

Lawyers' Ethics and the use of Artificial intelligence in Legal Services

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New technology, such as artificial intelligence (AI), is driving change in society and business. AI's advancement also impacts on legal practice, not just through efficiencies and profitability, but also through the ethical duties of lawyers. Ethical responsibilities both limit and require the use of AI. Lawyers need to be able to use AI tools to be able to discharge their duties of competence and acting in the best interest of clients. AI tools may also facilitate access to justice. AI also creates risks when it comes to maintaining confidentiality, legal professional privilege, and independence.

What is Artificial Intelligence?

AI, as a term or field of computer science, is employed where processes are used to carry out tasks which, if performed by a human, would be seen as evidence of intelligence – i.e. the processes mimic, imitate or simulate intelligence. AI is also an umbrella term. There are different branches of AI as shown by figure 1. This article focuses on the branches of AI relevant to legal practice, namely expert systems, machine learning and Natural Language Processing (NLP).

In brief, expert systems, the oldest and most simple form of AI, are pre-

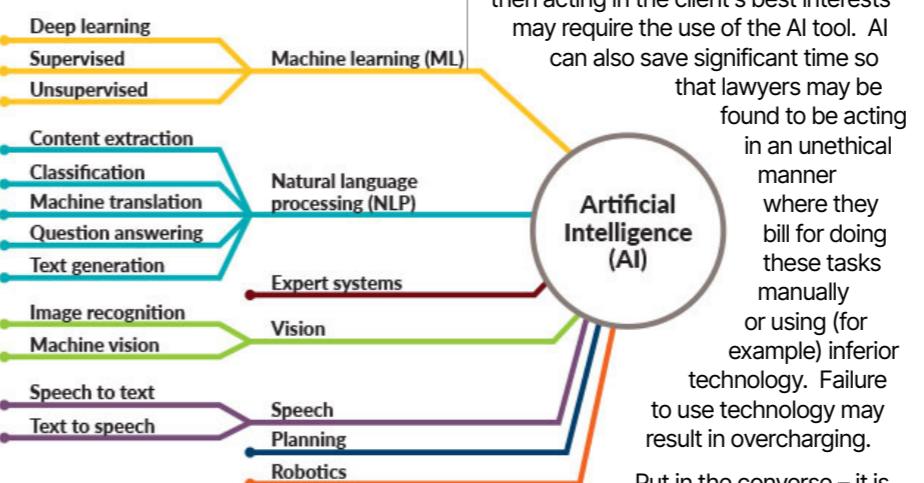
programmed systems which can guide users through a sequence or series of steps, similar to a decision tree. The system involves obtaining and deconstructing human expert knowledge into a computable form that can then be accessed more cheaply and widely. Machine learning refers to data-driven programs which use pattern recognition in data and statistics to produce their outputs. There are three types of machine learning. In supervised learning, the data is already labelled (for example, a picture is labelled as a dog or a cat), and the program is trained on that data to identify associations between

the data and the labelled outcome, or classification. The program can then classify new data. Unsupervised learning involves no labelling, instead the software searches for patterns in the data it is provided. Instead of telling the software which are pictures of cats and which are not, until it learns the difference, it is given enough pictures to discern the pattern itself.

Deep learning or neural networks are designed to replicate the architecture of the human brain. Neuroscience hypothesises that the brain functions via electrochemical activity in networks of brain cells called neurons. Neural networks consist of millions of hidden layers of nodes and connections. A node receives information from a number of other nodes, and depending on the weighting given to that information, transmits further information to another node. Neural nets can also 'learn' – for example by using backpropagation, a method by which, when told its outputs are erroneous, a system can work back through the layers, adjusting the weights, until a better answer is reached.

NLP is usually a form of neural network that uses statistics to work out the probability of words appearing next to one another. It allows computer programs to obtain knowledge from large collections of unstructured text – such as found on the internet – and produce answers to questions.

Figure 1 – Types of Artificial Intelligence



Source: Michael Mills, 'Artificial Intelligence in Law: The State of Play' (Thomson Reuters, 2016) 3.

Duty to the Client

Rule 4 in the Legal Profession Uniform

Law Australian Solicitors' Conduct Rules 2015 ("Solicitors' Conduct Rules") requires that a solicitor "act in the best interests of a client in any matter in which the solicitor represents the client". The duty to the client is typically characterised by requirements of loyalty, partisanship and acting in the client's best interests. The lawyer is required to put the client's interests before their own, although the lawyer is permitted to charge a fee for the services they provide.

AI may improve the quality and/or efficiency of the lawyer's work. This can mean a better result for the client. AI can assist the lawyer in promoting the client's interests by bringing about the outcome the client seeks – resolving a dispute or bringing a transaction to successful completion.

A long-standing use of AI in legal practice is technology assisted review (TAR), which is a form of machine learning, employed in discovery or due diligence. Just as a machine learning program can eventually successfully label a not-previously seen picture of a cat as a cat, TAR, once trained by a lawyer as to what is a relevant document, can also identify which documents in the discovery or due diligence are relevant.

Research studies have found TAR to be more accurate and less expensive than human review for large scale discovery. If TAR aids in finding the key documents in litigation or as part of a due diligence, then acting in the client's best interests may require the use of the AI tool. AI can also save significant time so that lawyers may be found to be acting in an unethical manner where they bill for doing these tasks manually or using (for example) inferior technology. Failure to use technology may result in overcharging.

Put in the converse – it is not in the client's interest to conduct representation in a way that is incomplete or takes more time and cost because the lawyer cannot use readily available technologies.

By way of further illustration, Chief

Justice Quinlan, in addressing the discovery of categories of documents from an electronic database containing approximately 29,000 documents, observed:

"it would be unrealistic to think that the discovery process in a case such as this will be conducted by way of a manual examination, by the client and its solicitor, of each and every document unaided by technology. The reality is that the discovery process in this case will involve a combination of solicitor, client and algorithm."

Competence

Rule 4 in Solicitors' Conduct Rules also provides that a solicitor must "deliver legal services competently, diligently and as promptly as reasonably possible". Competence may be defined as having knowledge of the law and being able to use the law (both substance and procedure) with skill to solve problems. It refers to technical proficiency. It also involves effectiveness and efficiency – the rule refers to diligence and promptness – which includes achieving an outcome in a timely and cost effective manner.

The impact of technology on the functioning of law and the legal profession was highlighted by the American Bar Association ("ABA") when it approved changes to its Model Rules of Professional Conduct. A comment was added to rule 1.1 (Competence) to make clear that lawyers have a duty to be competent not only in the law and its practice, but also in technology. A majority of US States have adopted the comment (Comment 8) which provides:

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.

In jurisdictions outside the US where there is no specific rule or commentary addressing technology, such as Western Australia, the general requirement of competence may nonetheless be viewed as including competence with technology. Just as lawyers need to keep up with changes in the law, lawyers need to keep up with changes in technology. This argument can be made



on the basis that it is not possible to carry out competent legal representation without being able to use relevant technology.

A straightforward example is legal research before and after the rise of electronic databases, the internet and various forms of search – keywords, connectors (ie AND, OR) and natural language. The way a lawyer finds the law has changed and with it the way a lawyer must think about finding the law. The lawyer who relies only on the textbooks, legislation and case law (including citators) physically in their office cannot be as comprehensive as the lawyer with access to online databases. However, the effectiveness of using those online databases requires knowledge of how to search.

Another example is TAR. TAR is a highly technical exercise. It involves an array of methodological choices, such as seed set selection strategies, choices among "learning protocols" and evaluation of performance metrics. The use of TAR in discovery is addressed by the Supreme Court of Victoria's Practice Note SC Gen 5 Technology in Civil Litigation. The Practice Note states that "the use of common technologies is a core skill for lawyers and a basic component of all legal practice". Equally, the use of AI is not "set and forget". The AI is not autonomous. The lawyer has important roles in supervising and interrogating the outputs from TAR. As Chief Justice Quinlan observed:

"Even with the use of text search programs, it is necessary that solicitors and clients be actively involved in order to satisfy themselves that appropriate searches and inquiries have been conducted."

A more recent use of AI is generative

AI, exemplified by Chat-GPT, which uses a neural network trained on a huge corpus of text written by humans, the internet, with feedback from humans and adjustments to the weights in the network to minimize error. Put simply, generative AI does not just perceive and classify a photo of a cat, but can create an image or text description of a cat on demand. Generative AI can be used for legal work as shown by Allen & Overy's law-focused tool "Harvey" which can be used to generate answers to questions about the law, draft documents and messages to clients. A concern with current generative AI is its tendency to confidently make things up—or "hallucinate." Consequently Allen &

Overy has a risk management program around the use of Harvey. Users who log in to Allen & Overy's Harvey portal receive a list of rules for using the tool, including validating outputs. Harvey can generate great efficiencies, but a lawyer still needs to check the output to make sure it is accurate.

Competence may also be required so as to allow a lawyer to challenge or interrogate AI tools. A particular concern for civil liberties and the administration of justice is the use of algorithmic risk assessments in the criminal justice system in relation to bail applications or sentencing, and in being able to challenge incorrect administrative uses of AI, which may be illustrated by Robodebt.

What does competence mean in relation to technology? It is the lawyer being able to:

- choose technology that is fit for purpose;
- use the technology correctly, including understanding its outputs;
- understand the risks associated with

- technology;
- challenge or interrogate technology.

Importantly – lawyers can get help. They can retain experts, such as third party providers of TAR, to assist them in using relevant technology to provide representation. They can undertake training, including as part of continuing professional development, to learn how technology functions as well as its limitations.

Confidentiality and Legal Professional Privilege

Rule 9 of the Solicitors' Conduct Rules states that a solicitor must not disclose a client's confidential information acquired by the solicitor during the client's engagement, subject to specified exceptions.

Relatedly, legal professional privilege protects from disclosure confidential communications between a client and his or her lawyer, made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.

The issue of technology and confidentiality has been considered in a number of contexts, namely the use of mobile phones, email, wireless technologies (such as public wifi) and data storage in the 'cloud'. It also arises in relation to AI.

The issue in relation to AI, notably machine learning, is that it needs data to be able to function. Client (or law firm) communications, including electronic versions of documents, may need to be analysed by the program as part of its training.

Machine learning applications generally require a high volume of data in order to be trained, so the status of this data must be clarified in order to maintain its confidentiality. For example, an AI product can be used to cite check a memorandum of law or court submissions to ensure that cases have not been over-ruled or questioned, and to suggest additional cases. The draft advice or submissions are confidential and privileged. However, for the AI product to perform its function the draft and confidential memo/submission must be accessed by the program.

Another example would be the use of natural language processing in relation to speech. The AI product will need to be given the recorded speech to

convert it to written text. This then raises a number of questions: Are the recordings being saved? If so, who owns them or has access to them? Are the recordings being used for AI improvement? What security measures are in place? If the recording contains confidential or privileged information the lawyer needs to obtain assurances that the recording will remain confidential and not be disseminated. Indeed, it would be prudent to go further and require that the recording be deleted after it has been converted to text.

A lawyer may be tempted to try and avoid technology because of confidentiality concerns. However, this has to be weighed with the duty of competence and the duty to the client.

Independence

Independence is the ability to act and to exercise judgment free from external pressure. Professional independence is typically discussed in relation to different pressures upon lawyers – commercial interests, pressure from more senior colleagues or employers, and from clients. Independence can mean independence from a client seeking to influence advice, i.e. maintaining a detached or objective state of mind. At other times it can mean independence from the pressures and influences of others who might compromise lawyers' loyalty to clients.

The Uniform Law rule 4.1.4 specifies that solicitors must 'avoid any compromise to their integrity and professional independence'. Moreover in relation to advocacy, rule 17.1 states that the lawyer "must not act as the mere mouthpiece of the client".

A challenge for lawyers' use of artificial intelligence is whether it amounts to 'outsourcing', even if on a small scale, and could compromise a lawyer's independent judgment. Arguably, if lawyers are overly reliant on an AI program – for example, to tell them about precedent cases, to search for relevant documents in discovery, or even to predict the outcome of litigation – they are not exercising independent professional judgment. The concern is 'automation bias' - the tendency for humans to trust that processes which are automated are also more reliable.

In response it is suggested that lawyers should supervise AI systems as they would their junior legal staff. Indeed this is the approach in the US in relation to complying with the competence

requirement discussed above. Yet this is complicated by the fact that lawyers may not be able to independently evaluate the functioning of the software due to their own lack of technical knowledge, which is quite different to supervising a junior lawyer. There is also the lack of transparency in a system's functioning, or the fact that no one (even its developers) may fully understand how its outputs were generated. For example, Chat-GPT has about 400 (core) layers, with millions of neurons and 175 billion connections. It may be difficult or even impossible for lawyers to understand how the technology is functioning. However, not all AI is unable to be tested. For generative AI this means verifying the output as accurate. The supervised machine learning used in TAR is able to be tested using statistical sampling.

AI is an assisting tool for lawyers not a replacement for the lawyer or their judgment.

Access to Justice

A lawyer has an ethical duty to facilitate access to justice. As the main possessors of legal knowledge and skills, and with a monopoly on exercising these, lawyers have a key role to play in ensuring access to the justice system, commonly through pro bono representation. The Solicitors' Conduct Rules do not address access to justice expressly, but it is nonetheless recognised as an ethical duty. The former Chief Justice of the Australian High Court, AM Gleeson has explained that:

The legal profession is a profession and not only a business; that its members have a duty to temper their pursuit of individual self-interest; and that they have a collective obligation to do their best to make legal services available to needy people. Collectively, this is a matter of duty, not generosity.

The duty to facilitate access to justice may be met through AI. At the individual lawyer level and at the profession level there is scope for AI systems to be used to assist those that cannot afford legal services to obtain advice, the drafting of documents and dispute resolution services. An AI product once created can be used repeatedly without additional cost or effort. Expert systems and chatbots have been deployed to provide basic legal information and to assist those with disputes to commence proceedings and attempt some form of alternative dispute resolution.

However, it is also likely that lawyers will still have a role to play in supporting the person during or after the use of the AI-provided service or product, depending on the complexity of the problem or what is at stake. Products might also help lawyers to work more efficiently and reduce their fees.

Conclusion

It is arguably no longer a question about whether lawyers should use technology but rather exactly what technology they should choose and the degree of knowledge they should have. Lawyers do not need to be experts in AI but adherence to the Solicitors' Conduct Rules requires them to at least know what they do not know and take steps to address a lack of knowledge. ■

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Michael's main research interests are the civil justice system, class actions, litigation funding, the public and private enforcement of securities laws and the interaction between technology, innovation and the legal profession. His research has been cited in Australian and overseas court judgments and law reform reports.

He has written extensively on litigation and dispute resolution and is the author of *Case Management and Complex Civil Litigation* (2nd ed 2022) and *Public and Private Enforcement of Securities Laws* (2022).

Endnotes

1 For a more detailed description of the various forms of artificial intelligence see Legg M and Bell F, *Artificial Intelligence and the Legal Profession* (Hart, 2020) and Bell F, Bennett Moses L, Legg M, Silove J and Zalnieriute M, *AI Decision-Making and the Courts* (AJA, 2022).

2 Legg M, *Case Management and Complex Civil Litigation* (Federation Press, 2nd ed 2022) 118-124.

3 See Grossman M and Cormack G, 'Technology-Assisted Review in E-Discovery Can be More Effective and More Efficient than Exhaustive Manual Review' (2011) 17 *Richmond Journal of Law & Technology*.

4 MAEK Pty Ltd v Ibrahim [2022] WASC 285 at [22].

5 Supreme Court of Victoria, *Practice Note SC Gen 5 Technology in Civil Litigation*, 29 June 2018, [4.3].

6 MAEK Pty Ltd v Ibrahim [2022] WASC 285 at [22] citing *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666 [1380].

7 Wolfram S, "What is ChatGPT doing ... and Why does it work?", *Writings*, 14 February 2023.

8 "A&O announces exclusive launch partnership with Harvey", Allen & Overy, 15 February 2023 and Stokel-Walker C, "Generative AI is Coming For the Lawyers", *Wired*, 21 February 2023.

9 Refer note 7 (nothing except the overall architecture is "explicitly engineered"; everything is just "learned" from training data.)

10 Gleeson A, 'Opening Speech', National Access to Justice and Pro Bono Conference, Melbourne, 11 August 2006, 5.