

# Legal Ethics, Artificial Intelligence, and Mindfulness, Oh My!

By Jan L. Jacobowitz, Founder & Owner, Legal Ethics Advisor



Any sufficiently advanced technology is indistinguishable from magic. -- Arthur C. Clarke

I can't come back; I don't know how it works!  
Good-bye, folks! — The Wizard of Oz

No, it's not lions, and tigers, and bears, but it is a journey down the proverbial yellow brick road to understand the impact of society's latest "wizard"—Generative Artificial Intelligence. ("AI") No doubt, for lawyers, the AI journey presents the additional challenge of conforming to the legal ethics rules. Presumably designed to serve the public good rather than as obstructive, evil flying monkeys; violations of the rules can nonetheless prove deadly to a lawyer's career.



A new exploration requires research about the destination. Questions abound. What is artificial intelligence (“AI”)? Why does it suddenly seem to be such a hot topic in the media, on continuing education programs, and well, just about everywhere? Generative Artificial Intelligence and our ready access to it may provide a partial answer. More explanation required?

#### Background & Context

Before traveling forward, travel to the past provides enlightenment. Specifically, a trip to 1956 reveals that a Dartmouth mathematics professor, James McCarthy, coined the term artificial intelligence in his funding proposal for a summer symposium. [1] Professor Mc-

Carthy explained his study of artificial intelligence:

The study is to proceed on the basis of the conjecture that every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it. An attempt will be made to find how to make machines use language, form abstractions and concepts, solve kinds of problems now reserved for humans, and improve themselves. [2]

Thus, Professor McCarthy defined AI as machine learning beyond the ability to understand simple logical reasoning. In other words, he proposed that a machine may be programmed

to extract patterns in data, and trained to “learn” from ongoing experience.

Fast forward to today--- most thought leaders agree that AI refers to machine learning. Nevertheless, disagreement exists among scientists, philosophers, futurists, and others about specific definitions and distinctions between intelligence and consciousness; AI technology’s potential developmental speed; and whether AI will ultimately result in machines that may usurp human control of the planet. [3]

In fact, Max Tegmark deems artificial intelligence to be “the most important conversation of our lifetime.” [4] He asserts that “[t]he questions raised by the success of AI aren’t merely intellectually fascinating; they are morally crucial, because our choices can potentially affect the entire future of life.” [5]

No doubt, Tegmark’s 2017 observations remain compelling, but our current journey necessitates a narrower discussion; that is, AI’s impact on the legal profession and the implications for the legal ethics rules. For today’s journey we need a contemporary working definition of AI.

Wendy Yu Chang provides a clear definition in the context of legal ethics. Her definition resembles McCarthy’s 1956 description, but states AI’s ability as a fact rather than a theory to be proven. She writes: “Broadly, AI is the ability of a machine to perform what normally can be done by the human mind. AI seeks to use an automated computer-based means to process and analyze large amounts of data and reach rational conclusions—

the same way the human mind does.” [6]

More specifically, AI’s capabilities include machine learning, natural language processing, vision, and speech. [7] AI already appears in our daily lives; navigation apps for directions and ride sharing, facial recognition for log ins, and voice assistants like Siri all employ AI. These examples, and others, have played a role in society for several years.

In fact, when Tegmark and Chang contributed to the AI discussion in 2017, evidence of the legal profession’s growing interest in AI appeared in legal ethics literature and symposiums. Suggestions for programming to assist lawyers with office management, legal research, and predictive analysis entered the conversation. [8]

What had not yet appeared on the scene was generative AI—a combination of machine learning and natural language processing that leverages massive data sources in response to a user’s prompt. The user receives an “answer” that may appear as summarized information, completion of a creative task, or new, unique content. [9] Moreover, some generative AI programs like ChatGBT provide cost free, open access to the public.

### **AI and Legal Ethics**

Before focusing on open access, “user friendly” programs like ChatGBT, it is worth noting that lawyers are already outsourcing legal services to third party vendors who may use AI—think e-discovery, document review, legal research, and drafting of documents or pleadings. In fact, from 2006-2012, new legal ethics opinions emerged to provide advice on

the ethical use of outsourcing for legal research, document review, and drafting of pleadings. [10] In 2012, the American Bar Association (“ABA”) acknowledged the implications of outsourcing issues on the legal ethics rules when it amended the competence and supervision rules’ comments to include outsourcing. [11]

Of course, initial outsourcing primarily transferred legal tasks from one human being to another—nonetheless the fundamental legal ethics concerns remain even when the outsourcing occurs between human and a machine. Primary considerations include an attorney’s duties of competence, diligence, communication, and confidentiality. [12]

Confidentiality remains an utmost priority and may involve an attorney delving into an AI vendor’s terms of service, and specific process for handling of client information. [13] The confidentiality review dovetails with an attorney’s duty of supervision over nonlawyer assistants as an AI vendor constitutes a nonlawyer assistant.

Additionally, communication generally requires that clients understand and consent to outsourcing. A task that may be more difficult when dealing with AI, but nonetheless required. [14]

Billing may also create attorney-client issues. Typically, an attorney may only bill the net cost for outsourcing plus any reasonable fees for supervision and review unless there is disclosure and client agreement to another reasonable billing method. [15]

If an AI program drafts a demand letter, in a

contingency case, is that an additional cost or should it be included in the attorney’s fees? Does the engagement agreement discuss AI?

An additional AI billing query: when does the failure to employ AI result in unreasonable attorney fees? An AI program may be able to complete a task (eg. an accurate patent application) much faster and less expensively than an attorney. Does an attorney who fails to offer a client the AI option, and bills the client considerably more in fees, violate the reasonable fee requirement in the legal ethics rule? [16]

Depending upon specific circumstances and use of AI, other legal ethics concerns may involve conducting a conflict check, ensuring that the attorney maintains independent professional judgment, and avoiding assisting in the unauthorized practice of law (by a machine...?). [17]

Given all of the existing opinions and rules, do additional legal ethics concerns with ChatGBT and similar programs exist? Recent events provide the answer: a resounding yes!

### **ChatGBT & Legal Ethics**

For simplicity, this article will use ChatGBT to refer to the generative AI programs that have become available—some at no cost and available to download as apps on an individual’s phone. A lawyer using this type of ChatGBT recently appeared in international headlines when he employed it for research that he included in a court filing.

Unfortunately, ChatGBT “decided” to “create” cases that do not exist. Both the court and opposing counsel conducted the research that

the attorney failed to do and ChatGBT's fictional cases were soon revealed. [18] Even more unfortunately, the event became another episode in the proverbial "the cover up is worse than the crime," --the lawyers involved were initially less than candid further angering an already displeased judge. [19]

Ultimately, the lawyers involved admitted their conduct; the judge sanctioned them \$5000.00 and required them to inform their client and write apologies to each judge who ChatGBT included in its fictional cases. [20] Obviously, these attorneys failed in their duty of competence, but also managed to violate legal ethics rules beyond those discussed above.

Candor to the tribunal and fairness to opposing counsel both come to mind.[21] And of course, the violation of any of the rules invokes the general misconduct rule that includes the duty of honesty and support for the fair administration of justice. [22]

Despite these lawyers becoming the poster kids for how *not* to use ChatGBT or other generative AI programs, AI use has also generated positive developments.

For example, generative AI has been recognized as a terrific tool for initial drafting from a reliable data base, editing, and translating. [23]

Additionally, there are both law firms and academic centers conducting research and development of generative AI programs designed with the legal ethics rules in mind.

The international law firm Dentons, recently

revealed some of the features of its inhouse "fleetAI" program that appear geared to both competence and confidentiality. Joe Cohen, Denton's head of innovation for the U.K, Ireland, and the Middle East explains:

The firm will train staff on the risks inherent in the technology, including inaccurate and biased responses. Even though client matter documents can be uploaded to the platform, Dentons has worked with Microsoft, which is one of OpenAI's owners, to ensure that data uploaded into fleetAI is not used to train the tech, no one outside Dentons can access it, and it is erased after 30 days, according to the news release.

To insulate the firm against some of the risks, Cohen says the chatbot's homepage warns users to independently verify and validate content the platform produces.

"This is a research tool, and that's how we're trying to get people to see it," Cohen says. "This is something to ask to get some inspiration about a particular topic and help you get something down on paper for you to change." [24]

Thus, Dentons incorporates legal ethics concerns in the rollout of its AI program designed to provide a tremendous assist to its lawyers, without permitting them to rely on AI for the final product. Other firms and vendors are proceeding in like manner. [25]

The University of Texas at Austin, School of Information and The University of Connecticut, School of Law are conducting research with the goal of determining the best methodology for

developing generative AI tools for the legal profession that adhere to the legal ethics rules. [26] And the legal ethics professionals are not only collaborating with the UT study, but also are participating in numerous continuing legal education seminars designed to enhance awareness of both the benefits and risks of generative AI. [27]

Ultimately, the responsibility for ethically employing generative AI falls to the individual attorney in the moment that an AI option is chosen. So, what's an attorney to do? Alas, that's why mindfulness found its way into the title.

### **Mindfulness, Legal Ethics, and AI**

Mindfulness has gained widespread popularity not only among the general public, but also in the legal profession. [28] While often thought about as a means for meditation and relaxation, it also serves a valuable purpose for lawyers; that is, heightened self-awareness in the moment that allows for thoughtful decision making rather than conduct born out of emotional reactivity or the stress of the situation. [29]

Mindfulness practices increase an individual's awareness of their thoughts, emotions, and bodily sensations often providing insight into the intentions underlying a chosen course of conduct. Professor Leonard Riskin observes that "mindfulness allows us to insert a 'wedge of awareness' before we act. [30] He explains that when we create a psychological distance to observe our thoughts, feelings, and bodily sensations "their strength or power or influence tends to diminish and we have a chance to consider their merit." [31] We may then act

from a place of thoughtful response rather than emotional reactivity.

Benefits of enhanced decision making may range from calming a parent prior to dealing with a misbehaving child, to managing a rush hour response to a discourteous driver, to strategic decisions on a response to a stressful work occurrence. Certainly, the New York lawyers should have educated themselves on the benefits and risks of ChatGBT, but their decisions as to how to conduct themselves in court following their initial filing sealed their fate.

Perhaps if the lawyers in New York court case, had paused and reflected on what thoughts, feelings, and bodily sensations were contributing to their dishonest responses to the court, they might have paused and reconsidered their strategy for proceeding. (Hypothetically: "I am in huge trouble, and experiencing fear, anxiety, upset stomach, and elevated pulse. I need to pause, take stock, and thoughtfully consider my options.").

Impossible to predict the outcome for those specific lawyers, but easy to offer as a general suggestion. Why? Because there has been a tremendous amount of research that supports both the positive impact of mindfulness and the enhanced decision-making made possible by inserting a pause in the decision-making process. [32]

A full exploration of mindfulness is beyond the scope of this article. However, a brief introduction seems warranted because as technology continues to evolve and the 24/7 pace of the world continues to increase, it becomes all the

more important for lawyers to pause and consider their ethical duties before rushing into the world of generative AI.

## Conclusion

Lawyers should absolutely embrace change--both technological and otherwise--but proceed with caution and gain understanding of any brave new world that they decide to enter. U.S. District Court Judge P. Kevin Castel's opinion sanctioning the New York lawyers, thoughtfully explains some of the repercussions of failing to pause and consider the application of AI to the practice of law.

In researching and drafting court submissions, good lawyers appropriately obtain assistance from junior lawyers, law students, contract lawyers, legal encyclopedias and databases such as Westlaw and LexisNexis. Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance. But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings...[Respondents] abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.

Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other endeavors. The client may be deprived of arguments based on authentic judicial prece-

dents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity. [33]

Judge Castel's analysis both embraces AI and warns of the risks associated with its use in court. No doubt, AI may also assist lawyers in other legal practice contexts; lawyers should pause to assess the benefit and risk of using an AI tool in any practice area. Ultimately, the benefits, carefully understood and ethically employed, may prove to be an incredible boost for both lawyers and their clients. So, let's welcome the opportunity to create positive change and maintain an optimistic eye towards the future.

*The secret of change is to focus all of your energy, not on fighting the old, but building on the new.* --Socrates (470-399 BC), Philosopher.

## Notes:

[1] Jan L. Jacobowitz Ms. & Justin Ortiz, Happy Birthday Siri! Dialing in Legal Ethics for Artificial Intelligence, Smartphones, and Real Time Lawyers, 4 Tex. A&M J. Prop. L. 407 (2018). (Internal citations omitted)

Available at: <https://scholarship.law.tamu.edu/journal-of-property-law/vol4/iss5/1>

[2] See JERRY KAPLAN, ARTIFICIAL INTELLIGENCE: WHAT EVERYONE NEEDS TO KNOW 13 (2016).

[3] MAX TEGMARK, LIFE 3.0: BEING HUMAN IN THE AGE OF ARTIFICIAL INTELLIGENCE 44, 49–50, 282–83 (2017); *see also* KAPLAN, *supra* note 2, at 67–86.

[4] *Id.* at 37

[5] *Id.* at 36

[6] Wendy Wen Yu Chang, *Competence: What Are the Ethical Implications of Artificial Intelligence Use in Legal Practice?* 33 LAW. MAN. PROF. CONDUCT 284 (May 17, 2017); Julie Sobowale, *How Artificial Intelligence is Transforming the Legal Profession*, ABA J. (Apr. 2016), [http://www.abajournal.com/magazine/article/how\\_artificial\\_intelligence\\_is\\_transforming\\_the\\_legal\\_profession](http://www.abajournal.com/magazine/article/how_artificial_intelligence_is_transforming_the_legal_profession)

[7] *See supra*, note 1 that provides Andrew Aruda’s clear definitions:

- **Machine learning** describes a system that can take data points, process them to improve performance at completing a task, and then loop that process to continue doing the task while continuously improving.
- **Natural language** processing is when a computer can understand human language. The computer can interpret what a human actually means—deciphering intent and therefore providing more accurate and relevant answers and search results.
- **Vision** is the computer having the ability to interpret images, identify them and describe them, which is a task humans perform automatically.
- **Speech** is a system like Siri that can speak and interpret oral language, so you can have a back-and-forth interaction.

[8] *See* Colin S. Levy, editor, HANDBOOK OF LEGAL TECH, Chapter 12, *Technology and the Legal Profession-What’s Legal Ethics Got to Do With IT?*, Globe Law and Business Publications, (July 2023)

*See also* Jan L. Jacobowitz Ms. & Justin Ortiz, Happy Birthday Siri! Dialing in Legal Ethics for Artificial Intelligence, Smartphones, and Real Time Lawyers, 4 Tex. A&M J. Prop. L. 407 (2018). Available at: <https://scholarship.law.tamu.edu/journal-of-property-law/vol4/iss5/1>; William Davis, *How AI’s Opportunities Will Augment Rather than Replace Lawyers*, Legaltech News (Oct. 5, 2017), <https://www.law.com/legaltechnews/almID/1202799657613/> [<https://perma.cc/4GQJ-5WYM>].

[9] Glenn Gordon, *The Use of Artificial Intelligence in the Legal Profession*, Lexis Nexis Practical Guidance Journal, (April 27, 2023) <https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/the-use-of-artificial-intelligence-in-the-legal-profession>

[10] *See* ABA Comm. on Ethics & Prof’l Resp., Formal Op. 08-451 (2008); State Bar of Cal. Comm. on Prof’l Resp. & Conduct, Formal Op. 2004-165 (2004); Colo. Bar Ass’n, Formal Op. 121 (2009); Fla. State Bar Prof’l Ethics Comm., Ethics Op. 07- 2 (2008); N.C. State Bar, Formal Op. 2007-12 (2008); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Ethics Op. 762 (2003); N.Y.C. Bar Ass’n Comm. on Prof’l & Jud. Ethics, Formal Op. 2006-3 (2006); Ohio Supreme Court Bd. Of Comm’rs on Grievances & Discipline, Advisory Op. 2009-06 (2009); San Diego Cty. Bar Ass’n, Ethics Op. 2007-1 (2007); L.A. Cty. Bar Ass’n Prof’l Resp. & Ethics Comm., Op. No. 518 (2006); D.C. Bar, Ethics Op. 362 (2012); *see also* N.Y.C. Bar Ass’n Comm. on Prof’l Resp., *The Outsourcing of Legal Services Overseas*, NYC BAR (2007), <http://www.nycbar.org/pdf/report/uploads/20071813-ReportontheOutsourcingofLegal-ServicesOverseas.pdf>



- [11] MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 6 (AM. BAR ASS'N 2020); MODEL RULES OF PROF'L CONDUCT r. 5.3 cmt. 3–4 (AM. BAR ASS'N 2020)
- [12] JAN L. JACOBOWITZ & JOHN G. BROWNING, LEGAL ETHICS AND SOCIAL MEDIA: A PRACTITIONER'S HANDBOOK 6 (2022)
- [13] *Supra* at note 9; MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2020)
- [14] MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2020)
- [15] *See supra* note 9; MODEL RULES OF PROF'L CONDUCT r. 1.5 (AM. BAR ASS'N 2020)
- [16] David Hricik, Machine Aided Patent Drafting: A Second Look, PATENTLYO (Aug. 25, 2017), <https://patentlyo.com/hricik/2017/08/machine-patent-drafting.html>; *See* Jan L. Jacobowitz Ms. & Justin Ortiz, Happy Birthday Siri! Dialing in Legal Ethics for Artificial Intelligence, Smartphones, and Real Time Lawyers, 4 Tex. A&M J. Prop. L. 407 (2018). Available at: <https://scholarship.law.tamu.edu/journal-of-property-law/vol4/iss5/1>
- [17] *See supra* note 9; MODEL RULES OF PROF'L CONDUCT r. 1.7, 5.4, 5.5 (AM. BAR ASS'N 2022)
- [18] Larry Neumeister, *Lawyers Blame Chatgpt For Tricking Them Into Citing Bogus Case Law*, Published 11:25 PM EDT, June 8, 2023 <https://apnews.com/article/artificial-intelligence-chatgpt-courts-e15023d7e6fd-f4f099aa122437dbb59b>
- [19] Elura, Nanos, Judge Fines Lawyers \$5,000 For Submitting 'Gibberish' Cases Generated By Chatgpt, Then Lying About It, Law & Crime, A Dan Abrams Publication, June 22, 2023, 7:08pm <https://lawandcrime.com/awkward/judge-fines-lawyers-5000-for-submitting-gibberish-cases-generated-by-chatgpt-then-lying-about-it/>
- [20] The judge's order can be read here: <https://www.documentcloud.org/documents/23856993-sanctions-mata-v-avianca?responsive=1&title=1>
- [21] MODEL RULES OF PROF'L CONDUCT r. 3.3; 3.4 (AM. BAR ASS'N 2020)
- [22] MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2020)
- [23] *Supra* at note 9
- [24] Matt Reynolds, 'The Real Game-Changer': Dentons Is Latest Major Firm To Launch GPT-Powered Chatbot, ABA Journal, August 14, 2023, 1:54 PM CDT [https://www.abajournal.com/web/article/dentons-law-firm-to-launch-gpt-powered-chatbot?utm\\_source=sfmc&utm\\_medium=email&utm\\_campaign=weekly\\_email&utm\\_term=&utm\\_id=709240&sfmc\\_id=45015867](https://www.abajournal.com/web/article/dentons-law-firm-to-launch-gpt-powered-chatbot?utm_source=sfmc&utm_medium=email&utm_campaign=weekly_email&utm_term=&utm_id=709240&sfmc_id=45015867)
- [25] *Id.*
- [26] Based on the author's interview with the UT Department. The title of the study is: "Professional Ethics Standards as a Guide for AI design: A Case Study of Expert Opinions on Legal AI". The published study can be found here (placeholder): <https://minlee.net/>
- [27] *Id.*; *See for example*, *Generative AI & Legal Ethics: The Intersection of Efficiency and Ethical Discord* <https://learning.bloomberglaw.com/catalog/product.xhtml?eid=49468>
- [28] *See* Jan L. Jacobowitz & Scott Rogers, *Mindful Ethics-A Pedagogical and Practical Approach to Teaching Legal Ethics, Developing Professional Identity, and Encouraging Civility*, 4 St. Mary's J. on Legal Malpractice & Ethics 198,220 (2014).; Scott L.

Rogers, *THE MINDFUL LAW STUDENT: A MINDFULNESS IN LAW PRACTICE GUIDE* pp74-81 Edgar Elgar Publishing (Northampton, Mass. 2022)

[29] *Id.*

[30] Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. TEX. L. REV. 493, 499 (2009).

[31] *Id.*

[32] *Supra* at note 27 pp 220-227

[33] The secret of change is to focus all of your energy, not on fighting the old, but building on the new. Socrates (470-399 BC), Philosopher

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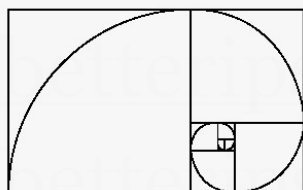
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