How Should Legal Ethics Rules Apply When Artificial Intelligence Assists Pro Se Litigants?

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INTRODUCTION

Each year, one out of every six Americans represents himself or herself in court without the assistance of a lawyer.[1] Individuals represent themselves, or litigate pro se,[2] for a variety of reasons, including their inability to afford a lawyer, their mistrust or dislike of lawyers, or their desire to advocate for themselves.[3] The justice gap—the large difference between the number of people who want or need legal assistance and the number who receive it—is widely perceived as a failure of the United States legal system to provide equal justice under the law.[4] Involuntary self-representation is especially prevalent in civil cases: no right to counsel exists for civil litigants, and, because most low-to-moderate-income families and individuals cannot afford legal services,[5] approximately three out of every five people in civil cases go to court with no lawyer.[6] Self-representation occurs in criminal cases to a lesser extent. The Sixth Amendment, applied to the states through the Fourteenth Amendment, provides criminal defendants the right to effective assistance of counsel both at trial[7] and on their first appeal as of right.[8] But there is no constitutional right to appeal,[9] and criminal defendants also have

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1. Nancy Kinnally & Jessica Brown, *Everyone Counts: Taking a Snapshot of Self-Represented Litigants in Miami-Dade*, DIALOGUE (Nov. 17, 2017), https://www.americanbar.org/groups/legal_services/publications/dialogue/volume/20/fall-2017/pro-bono-everyone-counts/ [https://perma.cc/4QPF-YJFL].

2. This is in contrast to represented litigants, who are represented by a lawyer in court. *See Pro Se n.*, BLACK'S LAW DICTIONARY (11th ed. 2019).

3. *See, e.g.*, Debra Slone, *10 Reasons to Represent Yourself in Court*, COURTROOM5 (Sept. 7, 2021), https://courtroom5.com/blog_content/10-reasons-to-represent-yourself-in-court/ [https://perma.cc/YHG6-VE9P].

4. *See, e.g.*, AM. ACAD. OF ARTS & SCI., MEASURING CIVIL JUSTICE FOR ALL: WHAT DO WE KNOW? WHAT DO WE NEED TO KNOW? HOW CAN WE KNOW IT? 1 (2021), https://www.amacad.org/sites/default/files/publication/downloads/2021-Measuring-Civil-Justice-for-All.pdf [https://perma.cc/H6AH-PVDP].

5. AM. BAR ASS'N SECTION OF LITIG., MODEST MEANS TASK FORCE, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 3 (2003) [hereinafter ABA HANDBOOK], https://www.americanbar.org/content/dam/aba/administrative/litigation/leadership-portal/handbook-on-limited-scope-legal-assistance.pdf [https://perma.cc/ZB9G-GBYF].

6. *Self-Represented Litigation Network*, SELF-REPRESENTED LITIG. NETWORK, https://www.srln.org/ [https://perma.cc/FRA7-CN4Z] (last visited Mar. 11, 2022).

7. U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel [is] fundamental and essential to fair trials.").

8. Evitts v. Lucey, 469 U.S. 387, 402 (1985).

9. District of Columbia v. Clawans, 300 U.S. 617, 627 ("Due process does not comprehend the right of appeal." (citing McKane v. Durston, 153 U.S. 684, 687 (1894))).

an implicit constitutional right to represent themselves, so long as their choice is "'free and intelligent.'"[10]

In the early 2000s, the American Bar Association ("ABA") began to recommend increased use of limited-scope representation (also known as unbundled legal services and discrete task representation) to mitigate the justice gap, guided by the idea that "in the great majority of situations some legal help is better than none."[11] Depending on the state, a lawyer and client might be allowed to agree that the lawyer will represent the client for only one or a few phases of the case and then withdraw,[12] that the lawyer will represent the client in a specified forum only,[13] or that the lawyer will help the client proceed pro se but will not represent the client in court.[14]

In the future, limited-scope representation might also be provided by machines. There is enormous potential to further narrow the justice gap using technology,[15] particularly software[16] that uses artificial intelligence ("AI") to provide legal services in a "one-to-many" format.[17] A few software publishers have made self-help legal information programs available to the public.[18] In the future, legal AI[19] could be developed to assist pro se litigants in drafting pleadings, motions, briefs, and other documents; to advise them on their litigation strategy and likelihood of success; or to perform other litigation-related tasks.

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10. Faretta v. California, 422 U.S. 806, 814–15 (1975) (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942)).

11. ABA HANDBOOK, *supra* note 5, at 12. Limited-scope representation is permitted under the *Model Rules*: "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2018) [hereinafter MODEL RULES]. A 2002 amendment to Comment 6 clarified that financial considerations are a legitimate basis for a decision to pursue limited-scope representation: lawyers can "exclude actions that the client thinks are too costly." MODEL RULES R. 1.2 cmt. 6; LISA G. LERMAN, PHILIP G. SCHRAG & ROBERT RUBINSON, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 199 (5th ed. 2020).

12. LERMAN, SCHRAG & RUBINSON, *supra* note 11, at 198.

13. For instance, a lawyer and client might decide to limit the representation to the portion of the case that takes place either in court or in arbitration. Eric W. Macaux, *Limiting Representation in the Age of Private Law: Exploring the Ethics of Limited-Forum Retainer Agreements*, 19 GEO. J. LEGAL ETHICS 795, 800 (2006).

14. Ala. State Bar Disciplinary Comm., Op. 2010-01 (2010) (The Unbundling of Legal Services and "Ghostwriting"); LERMAN, SCHRAG & RUBINSON, *supra* note 11, at 199.

15. Ed Walters, *The Model Rules of Autonomous Conduct: Ethical Responsibilities of Lawyers and Artificial Intelligence*, 35 GA. STATE U. L. REV. 1073, 1090 (2019).

16. The term "software" refers to computer programs. Computer programs can be classified as either application or operating system programs. Application programs or "apps"—the type of software this Note discusses—perform specific tasks for the user, such as web browsing or word processing. Meanwhile, operating system programs manage the computer's internal functions and facilitate users' use of apps. Apple Comput., Inc. v. Franklin Comput. Corp., 714 F.2d 1240, 1243 (3d Cir. 1983).

17. Legal services are typically provided in "one-to-one" format, where one or a few lawyers work on each client's case. Commercial software programs typically function in "one-to-many" format, where many people can use the software at the same time. If legal services were provided via software, then many more clients could be served at the same time. *See* Walters, *supra* note 15, at 1091.

18. *See infra* Part I.A.

19. This Note uses the term "legal AI" to denote software that uses AI to perform tasks traditionally performed by lawyers.

The development of such programs would give rise to unprecedented ethical dilemmas. Is it legal for this technology to be made available to the public? Who should be permitted to create and market this technology? To what legal ethics rules should software publishers be subject? How should publishers be sanctioned if they cause harm to users? This Note, which is structured in question-and-answer format, seeks to advise courts, practitioners, and rulemaking bodies on the application of legal ethics rules to legal AI software intended for use by pro se litigants. In some cases, the existing rules or the rationales underlying the existing rules can be applied directly to legal AI to produce a reasonable result.[20] But in other cases, it is not apparently clear how, or if at all, the existing rules should be applied.[21] Where the answers are not readily apparent, consumer protection should be prioritized—legal ethics rules should promote affordable access to legal services, hold legal service providers accountable for the quality of their services, and provide redress to clients who have been harmed by them. And when these various interests conflict, they should be balanced in a reasonable manner.

This Note is divided into three Parts. Part I provides background information on the current state of legal AI, sets forth the assumptions about likely future developments in legal AI on which Part II is based, and discusses the importance of protecting the public as these new technologies are introduced. Part II applies legal ethics rules to legal AI software intended for use by pro se litigants. The Note concludes with suggested avenues for future research.

I. BACKGROUND

A. CURRENT CAPABILITIES OF LEGAL AI

AI is the subfield of computer science that involves training computers to perform tasks that humans have traditionally used higher-order intelligence—the form of thinking that involves understanding and reasoning as opposed to mere memorization and repetition—to accomplish.[22] The term "artificial intelligence" tends to mislead those who are not computer science experts because it appears to suggest that AI can think at a level that meets or surpasses human capability.[23] Although AI may provide the semblance of higher-order intelligence, it does so through algorithms—series of commands that a computer system carries out in

20. Walters, *supra* note 15, at 1091.

21. *Id.*

22. Harry Surden, Professor of Law, Univ. of Colo., Speech at the Symposium on Artificial Intelligence and the Legal Profession: Where AI Works in Legal Practice, and Where It Still Has a Long Way to Go (Sept. 25, 2021) [hereinafter Surden Speech].

23. *Id.*

response to an input—and not through the understanding, abstract reasoning, and creative thinking that are characteristic of human cognition.[24]

Presently, nearly all legal AI is created by private-sector software publishers[25] and marketed toward legal professionals. Some legal AI helps lawyers in the early stages of legal research and writing. For instance, programs such as Westlaw Edge and Casetext's CARA A.I. tailor search results in response to uploaded documents and recommend relevant cases, statutes, and other authorities.[26] Casetext's Compose provides lawyers with templates to facilitate the drafting of briefs and motions and uses AI to suggest relevant supporting authority as the lawyer writes.[27] Other programs help lawyers polish their almost-finished work product. For example, BriefCatch uses AI to score lawyers' writing in terms of clarity, concision, flow, and punch, as well as to suggest edits.[28] And Fastcase and FirstLegal provide full-service AI support to law firms throughout many stages of the litigation process.[29]

Although tasks such as legal research and document drafting still necessitate a great deal of lawyer input, other steps of the litigation process, notably discovery involving vast amounts of documents, can be performed more efficiently and effectively by a machine than by a bleary-eyed first-year associate in the middle of the night.[30] Document review and eDiscovery tools such as Reveal and Brainspace use machine learning to sift through massive amounts of documents and determine which are relevant and non-relevant to a particular matter, detect abnormalities in documents, and even infer document authors' emotional states from documents' content.[31]

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24. Amy Cyphert, Lecturer in Law, W. Va. Univ. & Drew Simshaw, Assistant Professor of Law, Gonz. Univ., Speech at the Symposium on Artificial Intelligence and the Legal Profession: An Algorithm Wrote This Brief: The Ethics of AI Legal Writing Tools (Sept. 25, 2021) [hereinafter Cyphert & Simshaw Speech]; Surden Speech, *supra* note 22.

25. A software publisher, also called a software vendor, is an entity that markets and sells computer programs. A software developer is an entity that creates the programming and user interface of computer programs. The creation and marketing functions may be performed by the same entity or by different entities. *Definition of Software Publisher*, PCMAG ENCYCLOPEDIA, https://www.pcmag.com/encyclopedia/term/software-publisher [https://perma.cc/Y8ZC-GABR] (last visited Mar. 11, 2022).

26. WESTLAW EDGE, https://legal.thomsonreuters.com/en/products/westlaw-edge [https://perma.cc/VQ6W-M5L4] (last visited Mar. 11, 2022); CARA A.I., https://casetext.com/cara-ai/ [https://perma.cc/ZF67-XFJD] (last visited Mar. 11, 2022).

27. COMPOSE, https://compose.law/ [https://perma.cc/SU7L-6LPA] (last visited Mar. 11, 2022).

28. BRIEFCATCH, https://briefcatch.com/ [https://perma.cc/CE5N-6ZDF] (last visited Mar. 11, 2022).

29. FASTCASE, https://www.fastcase.com/ [https://perma.cc/M9H9-9U75] (last visited Mar. 11, 2022); FIRSTLEGAL, https://www.firstlegal.com/ [https://perma.cc/D3UW-KA6P] (last visited Mar. 11, 2022).

30. Surden Speech, *supra* note 22.

31. REVEAL | BRAINSPACE, https://www.revealdata.com/ [https://perma.cc/6LVW-WR4T] (last visited Mar. 11, 2022); LEGAL TECH PUBL'G, ARTIFICIAL INTELLIGENCE BUYER'S GUIDE: 2021 EDITION 16 (2021), https://resources.abovethelaw.com/hubfs/Non-Event-Legal-AI-Software-Buyers%20Guide-7.20.2021.pdf [https://perma.cc/Z43X-X27L].

There is technically nothing stopping pro se litigants from accessing and using most of these programs themselves, but this virtually never happens.[32] A few publishers, however, have marketed self-help legal software to the public. For example, the DoNotPay app uses AI to provide legal information on dozens of areas of law based on users' responses to questionnaires.[33] Courtroom5 educates pro se litigants about the law and how to research and write persuasively.[34] NextChapter, aimed at both attorneys and the public, and Upsolve, aimed primarily at the public, help users generate bankruptcy paperwork.[35] And LegalZoom provides assistance with legal document drafting and connects those in need of more assistance with qualified attorneys.[36] Each of these programs' terms of use specify that the program is not an attorney or law firm and does not provide legal advice,[37] though LegalZoom has been accused of unauthorized practice of law in several states.[38]

B. LIKELY FUTURE CAPABILITIES OF LEGAL AI

There are two primary types of AI: pattern-based and rule-based. Pattern-based AI extracts patterns from sometimes massive amounts of data and applies these patterns to solve statistical problems.[39] The process by which patterns are recognized and updated as new data is inputted is known as machine learning.[40] Meanwhile, rule-based AI applies logical rules expressed in "if/then" format to sets of facts and draws conclusions in "true/false" format.[41]

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32. Telephone Interview with Ed Walters, CEO, Fastcase, & Adjunct Professor, Geo. Univ. L. Ctr. & Cornell L. Sch. (Oct. 6, 2021) [hereinafter Walters Interview].

33. DONOTPAY, https://donotpay.com/ [https://perma.cc/5YJP-7R36] (last visited Mar. 11, 2022).

34. COURTROOM5, https://courtroom5.com/ [https://perma.cc/XYP9-9JVX] (last visited Mar. 11, 2022).

35. NEXTCHAPTER, https://nextchapterbk.com/ [https://perma.cc/9XLS-6ME9] (last visited Mar. 11, 2022); UPSOLVE, https://upsolve.org/ [https://perma.cc/JL2Y-UGKP] (last visited Mar. 11, 2022).

36. LEGALZOOM, https://www.legalzoom.com/ [https://perma.cc/7XGC-9YWN] (last visited Mar. 11, 2022).

37. *Terms of Service and Privacy Policy*, DONOTPAY (July 6, 2021), https://donotpay.com/learn/terms-of-service-and-privacy-policy [https://perma.cc/QRA6-EBKK]; *Terms and Conditions*, COURTROOM5, https://courtroom5.com/terms [https://perma.cc/C727-RGLQ] (last visited Mar. 11, 2022); *Terms of Service*, NEXTCHAPTER (Mar. 26, 2018), https://nextchapterbk.com/terms [https://perma.cc/Z9FQ-YVNS]; *Terms of Service*, UPSOLVE, https://upsolve.org/terms-of-service/ [https://perma.cc/RKR4-Y59N] (last visited Mar. 11, 2022); *Terms of Use*, LEGALZOOM (July 26, 2018), https://www.legalzoom.com/legal/general-terms/terms-of-use/ [https://perma.cc/D6WL-5RGD].

38. LegalZoom.com v. N.C. State Bar, No. 11 CVS 15111, 2015 WL 6441853, at *1 (N.C. Super. Ct. 2015) (consent agreement allowing LegalZoom to provisionally continue operating so long as it implements specified consumer protection measures); Janson v. LegalZoom.com, Inc., 802 F. Supp. 2d 1053, 1054 (W.D. Mo. 2011) (denying LegalZoom's motion for summary judgment on the issue of unauthorized practice of law); LegalForce RAPC Worldwide, P.C. v. LegalZoom.com, Inc., No. 17-cv-07194-MMC, 2018 WL 1730333, at *5 (N.D. Cal. 2018) (granting in part LegalZoom's motion to compel arbitration of plaintiffs' unauthorized practice of law claims). The Missouri case was settled out of court, allowing LegalZoom to continue operating in the state under specified conditions, and the California case is in arbitration. Caroline Shipman, *Unauthorized Practice of Law Claims Against LegalZoom—Who Do These Lawsuits Protect, and Is the Rule Outdated?*, 32 GEO. J. LEGAL ETHICS 939, 948, 950 (2019).

39. Surden Speech, *supra* note 22.

40. *Id.*

41. *Id.*

Although nearly all legal AI currently in existence is pattern-based, it is probable that rule-based legal AI will play a larger role in the future.[42] For instance, a group of European researchers is developing a rule-based program called HIERBERT-HA that can predict the outcomes of European Court of Human Rights cases with remarkable accuracy based on inputs of law and fact.[43] This program and others like it are good at predicting but bad at explaining their predictions;[44] researchers are continuing to improve these programs' predictive and explanatory capabilities.[45] It is conceivable that rule-based legal AI could someday advise pro se litigants on whether they or an adverse party might have a legal claim, how the court might apply the law to the facts of their case, and the case's likely outcome.

The development of much stronger pattern-based legal AI, capable of drafting legal documents from scratch and analogizing and distinguishing cases, is also probable. An auto-regressive natural language processing model, which uses the language that comes immediately before to predict that which comes immediately after,[46] called GPT-3 was recently developed that can simulate lifelike conversations, generate arguments, translate language, and even write creative poetry.[47] This kind of technology could soon be used to perform functions such as translating legalese to plain English and could be used in the more distant future to draft legal documents from scratch.[48]

AI experts generally agree that it is futile to resist the introduction of AI into the courtroom—the wiser course of action is to proactively plan for it.[49] The legal profession is notoriously resistant to technological change, and these potential developments may seem daunting to lawyers unfamiliar with computer science. Nevertheless, lawyers have adapted well to and benefited greatly from major technological changes in the recent past; for instance, the legal profession saved itself immeasurable time, paper, and headaches by overcoming its hesitance to

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42. *Id.*

43. Ilias Chalkidis, Manos Fergadiotis, Dimitrios Tsarapatsanis, Nikolaos Aletras, Ion Androutsopoulos & Prodromos Malakasiotis, *Paragraph-Level Rationale Extraction Through Regularization: A Case Study on European Court of Human Rights Cases*, *Proceedings of the 2021 Conference of the North American Chapter of the Association for Computational Linguistics: Human Language Technologies* 226–41 (2021), https://aclanthology.org/2021.naacl-main.22.pdf [https://perma.cc/H2HM-HRW3].

44. Teresa Godwin Phelps, Professor of Law Emerita, Am. Univ. & Kevin Ashley, Professor of Law, Univ. of Pitt., Speech at the Symposium on Artificial Intelligence and the Legal Profession: "Alexa! Write a Memo": The Promise and Challenges of AI and Legal Writing (Sept. 25, 2021) [hereinafter Godwin Phelps & Ashley Speech].

45. Chalkidis et al., *supra* note 43, at 234.

46. Cyphert & Simshaw Speech, *supra* note 24.

47. Cade Metz, *Meet GPT-3. It Has Learned to Code (and Blog and Argue)*, N.Y. TIMES (Nov. 24, 2020), https://www.nytimes.com/2020/11/24/science/artificial-intelligence-ai-gpt3.html [https://perma.cc/ECX8-C2WN]. But this technology is not yet perfect—it produces incoherent outputs just about as frequently as it succeeds. *Id.*

48. Cyphert & Simshaw Speech, *supra* note 24.

49. Godwin Phelps & Ashley Speech, *supra* note 44.

replace book research with online research.[50] Moreover, when considering legal AI aimed for use by the public, the fear that lawyers might be "replaced" by robots is misplaced.[51] It is plausible that the users of these programs will, in large part, be those who would otherwise have gone without legal assistance, not those who would otherwise have sought the services of a human lawyer.

C. PROMOTING THE PUBLIC INTEREST THROUGH LEGAL ETHICS

Legal AI could be subject to a continuum of regulation, with complete prohibition at one end and complete lack of regulation at the other. Both extremes would be detrimental to the public interest. If pro se litigants were barred from using legal AI, many would have no choice but to proceed without legal assistance—and pro se litigants are significantly less likely than represented litigants to obtain favorable outcomes.[52] On the other hand, if there were no rules constraining legal AI, publishers might freely engage in practices harmful to users, such as providing faulty legal advice or revealing users' sensitive information. The public interest would best be served somewhere in the middle, and this Note suggests one potential option: requiring human lawyers or law firms to bear ethical responsibility for the legal AI services provided to pro se litigants.

Legal ethics rules are, or at least should be, consumer protection devices. It is widely agreed that the legal profession's fundamental purpose is to serve society by promoting justice; the fulfillment of this purpose requires that lawyers work loyally to advance their clients' interests above their own interests or anyone else's.[53] The legal ethics rules in the United States support this fundamental purpose of the legal profession: for example, the Preamble to the *Model Rules of Professional Conduct* ("*Model Rules*") characterizes a lawyer as "a representative of clients"[54] first and foremost and lists "the lawyer's obligation zealously to protect and pursue a client's legitimate interests" as a fundamental principle underlying the *Model Rules*.[55] Some more cynically believe that legal ethics rules exist in order to (or, less harshly, that they are used to) protect lawyers' interests at the expense of clients—but even if that is sometimes true, it does not mean that the

50. *Id.*

51. *See id.*

52. For example, a 2017 study assessing eviction cases in Colorado found that, of renters who proceeded pro se, 68% were evicted from private housing and 43% were evicted from public housing. Of those represented by counsel, 94% of those in private housing and 80% of those in public housing kept their homes. AUBREY HASVOLD & JACK REGENBOGEN, COLO. CTR. ON L. & POL'Y, FACING EVICTION ALONE: A STUDY OF EVICTIONS, DENVER, COLORADO, 2014–2016, 1, 8 (2017), https://cclponline.org/wp-content/uploads/2017/10/Facing-Eviction-Alone-9-11-17_revised.pdf [https://perma.cc/QJ83-S7VN].

53. *E.g.*, Office of the United Nations High Commissioner for Human Rights, Basic Principles on the Role of Lawyers, Aug. 27–Sept. 7, 1990, https://www.ohchr.org/en/professionalinterest/pages/roleoflawyers.aspx [https://perma.cc/4WTR-6UEL].

54. MODEL RULES pmbl. ¶ 1.

55. MODEL RULES pmbl. ¶ 9.

legal profession should not aspire to do better.[56] Given the fundamental importance of consumer protection in the regulation of the legal profession, software that replicates the services offered by human lawyers should be held to the same or similar consumer protection standards as human lawyers.

II. APPLYING LEGAL ETHICS RULES TO AI INTENDED TO ASSIST PRO SE LITIGANTS

In question-and-answer format, this Part applies some legal ethics rules to hypothetical AI software intended to assist pro se litigants in drafting pleadings, motions, briefs, and other documents; to advise them on their litigation strategy and likelihood of success; or to perform other litigation-related tasks. The rules discussed are the *Model Rules* and statutory and case law pertaining to unauthorized practice of law and legal malpractice. Other rules to which lawyers or software publishers may be subject, such as procedural rules and intellectual property laws, are only discussed insofar as they relate to the ethical dilemmas at issue.

A. DOES LEGAL AI CONSTITUTE UNAUTHORIZED PRACTICE OF LAW?

In every U.S. jurisdiction, nonlawyers and lawyers not admitted in that jurisdiction are generally prohibited from providing legal advice or services, which is referred to as unauthorized practice of law ("UPL").[57] Depending on the state, UPL may be prohibited by a civil or criminal statute, a judge-made doctrine, a rule of professional conduct, or some combination thereof.[58] In a dispute over whether a particular legal AI program constitutes UPL, it must first be determined whether the program constitutes law practice and then, if it does, whether that law practice is authorized. The following two Subparts address each of these questions in turn.

1. WHETHER LEGAL AI IS LAW PRACTICE

States define "law practice" differently,[59] but it generally includes rendering services that require the exercise of professional judgment, such as representing another in court, drafting legal documents, speculating about the outcome of a matter, or providing legal advice—applying the law to a specific problem that

56. Walters Interview, *supra* note 32.

57. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2581 (1999).

58. For a list of state UPL laws as of 2019, see BATTERED WOMEN'S JUST. PROJECT, UNAUTHORIZED PRACTICE OF LAW MATRIX (2019), https://www.bwjp.org/2019-12-10-upl-matrix.pdf [https://perma.cc/UAX2-HDPR]. Rules of professional conduct, which apply only to lawyers, generally prohibit lawyers from practicing in jurisdictions in which they are not admitted. MODEL RULES R. 5.5.

59. For a list of states' definitions of law practice, see AM. BAR ASS'N, STATE DEFINITIONS OF THE PRACTICE OF LAW, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/model_def_statutes.pdf [https://perma.cc/53XD-234J] (last visited Mar. 11, 2022).

affects the client's rights and duties.[60] Unlike legal advice, the provision of legal information—facts about the law not applied to a particular person's situation—is not law practice.[61] Importantly, nonlawyers may generally not insulate themselves from the consequences of UPL solely by disclaiming that their services are not law practice—a statement that a nonlawyer does not practice law is immaterial if the nonlawyer does in fact practice law.[62]

The stated purpose of prohibiting UPL is quality control: "to protect the public from being preyed upon by those not competent to practice law—from incompetent, unethical, or irresponsible representation."[63] But sometimes, the prohibition on UPL might be misused to serve lawyers' self-interest at the public's expense by restricting competition and ensuring a "lawyer monopoly" over a wide variety of activities.[64] In light of these concerns, in determining whether particular activities constitute law practice, courts have tended to balance quality control with access to justice.[65] In the interest of access to justice, courts have generally held that it is not law practice to sell informational publications and generic do-it-yourself kits, such as fill-in-the-blank form books, as long as the seller does not provide legal advice, such as exercising judgment as to how a particular person should fill out a form.[66] In fact, some courts assist pro se litigants by publishing handbooks containing glossaries of legal terms, explanations of the litigation process, and fill-in-the-blank forms.[67] Furthermore, in states such as Massachusetts and New York, basic form-filling does not count as law practice at all.[68]

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60. *E.g.*, Oregon State Bar v. Smith, 942 P.2d 793, 800 (Or. Ct. App. 1997) ("'[P]ractice of law' means the exercise of professional judgment in applying legal principles to address another person's individualized needs through analysis, advice, or other assistance."); Comm. on Pro. Ethics & Conduct v. Baker, 492 N.W.2d 695, 701 (Iowa 1992) ("The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client.").

61. *What Is 'Legal Advice'?*, FINDLAW (Feb. 11, 2022), https://www.findlaw.com/hirealawyer/do-you-need-a-lawyer/what-is-legal-advice.html [https://perma.cc/78ZG-TP6U].

62. *See* Florida Bar v. TIKD Services LLC, No. SC18-149, at 19 (Fla. 2021); Akron Bar Ass'n v. Miller, 684 N.E.2d 288, 291 (Ohio 1997).

63. *In re* Application of R.G.S., 541 A.2d 977, 983 (Md. 1988); *see also* Unauthorized Prac. of L. Comm. of Sup. Ct. v. Grimes, 654 P.2d 822, 826 (Colo. 1982) ("The purpose of the bar and our admission requirements is to protect the public from unqualified individuals who charge fees for providing incompetent legal advice."); Binkley v. Am. Equity Mortg., Inc., 447 S.W.3d 194, 196–97 (Mo. 2014) ("Missouri restricts the practice of law solely to licensed attorneys to 'protect the public from being advised or represented in legal matters by incompetent or unreliable persons.'" (quoting Hargis v. JLB Corp., 357 S.W.3d 574, 577–78 (Mo. 2011))).

64. Walters Interview, *supra* note 32; *see* Denckla, *supra* note 57.

65. *In re* First Escrow, Inc., 840 S.W.2d 839, 844 (Mo. 1992) (holding courts have a "duty to strike a workable balance between the public's protection and the public's convenience"); *see also* Disciplinary Counsel v. Cotton, 873 N.E.2d 1240, 1245 (Ohio 2007) (Lanzinger, J., concurring) ("[W]ithin the prison universe, where the availability of licensed attorneys is generally nonexistent, the UPL Board's interest in regulating the legal profession is overridden by the need for prison inmates to have help in obtaining access to the courts.").

66. *See, e.g.*, Oregon State Bar v. Gilchrist, 538 P.2d 913, 916–17 (Or. 1975).

67. Helen Hershkoff & Stephen Loffredo, *Access to Justice: Enforcing Rights and Securing Protection*, *in* GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PEOPLE WITH LOW INCOME 785, 794–95 (2019).

68. Walters, *supra* note 15, at 1089–90.

Since the 1930s, courts have recognized that the definition of law practice must evolve over time as methods of doing business change.[69] As UPL cases involving software began to arise, courts looked to existing definitions for guidance and expanded them to encompass this new form of legal service provision. For example, the Florida Supreme Court ruled that a software program that determined whether or not users had a case and held clients' money in trust was engaged in law practice because it performed tasks that only lawyers may perform.[70] And the Ninth Circuit, applying California law, ruled that a bankruptcy form-filling program constituted law practice because the software provided legal advice when it determined in which schedule to place information inputted by the user and supplied relevant citations.[71] However, more basic informational and form-filling software may not be law practice; after all, "[t]he resulting advice or document may in fact be no different from what could be obtained by consulting a how-to book or do-it-yourself kit."[72] For example, in 1999, a federal district court enjoined the sale and distribution in Texas of the Quicken Family Lawyer form-filling software on grounds of UPL,[73] and, in response, the Texas legislature amended its UPL statute to provide that "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney."[74]

Given that courts have allowed the definition of law practice to evolve over time, they might continue to expand its definition to encompass legal AI, determining whether the software program at issue performs tasks traditionally reserved for lawyers or is more akin to a do-it-yourself guide. States might also consider reforming and harmonizing their definitions of law practice in order to put software publishers on clearer notice about the legality of their conduct. Professor Ed Walters, an expert in legal technology, argues that "UPL statutes represent a daunting obstacle to those who would address the access-to-justice gap with software."[75] The ambiguity of existing UPL laws and the lack of uniformity across states "may well deter many otherwise-enthusiastic developers from even trying to enter the market."[76] The development of AI capable of

69. Grand Rapids Bar Ass'n v. Denkema, 287 N.W. 377, 380 (Mich. 1939) ("It would be extremely difficult to formulate an accurate definition of the 'practice of law' which might endure, for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging business and social order."); Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1191–92 (Fla. 1978); Florida Bar v. TIKD Services LLC, No. SC18-149, at 6 (Fla. 2021).

70. *TIKD*, No. SC18-149 at 15, 18–19.

71. *In re* Reynoso, 477 F.3d 1117, 1125–26 (9th Cir. 2007).

72. *Qualifications, Unauthorized Practice of Law*, Law. Man. on Prof. Conduct (ABA/BNA) § 21:8001.20.280 (2022).

73. Unauthorized Prac. of L. Comm. v. Parsons Tech., Inc., No. 3:97-CV-2859-H, 1999 U.S. Dist. LEXIS 813, at *1 (N.D. Tex. 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999).

74. TEX. GOV'T CODE § 81.101(c) (1999).

75. Walters, *supra* note 15, at 1090.

76. *Id.*

engaging in law practice might therefore serve as a catalyst for the reform or harmonization of UPL laws.

2. WHETHER LAW PRACTICE INVOLVING LEGAL AI IS AUTHORIZED

In general, law practice is authorized only when it is done by lawyers admitted in the jurisdiction.[77] The main exception that allows nonlawyers to practice law is the pro se exception: nonlawyers may act as their own attorneys without threat of sanction for UPL.[78] But the pro se exception only applies when the nonlawyer is acting solely on his or her own behalf.[79] A nonlawyer who practices law to assist someone else is subject to sanction for UPL.[80] This exception is therefore not available to publishers of software intended to assist pro se litigants, though it is available to pro se litigant users themselves. If such software is deemed to constitute law practice, whether that law practice is authorized therefore depends on whether the entity practicing law is a lawyer admitted in the relevant jurisdiction.

When AI becomes sophisticated enough to autonomously replicate the advice that would be given by a lawyer, courts and legislatures will have to decide *who* exactly is engaged in law practice—who the lawyer (or nonlawyer) is. The answer to this question matters for purposes of UPL, as well as for determining who is a party to the attorney-client relationship, who is subject to the rules of professional conduct, and who may be held liable for legal malpractice.

Even if an AI program can act like a lawyer, it is not one, and designating it as such would thwart the legal ethics rules' purpose of promoting ethical behavior. Human lawyers almost always obey the rules not only because their moral compass tells them to, but also out of fear of what might happen to them if they do not—the threats of fines, sanctions, disbarment, and irreparable damage to their professional reputation generally keep lawyers acting ethically.[81] Meanwhile, computer programs do not have a moral conscience and do not care whether they, their creators, or their publishers are sanctioned, so they have no incentive to follow the rules.

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77. MODEL RULES R. 5.5. Law practice can also be performed by nonlawyer employees under the direction and supervision of appropriately licensed lawyers who retain responsibility for their work. MODEL RULES R. 5.3; *Qualifications, Unauthorized Practice of Law*, Law. Man. on Prof. Conduct (ABA/BNA) § 21:8001.20. 220 (2022).

78. Faretta v. California, 422 U.S. 806, 815 (1975) (finding an affirmative right of self-representation); Wash. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n, 586 P.2d 870, 875–76 (Wash. 1978) (finding pro se litigant "may appear and act in any court as his own attorney without threat of sanction for unauthorized practice").

79. *E.g.*, Perkins v. CTX Mortg. Co., 969 P.2d 93, 99 (Wash. 1999).

80. *See id.*

81. Note, *Collective Sanctions and Large Law Firm Discipline*, 118 HARV. L. REV. 2336, 2338 (2005). For a discussion of the deterrent effect of professional codes of conduct generally, see Melissa Rorie & Matthew Philip West, *Can "Focused Deterrence" Produce More Effective Ethics Codes?: An Experimental Study*, 3 J. WHITE COLLAR & CORP. CRIME 33 (2020).

It would make more sense to conceptualize the software publisher as the entity engaged in law practice and the AI as merely an intermediary or conduit through which the publisher provides services. The Florida Supreme Court took a similar approach in *Florida Bar v. TIKD Services LLC*, a 2021 UPL dispute involving the TIKD mobile app, which connected ticketed Florida drivers to independent lawyers in exchange for a fee after making an initial determination about the viability of their case.[82] The court found that the app's publisher engaged in UPL, considering that the publisher was not a law firm, nor was its founder and CEO a member of the Florida Bar.[83] In order to protect the public from the risk of having their rights substantially impaired by the failings of a software program engaged in law practice, the court would only allow software of this sort to be marketed by lawyers and law firms, subject to legal ethics rules.[84]

Even if an entity engaged in law practice is a lawyer, that law practice is not necessarily authorized—that further depends on whether the lawyer is admitted to practice in the state in which the practice takes place. This can mean the state in which the legal services are performed, or the state whose laws the lawyer advises the client about.[85] The United States maintains a policy of largely restricting lawyers' practices to the states in which they are licensed.[86] This policy is embodied in Model Rule 5.5, which forbids lawyers from practicing law in a given jurisdiction without being admitted, with some exceptions, and from practicing law in any jurisdiction in violation of that jurisdiction's rules.[87] In addition, states such as Delaware and New York require that lawyers admitted in the state maintain physical offices in the state.[88] Meanwhile, states such as California and New Jersey have abandoned the physical office requirement, provided that the lawyer comply with data security, service of process, and recordkeeping requirements.[89] This patchwork licensing system raises significant complications for software publishers who might wish to serve clients in more than one state. A publisher seeking to market legal AI nationwide might have to employ lawyers

82. Florida Bar v. TIKD Services LLC, No. SC18-149, at 26 (Fla. 2021).

83. *Id*. at 1–2.

84. *Id*. at 8–9. And in every United States jurisdiction except for the District of Columbia, law firms must be owned only by lawyers. MODEL RULES R. 5.4(d); LERMAN, SCHRAG & RUBINSON, *supra* note 11, at 799; D.C. RULES OF PROF'L CONDUCT R. 5.4(b) (2007).

85. *E.g*., Birbrower, Montalbano, Condon & Frank v. Superior Ct., 949 P.2d 1, 5–6 (Cal. 1998).

86. James W. Jones, Anthony E. Davis, Simon Chester & Caroline Hart, *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?*, 30 GEO. J. LEGAL ETHICS 125, 128 (2017).

87. MODEL RULES R. 5.5.

88. These requirements have been upheld as constitutional. *In re* Barakat, 99 A.3d 639, 641, 644 (Del. 2013); Schoenefeld v. Schneiderman, 821 F.3d 273, 276 (2d Cir. 2016).

89. State Bar of Cal. Standing Comm. On Prof'l Responsibility & Conduct, Formal Op. 2012-184 (2012) (May an attorney maintain a virtual law office practice ("VLO") and still comply with her ethical obligations, if the communications with the client, and storage of and access to all information about the client's matter, are all conducted solely through the internet using the secure computer servers of a third-party vendor (i.e., "cloud computing")?); N.J. CT. RULES, R. 1:21-1(a)(1) (2015).

admitted to practice in each of the fifty states and the U.S. territories.[90] If offering multistate service is too risky or burdensome, publishers might be incentivized to serve only the states with the largest populations, or the most litigious populations, or where the most lucrative pro se lawsuits tend to take place; this situation would arguably be unfair. Many have called for an overhaul of attorney licensing,[91] and the advent of sophisticated legal AI capable of performing the role of a lawyer might strengthen the case for loosening the restrictions on multistate practice.

B. WHEN DOES AN ATTORNEY-CLIENT RELATIONSHIP EXIST BETWEEN LEGAL AI PUBLISHERS AND USERS?

The existence of an attorney-client relationship is a threshold question in disciplinary matters and legal malpractice actions.[92] In order to enforce rules of professional conduct and provide redress to legal AI users harmed by publishers, it is therefore important to clarify when and between whom the attorney-client relationship exists.

1. THE PARTIES TO THE ATTORNEY-CLIENT RELATIONSHIP

The parties to the attorney-client relationship are, self-evidently, the attorney and the client. As argued in Part II.A.2, *supra*, the software publisher, not the software itself, should be considered the "attorney" in the context of legal AI intended to assist pro se litigants. In most cases, the "client" will be the individual who uses the software in litigating his or her own case. A minority of jurisdictions also permit organizational entities such as corporations to litigate pro se through their nonlawyer directors or officers.[93] If a publisher chooses to make its software available for use by organizational clients, the publisher might have a duty to make clear to the user that the organization, not the user, is the client.[94]

In some cases, parents, guardians, or other representatives might wish to use legal AI on behalf of a minor child or an individual with diminished capacity who is a pro se litigant. Allowing these types of arrangements might expand access to justice for many of society's most vulnerable people, but it might also facilitate abuse and coercion. When a lawyer serves a minor or disabled client who is accompanied by another person, Model Rule 1.14 imposes a duty to maintain a

90. *See* MODEL RULES R. 5.5.

91. *E.g.*, Jones, Davis, Chester & Hart, *supra* note 86.

92. *Lawyer-Client Relationship*, Law. Man. on Prof. Conduct (ABA/BNA) § 31:101.20 (2021).

93. Most jurisdictions require that corporations, limited liability companies, and unincorporated entities be represented by an attorney in court. *E.g.*, All City Glass & Mirror Inc. v. McGraw Hill Info. Sys. Co., 750 S. W.2d 395, 395 (Ark. 1988). But some jurisdictions, including Maryland, New York, and South Carolina, allow corporations to be represented by nonlawyer directors or officers in certain courts or under certain circumstances. Turkey Point Prop. Owners' Ass'n Inc. v. Anderson, 666 A.2d 904, 908 (Md. Ct. Spec. App. 1995); Feldman v. Mazzei, 631 N.Y.S.2d 241, 241 (N.Y. Dist. Ct. 1995); Renaissance Enters. Inc. v. Summit Teleservices Inc., 515 S.E.2d 257, 259 (S.C. 1999).

94. *See* MODEL RULES R. 1.13(a), (f).

normal attorney-client relationship to the extent reasonably possible,[95] which entails looking to the client for decisions as far as reasonably possible.[96] Protecting vulnerable clients' decisional autonomy necessitates the thoughtful exercise of professional judgment: the lawyer should consider and balance "the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client."[97] Software publishers should carefully consider whether their AI is sophisticated enough to reliably make these sorts of assessments in fulfillment of their obligations under Model Rule 1.14 before allowing their services to be used by one person on behalf of another with diminished capacity.

2. CREATION OF THE PROSPECTIVE-CLIENT RELATIONSHIP

Lawyers owe certain ethical duties to prospective clients—those who consult with them about the possibility of representation with respect to a matter—even when no attorney-client relationship is ever formed.[98] Specifically, Model Rule 1.18 limits lawyers' ability to use or reveal information learned from prospective clients and to represent other clients with conflicting interests.[99] Electronic communications can constitute a consultation giving rise to a prospective-client relationship if the lawyer invites people to submit information related to a possible representation without understandable statements limiting the lawyer's obligations.[100] The ABA therefore recommends that lawyers who have websites use clear warnings and disclaimers to avoid misunderstandings by users that a prospective-client relationship or an attorney-client relationship has been created entailing ethical duties on the part of the lawyer where the lawyer does not want to create any such relationship.[101] Legal AI publishers should heed this recommendation to avoid inadvertently creating relationships with users.

3. CREATION OF THE ATTORNEY-CLIENT RELATIONSHIP

The first way an attorney-client relationship can be created is by agreement, where "someone seeks legal advice from a lawyer and the lawyer gives or

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95. MODEL RULES R. 1.14(a).

96. MODEL RULES R. 1.14 cmt. 1.

97. MODEL RULES R. 1.14 cmt. 6.

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> Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established.

MODEL RULES pmbl. ¶ 17.

99. MODEL RULES R. 1.18.

100. MODEL RULES R. 1.18 cmt. 2.

101. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010) (Lawyer Websites).

impliedly agrees to give it."[102] Legal AI publishers will likely require users to electronically assent to an end-user license agreement at the outset of the representation. (In the case of software that provides limited-scope representation, it is especially important that the publisher make clear the extent to which the user is agreeing to limit the scope of the representation.[103]) The federal Electronic Signatures in Global and National Commerce ("E-Sign") Act[104] and the Uniform Electronic Transactions Act ("UETA"),[105] which has been adopted by all states except New York,[106] give electronic signatures equal legal status as ink signatures as long as certain conditions are met. Importantly, the parties must clearly show intent to sign, they must consent to do business electronically, and the records of the signature must be capable of retention and accurate reproduction.[107] Assuming no changes in the E-Sign Act or UETA, the process of creating an attorney-client relationship by agreement when legal AI is involved might look quite similar to how it looks today.

Publishers should keep in mind that attorney-client relationships can also be created by *inadvertent* agreement.[108] No explicit contract is necessary between the lawyer and the client, and it is sufficient that an individual seeks legal advice from a lawyer who then gives it.[109] Publishers should thus take care to not provide any legal advice until after it has been determined that the software can serve the user (that the publisher is admitted to practice in the jurisdiction whose law governs the user's legal dispute, for example) and the user has assented to the software's end-user license agreement. Moreover, publishers that choose to make their services available for free should be aware that no compensation is required to create an attorney-client relationship,[110] so pro bono users would be owed the same ethical duties as paying users.

The second way an attorney-client relationship can be created is through a lawyer's failure to clarify that one does *not* exist, where "a lawyer knows that someone reasonably believes himself to be the lawyer's client and the lawyer does not dispel that belief."[111] How can a lawyer "know" what another person believes when the lawyer has no face-to-face interaction with that person? According to

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102. *Lawyer-Client Relationship*, Law. Man. on Prof. Conduct (ABA/BNA) § 31:101.10 (2021).

103. *See* LERMAN, SCHRAG & RUBINSON, *supra* note 11, at 197.

104. 15 U.S.C. §§ 7001–7006 (2021).

105. UNIF. ELEC. TRANSACTIONS ACT (UNIF. L. COMM'N 1999).

106. *Electronic Transactions Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034 [https://perma.cc/GMH2-UWYL] (last visited Mar. 11, 2022). New York has instead adopted the Electronic Signatures and Records Act. N.Y. STATE TECH. LAW §§ 301–309 (2004).

107. *US Electronic Signature Laws and History*, DOCUSIGN, https://www.docusign.com/learn/esign-act-ueta#:~:text=The%20ESIGN%20Act%20is%20a,and%20to%20sign%20them%20electronically [https://perma.cc/CD3U-AUBF] (last visited Mar. 11, 2022).

108. *Lawyer-Client Relationship*, Law. Man. on Prof. Conduct (ABA/BNA) § 31:101.20.40 (2021).

109. *Lawyer-Client Relationship*, Law. Man. on Prof. Conduct (ABA/BNA) § 31:101.10 (2021).

110. *Id.*

111. *Id.*

the *Model Rules*' terminology section, knowledge "may be inferred from circumstances."[112] As discussed in Part II.C.2, *infra*, Model Rule 5.3 imposes a duty on lawyers to supervise the technology they work with.[113] Given that this duty exists, it would be fair, in the interest of holding publishers accountable for their software, to infer that publishers are familiar with all of the communications that can be output by their software and that they understand how a reasonable user would interpret those communications. If they are not notified otherwise, users might reasonably believe themselves to be clients in a variety of situations, particularly where they submit information to or receive information from the software. Publishers should therefore use clear warnings and disclaimers, as recommended by the ABA,[114] where applicable to preempt any misunderstandings by users that an attorney-client relationship exists where it in fact does not.

4. TERMINATION OF THE ATTORNEY-CLIENT RELATIONSHIP

Knowing when the attorney-client relationship ends is just as important as knowing when it begins for purposes of determining the parties' rights and obligations, as some legal ethics rules afford current clients greater protection than former clients.[115] There is no bright-line rule to determine when an attorney-client relationship is over; termination depends on the client's reasonable expectations, as assessed on a case-by-case basis with the facts taken from the client's perspective.[116]

Comment 4 to Model Rule 1.3 states that, "[i]f a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal."[117] While some pro se litigants might only use legal AI to deal with one isolated matter, others, such as small business owners or landlords, might run into legal disputes more regularly and might use the software often. In *Hatfield v. Seville Centrifugal Bronze*, an Ohio court held that, when an attorney renders advice to a client on an annual basis and does not formally notify the client that the representation has ceased, the attorney-client relationship remains in effect the following year.[118] If regular legal AI users are not notified that the attorney-client relationship has ended, they might similarly believe that they are still current clients while in between matters. Publishers should make it standard practice for the program to send a clearly worded notice of withdrawal when it determines that assistance is no longer needed or when the user opts to

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112. MODEL RULES R. 1.0(f).

113. MODEL RULES R. 5.3; Cyphert & Simshaw Speech, *supra* note 24.

114. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010) (Lawyer Websites).

115. *Compare, e.g.*, MODEL RULES R. 1.7(a) (some conflicts of interest involving current clients are nonconsentable), *with* MODEL RULES R. 1.9 (all conflicts of interest involving a former client are consentable).

116. *Lawyer-Client Relationship*, Law. Man. on Prof. Conduct (ABA/BNA) § 31:101.20.90 (2021).

117. MODEL RULES R. 1.3 cmt. 4.

118. Hatfield v. Seville Centrifugal Bronze, 732 N.E.2d 1077, 1081 (Ohio Ct. C.P. 2000).

terminate the relationship, and to ensure that the user acknowledges receipt and understanding of this notice.

Publishers should additionally be cautious about the contents of their marketing communications to former users. The Oregon State Bar contends that, if a lawyer sends periodic reminders to former clients about the possible need for further actions on otherwise completed matters, it may be reasonable for the recipients to believe that they are still current clients.[119] Publishers should ensure that, once a matter has been completed, the software ceases to provide communications pertaining to that matter unless requested by the user. Publishers that wish to send marketing communications to former clients[120] should take care to share only general information and to warn recipients that the information provided should not be relied on as legal advice and does not renew the attorney-client relationship.[121]

C. HOW SHOULD THE RULES OF PROFESSIONAL CONDUCT APPLY TO LEGAL AI PUBLISHERS?

Lawyers are subject to the rules of professional conduct of the jurisdictions where they are licensed, as well as the rules of the jurisdictions where their conduct or the effects of their conduct occur.[122] This Subpart discusses how some of the most relevant *Model Rules*[123] might apply to lawyers who publish legal AI software intended for use by pro se litigants. In practice, the legal profession is governed primarily by rules of professional conduct promulgated by each state's highest court and based heavily on the *Model Rules* produced by the ABA.[124] One exception is California, where many legal ethics rules are promulgated by the legislature.[125] Although the *Model Rules* themselves are not legally enforceable, this Subpart refers to them for the sake of simplicity, noting divergences among states where relevant.

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119. Or. State Bar, Formal Op. No. 2005-146 (2005) (Conflicts of Interest, Current Clients: Long-Term Docket Obligations).

120. It is permissible to solicit clients through "written communication that recipients may easily disregard," such as text message or email. MODEL RULES R. 7.3 cmt. 2.

121. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010) (Lawyer Websites).

122. A lawyer admitted to practice in a jurisdiction is subject to that jurisdiction's disciplinary authority regardless of where the lawyer's conduct occurs. MODEL RULES R. 8.5(a). A lawyer who provides or offers to provide legal services in another jurisdiction is additionally subject to that jurisdiction's disciplinary authority. MODEL RULES R. 8.5(a). A lawyer can be subject to the disciplinary authority of multiple jurisdictions for the same conduct. MODEL RULES R. 8.5(a). For matters pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply. MODEL RULES R. 8.5(b). For any other conduct, the rules of the jurisdiction in which the conduct occurred or where the predominant effects of the conduct occurred apply. MODEL RULES R. 8.5(b).

123. The *Model Rules* discussed are some of those identified as especially pertinent to legal AI by Amy Cyphert and Drew Simshaw. Cyphert & Simshaw Speech, *supra* note 24.

124. LERMAN, SCHRAG & RUBINSON, *supra* note 11, at 69.

125. *Id*. at 69, n.11.

1. THE DUTY OF (TECHNOLOGICAL) COMPETENCE

Model Rule 1.1 requires lawyers to provide competent service to clients, which demands "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[126] Although this duty cannot be waived, the fact of limited-scope representation "is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary,"[127] meaning that the burden on the lawyer may be reduced somewhat when providing unbundled services. Competence includes "use of methods and procedures meeting the standards of competent practitioners."[128] Thirty-eight states so far[129] have adopted a statement to the effect that, "[t]o 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."[130]

Ed Walters argues that Model Rule 1.1, read in conjunction with its Comments, already imposes an affirmative ethical duty on lawyers to employ AI where the cost of using it is outweighed by its potential benefit to the client.[131] Today, the use of eDiscovery or brief analytics tools might be required in the most high-stakes cases, and in the near future, these tools might become the standard of competent legal practice in all cases.[132] It is unlikely that a duty will arise for lawyers to provide legal AI to pro se litigants, as lawyers are under no obligation to undertake limited-scope representation, although the ABA suggests it.[133]

In the case of those lawyers who do provide legal services using AI, AI experts Amy Cyphert and Drew Simshaw argue that Model Rule 1.1 and its Comments impose a duty to either fully understand the technology or have nonlawyer employees, such as software engineers, who do.[134] In order for the software to provide "the legal knowledge, skill, thoroughness and preparation reasonably necessary" in a limited-scope relationship, it should be programmed with all the relevant statutory and case law, ask users the right questions to fully understand their situation, and produce outputs comparable to those a reasonably competent human lawyer can produce. While the technology is in its earlier phases,

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126. MODEL RULES R. 1.1.

127. MODEL RULES R. 1.2 cmt. 7.

128. MODEL RULES R. 1.1 cmt. 5.

129. AM. BAR ASS'N, CHART – JURISDICTIONAL ADOPTION OF MODEL RULE 1.1, COMMENT [8] ON TECH COMPETENCE (Mar. 23, 2021), https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ [https://perma.cc/BJA3-AATK].

130. MODEL RULES R. 1.1 cmt. 8. Some states have opted to hold lawyers to a stricter standard of technological competence. For example, West Virginia replaced the "should" of Comment 8 with "must." W. VA. RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2015).

131. Walters, *supra* note 15, at 1075–76.

132. *Id*. at 1076.

133. MODEL RULES R. 1.2(c) (a lawyer "*may* limit the scope of the representation") (emphasis added); *see* ABA HANDBOOK, *supra* note 5, at 4.

134. Cyphert & Simshaw Speech, *supra* note 24.

publishers might also need to supplement the software with the services of a human lawyer to satisfy the standard of professional competence.

2. THE DUTY TO SUPERVISE NONLAWYER ASSISTANCE

Model Rule 5.3 holds law firm partners and other lawyers with managerial authority responsible for the firm's compliance with legal ethics rules, and it holds lawyers with direct supervisory authority over nonlawyers responsible for the nonlawyers' compliance with these rules.[135] In 2012, the ABA renamed Model Rule 5.3 from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance." Whereas "Assistants" referred to human employees or contractors such as paralegals, secretaries, and investigators, "Assistance" also encompasses machines, thus imposing a duty on lawyers to supervise the software they work with.[136]

The way this duty applies might vary based on the organizational structure of the software publisher—whether it is a single lawyer or a law firm, and, within a law firm, whether there is a hierarchy between managing and nonmanaging lawyers. Like Model Rule 1.1, Model Rule 5.3 might also impose a duty on lawyers who do not fully understand the software to hire and appropriately supervise nonlawyer employees who do.[137] Furthermore, Model Rule 5.3 might require that the software be programmed in a way that allows lawyers or nonlawyer employees to inspect how the program processes given data inputs, reaches conclusions, and produces outputs.[138]

The duty to supervise might also include an obligation for software publishers to retain all legal rights to their products. Copyright protection generally attaches to a computer program once it is fixed in machine readable form.[139] The majority of computer software is commercial software; members of the public can acquire a license to use the software from the entity that owns the copyright and, depending on the terms of the license agreement, are generally prohibited from copying, modifying, deconstructing, or developing new works based on the software.[140] On the other hand, some computer software is public domain software to which the copyright holder has explicitly relinquished all rights; anyone can copy, modify, deconstruct, or develop new works based on this software.[141] If a legal AI publisher were to relinquish its rights to a program intended to assist pro se

135. This Rule contains several reasonableness limitations, however. MODEL RULES R. 5.3(a), (b).

136. Cyphert & Simshaw Speech, *supra* note 24.

137. *See id.*

138. *See* Walters, *supra* note 15, at 1091.

139. 17 U.S.C. § 102 (1990); Apple Comput., Inc. v. Franklin Comput. Corp., 714 F.2d 1240, 1249 (3d Cir. 1983).

140. *Guide to Legal and Ethical Use of Software*, WASH. UNIV. IN ST. LOUIS, https://wustl.edu/about/compliance-policies/computers-internet-policies/legal-ethical-software-use/ [https://perma.cc/C7Z4-RDYD] (last visited Mar. 11, 2022).

141. *Id.*

litigants, then anyone could freely copy or modify it. This might not only threaten the public interest and raise UPL, disciplinary, or legal malpractice issues for any copiers, but it might also indicate a failure to supervise on the part of the original publisher.

3. THE DUTY OF CONFIDENTIALITY

Lawyers are bound by a duty of confidentiality in order to encourage clients to communicate openly and candidly with them and ensure the most effective possible representation.[142] Model Rule 1.6(a) prohibits lawyers from revealing "information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation," or unless one of the exceptions listed in subsection (b) applies.[143] Model Rule 1.9(c) imposes a similar duty of confidentiality with respect to former clients.[144] Model Rule 1.6(c) also requires lawyers to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to," client information.[145]

Some AI is trained through machine learning, a process which uses existing data to discover and incorporate new patterns into the program's algorithm.[146] Developers might train legal AI using existing case law[147] or, more problematically, existing client files. Although the machine learning component of AI might enable the provision of higher-quality service to future clients, it might also compromise current and former clients' confidences if their sensitive data is incorporated into the program's algorithm and revealed.[148] Publishers might therefore be required to seek clients' informed consent in order to be allowed to use their data for research and development purposes, and they might have to refrain from training their software using the data of clients who do not consent to this.[149]

Additional complications might arise in the case of legal AI developed by one entity and then sold to another entity for marketing to the public. The developer might request that the publisher turn over data obtained from users for analysis.[150] Model Rules 1.6 and 1.9 might obligate the publisher to refuse requests such as

142. LERMAN, SCHRAG & RUBINSON, *supra* note 11, at 241.
143. MODEL RULES R. 1.6(a), (b).
144. MODEL RULES R. 1.9(c).
145. MODEL RULES R. 1.6(c).
146. Surden Speech, *supra* note 22.
147. Harry Surden cautions those developing predictive legal analytics software that training AI using only existing case law might introduce a selection bias into the algorithm, as the set of cases that go forward to litigation is only a small subset of all legal disputes. *Id.* The duty of competence might require taking measures to address this selection bias.
148. Cyphert & Simshaw Speech, *supra* note 24.
149. *See* MODEL RULES R. 1.6; MODEL RULES R. 1.9(c).
150. *See* Walters, *supra* note 15, at 1081.

these.[151] Publishers might instead consider conducting their own data analyses, using nonlawyer employees specialized in computer science if necessary.[152]

Finally, in order to "prevent the inadvertent or unauthorized disclosure of, or unauthorized access to," client information as required by Model Rule 1.6(c),[153] publishers might be obligated to implement cybersecurity measures to protect against threats such as identity theft and cyberattacks. Beyond the duties imposed by the rules of professional conduct, publishers might be required to take additional steps to comply with applicable state and federal data privacy laws.[154]

Despite these considerations, Ed Walters argues that the risks to client confidences brought about by the advent of legal AI are not worse, just different.[155] For decades, law firms have conducted business with clients via telephone and unencrypted email, methods of communication that are not very secure.[156] Improvements in technology could bring about further improvements in the protection of client confidences. But legal service providers should always remain conscious of how information is stored and transmitted, how it is used, and whether and when it is destroyed, and should be careful in choosing which outside parties to deal with.[157]

4. THE DUTY OF NONDISCRIMINATION

Model Rule 8.4(g), adopted by the ABA in 2016, provides that it is professional misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[158] Some states, Vermont being the first, have adopted the language of Model Rule 8.4(g) almost exactly; some states address discriminatory behavior in other rules, including Texas, or comments, including Arizona; and other states, including Georgia and Virginia, do not have rules or comments dealing with discrimination or harassment.[159]

Developers and publishers should be cautioned against assuming that AI is neutral. If the datasets that train the AI contain patterns of bias, the AI will

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151. *See* MODEL RULES R. 1.6; MODEL RULES R. 1.9(c).

152. *See* Walters, *supra* note 15, at 1081.

153. MODEL RULES R. 1.6(c).

154. MODEL RULES R. 1.6 cmt. 18 ("[A] lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy.").

155. Walters, *supra* note 15, at 1081.

156. *Id.* at 1082.

157. *Id.*

158. MODEL RULES R. 8.4(g). For a discussion of what it means for a legal AI publisher to "know" something, see *supra* Part II.B.3.

159. AM. BAR ASS'N, CPR POL'Y IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 8.4: MISCONDUCT (Dec. 7, 2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-4.pdf [https://perma.cc/235M-P856].

produce biased outputs.[160] As a particularly egregious example, GPT-3, the new natural language processing system discussed in Part I.B, *supra*, "learned" the English language in part by analyzing nearly a trillion words posted on social media and, as a result, "often spews biased and toxic language."[161]

Legal AI software aimed at pro se litigants will inevitably collect data on users' demographic characteristics. Users who seek legal advice about situations involving discrimination will need to provide the relevant demographic information in order to receive accurate legal advice. Furthermore, many sensitive characteristics might be inferred from information that seems innocuous. If a program asks users to state their first and last name for identity verification purposes, it might be able to infer their sex, national origin, or even religious affiliation. If a program asks users to provide their home address, it might be able to infer their race or socioeconomic status. Regardless of whether discrimination is addressed by any given state's rules of professional conduct, legal AI publishers should make every effort to ensure that their products do not treat users unfairly based on characteristics such as these. They should be mindful of the data they use to train their software, be on the lookout for evidence of individual-level and group-level bias, and take steps to correct bias when it is detected.

Nevertheless, it may not constitute discrimination for a publisher to aim its software specifically at the poor or another underserved population, as Model Rule 8.4(g) is not violated "by limiting the lawyer's practice to members of underserved populations in accordance with [rules of professional conduct] and other law."[162]

5. CONFLICTS OF INTEREST

Model Rule 1.7 sets forth the situations in which a conflict of interest with a current client prevents the lawyer from representing a new client, either absolutely or without the affected clients' consent.[163] Model Rule 1.9 sets forth the situations in which a conflict of interest with a former client prevents the lawyer from representing a new client without the affected clients' consent.[164] Conflicted representation is restricted and even sometimes prohibited in order to promote loyalty and independent judgment within the attorney-client relationship.[165]

It is hard to justify applying the conflict-of-interest rules as they currently exist to publishers of legal AI software aimed at pro se litigants. Where legal services are provided impersonally, without human interaction, instances of conflicted

160. *See generally* Xavier Ferrer, Tom van Nuenen, Jose M. Such, Mark Coté & Natalia Criado, *Bias and Discrimination in AI: A Cross-Disciplinary Perspective*, 40 IEEE TECH. & SOC'Y MAG. 72 (2021).

161. Metz, *supra* note 47.

162. MODEL RULES R. 8.4(g) cmt. 5.

163. MODEL RULES R. 1.7.

164. MODEL RULES R. 1.9.

165. MODEL RULES R. 1.7 cmt. 1.

representation are unlikely to engender the same feelings of betrayal[166] that would arise if a human lawyer were involved. This is because software can be programmed to isolate different users' cases from one another so that information provided by any given user is not later used against that user to help another.[167] Because pro se litigants whose claims are adverse to one another and who seek legal advice from the same AI software are not likely to feel that the software or its publishers are being disloyal, conflicted representation would not impair effective legal service provision.[168] The public interest might demand modifying the conflict-of-interest rules as they pertain to legal AI to avoid situations where one individual's use of a software program automatically bars numerous other people from using it.

A bigger concern might be the conflict between lawyers' ethical obligations and lawyers' and software companies' profit motives.[169] Applying Model Rule 5.4 can mitigate this conflict; it aims to promote lawyers' professional independence by prohibiting them from forming partnerships with nonlawyers to practice law or sharing legal fees with nonlawyers in most cases.[170] However, just as in traditional law practice, the conflict between clients' interest in spending as little money as possible and lawyers' interest in making as much money as possible may be impossible to fully eliminate.

If disciplinary authorities instead opt to apply the conflict-of-interest rules as they currently exist to legal AI, then software providers might be obligated to perform extensive conflicts checks on all prospective clients, decline to provide service in the event of a nonconsentable conflict, and seek informed consent in the event of a consentable conflict. It would likely be difficult for publishers to seek conflicts waivers from users at the outset of the attorney-client relationship. In law firms, especially large ones, it is standard practice to ask clients to provide written consent to future consentable conflicts of interest that could arise from the firm's representation of other clients or other work.[171] Whether that consent is valid depends on factors including how well the client understands the risks, how well the lawyer explained the waiver and the possible future conflicts, how much experience the client has using legal services, and whether the client received independent legal advice before consenting.[172] In the case of pro se litigants who use legal AI, future conflicts waivers are likely to be invalid: pro se litigant users

166. MODEL RULES R. 1.7 cmt. 6 (Conflicted representation without informed consent is likely to cause the client "to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively.").

167. Walters Interview, *supra* note 32.

168. *See* MODEL RULES R. 1.7 cmt. 6.

169. *See* Florida Bar v. TIKD Services LLC, No. SC18-149, at 17 (Fla. 2021).

170. MODEL RULES R. 5.4.

171. LERMAN, SCHRAG & RUBINSON, *supra* note 11, at 366.

172. MODEL RULES R. 1.7 cmt. 22; ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-436 (2005) (Informed Consent to Future Conflicts of Interest).

may not understand the risks, may not have much experience using legal services, and may be unlikely to be independently represented by another lawyer.

6. THE DISCIPLINARY PROCESS

The disciplinary process commences with a complaint filed by a client or another lawyer.[173] In most states, an independent office of the state's highest court investigates the complaint and files charges against the lawyer if appropriate.[174] The matter is first presented to an adjudicator, who may be a judge, a lawyer, or a committee. After making findings of fact, the adjudicator may recommend sanctions. This recommendation is reviewed by an administrative board, and the administrative board's decision may then be appealed to the state's highest court.[175] The disciplinary process for legal AI publishers that have potentially violated a legal ethics rule should work in largely the same way as the traditional disciplinary process, with the exceptions that different sanctions may be appropriate and that groups of lawyers may need to be disciplined collectively.

Sanctions typically include revoking the lawyer's license, prohibiting the lawyer from practicing law for a certain period of time, or reprimanding the lawyer publicly or privately.[176] In the case of legal AI, whose users will likely tend to be vulnerable financially and otherwise, it might be more appropriate to sanction publishers by fining them, compelling them to refund certain users, or prohibiting them from marketing their software to the public until it is brought into compliance with the applicable rules.

The fact that disciplinary sanctions only apply to individual lawyers[177] might make it difficult to hold responsible a publisher that is a law firm or a group of lawyers. If the law firm is organized in such a way that none of its members individually supervises any particular users' cases, then it might be impossible to pinpoint culpability, and ethical violations might go unpunished. In order to enforce the rules of professional conduct, courts should consider allowing collective discipline in cases involving software publishers. The means of collective discipline that have been proposed to address misconduct in large firms might be considered here as well. Professor Ted Schneyer, a legal ethics expert, has suggested that law firms as a whole could be sanctioned for their members' disciplinary violations under a theory of respondeat superior.[178] And an unsigned note in the Harvard

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173. Depending on the situation, it may also be appropriate for an aggrieved client to file a legal malpractice or other claim against the lawyer. The violation of a rule of professional conduct does not typically give rise to a cause of action against a lawyer, but lawyer conduct that violates a rule of professional conduct can simultaneously be grounds for civil liability. MODEL RULES scope ¶ 20; *Malpractice*, Law. Man. on Prof. Conduct (ABA/BNA) § 301:101.20.40.20 (2021).

174. LERMAN, SCHRAG & RUBINSON, *supra* note 11, at 87.

175. *Id*. at 87–88.

176. *Id*. at 86.

177. HARV. L. REV., *supra* note 81, at 2336.

178. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 28 (1991).

Law Review has called for imposing disciplinary sanctions on each individual lawyer in the responsible group unless a culpable individual can be produced.[179] Some other *Model Rules* already conceptualize law firms as collective entities,[180] so it would not be too great a stretch to treat a group of lawyers as a single unit for purposes of discipline.

D. HOW SHOULD LEGAL AI PUBLISHERS BE HELD LIABLE FOR LEGAL MALPRACTICE?

Even though most pro se litigants who use legal AI may not have the means to initiate another lawsuit against the publisher if things go wrong, legal malpractice suits are still a possibility. Legal malpractice is an umbrella category that includes the negligence, breach of contract, and breach of fiduciary duty claims available under state common law to clients who are harmed by their lawyers' mistakes or misconduct.[181] These causes of action are generally proven by establishing four elements: the existence of an attorney-client relationship giving rise to a duty owed by the lawyer to the client, the lawyer's breach of a duty owed to the client, damages suffered by the client, and a proximate cause relationship between the breach and the damages.[182] It is far from clear what duty publishers should owe to users, whereas the second through fourth elements can be approached in much the same way as in a traditional legal malpractice case. This Subpart therefore focuses on the first element, the duty owed by the publisher to the user.

The existence of an attorney-client relationship is a threshold question in legal malpractice suits: "the class of people who can sue an attorney for malpractice is limited to those who have entered into a contract for legal services with the lawyer."[183] Once this relationship is established, lawyers have a common law duty to serve their clients with reasonable competence, a standard of care that "lies somewhere between the highest level of proficiency and the barest minimum of skill."[184] This standard is not an average, as being below the median does not automatically make fifty percent of lawyers negligent—instead, the standard is "that common to those who are recognized in the [legal profession] as qualified,"[185] or the level of care "normally exercised by lawyers in similar

179. HARV. L. REV., *supra* note 81, at 2336.

180. For instance, "a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client." MODEL RULES R. 1.10 cmt. 2.

181. *Malpractice*, Law. Man. on Prof. Conduct (ABA/BNA) § 301:101.10 (2021).

182. *Id.*

183. *Malpractice*, Law. Man. on Prof. Conduct (ABA/BNA) § 301:601.20.10 (2021). There are some narrow exceptions to this rule. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 51 (2000) lists four circumstances in which lawyers may be held liable for malpractice by nonclients: when the nonclient is a prospective client, when the lawyer invites the nonclient to rely on the lawyer's opinion or other legal services, when the lawyer knows that a client intends to use the representation primarily to benefit a nonclient, and when the lawyer knowingly assists a client in breaching the fiduciary duties that client owes to a nonclient. For a discussion of when an attorney-client relationship exists between a publisher and user of legal AI, see *supra* Part II.B.

184. *Malpractice*, Law. Man. on Prof. Conduct (ABA/BNA) § 301:101.20.30 (2021).

185. RESTATEMENT (SECOND) OF TORTS § 299A cmt. e (AM. L. INST. 1965).

circumstances."[186] Lawyers remain responsible for this duty when they delegate tasks to nonlawyer employees[187]—and, by extension, machines.

Courts and legislatures will have to decide whether this level of reasonable competence should be determined by reference to the competent *lawyer* engaged in provision of unbundled services, or by reference to the competent *software program*. If software publishers are held to the same standard as human lawyers, then they may be reluctant to market their services or even to develop them in the first place. If software programs are only compared to each other, this deterrent effect would not be an issue, but the services provided might be significantly inferior to human lawyers' services at first. The ABA takes the position that "some legal help is better than none"[188] in allowing limited-scope representation, so the legal profession might also find that some help is better than none when it comes to software aimed at assisting pro se litigants. Ultimately, the answer to this question might depend on the current state of legal AI technology and how much quality control the legal profession is willing to sacrifice to promote access to justice. Ideally, as technology develops and publishers compete against one another to offer superior products, the standard of care will increase.

It should also be noted that several federal and state statutes impose malpractice-like liability on lawyers above and beyond the common law. This includes the federal Fair Debt Collection Practices Act, Securities Exchange Act of 1934, Fair Credit Reporting Act, Truth in Lending Law, Racketeer Influenced and Corrupt Organizations Act ("RICO"), and Telephone Consumer Protection Act of 1991.[189] This also includes state consumer protection and unfair trade practices acts and state statutes imposing punishments on lawyers for deceit or collusion.[190] Courts and legislatures may wish to clarify whether legal AI publishers are subject to each of these statutes, and publishers should take care to respect those to which they are or may be subject.

E. SHOULD PRO SE LITIGANTS BE REQUIRED TO DISCLOSE THEIR USE OF LEGAL AI?

Pro se litigants have no greater rights than represented litigants, are subject to the same legal standards and rules of practice and procedure as represented litigants, and are presumed to have full knowledge of these rules.[191] However, courts tend to hold pro se litigants to a lower standard of technical precision and afford them some leniency in the enforcement of procedural rules, so long as the litigant acted in good faith and the opposing party will not suffer prejudice.[192] This

186. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 52 (2000).
187. *See Malpractice*, Law. Man. on Prof. Conduct (ABA/BNA) § 301:1001.20.110.30 (2021).
188. ABA HANDBOOK, *supra* note 5, at 12.
189. *Malpractice*, Law. Man. on Prof. Conduct (ABA/BNA) § 301:401.20 (2021).
190. *Malpractice*, Law. Man. on Prof. Conduct (ABA/BNA) § 301:401.30 (2021).
191. 7A C.J.S. *Attorney & Client* § 247 (2021).
192. *Id.*; Haines v. Kerner, 404 U.S. 519, 520 (1972).

leniency serves to "protect *pro se* litigants from inadvertent forfeiture of rights due to their lack of legal training."[193] Whether pro se litigants should be required to disclose that their submissions were drafted by AI therefore depends on whether it is fair to allow them to potentially benefit from lowered standards.

Different courts and ethics committees have reached opposite conclusions as to whether it is ethical for lawyers to draft pleadings and briefs for pro se litigants without representing them in court or indicating their involvement—this practice is known as "ghostwriting." At least fourteen states[194] and the Second Circuit[195] allow lawyers to ghostwrite documents for pro se litigants. The ABA Standing Committee on Ethics and Professional Responsibility has opined that ghostwriting is ethical under the *Model Rules*.[196] This opinion asserts that ghostwriting does not grant unwarranted special treatment to pro se litigants or unfairly prejudice other parties.[197] If the lawyer has done a good job, the fact that a lawyer was involved will be evident to the court, and special treatment will not be given; conversely, if the lawyer has done a bad job, the pro se litigant will not have obtained an unfair advantage.[198] Because ghostwriting does not affect the merits of the litigation, it is not a material form of dishonesty or misrepresentation, and it therefore does not violate any of the *Model Rules* that mandate truthfulness, namely Model Rules 1.2(d), 3.3(b), 4.1(b), and 8.4(c).[199] But this reasoning assumes that it is the quality of pro se litigants' writing, not the fact of them being pro se litigants, that prompts courts to go easy on them, and this is not the case for all courts.[200]

Other ethics committees have condemned ghostwriting as unethical, and many states prohibit lawyers from assisting pro se litigants altogether or permit it only with disclosure. Some states, such as Colorado, Delaware, Kentucky, and New York, require lawyers to personally identify themselves on documents they prepare for pro se litigants, on the basis that the duty of candor toward the tribunal mandates this disclosure.[201] The Tenth Circuit also mandates personal

193. Askins v. Metro. Transit Auth., No. 1:19-cv-4927-GHW, 2020 U.S. Dist. LEXIS 38888, at *9 (S.D.N.Y. 2020).

194. LERMAN, SCHRAG & RUBINSON, *supra* note 11, at 199.

195. *In re* Liu, 664 F.3d 367, 373 (2d Cir. 2011).

196. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007) (Undisclosed Legal Assistance to Pro Se Litigants).

197. *Id.*

198. *Id.*

199. *Id.*

200. *See, e.g.*, Duran v. Carris, 238 F.3d 1268, 1272 (10th Cir. 2001) ("Ethics requires that a lawyer acknowledge the giving of his advice by the signing of his name. Besides the imprimatur of professional competence such a signature carries, its absence requires us to construe matters differently for the litigant, as we give pro se litigants liberal treatment, precisely because they do not have lawyers.").

201. Colo. Bar Ass'n, Ethics Op. 101 (2016) (Unbundling/Limited Scope Representation); Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1994-2 (1994) (Rules 1.2(c); 8.4(c)); Ky. Bar Ass'n, Ethics Op. E-343 (1991) (May a lawyer limit his or her representation of an indigent pro se plaintiff or defendant to the preparation of initial pleadings? May a legal services organization prepare handbooks for distribution to laymen

identification.[202] Other states, such as Florida and Kansas, require lawyers to indicate that the document was prepared with the assistance of counsel but do not require lawyers to identify themselves.[203] These courts have concluded that the fact of lawyer assistance *is* material to the outcome of the litigation, so the failure to disclose that a submission to the court was ghostwritten is materially misleading and therefore unethical.[204] This is because these courts tend to grant equally permissive treatment to all pro se litigants *because* they are pro se litigants—regardless of the quality of their writing.[205]

In addition, some courts have held that, regardless of whether ghostwriting is ethical, it is impermissible for lawyers to not personally identify themselves because it violates Federal Rule of Civil Procedure 11, which requires lawyers to sign the pleadings they write so as to represent to the court that there is good ground to support the litigant's claims.[206] These courts might also find that legal AI publishers violate this rule when their contribution to pro se litigants' submissions is not disclosed. Ultimately, as different courts treat pro se litigants differently, the answer to this question might vary by jurisdiction.

CONCLUSION

The role of artificial intelligence in the practice of law is going to expand in the coming years. Legal AI software aimed at assisting pro se litigants could vastly increase access to justice, but it should be introduced responsibly and ethically. This Note has suggested one way of protecting consumers as this software is made available: requiring that it be provided only by licensed lawyers or law firms and subjecting them to legal ethics rules. Alternative solutions are also possible and should be explored in future research. For instance, legal ethics rules could be modified so as to explicitly state how they apply to legal AI; courts or legislatures could enact new rules to govern legal AI while leaving intact the rules that govern human lawyers; or an exception to the prohibition on UPL could be made to allow for nonlawyer software publishers to enter the market, subject to their own set of ethical rules.

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concerning their legal rights, which contain forms of pleading and practice for use pro se?); N.Y. State Bar Ass'n, Ethics Op. 613 (1990) (Provision of Legal Services).

202. *Duran*, 238 F.3d at 1272.

203. Fla. Bar, Ethics Op. 79-7 (Reconsideration) (2000); Kan. Bar Ass'n, Ethics Op. 09-01 (2009) (Unbundled Legal Services).

204. *Contra* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446 (2007) (Undisclosed Legal Assistance to Pro Se Litigants).

205. *E.g.*, *Duran*, 238 F.3d at 1272.

206. FED. R. CIV. P. 11; *e.g.*, Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1231–32 (D. Colo. 1994); Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1079–80 (E.D. Va. 1997).

Regardless of how the legal profession and the government ultimately choose to regulate legal AI, software publishers should be mindful of the prohibition of unauthorized practice of law, the circumstances that give rise to a prospective-client relationship or an attorney-client relationship, the rules of professional conduct, the possibility of legal malpractice suits, and the requirement in some jurisdictions that legal service providers disclose their role in helping pro se litigants. With the advent of legal AI likely right around the corner, the legal profession should prepare itself to address these challenges.