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Ben Einhouse

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Concerns Over the Expansion of Artificial intelligence in the Legal Field

Advances in technology have surely made the practice of law more efficient, but looming advances in artificial intelligence should raise some concern about the price of this efficiency. Artificial intelligence programs already exhibit the capacity to replace the daily activities of some lawyers, which should raise some concern in the legal community, especially regarding legal ethics. Despite these concerns, the access to knowledge that artificial intelligence programs provide are a huge asset to the legal community, so we must regulate such programs properly. To frame this discussion, the type of artificial intelligence programs that are raising concern need to be identified. Then, the legal framework of what constitutes legal advice and malpractice will be examined, and how this framework might be applied to artificial intelligence programs. Finally, some general best practices for the future of artificial intelligence regulation as it pertains to legal ethics and malpractice will be discussed.

I. Artificial Intelligence in Context

Once a computer program is simulating or imitating intelligent human behavior, it has the potential to create serious issues in the legal field. It is worth noting then, that the dictionary definition of the term “artificial intelligence” specifically mentions the simulation or imitation of human behavior.¹ With this in mind, it is important to note that contemporary software programs that seem to replace some human behavior are not precisely what is being targeted by this discussion. Rather, it is programs that actively seek to replace functions of lawyers, as opposed to those programs that merely aid the functions of lawyers. However, while this distinction

initially seems clear, it is easily blurred when considering the variety of functions that artificial intelligence has the potential to perform.

To illustrate the difficulty in distinguishing between aiding and imitating human function, consider ROSS Intelligence, a leader in artificial intelligence for the legal field.ⁱⁱ ROSS Intelligence is currently principally focused on providing legal research through its software.ⁱⁱⁱ While efficient and expedited legal research clearly aids lawyers, this function also seems to imitate or simulate intelligent human behavior by virtue of the fact that legal research is traditionally only done by humans. However, the mere imitation of any human behavior is probably not enough to raise serious legal ethics concerns; concern arises when an artificial intelligence is completely imitating a human lawyer. The simulation of human lawyers by artificial intelligence seems to be in the future of the legal field; ROSS Intelligence even markets itself as an “A.I. Lawyer.”^{iv}

II. Unauthorized Practice of Law

As artificial intelligence in the legal field continues to become more sophisticated and require less oversight from the engineers and lawyers that created it, serious issues regarding the unauthorized practice of law are created. These issues are further complicated by the fact that the framework that regulates the unauthorized practice of law is not entirely uniform, and can come from more than one source.^v Thus, this discussion will be limited to the legal framework preventing the unauthorized practice of law in New York.

In New York, Judiciary Law §478 sanctions the unauthorized practice of law.^{vi} The pertinent part of this section reads: “It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself or herself in a court of record in this state, or to furnish attorneys or counsel or an

attorney and counsel to render legal services.”^{vii} The ABA’s Model Rule of Professional Conduct regarding the unauthorized practice of law is Rule 5.5(a), which reads: “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”^{viii} Further, Rule 5.5 of the New York Rules of Professional Conduct also prohibits the unauthorized practice of law in similar language to the model rule.^{ix}

With the intersecting framework of the New York Judiciary Code and Rules of Professional Conduct in mind, we will examine what types of specific conduct constitute the “practice of law” or “legal services,” as there is no clear, singular definition of the practice of law.^x Additionally, as the quoted language in the statute and rule are somewhat vague to apply directly to the role of artificial intelligence in a law firm, we will examine a similar gray area for which there is some official guidance: paralegals.

III. Guidance Regarding Paralegals

The American Bar Association has issued extensive guidance on ethical issues that pertain to paralegals.^{xi} This guidance is primarily contained in the ABA Model Guidelines for the Utilization of Paralegal Services, which contains 10 guidelines with corresponding comments, but only a few of these are relevant to this discussion.^{xii} Guidelines 1 and 2 indicate that a wide range of conduct can be delegated to paralegals, so long as lawyers maintain responsibility for the final work product and properly supervise the paralegal.^{xiii} By hypothetically applying these guidelines to artificial intelligence, we can illustrate some of the potential ethical issues that are implicated. For instance, it is unclear exactly how a lawyer would supervise an A.I. system. Most lawyers simply do not have the expertise to understand and monitor the code, algorithms, and deep learning systems that current and future A.I. systems use. Paralegals using programs like

Westlaw or LexisNexis for research are fundamentally easier to supervise, as lawyers can periodically retrace the research steps to ensure the paralegal's diligence and can also discuss how those paralegals reached their conclusions.

Guideline 3 could be troubling for the expansion of artificial intelligence in the legal field. Specifically, Guideline 3(c) prohibits a lawyer from delegating "responsibility for a legal opinion rendered to a client."^{xiv} In considering what constitutes a legal opinion, the comment to Guideline 3 focuses on a lawyer's "professional judgment."^{xv} Professional judgment is a logical aspect to focus on, as the ABA's Ethical Canon 3-5 equates the practice of law with exercising one's professional judgment: "functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer."^{xvi} Because it is possible that lawyers will be unable to effectively "supervise" A.I. systems they are using, this should be considered an obstacle for the expansion of such systems. For instance, if a lawyer becomes so reliant on an A.I. to the point where they are simply relaying the A.I.'s answers to their clients, a lawyer has surely delegated their professional judgment to that A.I. system.

Naturally, the relaying of answers that lack a lawyer's professional judgment to clients is possible when working with paralegals as well, and is clearly also prohibited under Guideline 3. The difference between the two situations is that it is possible for a lawyer to exercise some degree of professional judgment in evaluating and supervising how the paralegal came to their answer. Whether or not some degree of supervision is enough to escape liability from Guideline 3 should probably be determined on a case by case basis, but it should be clear that this situation is far different than receiving answers from an artificial intelligence system. Even with extensive training and experience, it would be difficult to claim that most lawyers will be able to understand how artificial intelligence systems determine actually determine answers to

questions. Perhaps more importantly, regardless of how well lawyers understand these systems, it will probably become increasingly difficult to differentiate between a lawyer's and an artificial intelligence's professional judgment.

IV. Malpractice

Much like the Model Rules of Professional Conduct, legal malpractice will be seriously impacted by the expansion of artificial intelligence systems in the legal field. This is principally because artificial intelligence will likely have a significant impact the public's and client's expectations of lawyers, and what constitutes ordinary care.

First, the elements of legal malpractice must be laid out. These elements are: the attorney was negligent in his/her representation, the negligence was the proximate cause of the plaintiff's injury, and the plaintiff suffered actual damages.^{xvii} Of these three, negligence is the critical element as artificial intelligence relates to malpractice. For example, if an attorney relies on an A.I. program in the course of representing a client, and the program gives an incomplete or wrong answer that causes actual damage to the client, should the attorney or the makers of the A.I. program be liable for malpractice?

Ordinary negligence claims hinge on the standard of ordinary care.^{xviii} However, attorneys are held to a higher standard of ordinary care.^{xix} To be precise, the New York Court of Appeals has interpreted this standard to be "ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession."^{xx} A New York 1st Department Appellate Court has even provided a rule: "The general rule is that an attorney may be held liable for ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action."^{xxi}

While it's definitely possible that the use of artificial intelligence programs will dramatically reduce an attorney's likelihood of committing any of these errors, it is likely that at least some of these errors will occur that are completely within the A.I. program. These errors could be due to a glitch in the program, but it's also possible that the program could simply return a wrong answer due to misunderstanding the question. For example, IBM Watson's committed some obvious errors on Jeopardy due to the program being confused by the question.^{xxii} When such an error occurs, there will have to be an inquiry into the quality of the artificial intelligence program to assure it reaches the level of ordinary knowledge commonly held by the legal profession.^{xxiii} If the quality of the artificial intelligence program is low enough, perhaps the lawyers who advised the engineers would be held liable for the malpractice. At the very least, these lawyers would probably be subject to sanctions under the Model Rule of Professional Conduct regarding competence.^{xxiv}

V. Potential Best Practices

With potential issues facing the rise of artificial intelligence in the legal field illustrated, some potential best practices for both regulators and developers of such systems will be examined. First, developers of artificial intelligence systems in the legal field can avoid ethical pitfalls by carefully limiting what their programs are capable of. Specifically, if developers limit A.I. systems to the point that they remain mere tools, there should be limited conflict with the Model Rules of Professional Responsibility and New York State statutes. Although the line between a program being a tool and substituting professional judgment will be blurry, perhaps the easiest way for artificial intelligence developers to avoid this conflict is by limiting the type of questions that A.I. programs can answer. For instance, general questions about the law in a particular jurisdiction would be permissible, but fact based questions about a particular case

would be avoided. This is because the answers to fact based questions have a much greater chance of being based on professional judgment, which is an area A.I. systems should avoid. Additionally, artificial intelligence developers should avoid giving their programs the ability to independently complete court orders or other documents that will be filed with the court, as this has been held in a New York District Court to constitute the unauthorized practice of law when performed by an independent paralegal.^{xxv}

Finally, the American Bar Association should provide some guidance on how the Model Rules of Professional Conduct will apply to artificial intelligence programs. The current guidance regarding paralegals provides a useful analogy, but is ultimately insufficient to address the breadth of functions that artificial intelligence can perform and the nuances unique to such a system. As an example of such a nuance, consider the competence requirement of Model Rule 1.1. Rule 1.1 requires a lawyer to be “thorough” in their representation of a client, which could theoretically be measured by the careful hours a lawyer spends doing legal research to uncover the best arguments for their client. However, if an artificial intelligence system can do the same or superior research in just a few seconds, can a lawyer truly be isolated from liability under Rule 1.1 by simply using an artificial intelligence? Perhaps there will be a point where the requirement of being “thorough” obligates a lawyer to consult an A.I. system. To answer these questions, there needs to be some clarity in the ethical rules regarding legal research completed by an A.I. system as opposed to a lawyer.

VI. Conclusion

Artificial intelligence systems have the potential to dramatically reshape how law is practiced, particularly in regards to legal ethics. A.I. systems will not only have a dramatic impact on traditional law firms, but also on in-house counsel departments and also legal aid

groups. Because of this vast potential, but also the uncertainty surrounding just how much and what impact A.I. systems will have, the ABA needs to undertake some proactive regulation.

An Ethical Canon of the ABA’s Model Rules of Professional Conduct reads: “Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.”^{xxvi} This canon embodies a significant concern with the rapid expansion of artificial intelligence in the legal field. It is clear from this canon that a primary aspect of the profession of law are is the heightened duties and responsibilities imposed on lawyers to protect the larger public interest. Thus, as more and more of the traditional functions of lawyers are completed by non-lawyers and even non-persons, the ethical rules need to be updated to cover these functions and protect the public interest.

ⁱ Merriam-Webster (<http://www.merriam-webster.com/dictionary/artificial%20intelligence>)

ⁱⁱ Brian Baxter, The Am Law Daily, October, 6, 2016. (<http://www.americanlawyer.com/id=1202769384977/ROSS-Intelligence-Lands-Another-Law-Firm-Client?slreturn=20161028143508>)

ⁱⁱⁱ *Id.*

^{iv} ROSS Intelligence website, “ROSS is an A.I. lawyer that helps human lawyers research faster and focus on advising clients” (<http://www.rossintelligence.com/>) accessed on November 28, 2016.

^v Model Rule of Professional Responsibility 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law; New York Judiciary Law § 478. Practicing or appearing as attorney-at-law without being admitted and registered.

^{vi} New York Judiciary Law § 478. Practicing or appearing as attorney-at-law without being admitted and registered

vii *Id.*

viii Model Rule of Professional Responsibility 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

ix New York Rule of Professional Conduct 5.5: Unauthorized Practice of Law, (<http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf>)

x ABA Model Code of Professional Responsibility, Ethical Canon 3, EC 3-5

xi ABA Model Guidelines for the Utilization of Paralegal Services, <https://apps.americanbar.org/legalservices/paralegals/downloads/modelguidelines.pdf>

xii *Id.*

xiii *Id.*

xiv ABA Model Guidelines for the Utilization of Paralegal Services, <https://apps.americanbar.org/legalservices/paralegals/downloads/modelguidelines.pdf>

xv *Id.*

xvi ABA Model Code of Professional Responsibility, Ethical Canon 3, EC 3-5

xvii 1-10 Warren's Weed New York Real Property § 10.09 (2016)

xviii *Id.*

xix Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney -- General Principles and Conduct Related to Interaction with Client, 58 A.L.R.6th 1, 2

xx Rudolf v. Shayne, Dachs, Stanisci, 867 N.E.2d 385, 387

xxi Bernstein v. Oppenheim & Co., P.C., 554 N.Y.S.2d 487, 489-90 (App. Div. 1990)

xxii Craig Kanalley, "Watson's Final Jeopardy Blunder in Day 2 of IBM Challenge," February 15, 2011. (http://www.huffingtonpost.com/2011/02/15/watson-final-jeopardy_n_823795.html)

xxiii Rudolf v. Shayne, Dachs, Stanisci, 867 N.E.2d 385, 387

xxiv Model Rule of Professional Responsibility 1.1: Competence

xxv Sussman v. Grado, 746 N.Y.S.2d 548, 550 (Dist. Ct. 2002)

^{xxvi} ABA Model Code of Professional Responsibility, Ethical Canon 3, EC 3-1
(<http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf>)