THE CLARKE PRIZE IN LEGAL ETHICS:

AN INTRODUCTION

Brooks Holland*

In this volume, *Gonzaga Law Review* is publishing the winning paper from the Gonzaga University School of Law Clarke Family Prize in Legal Ethics writing competition. The Clarke Prize in Legal Ethics program has served as an important foundation to Gonzaga Law's curriculum since 2014, and it includes one of the most generous student writing competitions in the country. The *Law Review's* decision to publish the winning paper affirms both the academic quality and the professional value of the student papers submitted to this competition.

The Clarke Prize program originates in the Harvey and Harriet Clarke Fund for Professionalism and Ethics. Harvey Clarke was a well-respected jurist, and the Clarke family was deeply involved in the Spokane, Washington community. Consistent with the Clarke family's values, the Clarke fund was endowed in 1980 to support Gonzaga Law's commitment to promoting ethics for both law students and lawyers. The Clarke family legacy continued through William "Bill" Clarke, one of Harvey and Harriet's four children. Bill Clarke taught at Gonzaga Law from 1975–2005, and he was a favorite among students and colleagues, in large part because of his own commitment to professionalism and ethics. Clarke family member Genevieve Mann maintains this legacy at Gonzaga Law as a valued member of the Law School's clinical faculty.

The Clarke Fund supports many important activities at Gonzaga Law, but I maintain the distinct honor of chairing the Clarke Prize in Legal Ethics program. Each year, this program begins with a student writing competition focusing on issues in legal ethics and professionalism. The goal of the competition is to showcase student achievement in scholarship that addresses legal ethics in a practical, real-world context. Previous writing competition problems have addressed the deregulation of the legal profession, for example, as well as access to justice, legal ethics during marijuana law reform, and the ethics of social media.

The competition problem this year took students deep into the 21st century by focusing on the ethics of artificial intelligence (AI) technologies in legal

* Professor of Law and J. Donald and Va Lena Scarpelli Curran Faculty Chair in Legal Ethics and Professionalism, Gonzaga University School of Law.

practice. The problem prompt invited students to address how AI "impacts the practice of law within the ethical rules governing legal practice," and also to assess "how these ethical rules may need to adapt to a future world of AI." Students responded to this prompt across three specific areas: (1) Concrete examples of how AI technologies are affecting legal practice; (2) The ethical issues raised by these examples under the American Bar Association Model Rules of Professional Conduct; (3) A policy proposal to amend the Model Rules to address one or more emerging ethical issues from AI.

The student papers were well up to the task, approaching the problem from distinct angles. For instance, one student looked at this question of AI and legal ethics specifically through the lens of transactional practice. This inquiry provided deep insight into one practice area for practitioners who desire greater practice-specific expertise in AI technologies. Another student undertook a more global inquiry, examining how AI could affect the ethics of lawyering across practice areas. This paper therefore offered broad ethical insight into the future of AI-empowered lawyering, regardless of practice area. Each of these papers delivered unique value, illustrating how complex legal questions can support, and even necessitate, diverse responses.

One of the most exciting aspects of the Clarke Prize competition is that the winning paper and runner-up are announced at the annual Clarke Prize Conference in Legal Ethics, which we host each spring to permit experts in the field to explore the themes raised by the writing competition. The Clarke Fund enables the Law School to offer this Conference as a free ethics CLE program to alumni and low-cost CLE program to other lawyers. This year, the Conference panel included the Honorable Veronica Alicea Galván, Judge of King County Superior Court, Bea Koempel-Thomas, a partner at the intellectual property law firm of Lee & Hayes, and Drew Simshaw, an Assistant Professor of Law at Gonzaga who has written cutting-edge scholarship on legal ethics and AI technologies.[1] Drawing on the paper competition theme, this distinguished panel explored The Ethical Implications of Artificial Intelligence Technologies with perspectives from the bench, from practice, and from the classroom. As an added treat for our attendees, Harvard Law Professor John Kroger delivered opening remarks on *The Enduring Value of Ethics and Professionalism to a 21st Century Legal Practice.* Professor Kroger previously served as Attorney General of Oregon and President of Reed College, giving him a uniquely holistic view of the role and future of legal ethics.

The Clarke Prize Conference, however, ultimately heralds the student awards, the true highlight of the Clarke Prize program. The 2019 Conference was

1. *See, e.g.*, Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law*, 70 HASTINGS L.J. 173 (2018).

no exception, where two outstanding finalists were recognized at the close of the program. First prize of $5,000 went to Taylor B. Schaefer, a law student in the class of 2020. Mr. Schaefer's winning paper follows this introduction. This paper delivers the essential qualities of excellent ethical analysis: thorough research, sound legal reasoning, and effective practical advice on how lawyers should and should not embrace the power of AI technologies. The second prize of $2,000 went to Alex Hutchings, a law student in our Executive J.D. program class of 2020. Mr. Hutchings' paper also exemplified stellar research and writing in legal ethics. At Gonzaga Law we cultivate scholarship from students as well as faculty, and these two examples of quality scholarship won generous cash prizes for both students.

Please enjoy this opportunity to review the winning paper from Mr. Schaefer and to learn from him about the many ethics issues, current and future, presented by AI technologies. I am grateful for *Gonzaga Law Review's* decision to publish this year's winning paper, reinforcing both the importance of ethics in legal studies at Gonzaga Law, and the achievement of our students in translating their legal studies into scholarly analysis of real-world ethics questions.

THE CLARKE PRIZE IN LEGAL ETHICS

THE ETHICAL IMPLICATIONS OF ARTIFICIAL INTELLIGENCE IN THE LAW

Taylor B. Schaefer*

TABLE OF CONTENTS

* Taylor B. Schaefer, Managing Editor, *Gonzaga Law Review*; Gonzaga University School of Law Juris Doctor Candidate, 2020; B.S. Arizona State University 2017. I would like to thank my wonderful colleagues of *Gonzaga Law Review* for their work in editing this article. Many thanks to my amazing fiancée Elizabeth for being a breath of fresh air when life gets too stressful. Finally, I would like to thank my parents, Kim and Scott, and my siblings for all of their support throughout the years.

I. INTRODUCTION

Artificial intelligence (AI)[1] is rapidly changing the world and profoundly impacting human lives. Recent advances in AI technology have changed vehicle design and traffic control operations, and have been utilized to predict natural disasters and migration crises.[2] These technological advances have also impacted the legal field, raising new ethical dilemmas. This article discusses recent advancements in AI and the impacts these advancements have on the legal field both ethically and professionally. The article concludes with proposed amendments to the Model Rules of Professional Conduct to keep up with the rapidly expanding growth of AI.

II. HOW ARTIFICIAL INTELLIGENCE IS IMPACTING THE PRACTICE OF LAW FOR ATTORNEYS AND CONSUMERS

Perhaps the most initially visible use of AI in the legal field for any industry professional is the use of artificial intelligence in legal research services, such as Westlaw and Lexis Advance.[3] These services have integrated AI in order to make legal searches easier for legal professionals.[4] Lexis Answers utilizes AI in order to anticipate the search of the user and recommends questions based on the predictive results.[5] Lexis Answers will then analyze millions of documents to

1. *Artificial Intelligence*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/technology/artificial-intelligence (last visited Aug. 1, 2019) (defining artificial intelligence as "the ability of a digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings").

2. *See, e.g.*, *Advanced Software Design Technology Leads GM into Next Generation of Vehicle Lightweighting*, GENERAL MOTORS (May 3, 2018), https://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2018/may/0503-lightweighting.html; *see also Optimizing Flow Within Mobility Systems with AI*, THE ALAN TURING INSTITUTE (June 25, 2018), https://www.turing.ac.uk/news/optimising-flow-within-mobility-systems-ai (AI being used to manage traffic signals); *see also* Babusi Nyoni, *How artificial intelligence can be used to predict Africa's next migration crisis*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, (Feb. 10, 2017), https://www.unhcr.org/innovation/how-artificial-intelligence-can-be-used-to-predict-africas-next-migration-crisis; *see also* Phoebe M. R. DeVries, et al, *Deep learning of aftershock patterns following large earthquakes*, NATURE (Aug. 29, 2018), https://www.nature.com/articles/s41586-018-0438-y.

3. *See You Ask. Lexis Answers—new machine-learning feature on Lexis Advance,* LEXIS NEXIS: LEXISNEXIS INFOPRO COMMUNITY (June 29, 2017, 8:11 AM), https://www.lexisnexis.com/infopro/keeping-current/b/weblog/archive/2017/06/29/you-ask-lexis-174-answers-new-machine-learning-feature-on-lexis-advance.aspx; *see also Introducing WestSearch Plus*, THOMPSON REUTERS, https://legal.thomsonreuters.com/en/products/westlaw/edge/westsearch-plus (last visited Feb 19, 2019).

4. *See id.*

5. *See* LEXISNEXIS, *supra* note 3.

create a Lexis Answer Card, linking directly to the text the Answer Card is citing.[6] This service initially launched with five different types of common questions supported—including definitions, standards of review, and elements of a claim or defense—aiming to reduce the time spent researching simple questions.[7] Westlaw Edge has followed suit utilizing AI in their own legal research platform through WestSearch Plus.[8]

Potentially even more impressive to the technologically-savvy attorney is the lesser-known legal research company ROSS Intelligence which has deeply integrated AI into their research platform.[9] ROSS Intelligence takes the research advances that WestSearch Plus and Lexis Answers have utilized, and improves them through a deep use of AI in their search engine.[10] ROSS utilizes Natural Language Processing which helps lawyers communicate with the search engine in a human-like manner "to retrieve authoritative decisions quickly, comprehensively, and accurately."[11] ROSS algorithms are used to detect and apply relevant filters, such as jurisdictional and date filters, without the user checking a box or applying the filters manually.[12] ROSS further improves the strength of their search engine by implementing a word embedding feature.[13] Word embedding improves searches by locating results for terms and words that are closely related to the original term in the search.[14] For example, ROSS uses relationships between words such as "duty" and "negligence" to find results for other related words.[15] This allows ROSS to provide search results aimed at the

6. *See id.* ("After analyzing millions of annotated legal documents and other content, Lexis Answers delivers the single best possible answer via a Lexis Answer Card. Each Lexis Answer Card links directly to the specific text within the document—rather than just the document itself—significantly speeding up the research process for common legal questions.").

7. *See id.*

8. *See* THOMPSON REUTERS, *supra* note 3.

9. *See* Charlie von Simson, *How ROSS AI Turns Legal Research On Its Head*, ROSS INTELLIGENCE, (Aug. 6, 2019), https://blog.rossintelligence.com/post/how-ross-ai-turns-legal-research-on-its-head.

10. *See id.*

11. *See* Stergios Anastasiadis, *How is Natural Language Search Changing The Face of Legal Research?*, ROSS INTELLIGENCE (Apr. 8, 2019), https://blog.rossintelligence.com/post/how-natural-language-search-changing-face-of-legal-research.

12. *See New Ross Features Improve Filtering and Precision*, ROSS INTELLIGENCE (Mar. 11, 2019), https://blog.rossintelligence.com/post/new-features-improve-filtering-and-precision.

13. *See A Visual Guide to AI.*, ROSS INTELLIGENCE, https://rossintelligence.com/what-is-ai.html (last visited Aug. 20, 2019).

14. *See id.*

15. *Id.* ("For example, lawyers come to understand intuitively that 'duty' and 'negligence' are related words. ROSS uses that relationship to broaden its understanding

intent of the search instead of just matching keywords because the software "is specially trained on legal documents to use word embeddings to recognize and understand the context, syntax, and meaning of case law."[16] ROSS uses word embeddings to "match cases to the intent and meaning" of the users search "rather than just the bare keywords."[17] Not only does ROSS provide advanced search tools through the use of AI, its document analyzer will analyze a brief or memorandum and identify any negative treatment of the law cited—all before the attorney ever reads the document.[18]

These legal research platforms utilize AI in order to make legal research quicker, more intuitive, and user friendly. These improvements assist attorneys in finding relevant authority faster and assist clients in keeping bills down through more efficient research.

The growth of AI has also led to increased automation in the areas of e-Discovery and contract review through the use of software such as Lexis DiscoveryIQ and COIN.[19] These software programs can drastically reduce the amount of time an attorney spends on e-Discovery document review or reviewing contracts.[20] COIN (short for Contract Intelligence) utilized by JPMorgan works to review and interpret commercial loan agreements cutting down on attorneys' hours by approximately 360,000 hours per year.[21] JPMorgan touts that the software "reviews documents in seconds," and has significantly cut down on past mistakes in interpreting contracts.[22] Lexis DiscoveryIQ aims to help reduce the amount of people needed in the document review process thereby reducing cost to consumer.[23]

---

beyond simple keywords. If you use 'duty' in a query ROSS may, depending on other factors, return cases that use the word 'negligence' but not the word 'duty', because the word embeddings indicate that those two words are closely related.").

16. *See id.*

17. *See id.*

18. *See* ROSS INTELLIGENCE, https://rossintelligence.com/features.html (last visited Aug 20, 2019).

19. *See* Ian Lopez, *Lexis DiscoveryIQ Applies Advanced Visual Analytics to E-Discovery; LexisNexis' new e-discovery platform aims to improve analytics in throughout the e-discovery process,* LAW TECHNOLOGY NEWS (Feb. 2, 2016) (Available on LexisNexis); *see, also* Hugh Son, *JPMorgan software does in seconds what took lawyers 360,000 hours*, INDEPENDENT (Feb. 28, 2017, 11:51 AM), https://www.independent.co.uk/news/business/news/jp-morgan-software-lawyers-coin-contract-intelligence-parsing-financial-deals-seconds-legal-working-a7603256.html.

20. *See* Lopez, *supra* note 19.

21. *See* Son, *supra* note 19.

22. *See id.*

23. *See* Lopez, *supra* note 19 (quoting Steven Ashbacher, vice president of Legaltech News, "The whole point is, 'let's get there faster, and not have to put a whole bunch of people

Reducing the cost of e-Discovery can critically impact the bill that a client is left with after a case or deal. A recent study shows that most Fortune 1000 companies spend upwards of $5 million each year on e-Discovery with 70% of the costs being attributed to reviewing physical documents.[24] A 2012 Rand study showed that reviewing the equivalent of 1 gigabyte of data costs approximately $18,000.[25] Through the use of AI in software such as COIN and Lexis DiscoveryIQ attorneys can limit the costs of document review they pass along to their clients.

AI has also been used in more revolutionary ways such as predicting a Supreme Court ruling on a particular issue.[26] A machine-learning statistical model reviewed previous rulings by the high court and accurately predicted over 70% of decisions by both the Supreme Court as a whole, as well as the votes of the individual justices.[27]

Not only has AI been used to predict how judges and courts will rule on an issue, courts are also utilizing AI and machine learning in making judicial decisions. Courts around the country utilize advanced algorithms to assist in pretrial detainment of the accused as well as sentencing decisions such as placement and supervision of offenders. One example of a pretrial algorithm is the Public Safety Assessment (PSA) which is utilized in twenty nine American jurisdictions.[28] The PSA uses a small set of factors which is largely limited to the defendant's age and criminal history to determine the risk associated with that defendant and produces these results to assist the judge in making a determination of whether the defendant should be released or detained pending trial.[29] Algorithms have been used in sentencing as well with Virginia becoming the

---

wrapped up around the review stage, which tends to be the most expensive stage and the most time consuming.").

24. *See* Jennifer Booton, *Don't send another email until you read this*, MARKET WATCH (Mar. 9, 2015, 10:10 AM), https://www.marketwatch.com/story/your-work-emails-are-now-worth-millions-of-dollarsto-lawyers-2015-03-06?ns=prod/accounts-mw.

25. *See id.*

26. *See, e.g.*, Matthew Hutson, *Artificial intelligence prevails at predicting Supreme Court decisions*, SCIENCE (May 2, 2017, 1:45 PM), https://www.sciencemag.org/news/2017/05/artificial-intelligence-prevails-predicting-supreme-court-decisions.

27. *See* Daniel Martin Katz et al, *A general approach for predicting the behavior of the Supreme Court of the United States*, PLOSONE (Apr. 12, 2017), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0174698 ("[O]ver nearly two centuries, we achieve 70.2% accuracy at the case outcome level and 71.9% at the justice vote level.").

28. *See* DANIELLE KEHL, ET. AL., BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y, *ALGORITHMS IN THE CRIMINAL JUSTICE SYSTEM: ASSESSING THE USE OF RISK ASSESSMENTS IN SENTENCING* (2017).

29. *Id*.

first state to utilize a risk-assessment algorithm in sentencing in 1994.[30] Virginia's instrument was "designed to identify low-risk felons in order to assign them a more suitable type of punishment."[31] These algorithms have become more widespread. A widely-used sentencing algorithm is the Level of Service Industry-Revised (LSI-R)[32] which analyzes a number of factors to "determine a person's risk for recidivism as well as the best sentencing options."[33] The LSI-R is used in jurisdictions around the country, notably including Washington and California.[34]

The most controversial use of one of these algorithms is COMPAS (short for Correctional Offender Management Profiling for Alternative Sanctions).[35] COMPAS analyzes five main areas of variables: "criminal involvement, relationships/lifestyle, personality/attitudes, family, and social exclusion," utilizing a "combination of static and dynamic factors" in these areas to determine the risk of recidivism by a defendant.[36] States including Wisconsin, Florida, and Michigan utilize COMPAS to assist in sentencing decisions.[37] Pro Publica has disputed the accuracy of COMPAS in a report where it is claimed "black defendants were far more likely than white defendants to be incorrectly judged to be at a higher risk of recidivism, while white defendants were more likely than black defendants to be incorrectly flagged as low risk."[38] Some of this concern with COMPAS comes from the lack of knowledge as to the functioning of the algorithm and how heavily it weighs certain factors; this lack of insight is due to the fact that there is no federal oversight of COMPAS.[39] This presents an ethical concern for the judiciary, warning courts to consider racial bias when rendering sentencing decisions through the use of an algorithm.

---

30. *See id.*

31. *Id.* (citing Brian Ostrom, *Offender Risk Assessment in Virginia: A Three-stage Evaluation: Process of Sentencing Reform, Empirical Study of Diversion and Recidivism, Benefit-cost Analysis*, NATIONAL CENTER FOR STATE COURTS: VIRGINIA CRIMINAL SENTENCING COMMISSION (2002), http://www. vcsc.virginia.gov/risk_off_rpt.pdf.).

32. *See supra* note 28.

33. *Id.*

34. *See id.*

35. *See* Ed Yong, *A Popular Algorithm Is No Better at Predicting Crimes Than Random People,* THE ATLANTIC (Jan. 17, 2018), https://www.theatlantic.com/technology/archive/2018/01/equivant-compas-algorithm/550646/.

36. *See* Kehl, *supra* note 28.

37. *Id.*

38. *See* Jeff Larson et al, *How We Analyzed the COMPAS Recidivism Algorithm,* PRO PUBLICA (May 23, 2016), https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm.

39. *See supra* note 28.

AI has also increased the availability of legal services to consumers without hiring an attorney. For example, a legal services application called DoNotPay has become increasingly popular assisting consumers in contesting parking tickets, unfair bank fees, and volatile airline prices—all without paying legal fees to an attorney.[40] In the first year of DoNotPay's existence it won approximately 64% of its roughly 250,000 cases.[41] An app such as DoNotPay may be appealing to customers who cannot or will not pay an attorney to handle a smaller matter like a parking ticket but nevertheless want to contest it.

These advances in AI have made the work of attorneys easier but have also led to concerns regarding the availability of jobs in the legal field. Deloitte concluded that 39% of the jobs in the legal field will likely be automated in the long-term future as technology continues to advance.[42] Some sources claim that 23% of the job of an attorney can be automated—other sources allege attorneys could reduce hours by as much as 13% using only AI already in existence.[43] Therefore, while attorneys should be utilizing AI to make their day-to-day tasks easier, attorneys may be wary regarding their future employment as a result of AI.

III. THE SIGNIFICANT ETHICAL ISSUES THAT THE USE OF ARTIFICIAL INTELLIGENCE PRESENTS TO ATTORNEYS

The use of AI presents a number of ethical issues for attorneys. Quite possibly the biggest concern that attorneys should consider is whether the use of AI software could violate the attorney's duty of confidentiality under Model Rule 1.6.[44] If an attorney is inputting sensitive and confidential information into AI software there is a risk of the data being exposed due to a data breach. An

40. *See* Jon Porter, *Robot lawyer DoNotPay now lets you 'sue anyone' via an app*, THE VERGE (Oct. 10, 2018, 12:13 PM), https://www.theverge.com/2018/10/10/17959874/donotpay-do-not-pay-robot-lawyer-ios-app-joshua-browder.

41. Samuel Gibbs, *Chatbot lawyer overturns 160,000 parking tickets in London and New York*, The Guardian (June 28, 2016, 6:07 AM), https://www.theguardian.com/technology/2016/jun/28/chatbot-ai-lawyer-donotpay-parking-tickets-london-new-york.

42. *Deloitte Insight: Over 100,000 legal roles to be automated* LEGAL IT INSIDER (Mar. 16, 2016, 10:28 AM), https://www.legaltechnology.com/latest-news/deloitte-insight-100000-legal-roles-to-be-automated; DELOITTE, *DEVELOPING LEGAL TALENT: STEPPING INTO THE FUTURE LAW FIRM*, 4 fig. 4 (2016), https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/audit/deloitte-uk-developing-legal-talent-2016.pdf.

43. *See* Lauri Donahue, *A Primer on Using Artificial Intelligence in the Legal Profession*, JOLT DIG. (Jan. 3, 2018), https://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession.

44. *See generally,* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR. ASS'N 2016).

attorney needs to pay specific attention to Comment 18 of Model Rule 1.6 to ensure they are taking appropriate steps to safeguard confidential information.[45]

Next, the introduction of AI into the law may affect the duty of competence that attorneys are ethically bound to maintain. A.B.A. Model Rule 1.1 states: "[A] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[46] Comment 8 to Rule 1.1 requires that an attorney obtain knowledge about relevant technology and how it impacts the practice of law.[47]

Third, the failure to use AI software that may cut down on costs to a consumer may potentially be argued as a form of overbilling leading to malpractice. The relevant rule, A.B.A. Model Rule 1.5, states in relevant part:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) *the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly*;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) *the fee customarily charged in the locality for similar legal services*;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;

45. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6, cmt. 18 (AM. BAR. ASS'N 2016).

46. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR. ASS'N 2016).

47. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1, cmt. 8 (AM. BAR. ASS'N 2016) ("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.").

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.[48]

Based upon interpretation of this rule with the growing development and use of AI in mind, a lawyer could potentially face malpractice liability for failure to utilize AI when it could save consumers money on legal services such as e-Discovery and contract review.

Yet another ethical issue presented by the emergence of AI in the legal field is the duty of supervision. As noted above, there is a duty of competence for all attorneys under Model Rule 1.1.[49] Model Rule 5.1 imposes a requirement on supervisory attorneys that they ensure that all attorneys they supervise comply with the Model Rules.[50] An issue presented with the introduction of AI is whether a lawyer utilizing AI is liable for ensuring the software has done the work competently.

Members of the judiciary should be wary when using AI in making sentencing decisions.[51] Washington does not allow factors such as race to be considered in sentencing by the court.[52] Canon 1 of the Model Code of Judicial Conduct states: "[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[53] If an algorithm that a judge utilizes in making sentencing decisions produces racially-skewed results, the judge could potentially be in violation of this Code by allowing impartiality to infiltrate the judicial process.

Finally, legal chatbots such as DoNotPay present an interesting ethical issue for the legal field. Model Rule 5.5 governs the unauthorized practice of law.[54] States have also adopted their own statutory schemes to regulate the unauthorized practice of law by laypersons. For example, Washington does not permit the practice of law by any person if he or she is not an active member of the

48. MODEL RULES OF PROF'L CONDUCT r. 1.5(a) (AM. BAR. ASS'N 2018) (emphasis added).

49. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR. ASS'N 2016).

50. MODEL RULES OF PROF'L CONDUCT r. 5.1 (AM. BAR. ASS'N 2018).

51. *See* discussion *infra* Part II.

52. *See* WASH. REV. CODE § 9.94A.340 (1983); *see also* State v. Roberts, 894 P.2d 1340, 1343 (Wash. 1995).

53. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM. BAR. ASS'N 2013).

54. *See* MODEL RULES OF PROF'L CONDUCT r. 5.5 (AM. BAR. ASS'N 2019).

Washington State Bar Association.[55] The Supreme Court of Washington has held that in order to determine whether an activity constitutes the practice of law the court must look at the nature and character of the services performed.[56] If the activities are determined to be part of the practice of law, the court then looks at whether the person engaging in these activities is authorized to practice law in the state.[57] While chatbots such as DoNotPay can make legal services more affordable to consumers they raise the question of whether the creators and operators of these chatbots are engaging in the unauthorized practice of law by providing legal services.

IV. PROPOSAL OF IMMEDIATE CHANGES TO THE MODEL RULES TO COMBAT THESE ETHICAL CONCERNS

A. *Confidentiality*

There is no immediate need for an immediate change to Model Rule 1.6 regarding the issue of a potential breach of the duty of confidentiality when using AI software. As noted above, Comment 18 to this Rule requires an attorney to take steps to ensure the security of information related to the representation of a client.[58] So long as attorneys are taking the time to ensure they are following common security practices and limiting cloud-based storage of client data no change to the Model Rules is required. The current comment does a satisfactory job of addressing the issue. However, attorneys should be cautious when using new technology to ensure proper screening for potential security issues before inputting any confidential client information.

B. *Duty of Competence*

The duty of competence has evolved in recent years from a duty to know the law and provide adequate representation to the requirement that a lawyer stay current with relevant technology that could impact their practice.[59] This duty is broader than simply taking steps to secure client data and avoid inadvertent

55. *See* WASH. REV. CODE § 2.48.170 (2011).

56. *See* Wash. State Bar Ass'n v. Great Western Union Fed. Sav. and Loan Ass'n, 586 P.2d 870, 874 (Wash. 1978) (citing Wash. State Bar Ass'n v. Wash. Ass'n of Realtors, 251 P.2d 619, 621 (Wash. 1952)).

57. *See id*.

58. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6, cmt. 18 (AM. BAR. ASS'N 2016); *see also* discussion *infra* Part III.

59. Jamie J. Baker, *Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society,* 69 S.C. L. REV. 557, 559-60 (2018).

disclosure.[60] Six states have adopted amendments to their ethics rules that clarify or heighten the ethical obligation owed by attorneys in their use of technology in the practice of law.[61]

This issue could be addressed by requiring technological competency and training. Many state bar associations have started requiring attorneys to be competent with technology impacting the legal field. For example, West Virginia has amended its ethics rules to require that an attorney "must keep abreast" of technological developments and advancements in technology.[62] Similarly, Colorado added a requirement of continuing education by attorneys for technology.[63] Florida recently promulgated a rule allowing attorneys to consult a person with technological competence in a relevant field in order to satisfy the competency requirement.[64] The Florida Supreme Court approved a requirement of mandatory technology CLE credits for attorneys, which went into effect on January 1, 2017. [65] These credits could end up being instrumental for attorneys to ensure they are technologically competent in their practice. A number of attorneys have had issues with basic competency in Microsoft Word, Microsoft Excel, and Adobe Acrobat.[66] CLE courses can help attorneys gain competence in not only those basic programs but may also help attorneys achieve competence and literacy in more complex software incorporating AI, such as e-Discovery tools. A requirement for technological competency would benefit all attorneys and help achieve uniform competence pursuant to the Model Rules.

---

60. *Id.* at 561.

61. *See id* at 562 (noting the following six states: Colorado, Delaware, Florida, New Hampshire, New York, West Virginia).

62. *See* W. VA. RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (W. VA. STATE BAR 2014).

63. *See* COLO. RULES OF PROF'L Conduct r. 1.1 cmt. 8 (COLO. BAR ASS'N 2016).

64. *See In re* Amendments to Rules Regulating the Fla. Bar 4-1.1 & 6-10.3, 200 So. 3d 1225, 1226 (Fla. 2016).

65. *See id.*; *see also* Victor Li, *Florida Supreme Court approves mandatory tech CLE classes for lawyers*, ABA JOURNAL (Sept. 30, 2016, 8:45 AM), http://www.abajournal.com/news/article/florida_supreme_court_approves_mandatory_tech_cles_for_lawyer.

66. *See* Victor Li, *Florida requires lawyers to include tech in CLE courses*, ABA JOURNAL (Feb. 1, 2017, 2:10 AM), http://www.abajournal.com/magazine/article/technology_training_cle ("On pre-assessment surveys, about 80 percent of people don't think they need to or should have to go to training. But according to Flaherty, only 5 percent of users who take the assessments—which cover Microsoft Word, Microsoft Excel and Adobe Acrobat—pass the Word portion on their first attempt.").

C. *Unreasonable Fees*

With the staggering amount of money that corporations spend on e-Discovery[67]—especially given how much AI software can reduce costs—it would be prudent for attorneys to address this issue through the use of AI software. However, AI software may not be practical for all firms. Therefore, a way to address this issue through a change in the Model Rules would be to require all fees charged by an attorney or firm be reasonable in light of the technology reasonably available to the attorney or firm. A change such as this would impose a higher responsibility upon larger firms than solo practitioners and small firms given the immensely larger resources that a big firm has available to them. Implementing this proposed change would require attorneys to utilize all available technology to reduce consumer bills, unless failure to use such software is justifiable in light of other financial, confidentiality, or competency concerns.

D. *The Duty of Supervision*

As noted above, the duty of supervision goes hand-in-hand with the duty of competence for attorneys.[68] There are many examples of practices necessary to satisfy the supervision requirement, including "detection and resolution of conflicts of interest, good calendar practices relating to deadlines, client trust account management, and supervision of inexperienced lawyers."[69] The duty to make certain that work is done adequately for the client is paramount to confirming that a client receives the best representation possible. This duty extends to any work done by software. For example, a court would not likely accept an excuse that e-filing software failed to file an important filing as the attorney has a duty to verify that their work is done competently.[70] Therefore, this article proposes the Model Rules include new subsections in Rules 1.1 and 5.1 to ensure an attorney is responsible for supervising the work done by any software, and to require the attorney to engage in regular due diligence, verifying that the software has completed the work to a satisfactory level of competence. A specific requirement addressing software would assure that attorneys continue to take responsibility for providing clients with the best possible representation.

---

67. *See supra* note 23.

68. *See* discussion *supra* Part III.

69. *See* LEAH CHRISTENSEN & BROOKS HOLLAND, LEARNING PROFESSIONAL RESPONSIBILITY FROM THE CLASSROOM TO THE PRACTICE OF LAW 184 (West Academic Publishing 2015).

70. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR. ASS'N 2016).

E. *The Use of AI by the Judiciary*

Rule 1.2 of the Model Code of Judicial Conduct requires a judge to act in a manner "that promotes public confidence in the . . . impartiality of the judiciary."[71] Comment 3 to this rule states: "[c]onduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct the Rule is necessarily cast in general terms."[72] As noted above, a judge could potentially run afoul of this Rule when using algorithms such as COMPAS in sentencing decisions that may make racially biased determinations.[73] This article proposes additional comments to this rule be created, stating a judge is responsible for doing due diligence to ensure all technology utilized by the court in decision-making is impartial. This would require the court to take responsibility for race-based decisions made through the utilization of AI, such as COMPAS.

F. *Unauthorized Practice of Law by Chatbots*

The unauthorized practice of law by chatbots may be the hardest of all of these issues to address through a proposed change to the Model Rules of Professional Responsibility. This is because chatbots are often not created or operated by attorneys, and the Model Rules regulate conduct by lawyers.[74] However, if an attorney is involved in the creation or operation of a chatbot the attorney should owe a duty of supervision. The attorney should be bound by Model Rules 1.1[75] and 5.1[76] to ensure the chatbot is providing competent legal advice to consumers. An attorney who has created or participated in the creation and operation of a chatbot or similar service must also be wary of potentially violating Rule 5.5(a). This Rule prohibits a lawyer from practicing law "in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."[77] This means the lawyer must take steps to ensure anyone working with or for the lawyer who is not a licensed

71. MODEL CODE OF JUDICIAL CONDUCT r. 1.2 (AM. BAR. ASS'N 2010).

72. MODEL CODE OF JUDICIAL CONDUCT r. 1.2 cmt. 3 (AM. BAR. ASS'N 2010).

73. *See* discussion *supra* Part III.

74. *See supra* note 69 ("The ABA Model Rules of Professional Conduct . . . are the basic source of rules governing the conduct of lawyers.").

75. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR. ASS'N 2016) ("A lawyer shall provide competent representation to a client.").

76. *See* MODEL RULES OF PROF'L CONDUCT r. 5.1 (AM. BAR. ASS'N 2016) (describing the responsibilities of supervisory lawyers).

77. MODEL RULES OF PROF'L CONDUCT r. 5.5 (AM. BAR. ASS'N 2016).

attorney does not engage in any action which could be considered as part of the practice of law.[78] Legal scholars have sounded off on this very topic:

> "The key for lawyers working with non-lawyers is to ensure that the admitted lawyer is properly supervising the work of the non-lawyers in the office and approving of their work. Lawyers who allow or require employees to act on their own without supervision are violating Rule 5.5 unless the jurisdiction has a special rule allowing the non-lawyer to practice law."[79]

For chatbots without an attorney involved in their creation or operation, another route must be taken. Because laypersons are not bound by any rules of professional conduct,[80] the state legislature must get involved. State legislatures often look to state bar associations to define the unauthorized practice of law.[81] In many states, injunctions are becoming more common as a remedy for the unauthorized practice of law.[82] State bar associations must be more proactive in defining the unauthorized practice of law, given the recent technological advancements in the legal field, in order to guide the legislature and courts in regulating laypersons.

V. CONCLUSION

AI is rapidly and drastically changing legal services, providing automation for daily tasks and providing consumers with affordable legal solutions.[83] However, this advancement in technology raises ethical concerns for attorneys and judges.[84] As AI advances and is increasingly utilized in the legal field,

---

78. *See supra* note 69 ("Rule 5.5(a) is clear. A lawyer cannot allow anyone working with or for the lawyer to take action within the definition of the practice of law if the person is not a lawyer.").

79. *Id.*

80. *See id* at 5 ("The ABA Model Rules of Professional Conduct . . . are the basic source of rules governing the conduct of *lawyers*.") (emphasis added).

81. *See* Pamela Lopata, *Can States Juggle the Unauthorized and Multidisciplinary Practices of Law?: A Look at the States' Current Grapple With the Problem in the Context of Living Trusts*, 50 CATH. U. L. REV. 467, 500 (2001).

82. *See Injunction as Proper Remedy to Prevent the Unauthorized Practice of Law*, 94 A.L.R. 359 § II(a)(1) (1935); *see also* Perkins v. CTX Mortg. Co., 969 P.2d 93, 98 (Wash.1999) ("the court held that lay employees of an escrow company engaged in the unauthorized practice of law by completing form legal documents. The court observed that 'the preparation of a legal form is doing work of a legal nature, and if done by a . . . layman, may be enjoined.'") (quoting *In re* Discipline of Droker, 370 P.2d 242, 248 (Wash. 1962).

83. *See* discussion *supra* Part II.

84. *See* discussion *supra* Part III.

changes to the Model Rules of Professional Conduct are required to ensure consumers receive competent, confidential, and affordable representation.[85] Technology will continue to impact society. The legal profession must ensure appropriate rules and regulations are in place.

85. *See* discussion *supra* Part III.