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There has been a lot of discussion lately surrounding the use of AI in law firms. The purpose of this article is not to come to any definitive answers one way or the other. What we're trying to do is start a dialogue about this topic. There will likely be those who disagree with what follows, and it may be that in six or twelve months the technology has moved on and a lot of this will be irrelevant, or even incorrect.

We know from meetings with various firms and from questions that we've received, that a lot of firms are working on coming up with internal policies on the use of AI at their firms. We've been told by some that they're trying to "get out ahead of this." We could certainly be wrong, but our view is that lawyers in a lot of firms, if not most, are already using AI. If that's the case, then policies are probably needed in relatively short order.

Starting at the very basic, what is AI and what are the platforms that are most likely to be utilized in the context of legal research and critically- legal writing? To answer this question, we logically turned to AI and asked ChatGPT some questions. According to that source, there are a number of other more legally focused platforms such as LawGeex, Kira Systems, Ross Intelligence, Casetext and Lexis Answers. From what we can see, all of these platforms will allow a user to pose a question and the platform will generate a written legal research memorandum, administrative or government forms, or even briefs. LawGeex and Kira Systems both also seem to provide contract analysis.

The first hurdle that we can see is that LawGeex, for one, can "read and analyze legal documents, identify key issues and provide suggestions for improving your legal research memorandum." And, as noted above both LawGeex and Kira Systems can provide "contract analysis." So, some legal focused AI platforms would require that, for certain tasks, the lawyer upload legal documents including draft contracts or other client information. This, of course, raises issues of client confidentiality and that can be problematic.

So, as a starting point firms need to emphasize to all of their lawyers that maintaining client confidentiality is extremely important and that disclosing client information to individuals or entities outside of the firm (including uploading of client information onto any outside platform) is strictly prohibited. ABA Model Rule 1.6 states- with limited exceptions, "a lawyer shall not reveal information related to the representation of a client unless the client gives informed consent." We would think everyone recognizes this already- but it's probably worth emphasizing that AI platforms are public in nature and they will use information that is provided to them in the future for non-firm work.

But what about using one of these AI platforms for legal research on generic topics? One lawyer told us that in his view these AI platforms are nothing more than an aggregator of information otherwise available in a typical Google search. On one level, that's sort of correct- but there is a big difference, and that difference is that these AI platforms are language-based models that will produce a written product as opposed to a Google search that will only provide a list of links that it believes are relevant.

The work product produced by an AI platform can be extremely useful, or extremely problematic depending on how it's used. If an attorney uses AI as a starting point for actual legal research and to frame out arguments and approaches, then AI can be very useful. But the lawyer must take what is generated by AI and independently confirm the information provided.

In a recent conversation a lawyer told us that he asked ChatGPT why a lawyer shouldn't use AI platforms for legal research and got what he thought was a very good answer. So, we did the same and part of the response was:

"One concern is the accuracy and reliability of the information produced by AI algorithms. AI platforms may make mistakes or draw incorrect conclusions, which could have serious consequences for legal cases."

We also asked about how AI handles misinformation that may appear on the web and found out that, while efforts have been made to minimize the use of misinformation in generated responses, there is a risk that AI will pick up misinformation and use it in the responses that are generated.

So, it's critical that lawyers recognize the current limitations of AI and verify everything independently. Again, AI can be a valuable tool as a starting point for legal research and it can identify issues that the lawyer may not have thought of at first blush. Where we could see things go wrong is where a lawyer takes the AI generated response at face value and simply adopts the work product as their own. Doing so would run afoul of ABA Model Rule 5.3 that governs non-lawyer assistance. That rule requires, in part, that a lawyer having "direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the *person's* conduct is compatible with the professional obligation of the lawyer." (emphasis added.) It is argued that this provision extends to legal software and AI driven legal programs.

Most lawyers who have read a brief that contains citations will know some cases cited as supporting a given position actually don't offer support. Somewhere along the way, the lawyer simply picked up a citation and never actually read the case. On one level, that's not really any different than not independently verifying what is generated by AI. But, while having a case distinguished or shown to be inapposite to the point being made is not good, having a position shown to be totally off base is something else. Again- independent verification is of utmost importance.

So, firms need to know that what they're seeing, before it goes out the door, is the work product of the lawyer presenting the brief or the memorandum. AI platforms have already been developed that are designed to detect AI generated work. These are called AI detectors or AI discriminators and they have been used to determine if work being presented has actually been written by a person. These detectors work by looking at patterns and characteristics of data and they come to a conclusion about whether the work is likely to have been generated by AI or written by a human. So, there's obviously an AI solution that firms can employ that would allow them to police their work product.

The next question we considered is what would happen if a firm were to submit AI generated work which was later found to be incorrect. The most egregious scenario we could come up with is a lawyer using an AI generated document (and for now putting aside issues surrounding the uploading of client information) without reviewing that document before submitting it. This scenario could bring up a number of potential problems including:

1. Most lawyers professional liability policies cover individuals for claims arising out of acts, errors or omissions arising out of their capacity as lawyers. The definition of those insured by a policy is pretty all-encompassing, but right now does not extend to an AI platform. We imagine that a firm would try and say that the issue is one of failure to supervise, but who was being supervised?
2. As a starting point, Model Rule 2.1 requires in part that "in representing a client, a lawyer shall exercise independent professional judgment and render candid advice." That independence would seem to run counter to simply adopting positions from outside nonlawyers, including AI.
3. Clients are expecting that a lawyer will be performing the work assigned to the firm. Has the firm advised the client that they will be submitting AI generated work product without review by a lawyer? ABA Model Rule 1.6 also recommends that practitioners "consider incorporating a digital information and AI software disclosure statement in their engagement letters."
4. Can a lawyer submit AI generated work, again without review, ethically? ABA Model Rule 1.1 states in part that "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation necessary for the representation." It's tough to satisfy that rule relying solely on work produced by an AI platform.
5. Is the lawyer who submits AI generated work, again without review, somehow involved in the unauthorized practice of law?

On a broader issue, lawyers throughout time have been trained by critically thinking through complex issues presented by their clients. They talk to other lawyers and revise and modify their views and draft documents memorializing their conclusions. If we rely too heavily on AI, how will those skill sets be learned? At this point at least, AI isn't going to hold meetings with clients, attend depositions or argue a case in court. A lawyer needs to be able to convey complex legal theories and react to opposing positions in real time. How will that happen if the lawyer hasn't been properly trained?

At this point, we're of the view that there is definitely a place for AI in the practice of law. If utilized properly, as a starting point in shaping arguments and positions, it can be very useful and efficient. But ultimately the work product and the advice to the client has to reflect the experience and expertise of the lawyer assigned to the matter.