

Artificial Intelligence in the Legal Field and the Indispensable Human Element Legal Ethics Demands

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INTRODUCTION

Over the last decade, artificial intelligence (“AI”) has grown increasingly advanced, and numerous industries have incorporated AI programs into their operations. The use of AI is finally beginning to permeate the legal field as well, bringing change to the practice of law.¹ Many of these changes are positive as the use of advanced AI programs has the potential to both improve the quality of legal services and increase individual access to justice.²

The use of AI in the legal field, however, also invokes many legal ethics concerns. Because the *Model Rules of Professional Conduct*, which serve as ethics guidelines for legal practitioners, were written far before advanced AI programs existed,³ their governance over such programs remains unclear. Nonetheless, it is important to establish how to use AI programs ethically because they will likely play an increasingly important role in the legal field, especially in the context of legal research, legal forms, and contract review. Specific concerns about the duty of lawyers to provide competent representation to clients and AI programs not to engage in the unauthorized practice of law are especially relevant to the use of AI in the legal field.

In exploring the ethical implications of the use of AI in the legal field, this Note will argue that as long as lawyers use AI to augment rather than replace their work and AI programs that do not involve human attorneys refrain from giving legal advice, AI can be an effective tool to improve the quality of legal services and increase individual access to justice while operating well within the parameters of legal ethics. There should always be a human element to the work of lawyers to ensure that lawyers are upholding their ethical obligations to clients.

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1. David Lat, *The Ethical Implications of Artificial Intelligence*, ABOVE THE LAW (Feb. 21, 2020, 4:48 PM), <https://abovethelaw.com/law2020/the-ethical-implications-of-artificial-intelligence/> [https://perma.cc/KV7Q-DSYK].

2. *Id.*

3. MODEL RULES OF PROFESSIONAL CONDUCT: ABOUT THE MODEL RULES (2009), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ [https://perma.cc/QLF3-EPSR] (“The ABA Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983.”).

This Note will proceed in four parts. Part I will define AI in the context of the legal field and provide background information on some of the AI programs currently in use in the legal field, including advanced legal research platforms, self-help legal applications, and contract review systems. Part II will explain how AI can be used to improve the quality of legal services and the ethical implications that flow from this benefit. Part III will discuss how AI can be used to increase individual access to justice and the accompanying ethical concerns. Finally, Part IV will summarize why the use of AI to completely replace the work of a human lawyer would be unethical.

I. AI IN THE LEGAL PROFESSION DEFINED AND CURRENTLY USED PROGRAMS

AI has been defined in several ways over the course of its existence, but generally AI is “the capability of a machine to imitate intelligent human behavior.”⁴ This includes “recognizing speech and objects, making decisions based on data, and translating languages.”⁵ AI can mimic human intelligence in two ways: first, AI programs can be trained by data input, which historically was the only way AI programs could mimic human intelligence; second, more advanced AI programs can learn on their own through trial and error.⁶

While the concept of AI has been around for a long time, the use of more advanced programs in the legal field is a recent development.⁷ AI’s start in the legal field was modest.⁸ There were only a handful of companies that developed AI programs tailored to legal work, and the program functions were generally confined to eDiscovery,⁹ contract review, and due diligence.¹⁰ Furthermore, originally the only entities using AI in the legal field were the largest law firms working on the biggest deals.¹¹

Over time, the uses for and developers and users of AI in the legal field expanded. Today, more companies are looking at how AI can be used

4. *Artificial intelligence*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/artificial%20intelligence> [<https://perma.cc/3ZBP-PLAJ>] (last visited Mar. 19, 2020).

5. Lauri Donahue, *A Primer on Using Artificial Intelligence in the Legal Profession*, HARV. J. L. & TECH. (Jan. 3, 2018), <http://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession> [<https://perma.cc/H65H-6A5A>].

6. *Id.*

7. Keith Mullen, *Artificial Intelligence: Shiny Object? Speeding Train?*, AM. BAR ASS’N RPTE EREPORT 2018 FALL ISSUE, https://www.americanbar.org/groups/real_property_trust_estate/publications/ereport/rpte-ereport-fall-2018/artificial-intelligence/ [<https://perma.cc/HCE7-WNWX>] (last visited Mar. 20, 2020).

8. *Id.*

9. E-discovery is the “discovery of records and documents (as e-mails kept in electronic form.” *E-discovery*, MERRIAM-WEBSTER LEGAL DICTIONARY, <https://www.merriam-webster.com/legal/e-discovery> [<https://perma.cc/JKT9-5S72>] (last visited Mar. 20, 2020).

10. Donahue, *supra* note 5.

11. Mullen, *supra* note 7 (“As recent as 2014, only a handful of companies pointed artificial intelligence (“AI”) at legal documents. For uses outside of eDiscovery, it was a narrow focus: contract reviews and legal due diligence – used by the largest of law firms on the grandest of deals.”).

successfully in the legal field, and AI is no longer only accessible to the wealthiest law firms. As of February 2018, the National Law Journal identified over fifty companies offering AI programs created for the legal industry.¹² AI can now be used for contract drafting, contract review, digital signature, legal and matter management, expertise automation, legal analytics, task management, title management, and lease abstracts.¹³ Smaller firms are also starting to rely on AI technology to help them compete in the legal market.¹⁴ Around “85 percent of lawyers at smaller law firms. . . have been using AI to level the playing field, diminishing or eliminating what were once the resource and staffing advantages at the bigger law firms.”¹⁵ As AI technology becomes more advanced, AI’s functions, producers, and user base will likely continue to grow.

A. ADVANCED LEGAL RESEARCH PLATFORMS

Legal research is one area in which AI has made significant advancements. Legal research has come a long way since the days when law students and associates needed to read through heavy casebooks to find relevant precedent. Today, most lawyers use online legal research platforms like LexisNexis or Westlaw that utilize AI technology. In recent years, even more advanced legal research platforms that incorporate more modern AI technologies have been developed.¹⁶

One example is ROSS Intelligence. ROSS Intelligence launched in 2018 and advertises itself as “the world’s first artificially intelligent attorney.”¹⁷ The program costs \$69 per month on an annual plan,¹⁸ and is being used by several big law firms including Baker Hostetler, Latham & Watkins, Jackson Lewis, and Dentons.¹⁹

The main way ROSS Intelligence differs from older legal research platforms like LexisNexis and Westlaw is in its ability to generate search results from natural language queries.²⁰ Westlaw and Lexis’ standard functions are only capable of generating search results based on keywords or Boolean searches. Boolean

12. *Id.*

13. *Id.*

14. Jake Heller, *Is AI the Great Equalizer For Small Law?*, ABOVE THE LAW (Aug. 15, 2018), <https://abovethelaw.com/2018/08/is-a-i-the-great-equalizer-for-small-law/> [<https://perma.cc/7UPA-CK4W>].

15. *Id.*

16. Nicole Black, *Lawyers have a Bevy of Advanced and AI-enhanced Legal Research Tools at their Fingertips*, ABA J. (Nov. 22, 2019), <https://www.abajournal.com/web/article/lawyers-have-a-bevy-of-advanced-and-ai-enhanced-legal-research-tools-at-their-fingertips> [<https://perma.cc/6FBS-U736>].

17. Matthew Griffin, *Meet Ross, The World’s First AI Lawyer*, 311 INST. (Jul. 11, 2016), <https://www.311institute.com/meet-ross-the-worlds-first-ai-lawyer/> [<https://perma.cc/89RH-C9M9>].

18. ROSS INTELLIGENCE, <https://rossintelligence.com/pricing.html> [<https://perma.cc/SU3E-J83F>] (last visited Apr. 16, 2019).

19. *Ross Intelligence Offers A New Take on Legal Research*, ABOVE THE LAW (May 29, 2019), <https://abovethelaw.com/2019/05/ross-intelligence-offers-a-new-take-on-legal-research/> [<https://perma.cc/9M9W-HUJ>].

20. Stergios Anastasiadis, *How is Natural Language Search Changing The Face of Legal Research?*, ROSS INTELLIGENCE BLOG (Apr. 8, 2019), <https://blog.rossintelligence.com/post/how-natural-language-search-changing-face-of-legal-research> [<https://perma.cc/7W83-CP6K>] (“ROSS’s natural language processing (NLP) allows lawyers to phrase their research queries the way they would phrase a question to a colleague.”).

searches are those that combine words and operators like “AND,” “OR,” and “NOT” to limit search results.²¹ Thus, when searching for cases on ROSS Intelligence, one would be able to simply enter a phrase or question like they would into Google’s search bar. ROSS Intelligence claims that natural language processing (“NLP”) will improve search results because a “query optimized with the help of NLP will surface the most accurate and relevant decisions because the system was assessed with the prior queries that yielded the best legal search results.”²²

After doing legal research, associates typically compile their findings into a legal memorandum or brief. Another more advanced function of ROSS Intelligence is that it is capable of generating such legal writings—ROSS Intelligence can draft legal research memoranda based on the search results it generates.²³ ROSS Intelligence can also evaluate legal writing.²⁴ In short, compared to older research platforms, newer programs such as ROSS Intelligence can perform more functions of a human lawyer.

B. LEGAL SELF-HELP APPS

In addition to becoming more advanced, AI programs have also become more widely accessible, especially through the legal self-help app market. One example of a legal self-help app is DoNotPay. DoNotPay was launched in 2016 by Joshua Browder who, at the time, was a nineteen-year-old college student who created the app to “help his family and friends challenge their [parking] tickets.”²⁵ The app gained popularity, had its capabilities expanded, and now touts itself as “The World’s First Robot Lawyer.”²⁶

The app is free to download and currently enables users to file a claim in any small claims court in the country, acquire green cards and visas, fight credit card fees, sue tech companies for data breaches, and, of course, fight parking tickets.²⁷ To use the app, users must simply answer a few questions relevant to their

21. Shauntee Burns, *What is Boolean Search?*, N.Y. PUB. LIBR. (Feb. 22, 2011), <https://www.nypl.org/blog/2011/02/22/what-boolean-search> [https://perma.cc/TJF7-8STF].

22. Anastasiadis, *supra* note 20.

23. Andrew Arruda, *Andrew Arruda, CEO of Ross Intelligence, Discusses AI in the Legal Profession*, NORTHWESTERN PRITZKER SCH. L.: NEWS (Nov. 10, 2017), <http://www.law.northwestern.edu/about/news/newsdisplay.cfm?ID=892> [https://perma.cc/V8YB-WRUH] (“One of Ross Intelligence’s most exciting capabilities may be that it can automatically write a legal memo from the selected results.”).

24. “Casetext, ROSS Intelligence and Judicata have launched tools that use AI to analyze briefs, helping to identify missing cases or the strongest arguments.” Ed Walters, *AI Practice, Not Promise, in Law Firms*, ABA L. PRAC. MAG.: TECHSHOW ISSUE (Jan. 1, 2019), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2019/january-february/JF2019Walters/ [https://perma.cc/SL5C-DHK8].

25. Julie Fishbach, *Coder, 19, Builds Chatbot That Fights Parking Tickets*, NBC NEWS (Jul. 21, 2016), <https://www.nbcnews.com/feature/college-game-plan/coder-19-builds-chatbot-fights-parking-tickets-n612326> [https://perma.cc/UEN7-DBAM].

26. *Id.*

27. Steph Wilkins, *DoNotPay Is the Latest Legal Tech Darling, But Some Are Saying Do Not Click*, EVOLVE THE LAW: ATL’S LEGAL INNOVATION CTR. (Oct. 12, 2018), <https://abovethelaw.com/legal-innovation-center/2018/10/12/donotpay-is-the-latest-legal-tech-darling-but-some-are-saying-do-not-click/> [https://perma.cc/NSZ5-F2XF].

claim.²⁸ The app then takes their answers to automatically fill out legal forms that can be sent directly to the necessary recipient.²⁹ Since its launch, the app has successfully reversed 160,000 parking tickets.³⁰ Furthermore, the “app claims to be successful about 50% of the time, with an average recovery around \$7,000.”³¹ Apps like DoNotPay bypass the need for human lawyers and increase access to justice.

C. SUBSTANTIVE CONTRACT REVIEW

Contract review is another area in which AI is starting to make major advancements. Several companies—such as Salesforce, Home Depot, and eBay—use AI technology for contract review in their daily operations.³² As more lawyers begin to use AI for contract review, the practice is becoming common-place.³³

Before the age of AI, contract review was the job of human lawyers. As one of the more tedious tasks of lawyering, it is no wonder that it is one of the first tasks being transferred to AI programs. AI programs that can “read contracts accurately in any format, provide analytics about the data extracted from the contracts, and extract contract data much faster than would be possible with a team of lawyers” already exist.³⁴ Several startups including Lawgeex, Klarity, Clearlaw, and LexCheck have tailored this technology to the legal field.³⁵ These startups seek to create programs that “automatically ingest proposed contracts, analyze them in full using natural language processing (NLP) technology, and determine which portions of the contract are acceptable and which are problematic.”³⁶

These emerging programs, however, are not completely devoid of the human element. Lawyers still need to make final substantive decisions on the exact content of and language used in a contract after reviewing the suggestions from the AI program. Lawyers also need to be the ones to negotiate the contract. Nonetheless, “as NLP capabilities advance, it is not hard to imagine a future in which the entire process is carried out end-to-end by AI programs that are empowered, within preprogrammed parameters, to hammer out agreements.”³⁷ Contracting has the potential to become an increasingly automated process.

28. Joshua Browder, *Will Bots Replace Lawyers?*, O'REILLY, <https://www.oreilly.com/library/view/nex-teconomy-summit-2016/9781491976067/video282513.html> (last visited Apr. 17, 2020) (video).

29. *Id.*

30. Fishbach, *supra* note 25.

31. Wilkins, *supra* note 27.

32. Rob Toews, *AI Will Transform the Field Of Law*, FORBES (Dec. 19, 2019), <https://www.forbes.com/sites/robtoews/2019/12/19/ai-will-transform-the-field-of-law/#23c5a9e47f01> [<https://perma.cc/47WE-QPMU>].

33. *See id.* (“‘We believe legal professionals should be able to leverage large datasets to make more informed decisions in the same way that marketing and sales professionals have been doing for years,’ said Clearlaw CEO Jordan Ritenour.”).

34. Beverly Rich, *How AI Is Changing Contracts*, HARV. BUS. REV. (Feb. 12, 2018), <https://hbr.org/2018/02/how-ai-is-changing-contracts> [<https://perma.cc/DT54-4R5N>].

35. Toews, *supra* note 32.

36. *Id.*

37. *Id.*

II. USING AI TO IMPROVE THE QUALITY OF LEGAL SERVICES

AI programs have the potential to improve the quality of legal services by increasing the accuracy and efficiency of lawyers. Advanced legal research platforms equipped with AI have made legal research both faster and easier, giving lawyers the capacity to do more in a shorter amount of time.³⁸ These advanced legal research platforms also enable lawyers to check their work with ease, increasing their accuracy. In the contract review context, AI programs have already demonstrated the capacity to work faster and with a higher rate of accuracy than human lawyers.³⁹ In a contract review contest between experienced corporate attorneys and AI, the AI program “achieved a 94% accuracy level of spotting risks in the contracts” in 26 seconds.⁴⁰ On the other hand, the lawyers, on average, “spent 92 minutes to achieve an 85% accuracy level.”⁴¹

Increased accuracy and efficiency could also save clients money and increase profits for lawyers. Working at higher rates of accuracy faster likely means less billable hours charged by lawyers, meaning more money saved for clients.⁴² While this may initially seem like a profit-loss to lawyers, it could actually produce larger profit margins. This is because working faster at a higher rate of accuracy may incentivize clients to come back for more business and allow law firms to take on more clients. For these reasons, it could actually be an extremely costly decision to not use AI technology in one’s legal practice. In comparison to companies like Google and Adobe, which have gross margins of sixty to ninety percent, law firms must deal with a set cost structure and struggle to get their margins above forty percent.⁴³ AI can help law firms break free of their existing cost structure to increase margins as they grow in size.⁴⁴

While increased accuracy and efficiency and lower costs are tremendous benefits to the legal industry, the use of AI also implicates legal ethics concerns. The *Model Rules of Professional Conduct*, which serve as ethics guidelines for legal practitioners, were adopted in their original form in 1983.⁴⁵ Thus, the *Model*

38. See *infra* Part I.A.

39. Audrey Herrington, *How AI Can Make Legal Services More Affordable*, SMARTLAWYER (Jul. 23, 2019), <http://www.nationaljurist.com/smartlawyer/how-ai-can-make-legal-services-more-affordable> [https://perma.cc/TJ97-CA4H].

40. *Id.*

41. *Id.*

42. Andrew C. Hall, *How Law Firms Can Benefit from Artificial Intelligence*, LAW TECH. TODAY (Nov. 13, 2018), <https://www.lawtechnologytoday.org/2018/11/how-law-firms-can-benefit-from-artificial-intelligence/> [https://perma.cc/X8PP-4JHR] (“The technology can deliver potential savings by lessening the number of billable hours to gather necessary facts based on document review as well as create a timeframe and fact pattern.”).

43. Mohanbir Sawhney, *Putting Products into Services*, HARV. BUS. REV. (Sept. 2016), <https://hbr.org/2016/09/putting-products-into-services> [https://perma.cc/3GL8-7DLZ].

44. *Id.*

45. MODEL RULES OF PROF’L CONDUCT: PREFACE (2019), https://www.americanbar.org/groups/professional_responsibility/publications/model_ruler_of_professional_conduct/model_rules_of_professional_conduct_preface/ [https://perma.cc/E8K6-ZYY9].

Rules were not created to consider more advanced AI programs like ROSS Intelligence and DoNotPay. Nonetheless, the *Rules* were written with the intent of having them be adaptable to modern times.⁴⁶ The Ethics 2000 Chair's Introduction states that in establishing the *Rules*, the writers' "desire was to preserve all that is valuable and enduring about the existing *Model Rules*, while at the same time adapting them to the realities of modern law practice and the limits of professional discipline."⁴⁷ Thus, the *Model Rules of Professional Conduct* are capable of governing the use of more advanced AI programs in the legal field.

One ethical implication that arises from the use of AI in the legal field is lawyer competency. Model Rule 1.1 requires lawyers to represent clients competently.⁴⁸ The rule states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁴⁹ Additionally, Comment 8 to Rule 1.1, which was added in 2012, expands on the concept of competent representation in light of technological advancements in the legal field:

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.⁵⁰

Reading Rule 1.1 and Comment 8 together indicates that lawyers have an ethical obligation to keep up to date on the technology used in the legal field in order to provide competent representation to clients. More specifically, the Rule seems to indicate that in the age of AI, lawyers are tasked with two ethical duties. First, lawyers must have a basic understanding of the AI programs they choose to utilize in their practice.⁵¹ Because AI is a branch of computer science and often involves technical knowledge outside of most lawyers' expertise, understanding how AI programs operate may be difficult for lawyers.⁵² Nonetheless, lawyers must still maintain a baseline of knowledge about the AI programs they use, including: (1) why the AI program produces its results and (2) what the AI

46. MODEL RULES OF PROF'L CONDUCT: PREFACE, ETHICS 2000 CHAIR'S INTRODUCTION (2002), https://www.americanbar.org/groups/professional_responsibility/publications/model_ruler_of_professional_conduct/model_rules_of_professional_conduct_preface/ethics_2000_cchai_introduction/ [https://perma.cc/7F3K-N4XG].

47. *Id.*

48. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009) [hereinafter MODEL RULES].

49. MODEL RULES R. 1.1.

50. MODEL RULES R. 1.1 cmt. [8].

51. *Lat, supra* note 1.

52. Jason Tashea & Nicholas Economou, *Be Competent in AI Before Adopting, Integrating It into Your Practice*, ABA J. (Apr. 23, 2019), <http://www.abajournal.com/lawscribbler/article/before-lawyers-can-ethically-adopt-and-integrate-ai-into-their-practices-they-must-first-be-competent> [https://perma.cc/45P6-B72G] ("Governed by computer science and statistics, these are complex academic disciplines in which lawyers are generally untrained and cannot become experts on the fly.").

program is and is not capable of.⁵³ Without this baseline of knowledge, lawyers will be unable to use AI programs with full competence, thereby jeopardizing their ability to provide competent representation to their clients.

Numerous states have come to understand this and have instituted their own rules governing lawyer competency in regard to the use of technology. A total of thirty-six states have already implemented their own rules governing technology use.⁵⁴ A Florida rule “suggests that continuing education may be necessary to understand the risks associated with technology use.”⁵⁵ Furthermore, “New York promulgated a rule that lawyers must use reasonable care [in]. . . stay[ing] abreast of technological advances.”⁵⁶ Understanding the technology one uses in his or her practice is imperative to providing competent legal service.

The second key aspect for lawyers to understand in fulfilling the duty of competence is that AI results should not automatically be accepted as true. While many of the newer AI programs are technically sound, they still are imperfect.⁵⁷ Lawyers must still exercise care when using these programs. Therefore, lawyers must (1) regularly check to make sure that the AI program they are using is working properly and (2) review the program’s results in order to provide competent legal representation.

The obligation of lawyers to review AI programs and the results they produce is further substantiated by Model Rule 5.3, which establishes a duty for lawyers to supervise nonlawyers.⁵⁸ Rule 5.3(b), the most relevant provision, states: “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*.”⁵⁹ While the AI program is not a person—it is a machine—it will mimic human intelligence to perform tasks and the lawyer will incorporate its “thinking” into his or her work. Therefore, under Rule 5.3, the AI could be considered a nonlawyer that is being delegated work by the lawyer, triggering the lawyer’s duty to ensure that the work produced by the AI program is competent.

Reading the *Model Rules* in modern times indicates that in order for lawyers to provide competent legal representation to clients, they must have a basic understanding of how the AI programs they use operate and not automatically accept

53. See generally Lat, *supra* note 1; Tashea & Economou, *supra* note 52; Roy D. Simon, *Artificial Intelligence, Real Ethics*, 90-APR N.Y. ST. B.J. 34, 34 (2018).

54. Tashea & Economou, *supra* note 52.

55. Katherine Medianik, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1497, 1515 (2018) (citing Fla. Bar Prof’l Ethics Comm., Op. 06-2 (2006)).

56. Medianik, *supra* note 55 (quoting N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 782 (2004)).

57. Stephanie Francis Ward, *How accurate is AI in legal research?*, ABA JOURNAL (Feb. 28, 2020), <https://www.abajournal.com/news/article/how-accurate-is-ai-in-legal-research> [<https://perma.cc/BCD7-5QYX>].

58. MODEL RULES R. 5.3(b) (emphasis added).

59. MODEL RULES R. 5.3(b) (emphasis added).

the results the AI program produces as true. Currently, this may seem self-evident. After all, in the practice of law, blindly accepting the results of a program one does not completely understand how to use would not only be unethical, but reckless.⁶⁰ As AI programs become more advanced, widely used, and heavily relied on in the future, however, these basic notions of how to use AI in an ethical fashion may become much less self-evident.

Increasingly relying on AI in the legal field may also cause an additional ethics concern in regard to competent legal representation. While the aforementioned discussion warns of the ethical implications of utilizing AI, there may be ethical implications of refusing to use AI as well. As AI technology improves and becomes more widespread in the legal field, refusing to use AI in one's legal practice may considerably hamper one's ability to provide competent legal representation. This is especially true because the more one uses AI, the more beneficial the program becomes: "the AI tools of the next few years will leverage the private data of law firms to create unique insights unattainable by other law firms because they are generated using the collective experience of lawyers and their work product from a particular firm."⁶¹ Thus, a refusal to use technology that makes legal work more accurate and efficient may be considered a refusal to provide competent legal representation to clients.

III. USING AI TO IMPROVE ACCESS TO JUSTICE

Another positive effect of using AI in the legal field is the ability to increase individual access to justice. The United Nations defines access to justice as "a basic principle of the rule of law."⁶² The United Nations also explains what access to justice entails: "In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable."⁶³ Furthermore, the preamble to the *Model Rules* provides that lawyers "should seek improvement of the law, access to the legal system. . . ." and "ensure access to our legal system for all those who because of economic or social barriers cannot afford or secure adequate legal counsel."⁶⁴

The United States is currently experiencing an access to justice crisis as not enough people are able to afford or obtain legal services when they need them.⁶⁵

60. Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 No. 2 HARV. J. L. & TECH. 890, 934 (2018) ("To continue to rely on AI that may be making flawed decisions or that is relying on problematic data may be evidence of willful blindness or may arise to the level of recklessness required for scienter.").

61. Walters, *supra* note 24.

62. *Access to Justice*, U.N., <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> [<https://perma.cc/XL86-J8S8>] (last visited Mar. 23, 2020).

63. *Id.*

64. MODEL RULES pmb1.

65. Legal Services Corp., *The Justice Gap: Measuring Unmet Civil Legal Needs*, EXECUTIVE SUMMARY OF THE 2017 THE JUSTICE GAP REPORT (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-ExecutiveSummary.pdf>.

The Legal Services Corporation found that in 2017, “86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help.”⁶⁶ Moreover, the Legal Services Corporation found that the majority—around eighty-five to ninety-seven percent—of civil legal problems not fully addressed was due to a lack of available resources.⁶⁷ After conducting a study in 2014, The American Bar Foundation discovered that “some 80 percent of people with legal problems don’t address them through the legal system.”⁶⁸ The Foundation’s study also found that people who handle legal matters on their own do less well than people who have the benefit of counsel, meaning that “the vast majority of people with a legal problem are disadvantaged because they do not or cannot avail themselves of legal counsel, suggesting a latent market for legal services.”⁶⁹

Using AI in the legal field can help to solve this severe access to justice problem in the U.S. in the following two ways. First, new AI programs can expand access to legal tools, allowing more people to get legal help when they need it. Consider the legal self-help market. Mobile apps in particular have become an effective tool for legal self-help.⁷⁰ For example, DoNotPay has enabled individuals to file claims on their own without consulting an actual human lawyer.⁷¹ Because the app offers certain services for free and others at a low cost,⁷² cost is less of a barrier to accessing the resource.

Other examples of legal self-help apps include “Ask a Lawyer: Legal Help,” which is free to download for iPhone and Android users, and “PaperHealth,” which is free to download for iPhone users in Massachusetts only.⁷³ “Ask a Lawyer” gives “everyday people the ability to get preliminary legal advice from attorneys free of charge.”⁷⁴ “PaperHealth” allows “people in Massachusetts who don’t have the money or inclination to shell out for the creation of a living will” to use the app instead.⁷⁵ While apps such as these have helped to increase access

66. *Id.*

67. *Id.*

68. Walters, *supra* note 24.

69. *Id.*

70. “Just as the smartphone brought computing to the cyberchallenged, it is putting justice into the hands of some who may need it most.” Joe Dysart, *20 Apps to Help Provide Easier Access to Legal Help*, ABA J. (Apr. 1, 2015), http://www.abajournal.com/magazine/article/20_apps_providing_easier_access_to_legal_help [<https://perma.cc/E5LA-HVDX>].

71. DoNOTPAY, <https://donotpay.com> [<https://perma.cc/3E2D-9NFL>] (last visited Apr. 17, 2020); Jason Tashea, *DoNotPay App Aims to Help Users Sue Anyone in Small Claims Court—Without a Lawyer*, ABA J. (Oct. 10, 2018), https://www.abajournal.com/news/article/file_a_smalls_claims_suit_anywhere_in_the_cocount_through_an_app [<https://perma.cc/VL3R-4GMD>].

72. Scotty Stump, *This Free App Can Help You Quickly File for Unemployment*, TODAY (Apr. 15, 2020), <https://www.today.com/money/free-app-donotpay-can-help-you-quickly-file-unemployment-t178657> [<https://perma.cc/TSES-NJMA>].

73. Dysart, *supra* note 70.

74. *Id.*

75. *Id.*

to the legal system, they also engender ethics concerns regarding the unauthorized practice of law—a valid concern that will be addressed more fully below.

The second way AI programs can help to solve the access to justice crisis is by allowing lawyers to work more efficiently, allowing them to serve more clients. According to the ABA, if “firms can automate some of the most time-consuming tasks of providing legal services, they can provide the services at lower cost and can afford to help many more clients.”⁷⁶ This will enable law firms to serve “those without the means comfortably to hire a lawyer but who nevertheless do not qualify for assistance from legal aid.”⁷⁷ Admittedly, this will only work if lawyers who have the capacity to take on more clients take on clients who would not have had access to the justice system otherwise. Assuming that lawyers only take and serve clients in the jurisdiction in which they are authorized to practice, this poses less of an ethics concern regarding the unauthorized practice of law.

Model Rule 5.5 forbids lawyers from engaging in the unauthorized practice of law.⁷⁸ Section (b) provides:

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.⁷⁹

While there have been lawsuits against AI program developers,⁸⁰ claiming they engaged in the unauthorized practice of law, legal precedent on this matter is still new and murky. Nonetheless, courts will need to start responding to this concern as AI programs become more widely used.⁸¹

In *Lola v. Skadden*, the court implied that machines could not engage in the practice of law.⁸² The Second Circuit found that the plaintiff who exclusively engaged in document review was not practicing law in North Carolina because he

76. Walters, *supra* note 24.

77. *Id.*

78. MODEL RULES R. 5.5.

79. MODEL RULES R. 5.5.

80. Steven Buse, *Disclaim What I Say, Not What I Do: Examining the Ethical Obligations Owed by LegalZoom and Other Online Legal Providers*, 37 J. LEGAL PROF. 323, 323 (2013); Alexandra M. Jones, *Old Days Are Dead and Gone: Estate Planning Must Keep Its Head Above Water with the Changing Tide of Technology*, 11 EST. PLAN. & CMTY. PROP. L.J. 161, 170 (2018).

81. Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law*, 70 HASTINGS L.J. 173, 178 (2018) (“On the legal self-help front, courts, state legislatures, and bar associations in the near term will have to decide whether increasingly sophisticated services such as DoNotPay constitute the unauthorized practice of law.”).

82. Michael Simon, Alvin F. Lindsay, Loly Sosa & Paige Comparato, *Lola v. Skadden and the Automation of the Legal Profession*, 20 YALE J.L. & TECH. 234, 248 (2018) (“According to the *Lola* decision, if a lawyer is performing a particular task that can be done by a machine, then that work is not practicing law.”); *Lola v. Skadden*, Arps, Slate, Meagher & Flom LLP, 620 Fed. Appx. 37, 45 (2nd Cir. 2015).

only “provided services that a machine could have provided.”⁸³ The court also interpreted North Carolina’s law to imply, however, that the practice of law requires “at least a modicum of independent legal judgment.”⁸⁴ Thus, a more accurate declaration of the Second Circuit’s holding is not that tasks machines can do are not the practice of law, but that tasks machines can do that do not involve independent legal judgment are not the practice of law.

A Missouri court grappled with a legal question about AI and the unauthorized practice of law in *Janson v. LegalZoom.com, Inc.*⁸⁵ In this case, LegalZoom, a “well-known website that allows consumers to create their own legal documents with an online portal” was sued for engaging in the unauthorized practice of law.⁸⁶ The court held that filling out blank forms like the ones provided on LegalZoom’s website “is not in and of itself the unauthorized practice of law.”⁸⁷ Because apps like DoNotPay also use client answers to fill out forms, they would likely meet a similar fate in court.

LegalZoom provides a disclaimer, stating that LegalZoom is “not a law firm or a substitute for an attorney or law firm” and cannot provide any legal advice.⁸⁸ In a settlement between LegalZoom and the North Carolina Bar Association, LegalZoom agreed to have a licensed attorney review blank templates offered to customers in North Carolina and to clearly indicate to customers that that the templates do not replace the advice of an attorney to ensure LegalZoom would not engage in the unauthorized practice of law.⁸⁹

If these AI programs simply direct clients to the forms they need to fill out and do not advise clients on the substance of their answers, there is no unauthorized practice of law. The irony here is that in limiting AI programs to being secretarial services rather than ones capable of providing legal advice, they will have a decreased ability to improve the access to justice crisis because individuals will still need to hire lawyers to receive proper legal advice. While the law in this area is still new, it currently seems that AI programs can direct clients to the forms they need to fill out, but they may not give any advice as to the substance of the client’s answers because that would be replacing the work of a human lawyer.

83. *Lola*, 620 Fed. Appx. at 45.

84. *Id.* at 44.

85. *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1057–58 (W.D. Mo. 2011).

86. *Buse*, *supra* note 80, at 323; *Janson*, 802 F. Supp. 2d at 1057–58.

87. *Jones*, *supra* note 80, at 170 (citing *Janson*, 802 F. Supp. 2d at 1064).

88. LEGALZOOM, <https://www.legalzoom.com> [<https://perma.cc/7QBT-R8GP>] (last visited Mar. 23, 2020) (“Disclaimer: Communications between you and LegalZoom are protected by our Privacy Policy but not by the attorney-client privilege or as work product. LegalZoom provides access to independent attorneys and self-help services at your specific direction. We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies.”).

89. *Jones*, *supra* note 80, at 171.

IV. LEGAL ETHICS INDICATES THAT AI SHOULD NOT REPLACE THE WORK OF A HUMAN LAWYER

While the law has not yet clearly defined how to use AI programs in accordance with principles of legal ethics, guidelines should still be inferred from the *Model Rules*. The *Model Rules* demand a human element to the work of lawyers.

Lawyers may not use AI programs to replace their work without violating their duty to provide competent representation in Rule 1.1.⁹⁰ Lawyers can use AI programs, however, to augment their work. Where the line falls between replacement and augmentation is not always clear. In order to ensure that the duty of competence is met when using AI, lawyers should adhere to the following suggestions.

To ensure competent representation, lawyers should have a basic understanding of the AI programs they choose to utilize in their practice and refrain from automatically accepting the results of AI programs they use as true. This applies to all AI programs whether it is an advanced legal research platform or program that does contract review. Having a basic understanding of the AI program one uses entails understanding why the AI program produces its results and what the program is and is not capable of. Not automatically accepting the results of the AI program one uses as true entails regularly checking the program to make sure it is working properly and reviewing the program's results.

AI programs that do not involve human lawyers should not provide legal advice because this would be the unauthorized practice of law per Rule 5.5.⁹¹ When using programs such as legal self-help apps and robo-forms, for example, the AI program is not allowed to give substantive legal advice—this would be the unauthorized practice of law and therefore a violation of the *Model Rules of Professional Conduct*. Thus, the indispensable human element in lawyering in the age of AI works both ways. Human lawyers should not completely rely on AI programs to give legal advice and AI programs should not give legal advice unless a human lawyer is involved.

CONCLUSION

The use of AI in the legal field is likely to grow in the future and continue to bring more change to the practice of law. As discussed above, examples of AI programs already being heavily used in the legal field include advanced legal research platforms like ROSS Intelligence, legal self-help apps like DoNotPay, and contract review systems.

AI has already shown immense promise in bringing positive change to the legal world. One of these changes is improving the quality of legal services by helping lawyers work more accurately and efficiently. AI also has the potential to

90. MODEL RULES R. 1.1.

91. MODEL RULES R. 5.5.

increase individual access to justice. This is especially beneficial considering that the United States is currently experiencing an access to justice crisis as most individuals who need legal help cannot afford a lawyer. AI has the potential to help bridge this gap by enabling legal self-help tools that more people can access and by allowing lawyers to work more efficiently, thereby allowing them to serve more clients.

While AI seems to have the potential to bring positive change, the use of more advanced AI technology in the legal field also invokes legal ethics concerns. The *Model Rules of Professional Conduct*, which were written long before the age of AI, nonetheless provide guidance that is relevant to the use of AI. Specific concerns about the duty of lawyers to provide competent representation to clients and for AI programs not to engage in the unauthorized practice of law are especially relevant to the use of AI in the legal field.

As long as lawyers use AI to augment rather than replace their work and AI programs that do not involve a human attorney refrain from giving legal advice, AI can be an effective tool to improve the quality of legal services and increase individual access to justice while operating well within the parameters of legal ethics. Human lawyers should not completely rely on AI programs to give legal advice and AI programs cannot give legal advice unless a human lawyer is involved. In the age of AI, legal ethics preserves a human element in the practice of law.