ETHICAL CONSIDERATIONS INVOLVING THE USE OF ARTIFICIAL INTELLIGENCE IN LEGAL PRACTICE

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By: Fred Wagner, Jacobs

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# WHAT IS ARTIFICIAL INTELLIGENCE (AI)?

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AI reviews vast quantities of data and analyzes that data for patterns. It then uses those patterns to make predictions about the future.

Predictions can take the form of text, images, music, or other media.

Major advances with multiple AI tools: Claude, Meta AI, Google Gemini, Co-Pilot, Chat GPT, and dozens of others.
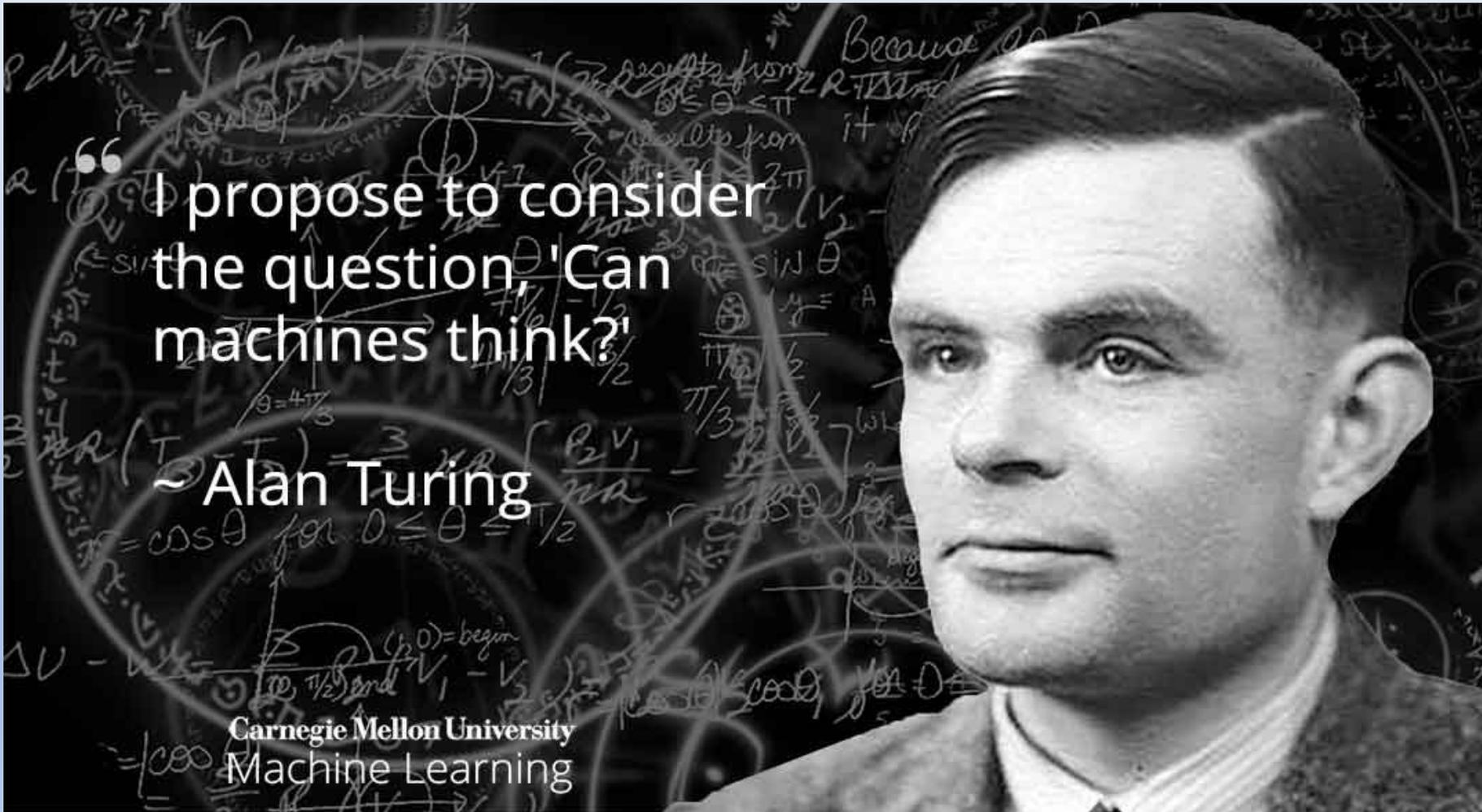
"GOOD MORNING, GARY! WOULD YOU LIKE TO PLAY A GAME?"

THE "TURING TEST": CAN A COMPUTER THINK LIKE A HUMAN?

- 1950 test attempted to determine if a computer can mimic human responses under specific conditions.

- Interrogator is separated from a person and a computer and asks questions; goal of the "test" is whether the interrogator can correctly identify which is the human and which is the machine.

- Turing predicted that in about fifty years (2000!), the average interrogator will not have more than a 70 percent change of making the correct identification after five minutes of questioning.

- How Have Lawyers Already Used AI?
  - Legal research using search terms
  - e-discovery document management
  - Litigation risk/jury selection
  - Locating "hot docs" and organizing witness testimony
  - Client Intake

ADVANTAGES/ DISADVANTAGES OF USING AI IN LEGAL PRACTICE

- Accuracy

  - Efficiencies (but see "accuracy" bullet point)

    - Improved access to Justice

      - Allows attorneys to focus on more sophisticated legal issues

UNSETTLING INCREASE IN SANCTIONS

- **Fletcher v. Experian Info Solutions (Fifth Circuit, Feb. 2026); $2500 fine; ignorance of AI risks is not an excuse**

- **California State Court Appeal (Oct. 2025); $10,000 (highest fine to date); 21 of 23 quotes in brief found to be fabricated**

- **Lacey v. State Farm (Sept. 2025); $31,000 in fines to prominent law firms**

- **Wisconsin Felony Dismissals (Feb. 2026); rampant AI errors led to dismissal of dozens of felony charges**

…EVEN FEDERAL COURT JUDGES!

Per the Washington Post:

Federal District Court judges in New Jersey and Mississippi admitted in letters to the Senate Judiciary Committee that their chambers created inaccurate court orders, including false citations and party names. The judges attributed mistakes to a law clerk and law school intern.

[Federal judges blasted for filing court orders with AI-generated errors - The Washington Post](#)

ADVANTAGES/ DISADVANTAGES OF USING AI IN LEGAL PRACTICE

- Biases of machine learning
- Data security concerns
- Moral Judgments

THE MODEL RULES AND AI

- No new rules proposed to address use of AI in legal practice; applicability of existing rules

- ABA Formal Opinion 512, July 29, 2024

- State actions; as many as 30 states have issued formal guidance, with more on the way

MODEL RULES OF PROFESSIONAL CONDUCT – RULE 1.1

Competence

"A lawyer shall provide competent representation to a client. Competent representation requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

COMMENT 8 to RULE 1.1 (adopted 2012)

"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."

MODEL RULES OF PROFESSIONAL CONDUCT 1.1 (CONT.) "COMPETENCE"

"Judicial officers must maintain competence with advancing technology, including but not limited to artificial intelligence." State Bar of Michigan, Standing Committee on Professional and Judicial Ethics, Opin. No. JI-155 (10-27-23).

ABA FORMAL OPINION PRINCIPLES

- Attorneys need not become experts, but should obtain a "reasonable understanding of the benefits and risks of AI tools…"

- Competence is not a "static undertaking"

- Appropriate amount of "independent verification" depends on the AI tool used

- But "competent legal service" may also require awareness of and use of different AI tools

PRACTICE POINTERS

BLISSFUL IGNORANCE WILL NOT BE ACCEPTABLE – SOME LEVEL OF UNDERSTANDING IS REQUIRED

Training, individually and as an organization, may be required

What you don't know can hurt you – understand how your organization may be using or is planning to use AI

MODEL RULES OF PROFESSIONAL CONDUCT – RULE 1.4

COMMUNICATIONS

- "(a) A lawyer shall… reasonably consult with the client about the means by which the client's objectives are to be accomplished."

- Informed consent includes Confidentiality. If the tool is self-generating, Client information will be used/available to benefit future users, which may include adversaries and competitors.

ABA FORMAL OPINION PRINCIPLES

- Consistent with Rule, attorney may be required to disclose or in some instances, may be required to obtain informed consent

- Examples provided include when attorney inputs client data to an AI tool, or when AI is used to make a "significant decision in the representation"

- Disclosure may relate to client expectations of attorney's exercise of professional judgment v. use of AI tools (jury selection, claim evaluation)

PRACTICE POINTERS

ETHICAL OBLIGATIONS ADDRESS BOTH NEGATIVE AND POTENTIALLY POSITIVE USES OF AI

Clients read newspapers too! They will have questions and/or expectations

Should this be standard engagement letter communication in any matters involving litigation?

MODEL RULES OF PROFESSIONAL CONDUCT – RULE 1.5

- Will the rules governing the reasonableness of an attorney's fee implicate the use (or non-use) of AI technologies?

- Factors involved in determining the reasonableness of a fee:
  - time and labor required
  - novelty and difficulty of the questions involved
  - skill required to perform the legal services properly

- *See* Rule 1.5(a)(1)-(3).

ABA FORMAL OPINION PRINCIPLES

- Applicability of ABA Formal Ethics Opinion 93-379

- Modification of flat fee arrangements could be required if attorney uses AI tools for certain tasks

- AI tools as a "disbursement" or legal expense (like Westlaw research)

- Overhead v. other cost – is use of AI "equipping and maintaining" a legal practice?

- Billing for attorney training is generally not permissible

MODEL RULES OF PROFESSIONAL CONDUCT – RULE 1.6

Confidentiality of Information

- 1.6(c): "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

- Harder principle to grasp in the context of AI. It involves coordination with and supervision of third-party vendors assisting with the management and analysis of client data.

ABA FORMAL OPINION PRINCIPLES

- Every AI is different; inquiries must be made to understand how information is used in response to future prompts

- Informed disclosure particularly important to comply with this rule

- Fact-specific inquiry depending on the AI tool used

- Disclosure of confidential information may be inadvertent; attorneys should be aware of inadvertent disclosure, even inside a law firm ("closed" AI tool)

PRACTICE POINTERS

More detailed discussions with third-party vendors are likely required

Data protection may need to be incorporated into contracts for services

Liability concerns for unauthorized uses of data or breaches?
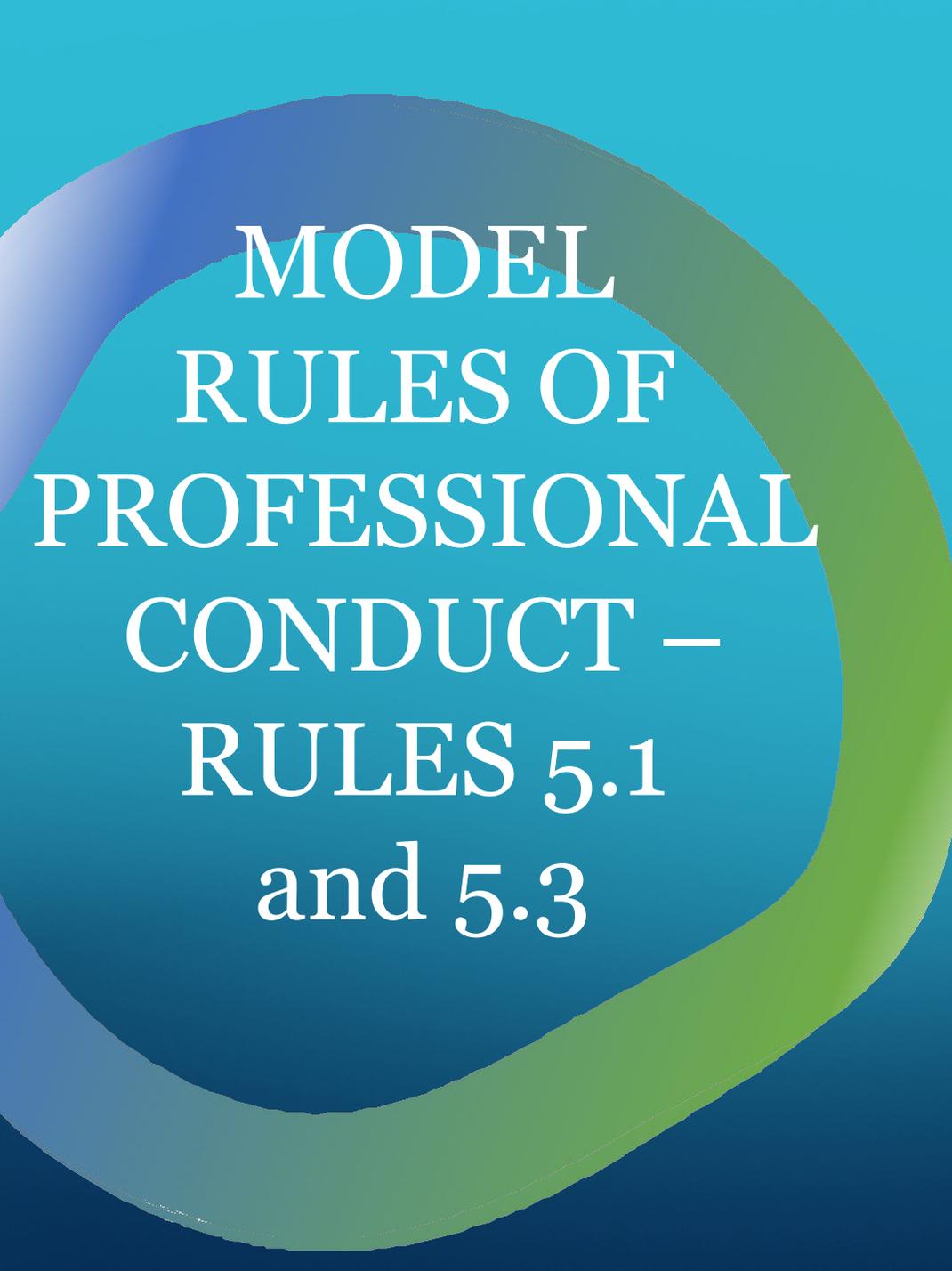
MODEL RULES OF PROFESSIONAL CONDUCT – RULES 5.1 and 5.3

- Responsibilities of a Partner or Supervisory Lawyer and

- Responsibilities Regarding Nonlawyer Assistance

- NOTE: 2012 Amendment to Rule 5.3, changing word in title from "Assistants" to "Assistance". Amendment intended to clarify that the rule covers non-lawyer, human or not!

RULE 5.3 TEXT

With respect to a nonlawyer employed or retained by or associated with a lawyer:

a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

b) 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 obligations of the lawyer;

ABA FORMAL OPINION PRINCIPLES

- Supervision includes the responsibility to require training

- Senior attorneys must exercise independent oversight; responsibility for any shortcomings will fall to the attorney, even if work was performed by a junior attorney or non-attorney

- Supervision becomes more complicated with use of third-party vendors

Unauthorized Practice of Law

"(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction."

STATE BAR ACTIONS

- Florida Bar Board of Governors' Review Committee on Professional Ethics issued Advisory Opinion 24-1 (January 19,2024) regarding lawyers' use of generative AI, to provide guidance to Florida Bar members as to some of the ethical implications of these new programs.

WHETHER USING AI AMOUNTS TO THE UNAUTHORIZED PRACTICE OF LAW

- *Lola v. Skadden, Arps*, 620 Fed. Appx. 37 (2d Cir. 2015)
  - o Contract attorney's claim for overtime under the Fair Labor Standards Act for document review tasks
  - o Appellate court reverses trial court, holding that the "practice of law" reflects, at least in part, "the exercise of at least a modicum of independent legal judgment." *Id*. at ____.
  - o Remanded matter to trial court to determine whether the document review services were those that a machine could have provided.

WHETHER USING AI AMOUNTS TO THE UNAUTHORIZED PRACTICE OF LAW

- *Janson v. LegalZoom.com, Inc.*, 802 F.Supp.2d 1053 (W.D. Mo. 2011)

  o Selling general instructions to accompany blank forms over the internet would NOT be engaging in the unauthorized practice of law.

  o However, LegalZoom's services went beyond that because of the role human employees play in providing the customer assistance at numerous stages of the process.

  o Where is the line to determine whether a machine is replacing human judgment?

ADDITIONAL REFERENCES

- Yamane, Nicole, "Artificial Intelligence in the Legal Field and the Indispensable Human Element Legal Ethics Demands," 33 Georgetown Journal of Legal Ethics 877 (2020)

- Cerny, Delchin, and Nguyen, "Legal Ethics in the Use of Artificial Intelligence," Squire, Patton, Boggs (2019)

- Villasenor, John, "How AI Will Revolutionize the Practice of Law," Brookings Institute, March 20, 2023

- Lat, David, "The Ethical Implications of Artificial Intelligence," Above the Law, December 27, 2023

- Florida Bar Advisory Opinion 24-1, "Regarding Lawyers' Use of Generative Artificial Intelligence," January 19, 2024