable Information (PII), using as many as thousands of complex search terms designed by linguists to speed up identification of PII to support requirements of Europe's [General Data Protection Regulation \(GDPR\)](#), the [California Consumer Privacy Act \(CCPA\)](#) and other recent data privacy laws designed to protect individual's data rights.

Ethical Duties of Lawyers

If you know your ABA model rules, you know that Revised Model Rule 1.1 of the ABA Model Rules (which has since been [adopted by 38 states](#)) requires that lawyers need to be competent, and Comment 8 states that includes keeping “abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology.*” Understanding those benefits and risks certainly extends to AI technology. The report

also discusses duty to communicate ([Model Rule 1.4](#)), duty of confidentiality ([Model Rule 1.6](#)) and duty to supervise ([Model Rule 5.1](#) and [Model Rule 5.3](#)) as other ethical duties for lawyers with regard to AI.

Bias and Transparency

Of course, you can't discuss training of algorithms without addressing the potential of bias skewing the results of the AI model, so lawyers need to understand and address how bias can impact AI results. Bias in the development of AI can potentially implicate professional ethics as reflected in [Model Rule 8.4\(g\)](#), which prohibits harassment and discrimination by lawyers against eleven protected classes.

Here's an example of how bias can influence AI. In 2016, Microsoft released Tay, which was an AI chatbot for Twitter that the company described as an experiment in “conversational understanding.” It was designed to learn to engage people through “casual and playful conversation” resembling how a teen might speak. But, it took less than 24 hours for various Twitter users and Internet trolls to tweet Tay with various misogynistic and racist remarks for Tay to repeat those sentiments back to other Twitter users – eventually unprompted – and Microsoft was forced to shut it down.

AI is moving away from “black box” AI, in which there is little understanding on how AI derived its result, to a more transparent “explainable AI”. In addition, there are industry specific laws that prohibit bias and require AI transparency which lawyers have a duty to understand.



Questions to Ask When Adopting AI

The report also contains a section to identify sample questions to address with vendors to ensure they understand various issues, like bias, explainability and transparency; ethical and beneficial activities; monitoring, accountability, controls and oversight; and privacy. Here are a few sample questions:

- Can the result of the AI's decision be explained in a meaningful and lawful way to affected stakeholders, where appropriate?
- Is the training set examined to minimize potential of data bias?
- Depending on the industry, does AI accommodate diverse populations?
- How does the lawyer or court know if the AI is operating properly?

So, What Can You Do?

In addition to reading and understanding the accompanying report to Resolution 112, here are three additional things you can do to address your ethical responsibilities to understand AI:

- **Read About AI Regularly:** Make time several times a week to read about AI technology and the use of AI, including AI approaches and Technology Assisted Review (TAR) technologies related to electronic discovery. General blogs about AI include [AI Trends](#) and [Datanami](#); legal technology focused resources include [this blog](#) and Law.com's [Artificial Intelligence](#) section. And, you can always browse the [LinkedIn](#) and [Twitter](#) feeds for AI topics. Five to fifteen minutes several times a week can make a big difference in your understanding of AI and the issues related to it.

- **Attend Webinars:** In person training and presentations are on-hold during the pandemic, but there are also plenty of free webinars you can attend to boost your understanding of AI and TAR – without leaving your desk! Attending at least one webinar per month can make a big difference in your understanding of AI and TAR technologies and issues.
- **Look at Each Case for Opportunities to Use AI:** The ABA report addresses questions you should ask vendors, but it doesn't address the questions you should ask to determine whether litigation, investigation or compliance activities are suited for AI and TAR. EDRM's [Technology Assisted Review \(TAR\) Guidelines](#) is a terrific resource that examines potential use cases for TAR and also discusses factors to consider when deciding whether to use TAR, such as document set, cost, timing, and jurisdiction.

As the ABA report states, "The bottom line is that it is essential for lawyers to be aware of how AI can be used in their practices to the extent they have not done so yet." Doing the three things above can help you address your ethical duties with regard to understanding and utilizing AI in your own legal and eDiscovery practices.

For more information on AI education, check out [H5's blog here](#).

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