Generative AI and Ethical Considerations in Legal Practice

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The enthusiasm with which Australian lawyers have adopted artificial intelligence has raised questions (and eyebrows) with those belonging to a more traditional profession, including with respect to accountability, regulation and ethics. While some commentators have published warnings on the widespread use of AI in law,[1] other firms in Australia have shown the market how AI is being used for the benefit of clients and the profession.[2]

Legal practitioners have long been using AI to automate processes before human review. It is trite to comment that predictive coding and technology assisted review is routinely used by commercial legal practitioners in discovery or due diligence – and that broader practice areas use AI assisted research on case law databases, whether knowingly or not.[3] However, our increasing uptake of generative AI (including systems like ChatGPT that generate content like text, images, music, and can replicate forms of human intelligence),[4] has raised concerns over accountability and regulation, as technologies are increasingly capable of performing complex legal tasks.

As generative AI develops and becomes more integrated into our practice, we are likely to face new challenges in navigating WA's ethical and legal landscape, including with respect to costs, efficiency and playing catch-up with technology. While lawyers are querying whether it is permissible to use generative AI, further questions might be asked on whether practitioners will ever be subject to some positive duty to use generative AI. This article briefly considers whether it will ever become appropriate – or necessary – under some ethical duties, to use generative AI, lest our profession be seen to profit from its inefficiency.

Generative AI debrief

Our current interest with the ground-breaking role of generative AI might suggest that automation of work (and legal work) is novel. While we must acknowledge the incredible new capabilities of generative AI and the way in which the tools may change parts of our practice, the disruptive role of AI is not necessarily wholly unprecedented in law.[5]

In current commercial practice, generative AI is used to draft documents or briefs, propose guidance or advice, pick out counterarguments or issues with drafting, including by understanding a context (like laws and regulations) and by following instructions.

Generative AI has also be used in case prediction by using past decisions to forecast outcomes of legal matters, and producing predictions as new information arises – or as new judgments and case law are delivered. One example of a case prediction business (though not necessarily a large language model form) is called Solomonic, a litigation intelligence tool which analyses bulk judgments to make statistical predictions of legal outcomes, and which is being used at least in the UK by a considerable number of law firms which also operate in Australia, including in Perth.

Generative AI – like other forms of AI - brings us beyond some of our outdated conceptions of legal tech that merely completes the "grunt work", into a more sophisticated realm of balancing interests, concepts, facts and societal and industry concerns in our daily work, mimicking past analyses or precedents. With this, comes new possibilities of efficiency, confidentiality and competency that may impact the ethical decisions we make as practitioners, including whether we have a duty to use, or avoid using, generative AI as the context requires.

To date, we have seen limited practical guidance relating to our Australian ethical duties and generative AI. The current Australian guidance, although necessary and appropriate, appears to re-state, perhaps obviously, that certain ethical duties continue to apply, such as avoiding using confidential information on open source tools, or comment on the importance of understanding the limits of current technologies.[6]

In light of the current guidance, practitioners should be mindful of balancing the capability of AI tools with our overarching duties to the court and administration of justice, of competence, confidentiality, and our duties to act in our client's best interests under the Legal Profession Uniform law Scheme.

Paramount duty

Since WA's adoption of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, the solicitors' paramount duty to the court and administration of justice is found in rule 3.1. The content of this duty requires lawyers to "assist the court in the doing of justice according to law",[7] and applies to ensure that lawyers "do what they can to ensure that the law is applied correctly to the case".[8] The duty has been linked to ensuring public confidence in the administration of justice and law, which equally applies to transactional lawyers in upholding law and regulations, as to other practitioners more readily interacting with courts and tribunals.[9]

Relevantly, the solicitor's duty to the court and the administration of justice has been associated with the duty to act in a prompt and efficient manner, including to assist the court to reach a proper resolution of a dispute.[10] The duty of timeliness and efficiency is particularly relevant today "because of the complexity and increased length of litigation [or transactions] in this age".[11]

In the litigation context, Order 1, rule 4A of the *Rules of the Supreme Court 1971* (WA) requires Court processes to aim to eliminate any lapse of time between initiating proceedings and their final determination. Order 1, rule 4B also provides that Court actions, causes and matters will be managed and supervised in aim of disposing court business efficiently, and facilitating the timely disposal of business.

The issue of public confidence in the justice system (including in transactional matters) is squarely impacted by the increasing use of generative AI – and not only in the widely discussed examples of generative AI producing incorrect or questionable results. In fact, depending on the capability and privacy of certain generative AI models (including those produced and currently being used in-house by law firms operating in Australia), there may come a time when solicitors might be seen to hinder public confidence in the administration of justice by *avoiding* the appropriate use of generative AI, or other forms of AI, when a just result could be achieved more promptly or efficiently than if only conducted manually by humans. In some ways, this type of AI efficiency transition has already occurred in the profession, where a solicitor might currently be encouraged to use predictive coding or technology assisted review where appropriate for a large discovery in dispute resolution or document production process – and in failing to do so (and by, for example, solely relying on human document review), a lawyer may not be acting efficiently or as diligently as practicable in a particular case.

At present, we know AI can be trained to recognise and act on specific information, such as suggesting redactions to personally identifiable information, trade secrets, or communications subject to legal professional privilege. The prowess of AI in this area relies on its dataset – and often continuous machine learning – to apply relevant legal rules, and

ensure redactions are applied consistently across a dataset. Machine learning AI learns from its dataset to continuously improve its capabilities. By delegating redactions to AI (subject to later human review), we know law firms already save time and resources, and may also be seen to reduce the risk of human error, inconsistency between different human reviewers, and oversights.

However, the development of generative AI also raises more sinister questions on when using tools might be contrary to a solicitor's paramount duty to the court and the administration of justice.

In recognising the ability of AI to make redactions from a dataset, and continuously learn from that dataset, there are some that have pointed to the more concerning ability of AI to predict outcomes, or even likely words behind redactions.[12] For example, generative AI may be trained on a dataset of documents in a due diligence, FOI request, or discovery, with an ability to review and remember the information that far surpasses the possibility of what a human may be capable of, and use that dataset to predict (or generate) words behind redactions. This troublesome power of generative AI calls into question our ethical duties as practitioners, including our paramount duty to the court and administration of justice in both transactional and litigious work, as compared with our duty to act in the client's best interests.

With the concerning (or Frankenstinien) conceptions of generative AI, lawyers – and technology developers – must be clear on the ethical boundaries of using AI to ensure legal rules, rights and responsibilities are upheld. In doing so, generative AI users must satisfy themselves on the transparency and explicability in AI decision making. Legal institutions should also be aware of the possibilities of generative AI tools, and guard against their misuse at an individual and group level.

Client's best interests

In a similar vein, there may be circumstances where a solicitor might not – or might – be acting in their client's best interests by using generative AI.

There are a multitude of well-discussed reasons why using generative AI would not be in a client's best interests, and which risk becoming banal to outline in this article. Cases involving nuanced or new interpretations of the law, or weighty social or moral considerations would inherently be limited by AI, which is limited by its pattern recognition from past data, and may also struggle to account for subtle context, moral considerations, or in-person experience (such as in-court advocacy). Matters requiring levels of emotional intelligence would also be inappropriate for use of generative AI. In these cases, using generative AI without sufficient human oversight or involvement from an experienced legal professional could lead to inappropriate, risky, or disastrous outcomes for a client, and for justice generally.

However, for interest's sake, and recognising the limitations inherent with generative AI in some legal areas, there may be cases where using AI might be appropriate, and that by adopting those technologies, a lawyer might be bound to adopt AI to act in their client's best interests.

For matters involving massive tranches of contracts, emails and records, generative AI is already being used in WA to rapidly process, analyse and compare documents far more efficiently than human lawyers, leading to lower costs and faster turnaround for clients. Generative AI can also be used to point our weaknesses in legal reasoning, or in providing practical examples of legal problems that may arise from certain drafting.

From a non-litigious point of view, generative AI might also be used in the client's best interests, to independently manage a contract's lifecycle, for example by generating and reviewing contracts (or contractual entitlements and claims) following an organisation's instructions, and allowing for a more nuanced overview from human reviewers, or allowing a fully informed client to make a quick commercial or risk-based decision based on generative AI.

Where to from here?

This article does not comment on whether solicitors should currently adopt generative (or other forms of) AI for these purposes, or whether the current technology is up to scratch. However, considering the developing sophistication in legal AI technologies, there may come a time when it might not only be ethically appropriate for lawyers to use (generative) AI, but where lawyers are ethically obligated to do so.

Ensuring AI's alignment with core ethical duties of competence, confidentiality, and duties to the court and the administration of justice, requires solicitors to have knowledge of AI capabilities and restraints. As AI systems become more sophisticated, and in some respects continue to lack transparency in resources or data consulted, reasoning processes and the production of results, legal professionals must remain vigilant when balancing ethical duties. Perhaps the only way for solicitors to be fully able to understand the ethical boundaries of using AI, is to have experience with the tools themselves, and to ward off becoming unskilled or outdated in a changing legal environment.

Ultimately, the ethical integration of AI should be viewed not simply as an obstacle, but as a catalyst for legal professionals to reaffirm their role to uphold justice in society. Striking this balance thoughtfully will determine generative AI's potential to best serve justice in our legal practice.[13] ■

Endnotes

1. See, for example: Legal Practitioners' Liability Committee, 'Limitations and risks of using AI in legal practice' (17 August 2023), available from: https://lplc.com.au/resources/lplc-article/limitations-risks-ai-in-legal-practice; and Michael Pelly, 'Lawyers warned on goldilocks regulation of AI, *Australian Financial Review* (20 July 2023), available at https://www.afr.com/companies/professional-services/lawyers-warned-on-goldilocks-regulation-of-ai-20230711-p5dne4.
2. See Euan Black, 'What this law firm learnt from experimenting with AI', *Australian Financial Review* (10 April 2024), available at: https://www.afr.com/work-and-careers/workplace/what-this-law-firm-learnt-from-experimenting-with-ai-20240408-p5fi2k; Ben Abott, 'Legal AI is taking off in Australia and could shake up the private practice legal market', *TechRepublic* (8 March 2024), available at: https://www.techrepublic.com/article/australian-legal-profession-adapting-ai/#:~:text=Law%20firms%20are%20trialling%20AI,lawyers%20to%20more%20complex%20matters; and Euan Black '"Get the job done": One in two lawyers use AI', *Australian Financial Review* (16 April 2024), available at: https://www.afr.com/work-and-careers/workplace/get-the-job-done-one-in-two-lawyers-use-ai-20240415-p5fjz0?utm_content=INTRODUCTION&list_name=933E667E-5EA7-4F07-AB04-91B0FB8A68E3&promote_channel=edmail&utm_campaign=afr-legal-brief&utm_medium=email&utm_source=newsletter&utm_term=2024-04-19&mbnr=MjMwOTMxMDc&instance=2024-04-19-06-00-AEST&jobid=30403162.
3. See H Surden, 'Artificial Intelligence and Law: An Overview', *Georgia State University Law Review* (vol 35, issue 4) 2019, pp 1328 – 1332.
4. AWS, 'What is Generative AI?' https://aws.amazon.com/what-is/generative-ai/#:~:text=Generative%20artificial%20intelligence%20(generative%20AI,images%2C%20videos%2C%20and%20music.
5. The author acknowledges the obvious and incontrovertible effect of new AI technologies on the profession and society (including agentic AI, large language models), and merely intends to comment here that the profession has never been totally immune from technological developments changing the dominant methods of practice. Take online document review or legal research as examples.
6. The Queensland Law Society's Guidance Statement 'No. 37 Artificial Intelligence in Legal Practice' available at https://www.qls.com.au/Guidance-Statements/No-37-Artificial-Intelligence-in-Legal-Practice (accessed 25 June 2024) aims to provide a "standard of good practice", though the Statement does not directly deal with the practical capabilities of Generative AI currently and how it may be used rightly or wrongly in practice.
7. *Gianarelli v Wraith* (1988) 165 CLR 543, 578 (Brennan J).
8. *Re Gruzman* (1968) 70 SR (NSW) 316, 323.
9. See *Hoe v Manningham City Council* [2011] VSC 37 [5]-[6] and surrounding discussion in
10. M Warren AC, *The Duty Owed to the Court: The Overarching Purpose of Dispute Resolution in Australia* (revised paper delivered by the Hon. Marilyn Warren AC, Chief Justice of Victoria at the Bar Association of Queensland Annual Conference, Gold Coast, 6 March 2011), at 4, available at https://www.supremecourt.vic.gov.au/about-the-court/speeches/the-duty-owed-to-the-court-the-overarching-purpose-of-dispute-resolution-in (accessed 25 June 2024).
11. *A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd* [2009] VSCA 208 [15].
12. We have seen open source conversations online pointing to the ability of Generative AI to predict redacted portions of documents produced on an OpenAI webpage regarding the relationship between Elon Musk and Open AI in https://openai.com/index/openai-elon-musk/ (accessed 26 June 2024).
13. This article was drafted with thanks to discussions and review by Matthew Blycha.