Artificial Intelligence and Legal Malpractice Liability

Vincent R. Johnson
St. Mary's University School of Law

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Author. Vincent R. Johnson is the Katherine A. Ryan Distinguished Chair for Global and International Law at St. Mary's University, San Antonio, Texas, where he has been a member of the faculty since 1982. Johnson is the author with Susan Saab Fortney of a leading textbook on attorney civil liability: LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION (West Acad. Publishing, 3d ed. 2021). Johnson and Fortney are also the authors of the legal malpractice chapters of the West hornbook on legal ethics. *See* SUSAN SAAB FORTNEY & VINCENT R. JOHNSON*, Legal Malpractice* §§ 5.1 to 5–8.5, LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION (West Academic Publishing, 2018).

By appointment of the Texas Supreme Court, Johnson is serving his second three-year term on the Committee on Disciplinary Rules and Referenda (CDRR). The CDRR plays a key role in formulating and reviewing proposed changes to the Texas Disciplinary Rules of Professional Conduct.

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I. INTRODUCTION

The use of artificial intelligence[1] by law firms in connection with their representation of clients is likely to become the subject of legal malpractice claims. This is true for three reasons. First, there is strong sentiment, both within and outside the legal profession,[2] favoring the development and use of artificial intelligence (A.I.) technology in a multitude of contexts, including the practice of law. Second, as the use of A.I. in law practice becomes common, if not pervasive, there are to be certain losses arising from perceived mistakes, errors, misuse, and other problems that will make it fair to ask whether a person suffering economic[3] or other harm is entitled to compensation.[4] Third, there are well-established causes of action that provide a fair and viable framework for determining who should pay for losses to clients or others caused by acts or omissions related to the use of

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1. The term artificial intelligence "generally refers to computer technology with the ability to simulate human intelligence to: [a]nalyze data to reach conclusions about it, find patterns, and predict future behavior . . . [and] [l]earn from data and adapt to perform certain tasks better over time." Practical Law Intellectual Property & Technology, *Artificial Intelligence Key Legal Issues: Overview*, Practical Law Practice Note Overview w-018-1743, https://us.practicallaw.thomsonreuters.com/w-018-1743 [https://perma.cc/Q9ZF-HLPN]; *see also* Steve Lohr, *Why Isn't A.I. Increasing Productivity?*, N.Y. TIMES, May 25, 2022, at B1 (quoting Northwestern University economist Robert J. Gordon as stating, "[t]oday's artificial intelligence . . . is mainly a technology of pattern recognition, poring through vast troves of words, images and numbers"); *see also* American Bar Association Resolution 604 (Feb. 2023), https://www.americanbar.org/news/reporter_resources/midyear-meeting-2023/house-of-delegates-resolutions/604/ [https://perma.cc/BM9N-JX5N] ("AI enables computers and other automated systems to perform tasks that have historically required human cognition, such as drawing conclusions and making predictions.").

2. *See* Bob Ambrogi, *Few Legal Professionals Using or Planning to Use Generative AI So Far, LexisNexis Survey Finds*, LAWSITES (Mar. 21, 2023), https://www.lawnext.com/2023/03/few-legal-professionals-using-or-planning-to-use-generative-ai-so-far-lexisnexis-survey-finds.html [https://perma.cc/Q68W-RU6A] ("[R]oughly 49% of lawyers agree their clients will expect them to use cutting-edge technology, including generative AI.").

3. In American tort law, there is no general duty on an actor not to negligently inflict purely economic loss. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 1 (AM. L. INST. 2020) ("(1) An actor has no general duty to avoid the unintentional infliction of economic loss on another."). However, claims for legal malpractice brought by a client are treated as an exception to this no-duty rule. *See id.* at § 4 ("A professional is subject to liability in tort for economic loss caused by the negligent performance of an undertaking to serve a client.").

4. *See* Rhys Dipshan, *Will ChatGPT Spur a Law Firm Chatbot Revolution Among Skepticism?*, LAW.COM (Apr. 5, 2023) https://www.law.com/americanlawyer/2023/04/05/will-chatgpt-spur-a-law-firm-chatbot-revolution-among-skepticism/ [https://perma.cc/7JHF-XYQF] (quoting a legal tech company executive as stating that using chatbots "opens us up to liability").

A.I. in representing clients. Given these realities, legal malpractice claims will be brought related to the use of A.I., especially if the sums in dispute are large.[5]

A.   The Push for Artificial Intelligence Technology

Lawyers are urged to stay up to date with technology as it relates to the practice of law. This push toward technological competence is echoed in the text of the *Model Rules of Professional Conduct*[6] and state ethics codes,[7] not to mention the writings of commentators[8] and ethics committees.[9] These influential voices will spur the proliferation of new and innovative practices in the legal profession, particularly because there is widespread interest on the part of the general public and the business community about what artificial intelligence can do,[10] as well as a gold rush of venture capitalists

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5.   *See* Michael Mauriel & Andrew A. Noble, *Artificial Intelligence: Patentability Considerations*, Practical Law Practice Note w-030-7442, https://uk.practicallaw.thomsonreuters.com/w-030-7442 [https://perma.cc/Y34F-4ZJB] ("Artificial Intelligence (AI) innovation has become increasingly common and consequential to advancing *high-stakes* endeavors across a wide range of technologies.") (emphasis added).

6.   *See* MODEL RULES OF PRO'L CONDUCT R. 1.1 cmt. 8 (AM. BAR ASS'N 2023) https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_pr ofessional_conduct/rule_1_1_competence/comment_on_rule_1_1/   [https://perma.cc/MJ4B-P88K] ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.").

7.   *See* TEX. DISCIPLINARY RULES PRO'L CONDUCT R. 1.01 cmt. 8 *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9) ("[E]ach lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology."); Robert Ambrogi, *40 States Have Adopted the Duty of Technology*, LAWSITES,   https://www.lawnext.com/tech-competence   [https://perma.cc/5QCZ-ZWUM] (containing links to state rules).

8.   *See* Elizabeth Rogers, *"Remote" Lawyering: Overcoming Privacy and Confidentiality Challenges for Attorneys*, 83 TEX. B.J. 864, 864 (2020) (lawyers "need to know how to not only use technology effectively but also how to use it in a way that complies with legal and ethical obligations toward clients and their information"); *see also* Jan L. Jacobowitz, *Negative Commentary—Negative Consequences: Legal Ethics, Social Media, and the Impact of Explosive Commentary*, 11 ST. MARY'S J. LEGAL MAL. & ETHICS 312, 332 (2021) ("[M]embers of the legal profession have an ongoing duty to remain competent, including the obligation to understand technology's benefits and disadvantages.").

9.   Isha Marathe, *As More Law Firms Leverage ChatGPT, Few Have Internal Policies Regarding Its Use*, LAW.COM (Feb. 15, 2023) https://www.law.com/legaltechnews/2023/02/15/as-more-law-firms-leverage-chatgpt-few-have-internal-policies-regarding-its-use [https://perma.cc/C7ZB-JLU3].

10.   *See* Adam Satariano & Cade Metz, *Using A.I. to Detect Breast Cancer That Doctors Miss*, N.Y. TIMES (Mar. 6, 2023), at A1, https://www.nytimes.com/2023/03/05/technology/artificial-intelligence-breast-cancer-detection.html [https://perma.cc/6PVF-ML59] ("A.I. usage is growing as the technology has become the center of a Silicon Valley boom."); *but see* Yuval Noah Harari et al., *If*

eager to finance A.I. product development.[11] Geopolitics also cheer on the tech world's innovations because the struggle to invent and perfect new and better forms of A.I. is regarded, by many, as a struggle between the United States and China.[12] In addition, "AI certification initiatives have offered hope to lawyers wishing to make up for a lack of knowledge."[13]

B. *Innovation and Its Costs*

With the new and better practices that may flow from A.I., will come the types of mistakes, errors, and misuse[14] that are part of the growing pains of many new technologies.[15] From those losses will ultimately emerge civil

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We Don't Master A.I., It Will Master Us, N.Y. TIMES, Mar. 27, 2023, at A18 ("A.I. systems . . . should not be entangled with the lives of billions of people at a pace faster than cultures can safely absorb them. A race to dominate the market should not set the speed of deploying humanity's most consequential technology."); *see also* Dipshan, *supra* note 4 (quoting a legal tech expert as stating, "I don't think this is going to lead to an explosion of built-for-purpose legal chatbots").

11. *See* Erin Griffith & Cade Metz, *'Let 1,000 Flowers Bloom': A.I. Funding Frenzy Escalates*, N.Y. TIMES, (Mar. 14, 2023), https://www.nytimes.com/2023/03/14/technology/ai-funding-boom.html [https://perma.cc/8LEP-LCSK] ("Over the past few months, a gold rush into start-ups working on 'generative' artificial intelligence has escalated into a no-holds-barred deal-making mania."); Erin Griffith & Cade Metz, *A New Area of A.I. Booms, Even Amid the Tech Gloom*, N.Y. TIMES, (Jan 7, 2023), https://www.nytimes.com/2023/01/07/technology/generative-ai-chatgpt-investments.html [https://perma.cc/Q8PX-B54Q] (discussing a deal that would value an A.I. lab at around $29 billion, twice its value two years earlier); *see also* Lohr, *supra* note 1, at B1 ("For years, it has been an article of faith in corporate America that cloud computing and artificial intelligence will fuel a surge in wealth-generating productivity.").

12. *See* Chang Che & John Liu, *China's Answer to ChatGPT Gets an Artificial Debut and Disappoints*, N.Y. TIMES, (Mar. 16, 2023), https://www.nytimes.com/2023/03/16/world/asia/china-baidu-chatgpt-ernie.html [https://perma.cc/J3L8-C5ER] ("China still has work to do to catch up with the United States in artificial intelligence, a race that has only intensified in recent years as relations between the two countries have deteriorated.").

13. Matt Reynolds, *Even with A.I. Certification Initiatives, Lawyers Need More Schooling on Tech*, A.B.A. J., (Mar. 4, 2022), https://www.abajournal.com/web/article/even-with-ai-certification-initiatives-lawyers-need-more-schooling-on-tech [https://perma.cc/V5HS-U8GS].

14. *See* Jessie Yount, *Accountable AI Is Here to Stay, and Big Law Has Taken Notice*, LAW.COM, (Mar. 15, 2023), https://www.law.com/americanlawyer/2023/03/15/accountable-ai-is-here-to-stay-and-big-law-has-taken-notice/ [https://perma.cc/ATX2-TXLQ] (quoting Vivek Mohan, who leads Gibson Dunn's "AI and automated systems practice" as stating that "has so much potential to impact people, both good and potentially bad").

15. "The role of computerized artificial intelligence will undoubtedly grow as companies use this new technology to help serve clients in the self-help legal marketplace." § 5.5-3 *Unauthorized Practice of Law: Defining the "Practice of Law"?*, LEGAL ETHICS, LAW. DESKBK. PROF. RESP. § 5.5-3 (2021–2022 ed.).

liability claims,[16] not to mention bad press,[17] and unflattering depictions in legal humor.[18] There will also be unanticipated problems because "[o]ne strange characteristic of today's A.I. language models is that they often act in ways their makers do not anticipate, or pick up skills they weren't specifically programmed to do."[19] No matter how much hype surrounds A.I., "computer algorithms can be faulty, just like cars and other products designed by humans . . . ."[20]

The adoption of new technologies often produces undesired risks and losses that would not have occurred if established technologies had continued to be used. In the A.I. field, such harm may be the result of algorithmic bias or lack of transparency,[21] or the rapidly evolving nature of the technology itself.[22] Legal malpractice litigation is one method of

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16.   *See* Marathe, *supra* note 9 (discussing an A.I. application that is "prone to errors" and opining that its use "by attorneys, without any guardrails, is likely [to] create a host of liabilities").

17.   *See* Cade Metz & Keith Collins*, 10 Ways GPT-4 Is Impressive but Still Flawed*, N.Y. Times, (Mar. 14, 2023), https://www.nytimes.com/2023/03/14/technology/openai-new-gpt4.html [https://perma.cc/TKJ7-JFGY] (describing a new chatbot as being "close to telling jokes that are almost funny"); *see also* Che & Liu, *supra* note 12 (reporting that "Chinese authorities suspended ChatYuan, one of the earliest chatbots in China, for providing, among other things, answers that challenged the Communist Party's official stance on Russia's war in Ukraine").

18.   *See, e.g.*, Claude Ducloux, *Entre Nous, My Interview with a Chat-Bot*, Austin Lawyer, Mar. 2023, at 30 ("[C]hat-bots are a diversion, intended to give the false impression that a machine can solve your problem, and their evasion will outlast any human being's tolerance for waiting.").

19.   Kevin Roose, *GPT-4 Is Exciting and Scary*, N.Y. Times (Mar. 15, 2023), https://www.nytimes.com/2023/03/15/technology/gpt-4-artificial-intelligence-openai.html [https://perma.cc/V427-NKQC].

20.   Natasha Singer, *At This School, Computer Science Class Now Includes Critiquing Chatbots*, N.Y. Times (Feb. 6, 2023), https://www.nytimes.com/2023/02/06/technology/chatgpt-schools-teachers-ai-ethics.html [https://perma.cc/4H5X-BS8Z].

21.   *See* Thomas H. Davenport, *The State of AI in Business*, Harv. Bus. Rev., Sept. 17, 2019, at 9 ("[I]t's not too early to consider ethical concerns around AI. Algorithmic bias and lack of transparency are two critical issues that AI exacerbates."); *see also* American Bar Association Resolution 604, *supra* note 1, at 8 stating:

> In the context of AI, transparency is about responsible disclosure to ensure that people understand when they are engaging with an AI system, product, or service and enable those impacted to understand the outcome and be able to challenge it if appropriate. . . . Lack of transparency with AI can negatively affect individuals who are denied jobs, refused loans, refused entry or are deported, imprisoned, put on no-fly lists or denied benefits.

Id.

22.   *See* Brian X. Chen et al., *How Siri, Alexa and Google Assistant Lost the A.I. Race*, N.Y. Times (Mar. 16, 2023), https://www.nytimes.com/2023/03/15/technology/siri-alexa-google-assistant-artificial-intelligence.html#:~:text=The%20virtual%20assistants%20had%20more,room%20for%20chatbots

determining who must bear the costs of innovations in the delivery of legal services.[23] As I have explained elsewhere:

%20to%20rise.&text=and%20Karen%20Weise-
,Brian%20X.,Google%2C%20reported%20from%20San%20Francisco.   [https://perma.cc/6BQQ-E5DD] (discussing virtual assistant and chatbots, and noting that "Google . . . said it would soon release generative A.I. tools to help businesses, governments and software developers build applications with embedded chatbots, and incorporate the underlying technology into their systems"); *see also* Karen Sloan, *Bar Exam Score Shows AI Can Keep Up with 'Human lawyers,' Researchers Say*, REUTERS (Mar. 15, 2023, 1:17 PM) https://www.reuters.com/technology/bar-exam-score-shows-ai-can-keep-up-with-human-lawyers-researchers-say-2023-03-
15/#:~:text=researchers%20say%20%7C%20Reuters-
,Bar%20exam%20score%20shows%20AI%20can%20keep,'human%20lawyers%2C'%20researchers
%20say&text=March%2015%20(Reuters)%20%2D%20Artificial,a%20new%20study%20released%2
0Wednesday [https://perma.cc/Q2H3-JF7G] ("Less than four months ago, two of the same researchers concluded that OpenAI's earlier large language model, ChatGPT, fell short of a passing score on the bar exam, highlighting how rapidly the technology is improving.").

  23. *See generally* Barbara Pfeffer Billauer, *The Bionic Plaintiff and the Cyborg Defendant: Liability in the Age of Brain-to-Computer Interface*, 25 VA. J.L. & TECH. 38, 76–77 (2021), stating:

> Tort law (of which negligence is one variety) has at least two goals, "victim specific compensation and deterrence." Negligence is essentially a common law means of requiring people to think about their actions. Mindless or thoughtless behavior—if damaging to others—is compensable. Claiming "I didn't know" will not excuse a defendant—if s/he should have known, or if others similarly situated would have known. What the defendant should have, could have, or would have known, is a function of preventing foreseeable harm.

Id. In thinking about losses caused by the use of A.I. in client representation, it is useful to differentiate four lines of argument that deal with (1) deterrence, (2) spreading, (3) shifting, and (4) benefit:

> The deterrence principle recognizes that tort law is concerned not only with fairly allocating past losses, but also with minimizing the costs of future accidents. According to this principle, tort rules should discourage persons from engaging in those forms of conduct which pose an excessive risk of personal injury or property damage. In some cases, this means nothing more than that liability should be imposed on those who deliberately inflict injury or cause harm by ignoring foreseeable risks. In other situations, such as those where a risk of harm is foreseeable to more than one person, the policy of deterrence may favor placing the threat of liability on the party best situated to avoid the loss, or, as some might say, the cheapest cost avoider, or taking fault on the part of all such persons into account in determining damages, so that all relevant actors have an incentive to avoid causing losses.
> . . . . The idea underlying the "spreading" rationale is that the financial burden of accidents may be diminished by spreading losses broadly so that no person is forced to bear a large share of the damages. For example, some argue that when a defective product unforeseeably causes injury to a consumer, it is best to place the loss on the manufacturer, even in the absence of fault, for unlike the unfortunate consumer, the manufacturer can distribute the loss to a large segment of the public by incrementally adjusting the price of its products. Losses can be spread not only through increases in the costs of goods and services, but through other devices such as taxation and insurance. Though controversial, the spreading principle revolutionized the law of products liability and has catalyzed other changes in tort doctrine.

Innovation is frequently followed by litigation because new or expanded practices often cause harm. When losses occur as a result of such developments, lawsuits offer a public mechanism for compensating injured persons, forcing innovators to internalize the costs of their endeavors, and creating incentives for measures that minimize future harm by reducing activity levels or increasing precautions. Within proper limits, litigation can, and frequently does, provide a healthy check on market excesses by forcing persons who benefit from selling goods or services to bear the burden of incidental losses or at least spread those losses broadly among the persons who enjoy the goods or services.[24]

. . . . The "shifting" rationale is closely related to the spreading principle insofar as it seeks to use the process of loss allocation to minimize the economic burden of accidents. According to this view, a loss will be less severely felt if it is placed on one with substantial resources than on one with limited wealth, and therefore losses should be shifted to those financially able to bear them . . . . To be sure, the law has never held that a poor person should always be able to recover from a rich one, or that a wealthy person is precluded from seeking damages from one financially less well to do. Indeed, there is great reluctance to applying one law to the rich and another to the poor. Yet, the shifting rationale—sometimes pejoratively referred to as the search for the "deep pocket"—has not been without influence. However, its impact on tort doctrine has been more covert than the impact of many other policy considerations.

[It is also argued that those] . . . who benefit from dangerous activities should bear resulting losses. Certain activities—e.g., owning a dog that may bite or using explosives—entail a serious risk of harm to third persons even if care is exercised by the actor. According to this principle, fairness requires that those who benefit from engaging in such conduct should bear resulting losses, even in the absence of fault. Thus, it is sometimes said that an activity "must pay its own way." What this means is that the law should force actors to "internalize" the costs that their endeavors inflict on third persons. Only when those costs are taken into account, it is argued, are actors likely to make decisions about activities and precautions that are not only personally beneficial, but socially responsible.

Vincent R. Johnson & Chenglin Liu, Studies in American Tort Law 771–72, 820–21 (7th ed. 2022).

    24. Vincent R. Johnson, *Standardized Tests, Erroneous Scores, and Tort Liability*, 38 Rutgers L.J. 655, 668–69 (2007). Elaborating on this theme the article explains:

In the early and mid-twentieth century, mass production of automobiles was soon followed by car-accident lawsuits, and mass-marketing of consumer goods gave rise to products-liability litigation. More recently, the widespread use of computerized databases has produced lawsuits related to data security and identity theft, and the expansion of international education programs is now generating claims by students injured while studying in foreign countries. It is entirely natural, from the perspective of more than a century of American legal history, for the recent vast expansion of standardized testing to be followed by lawsuits seeking to balance the sometimes conflicting goals of compensating victims and deterring bad practices, with the need to craft

In many instances, "[t]echnological developments can . . . reduce the cost of taking precautions while maintaining or even improving the level of care."[25] However, the application of artificial intelligence technology to law practice will not be an innovation that comes without costs.[26] As the Biden Administration's *Blueprint for an AI Bill of Rights*[27] correctly notes, "[a]mong the great challenges posed to democracy today is the use of technology, data, and automated systems in ways that threaten the rights of the American public."[28] The proposed Bill of Rights has identified "five principles that should guide the design, use, and deployment of automated systems to protect the American public in the age of artificial intelligence."[29] Those principles would mandate: (1) safe and effective systems; (2) algorithmic discrimination protections;[30] (3) data privacy; (4) notice and explanation; and (5) human alternatives, where appropriate.[31] The American Bar Association House of Delegates has articulated its statement of policies in somewhat different terms that prize (1) human authority, oversight, and control, (2) individual and enterprise accountability for harmful consequences, (3) transparency, and (4) traceability.[32]

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liability rules that facilitate the types of innovative practices and products that promote growth and progress and assist societal achievement and personal fulfillment.

Id. at 669–70*; but see* Alan Gunn, *Economic Analysis: Risk Spreading*, in JOHNSON & LIU, *supra* note 23, at 820–21 (7th ed. 2022) (discussing limits on risk spreading).

25. Ido Baum, *The Accidental Lawyer: A Law and Economics Perspective on Inadvertent Waiver*, 3 ST. MARY'S J. LEGAL. MAL. & ETHICS 112, 142 (2013).

26. *Cf.* Ethan S. Burger, *Professional Responsibility, Legal Malpractice, Cybersecurity, and Cyber-Insurance in the Covid-19 Era*, 11 ST. MARY'S J. LEGAL MAL. & ETHICS 234, 240 (2021) ("Technological tools used by law firms for legal and administrative activities have implications for staffing needs, office space requirements, and management or supervisory procedures.").

27. THE WHITE HOUSE, *Blueprint for an AI Bill of Rights*, https://www.whitehouse.gov/ostp/ai-bill-of-rights/ [https://perma.cc/7P5L-Y5JZ].

28. *Id.*

29. *Id.*

30. *See* Yount, *supra* note 14 ("After forming an official AI practice group about four years ago, DLA Piper uncovered a need to help clients test and monitor automated decisions, so that discrimination in raw data isn't carried forward.").

31. *Id.*

32. American Bar Association Resolution 604, *supra* note 1, stating:

3) Developers should ensure the transparency and traceability of their AI products, services, systems, and capabilities, while protecting associated intellectual property, by documenting key decisions made with regard to the design and risk of the data sets, procedures, and outcomes underlying their AI products, services, systems and capabilities.

C.   *Viable Theories of Legal Malpractice Liability*

The use of artificial intelligence in legal representation will sometimes diverge from client expectations. Such divergence may be insignificant when the representation succeeds. However, if the underlying claim, defense, or transaction is unsuccessful, disappointed expectations may give rise to plausible claims[33] that the undisclosed, unexplained, or incompetent use of artificial intelligence technology was caused by the lawyer's failure to meet the evolving standards of care.[34] Those standards may be set down by state and federal statutes.[35] But they will also be found in the common law principles governing liability for breach of fiduciary duty,[36] negligence[37] (including the law of informed consent),[38] or other demanding theories of

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33.   *See* Vincent R. Johnson, *The Informed Consent Doctrine in Legal Malpractice Law*, 11 ST. MARY'S J. LEGAL MAL. & ETHICS 362, 362 (2021) (suing for negligence based on "a lack of informed consent can potentially transform a losing case into a winner. Among other things, the doctrine has the potential to simplify and clarify the plaintiff's argument . . . .").

34.   *See* VINCENT R. JOHNSON & SUSAN SAAB FORTNEY, LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION 3 (3d ed. 2021) stating:

When a client is dissatisfied with lawyer performance, other factors relating to contemporary life may affect a client's willingness to challenge a lawyer's work. Technological advances are not entirely positive, for they may adversely affect the personal nature of lawyer-client relationships.
. . . .
[T]he complexity of the law and the arcane nature of legal procedures make it difficult for clients to assess their lawyers' performance. This contributes to a sense of distrust and a willingness to second-guess the lawyer.

Id.

35.   *See* National Conference of State Legislatures (NCLS), *Artificial Intelligence 2023 Legislation*, (July 20, 2023) https://www.ncsl.org/technology-and-communication/artificial-intelligence-2023-legislation [https://perma.cc/K97L-GPAR] (providing a compiled list of recent legislation addressing AI).

36.   *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (AM. L. INST. 2000) (discussing breach of fiduciary duty).

37.   *See* HENRY A. KISSINGER ET AL., THE AGE OF AI AND OUR HUMAN FUTURE 23 (2021) ("Once AI's performance outstrips that of humans for a given task, failing to apply that AI, at least as an adjunct to human efforts, may appear increasingly perverse or even negligent."); *see also* RESTATEMENT (THIRD) OF TORTS § 13 cmt. c (AM. L. INST. 2010) (discussing departure from custom); *see also id.* at § 48 (discussing professional negligence).

38.   *See* Johnson, *supra* note 33, at 362 ("The doctrine of informed consent is now deeply embedded into the law of legal ethics . . . [and] holds that a lawyer has a duty to disclose to a client material information about the risks and alternatives associated with a course of action.").

attorney liability (such as fraud[39] and negligent misrepresentation[40]). There may also be claims against lawyers *by nonclients* who believe they were harmed by a lawyer's use of artificial intelligence technology.[41]   Even in "strict privity" states,[42] many courts recognize an expanding range of theories under which nonclients may recover from lawyers whose actions have harmed them. By one count, "nonclients sometimes prevail on at least seventeen different theories of liability."[43]   However, the reality is that it is

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39.   *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 (AM. L. INST. 2020) ("One who fraudulently makes a material misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to act or refrain from acting, is subject to liability for economic loss caused by the other's justifiable reliance on the misrepresentation.").

40.   *See id.* at § 5 (2020) (entitling "negligent misrepresentation").   Discussing liability for negligent misrepresentation, section 5 provides:

> (1) An actor who, in the course of his or her business, profession, or employment, or in any transaction in which the actor has a pecuniary interest, supplies false information for the guidance of others is subject to liability for pecuniary loss caused to them by their reliance upon the information, if the actor fails to use reasonable care in obtaining or communicating it.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered:
>
> > (a) by the person or one of a limited group of persons for whose guidance the actor intends to supply the information, or for whose guidance the actor knows the recipient intends to supply it; and
> >
> > (b) through reliance upon the information in a transaction that the actor intends to influence, or that the actor knows the recipient intends to influence, or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to supply the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.
>
> (4) A plaintiff's recovery under this Section is subject to the same principles of comparative responsibility that apply to other claims of negligence.
>
> (5) This Section does not recognize liability for negligent misrepresentations made in the course of negotiating or performing a contract between the parties.

Id.

41.   SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, *Legal Malpractice* §§ 5–4.1(a), LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION (West Acad. Publishing, 2018).

42.   *See id.* ("In the law of legal malpractice, 'privity' means that there was an attorney-client relationship between the defendant and the plaintiff (or the plaintiff's predecessor-in-interest) and that the lawyer therefore owed the plaintiff a broad array of legally enforceable obligations.").

43.   *See id.* at § 5–4.1(b) (listing theories).

difficult—often dauntingly difficult—for a nonclient to recover damages[44] from a lawyer who represented someone else.

American Bar Association Resolution 604, which details the basic principles that should govern liability for harm caused by use of artificial intelligence, appears to expect that users of artificial intelligence may be held liable (presumably in litigation)[45] based on negligence principles. Resolution 604 provides in relevant part:

> 2) Responsible individuals and organizations should be accountable for the consequences caused by their use of AI products, services, systems, and capabilities, including any legally cognizable injury or harm caused by their actions or use of AI systems or capabilities, unless they have taken reasonable measures to mitigate against that harm or injury[.][46]

(The last part of paragraph two refers to the absence of "reasonable measures." Negligence is the failure to exercise reasonable care to prevent harm to another).[47] The ABA Report on Resolution 604 states that in "AI,

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44. VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 187 (3d ed., West Acad. Publishing, 2021).

45. ABA Resolution 604 looks toward the possibility of litigation and recognizes the need to preserve essential evidence. *See* American Bar Association Resolution 604, *supra* note 1, at 2. The Report states:

> This Resolution will ensure that courts and participants in the legal process have the capacity to evaluate and resolve legal questions and disputes by specifying the essential information that must be included in the design, development, deployment, and use of AI to ensure transparency and traceability.

Id.; *see also id.* at 7–8, stating:

> Under our legal system, in order to be held accountable, an entity must have a specific legal status that allows it to be sued, such as being an individual human or a corporation. On the other hand, property, such as robots or algorithms, does not have a comparable legal status. Thus, it is important that legally recognizable entities such as humans and corporations be accountable for the consequences of AI systems, including any legally cognizable injury or harm that their actions or those of the AI systems or capabilities cause to others, unless they have taken reasonable measures to mitigate against that harm or injury.

Id.

46. *See id.* at 1 (discussing the negative aspects of AI and who should be held accountable for its harmful consequences).

47. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 3 (2010) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable

individual and enterprise accountability and human authority, oversight, and control are required and it is not appropriate to shift legal responsibility to a computer or an 'algorithm' rather than to responsible people and other legal entities."[48]

New modes of representation may threaten to run afoul of well-established ethics rules, particularly if those rules were crafted during earlier eras in which the use of artificial intelligence was never envisioned.[49] A violation of an ethics rule that was intended to protect a client from harm will often support a viable claim that the lawyer failed to protect the client's interests.[50] As Professor Jan Jacobowitz has perceptively asked, "[w]hen does a lawyer's failure to understand and engage technology, social media, and artificial intelligence evince incompetence that rises to the level of malpractice?"[51] According to Jacobowitz, an expert in the law of attorney professional responsibility:

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likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.").

48. American Bar Association Resolution 604, *supra* note 1, at 2.

49. *See* Justin Henry, *Be Alert to These 3 Disruptions in the Legal Industry*, LAW.COM (Mar. 23, 2023), https://www.law.com/americanlawyer/2023/03/23/be-alert-to-these-3-disruptions-in-the-legal-industry/ [https://perma.cc/3EBJ-8H9Y] (claiming "many antiquated fixtures in the legal industry colliding with new trends like artificial intelligence"); *cf.* David Hricik, et al., *An Article We Wrote to Ourselves in the Future: Early 21st Century Views on Ethics and the Internet*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 114, 149 (2011) ("[I]n the early twenty-first century, the organized bar was too skeptical and cynical about the use of technology, applying principles to the Internet that had no analogous application in the real world. This dichotomy resulted in clients receiving too little information about lawyer services and juries not hearing the truth in court proceedings, among other things.").

50. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 (2000). Section 52 provides:

(1) . . . [A] lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.
(2) Proof of a violation of a rule or statute regulating the conduct of lawyers:

(a) does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty;
(b) does not preclude other proof concerning the duty of care in Subsection (1) or the fiduciary duty; and
(c) may be considered by a trier of fact . . . to the extent that (i) the rule or statute was designed for the protection of persons in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to the claimant's claim.

Id.

51. Jan Jacobowitz, *In the Midst of Change, A Few Truths Remain—A Review of Trazenfeld and Jarvis's Florida Legal Malpractice Law, Florida Legal Malpractice Law: Commentary and Forms by Warren R. Trazenfeld & Robert M. Jarvis Full Court Pre*, 10 ST. MARY'S J. LEGAL MAL. & ETHICS 342, 343 (2020).

While the legal ethics rules stand apart from professional liability, the rules may contribute evidence to prove the standard of care in a malpractice action. A lawyer who lacks a fundamental understanding of the rules and malpractice law may not only trip upon traditional professional liability landmines, but also risks falling into a double bind [(disciplinary liability and malpractice liability)] if he fails to keep pace with the evolving definition of professional competence and the current challenge to the legal profession's status quo.[52]

Part II of this Paper introduces the subject of artificial intelligence both in general and as it relates to serving clients in the practice of law. Part III considers important principles of the law of legal ethics that are likely to shape the law of legal malpractice liability in cases involving use of artificial intelligence in the representation of clients. Part IV offers concluding thoughts.

II. Use of Artificial Intelligence in Lawyering

A. *Artificial Intelligence in General*

"The term *artificial intelligence* was coined in 1955 by John McCarthy, a math professor at Dartmouth."[53] The moniker is today so well known that it is recognized worldwide by its initials, A.I. "'Generative A.I.' [is] the name for technologies that generate text, images and other media[54] on their own."[55]

"Artificial Intelligence Law is the field of law that studies and deals 'with the rights and liability that arise[] from the use of AI' and the technology itself."[56] As Henry A. Kissinger, Eric Schmidt, and Daniel Huttenlocher explain in their book *The Age of AI and Our Human Future*:

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52. *Id.* at 343–44.

53. Erik Brynjolfsson & Andrew McAfee, *The Business of Artificial Intelligence*, Harv. Bus. Rev., July 18, 2017, at 6.

54. *See generally* Cade Metz, *Instant Videos Could Represent the Next Leap in A.I. Technology*, N.Y. Times (Apr. 5, 2023), https://www.nytimes.com/2023/04/04/technology/runway-ai-videos.html [https://perma.cc/X7T2-999Y] (discussing "several companies building artificial intelligence technology that will soon let people generate videos simply by typing several words into a box").

55. Cade Metz & Mike Isaac, *Meta, Long an A.I. Leader, Tries Not to Be Left Out of the Boom*, N.Y. Times (Feb. 7, 2023), https://www.nytimes.com/2023/02/07/technology/meta-artificial-intelligence-chatgpt.html [https://perma.cc/6MPW-BZ5N].

56. *See* Pablo J. Olmo Rodríguez, *Artificial Intelligence Law: Applications, Risks & Opportunities*, 90 Rev. Juridica U.P.R. 701, 709–10 (2021) (stating AI "can be regarded as a specific discipline of the law").

> AI is not an industry, let alone a single product. . . . It is an enabler of many industries and facets of human life.
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> [This] technology is changing human thought, knowledge, perception, and reality—and, in so doing, changing the course of human history.
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> . . . .
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> Its foundation was laid by computers and the internet. Its zenith will be AI that is ubiquitous, augmenting human thought and action in ways that are both obvious (such as new drugs and automatic language translations) and less consciously perceived (such as software processes that learn from our movements and choices and adjust to anticipate and shape our future needs).[57]

It is no longer true, although it recently was, that "the applicability of AI-based systems is still quite narrow."[58] Instead, A.I. rules an increasingly broad domain. "Examples of AI innovations include self-driving cars, diagnostic assistants to hospital clinicians and autonomous self-directed weapons systems."[59] Some A.I. applications "can attempt to solve math problems and imitate conversational English to explain concepts and write simple yet often nuanced sentences."[60] Chatbots[61] that are available online can "answer complex questions, write poetry and even mimic human

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57. KISSINGER ET AL., *supra* note 37, at 4–18.

58. *But see* Brynjolfsson, *supra* note 53, at 10 (explaining AI technology was not in widespread use).

59. Amanda Robert, *ABA House Adopts 3 Guidelines to Improve Use of Artificial Intelligence*, A.B.A. J. (Feb. 6, 2023), https://www.abajournal.com/web/article/aba-house-adopts-3-guidelines-to-improve-use-of-artificial-intelligence [https://perma.cc/WRE3-MDLZ].

60. Eric Killele & Danya Perez, *San Antonio profs introducing themselves to students' new pal: AI*, SAN ANTONIO EXPRESS-NEWS (Feb. 4, 2023, 8:01 PM), https://www.expressnews.com/news/education/article/s-a-profs-introducing-students-new-pal-ai-17762998.php [https://perma.cc/RYV2-GXMB].

61. *See generally AI Chatbots Vs Search Engines: What is the Difference*, ANALYTICS INSIGHT (Jan. 21, 2023), https://www.analyticsinsight.net/ai-chatbots-vs-search-engines-what-is-the-difference/ [https://perma.cc/2LTR-HPP8] ("Technically speaking, the range of memory is the major difference . . . . While chatbots hold data for a long period of time, search engines have short-term memory. This explains why chatbot replies are more personalized and specific. Chatbots analyze the question based on the entire historic data pertaining to the question while the search engine looks for only the previous searches."); *see also* Katie Robertson, *Publishers Worry A.I. Chatbots Will Cut Readership.*, N.Y. TIMES (Mar. 30, 2023), https://www.nytimes.com/2023/03/30/business/media/publishers-chatbots-search-engines.html [https://perma.cc/9QU4-B3XA] ("New artificial intelligence tools . . . give answers to search queries in full paragraphs rather than a list of links.").

emotions."[62] Other A.I. applications create logos, draft technical manuals,[63] and perhaps design more appealing cars.[64] "By allowing computers to better recognize objects and make predictions, AI plays an important role in robotics, automated transportation, natural language processing, telecommunication routing, and other areas."[65]

University of Minnesota law professors published a study showing that an A.I. app "could get passing grades on graduate-level exams."[66]

Other examples of A.I.'s power abound. In a livestreamed demonstration of a ground-breaking chatbot called GPT-4, OpenAI's president:

> [S]napped a photo of a drawing he'd made in a notebook—a crude pencil sketch of a website. He fed the photo into GPT-4 and told the app to build a real, working version of the website using HTML and JavaScript. In a few seconds, GPT-4 scanned the image, turned its contents into text instructions,

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62. *See* Cade Metz, *OpenAI Plans to Up the Ante In Tech's A.I. Race*, N.Y. TIMES (Mar. 14, 2023), https://www.nytimes.com/2023/03/14/technology/openai-gpt4-chatgpt.html#:~:text=The%20company%20unveiled%20new%20technology,some%20of%20the%20same%20baggage.&text=Cade%20Metz%2C%20who%20has%20written,week%20while%20reporting%20this%20article [https://perma.cc/GH6P-DSHH] ("Many industry leaders believe developments in A.I. represent a fundamental technological shift, as important as the development of web browsers in the 1990s."); *see also* Cade Mentz, *How Smart Are the Robots Getting?*, N.Y. TIMES (Jan. 20, 2023), https://www.nytimes.com/2023/01/20/technology/chatbots-turing-test.html [https://perma.cc/8XYA-UVQS] (writing in response to the Turing test prompt, "[p]lease write me a sonnet on the subject of the Forth Bridge").

63. *See* Charles Toutant, *What Could Go Wrong? IP Lawyers Issue Warning About ChatGPT*, LAW.COM (Mar. 23, 2023, 5:51 PM), https://www.law.com/njlawjournal/2023/03/23/what-could-go-wrong-ip-lawyers-issue-warning-about-chatgpt/ [https://perma.cc/SC9G-GXR6] ("Fans of the platform speak of its ease of use, versatility and language skill, and its ability to design a logo, draft a technical manual or write a poem.").

64. *See* Alex Burnap, *Can AI Help Design a More Appealing Car?*, YALE INSIGHTS (Apr. 4, 2023), https://insights.som.yale.edu/insights/can-ai-help-design-more-appealing-car [https://perma.cc/95P4-ABTA] (discussing the use of A.I. to make the car design process better, faster, and cheaper).

65. Mauriel & Noble, *supra* note 5.

66. Killele & Perez, *supra* note 60; *see* Greg Toppo, *ChatGPT Scores a C+ At the University of Minnesota Law School. Now What?,* YAHOO!LIFE (Feb. 7, 2023), https://www.yahoo.com/lifestyle/chatgpt-scores-c-university-minnesota-202800345.html [https://perma.cc/XJ4D-VK4Y] ("Four legal scholars at the University of Minnesota Law School tested . . . [OpenAI's ChatGPT] on 95 multiple choice and 12 essay questions from four courses. It passed, though not exactly at the top of its class. The chatbot scraped by with a 'low but passing grade' in all four courses, a C+ student.").

turned *those* text instructions into working computer code and then built the website. The buttons even worked.[67]

Machine Learning—which is "perhaps the most important component of AI"[68]—is the process "technology undergoes to acquire knowledge and capability—often in significantly briefer time frames than human learning processes require."[69] Machine learning has been continually expanding into new fields like medicine, environmental protection, and law enforcement.[70] Experts say that machine learning systems "can achieve superhuman performance in a wide range of activities, including detecting fraud."[71] It is difficult to think of a more useful application "because there is no shortage of deception in human affairs."[72] Today's "deep learning algorithms have a significant advantage over earlier generations of machine learning in that they make better use of large data sets," and more data leads to "more accurate and more relevant predictions."[73]   In machine learning, "a computer program improves its answers to a question by creating and iterating algorithms based on data."[74]

Many groups are interested in introducing A.I. into education, but others want to ban it on grounds that it is likely to aid students to commit plagiarism[75] or avoid following the news or engaging in difficult research work.[76] Some high schools "are encouraging their students to question the

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67.   Roose, *supra* note 19 (emphasis added).

68.   Davenport, *supra* note 21, at 8.

69.   KISSINGER ET AL., *supra* note 37, at 15. *See generally* Metz, *supra* note 54 ("[G]enerative A.I. technologies . . . learn[] by analyzing digital data . . . .").

70.   KISSINGER ET AL., *supra* note 37, at 15.

71.   Brynjolfsson & McAfee, *supra* note 53, at 3.

72.   VINCENT R. JOHNSON, ADVANCED TORT LAW: A PROBLEM APPROACH 17 (3d ed. 2020).

73.   Julie   Potts,   *Understanding   AI*,   HYPERIONGP   (May 7,   2018), https://insights.hgpresearch.com/understanding-ai#:~:text=While%20there%20is%20still%20an,accurate%20and%20more%20relevant%20predictions [https://perma.cc/997Z-BBGQ].

74.   Emma Martinho-Truswell, *Three Questions About AI That Nontechnical Employees Should Be Able to Answer*, HARV. BUS. REV., Aug. 2, 2018, at 66.

75.   *See generally* Kevin Pocock, *Is Chat GPT Plagiarism Free?,* PC GUIDE, (June 9, 2023), https://www.pcguide.com/apps/is-chat-gpt-plagiarism-free/   [https://perma.cc/7GJP-MS2P   ] (discussing ChatGPT and plagiarism); *see also* Metz, *supra* note 62 ("ChatGPT and similar technologies are already shifting the behavior of students and educators who are trying to understand whether the tools should be embraced or banned."); Natasha Singer, *New in Coding Class: Critiquing ChatGPT*, N.Y. TIMES, Feb. 6, 2023, at B1.

76.   *Cf.* Robertson, *supra* note 61 ("Many publishers worry that far fewer people will click through to news sites as a result.").

hype around rapidly evolving artificial intelligence tools and consider the technologies' potential side effects."[77] Some critics say that A.I. technology has created an "existential crisis that threatens our communities' access to reliable and trustworthy journalism."[78]

At present, "throughout the U.S. there [is] no specific curriculum or requirement to learn about AI."[79] At least one online education company is using A.I. technology to build an "automated tutor."[80] Family caregivers are eager to understand how A.I. technology "could help them care for their aging relatives."[81]

Some forms of artificial intelligence used by lawyers are not unique to the legal profession, such as the autocomplete function that is incorporated into word-processing software to predict what word the user is typing after just a few keystrokes.[82] A.I. also has a "remarkable ability to communicate in humanlike prose—sometimes with worrying results."[83]

B.   *Artificial Intelligence Designed to Help Lawyers with Client Work*

Erik Brynjolfsson and Andrew McAfee list law as one of the fields in which the effects of A.I. are likely to be magnified during the coming decade as various industries "transform their core processes and business models to take advantage of machine learning."[84] Who is most likely to be adversely

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77.   *See* Singer, *supra* note 20 ("With generative A.I. technologies proliferating, educators and researchers say understanding such computer algorithms is a crucial skill that students will need to navigate daily and participate in civics and society.").

78.   *See* Robertson, *supra* note 61 (discussing a document issued by The News Media Alliance).

79.   Dina Bass, *Microsoft, Google-Backed Group Wants to Boost AI Education in Low-Income Schools*, BLOOMBERG (Mar. 25, 2023), https://www.bloomberg.com/news/articles/2023-03-07/microsoft-google-backed-group-helps-students-learn-to-use-ai-chatgpt#xj4y7vzkg [https://perma.cc/YW88-72UU].

80.   *See* Metz, *supra* note 62 (discussing Khan Academy).

81.   Jason Horowitz, *Who Will Take Care of Italy's Older People? Maybe Robots.*, N.Y. TIMES, (Mar. 26, 2023), https://www.nytimes.com/2023/03/25/world/europe/who-will-take-care-of-italys-older-people-robots-maybe.html [https://perma.cc/EQ64-S566] (explaining one study showed that a "robot wasn't 'a replacement for socializing with other people [but it] . . . can nevertheless be company'").

82.   *See* Autocomplete, WIKIPEDIA, https://en.wikipedia.org/wiki/Autocomplete [https://perma.cc/4LCS-BG75] ("Autocomplete, or word completion, is a feature in which an application predicts the rest of a word a user is typing.").

83.   Satariano & Metz, *supra* note 10.

84.   Brynjolfsson & McAfee, *supra* note 53, at 5.

affected, the unskilled, the highly skilled, or those in between?[85] According to one analysis:

> Even the most impressive (A.I.) systems tend to complement skilled workers rather than replace them. The systems cannot be used in lieu of doctors, lawyers or accountants. Experts are still needed to spot their mistakes. But they could soon replace some paralegals (whose work is reviewed and edited by trained lawyers) . . . .[86]

Another article lists legal services providers among the sectors of the economy "most exposed" to the impact of artificial intelligence.[87] ChatGPT "is the first [new technology] to confront a broad range of white-collar workers so directly."[88] It "can assist with contract drafting and review by suggesting contract language or identifying potential issues found in a contract."[89] It can also "be leveraged during legal research to provide summaries of cases, laws or even pleadings filed with the court."[90] It can be employed to create "workable first drafts of demand letters, discovery demands, nondisclosure agreements and employment agreements."[91]

It is reasonable to imagine that document review incidental to litigation or business planning could more accurately and less painfully be performed by A.I.-aided machines than by humans.[92] Courtroom advocacy might also

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85.   *See generally* Metz, *supra* note 54 (suggesting that new A.I. applications "could, in time, replace [video] editing skills with the press of a button").

86.   Metz, *supra* note 62.

87.   *See* Lydia DePillis & Steve Lohr, *Tinkering With ChatGPT, Workers Wonder: Will This Take My Job?*, N.Y. TIMES (Mar. 28, 2023), https://www.nytimes.com/2023/03/28/business/economy/jobs-ai-artificial-intelligence-chatgpt.html [https://perma.cc/LLH4-BCFT] (explaining sectors most likely to be impacted by AI technology); *but see* Dipshan, *supra* note 4 ("[M]any law firms that experimented with chatbots have come away with a less than ideal impression, finding such tools clunky, cumbersome and altogether concerning.").

88.   DePillis & Lohr, *supra* note 87.

89.   Nicole Black, *The Case for ChatGPT: Why Lawyers Should Embrace AI*, A.B.A.J. (Feb. 21, 2023), https://www.abajournal.com/columns/article/the-case-for-chatgpt-why-lawyers-should-embrace-ai [https://perma.cc/HQ5R-7PG6].

90.   *Id.*

91.   *Id.*

92.   *See* John Villasenor, *How AI Will Revolutionize the Practice of Law*, BROOKINGS (Mar. 20, 2023), https://www.brookings.edu/blog/techtank/2023/03/20/how-ai-will-revolutionize-the-practice-of-law/amp/ [https://perma.cc/56G8-DBMB] (opining that A.I. will "vastly accelerate" discovery).

be made more effective by high-speed analysis of testimony transcripts in real time.[93]

It would also be nice to think that A.I. could provide reliable and robust legal advice to ordinary persons at a fraction of the cost that must now be paid to engage the services of a lawyer.[94] It seems possible that A.I. tools will take center stage with regard to the exercise of the distributive powers of the state. Widespread implementation of A.I. may also mean that judges may have less room for the exercise of discretion in adjudicating legal challenges to regulatory regimes. Not surprisingly, judges are now being trained on the use of A.I.[95]

Publications focused on the legal profession report that "[a]rtificial intelligence is taking over Big Law's regulatory offerings and leading to unique, client-tailored teams."[96] Some of the most complex data issues may relate "to e-discovery, or information governance, or cross-border data privacy issues."[97] For example, Mayer Brown[98] has a "global data innovation practice."[99] Similarly, Winston & Strawn[100] has established "a multidisciplinary team with broad subject-matter expertise focused on dealing with the most challenging areas of data."[101] Law firms are placing a

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93. *See id.* ("AI could . . . be used during a trial to analyze a trial transcript in real time and provide input to attorneys that can help them choose which questions to ask witnesses.").

94. *See id.* (predicting "AI will make it much less costly to initiate and pursue litigation").

95. *See Artificial Intelligence and the Courts: Materials for Judges*, AM. ASS'N FOR THE ADVANCEMENT OF SCI. (Sept. 2022), https://www.aaas.org/ai2/projects/law/judicialpapers [https://perma.cc/EQ7K-65ET] ("[M]aterials for judges have been generated that can assist them to become familiar with various aspects of artificial intelligence (AI), which is increasingly used in the legal field and beyond.").

96. Yount, *supra* note 14.

97. *Id.*

98. *See* Mayer Brown, WIKIPEDIA, https://en.wikipedia.org/wiki/Mayer_Brown [https://perma.cc/8SAR-UEJ4] ("Mayer Brown is a global white-shoe law firm, founded in Chicago, Illinois, United States. It has offices in 27 cities across the Americas, Asia, Europe, and the Middle East, with its largest offices being in Chicago, Washington, D.C., New York City, Hong Kong, and London. Mayer Brown has more than 1,900 lawyers and by revenue is the 19th largest law firm in the world.").

99. *See* Yount, *supra* note 14 (describing Mayer Brown's legal practice concerning data).

100. *See* Winston & Strawn, WIKIPEDIA, https://en.wikipedia.org/wiki/Winston_%26_Strawn [https://perma.cc/P6WA-EWFK] ("Winston & Strawn LLP is an international law firm. Headquartered in Chicago, it has nearly 800 attorneys in ten offices in the United States and six offices in Europe and Asia. Founded in 1853, it is one of the largest and oldest law firms in Chicago.").

101. *See* Yount, *supra* note 14 (explaining Winston & Strawn's AI practice).

premium on hiring "tech-fluent lawyers, with Debevoise & Plimpton doubling the size of its AI practice in the past 18 months."[102]

Innovation with artificial intelligence is also taking place in smaller firms. According to news reports, law firm employees are experimenting with using A.I. to draft documents and e-mails and conduct legal research.[103] At least in some quarters, it seems to be taken for granted that lawyers will "rely on artificial intelligence to analyze data, handle client queries and check and review documents and contracts."[104]

While it is unclear just how artificial intelligence will make lawyers more productive, effective, or efficient, there are many reasons to think that such technology has a role to play in the practice of law. In the words of one commentator:

> Law firms that effectively leverage emerging AI technologies will be able to offer services at lower cost, higher efficiency, and with higher odds of favorable outcomes in litigation. Law firms that fail to capitalize on the power of AI will be unable to remain cost-competitive, losing clients and undermining their ability to attract and retain talent.[105]

According to Open AI, a maker of popular forms of artificial intelligence:

> GPT-4 is more capable and accurate than the original Chat-GPT, and it performs astonishingly well on a variety of tests, including the Uniform Bar Exam (on which GPT-4 scores higher than 90 percent of human test-takers).[106]

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102. *See id.* (stating "clients want lawyers who can help translate the tech issues . . ."); *see also* Debevoise & Plimpton, WIKIPEDIA, https://en.wikipedia.org/wiki/Debevoise_%26_Plimpton [https://perma.cc/T672-X2FU] ("Debevoise & Plimpton LLP (often shortened to Debevoise) is an international law firm headquartered in New York City. . . . Debevoise & Plimpton currently employs approximately 769 lawyers in nine offices throughout the world. The firm divides its practices into three major areas: Corporate, Litigation, and Tax.").

103. *See* Rhys Dipshan, *Lawyers Predict Generative AI Impact—But Aren't Exactly Welcoming It.*, LAW.COM (Mar. 20, 2023), https://www.law.com/legaltechnews/2023/03/20/lawyers-predict-generative-ai-impact-but-arent-exactly-welcoming-it/?slreturn=20230620231201 [https://perma.cc/V34U-HMGX] (discussing a survey of law students, lawyers, and consumers by LexisNexis).

104. Reynolds, *supra* note 13.

105. Villasenor, *supra* note 92.

106. Roose, *supra* note 19; *see also* Sloan, *supra* note 22 ("'Large language models can meet the standard applied to human lawyers in nearly all jurisdictions in the United States by tackling complex

Lawyers will experiment with A.I.[107] and probably welcome whatever advantages it can confer.[108] Those benefits may be considerable because currently available technology is powerful. "We already know that A.I. can help scientists develop new drugs, increase the productivity of programmers and detect certain types of cancer."[109] However, like people, chatbots have strengths and weaknesses. Describing one recent model, a reporter wrote:

> It is an expert on some subjects and a dilettante on others. It can do better on standardized tests than most people and offer precise medical advice to doctors, but it can also mess up basic arithmetic.[110]

For the present there seems to be limits on the use of A.I., at least in certain contexts. As one article explained: "[A chatbot] can write a joke, but it does not show that it understands what will actually make someone laugh. It does not grasp the nuance of what is funny."[111]

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tasks requiring deep legal knowledge, reading comprehension, and writing ability,' the authors wrote."); Stephanie Wilkins, *How GPT-4 Mastered the Entire Bar Exam, and Why That Matters*, LAW.COM (Mar. 17, 2023), https://www.law.com/legaltechnews/2023/03/17/how-gpt-4-mastered-the-entire-bar-exam-and-why-that-matters/ [https://perma.cc/4383-797F] (quoting Pablo Arredondo of Casetext as stating, "we are now in a new age of the practice of law, one where computers have, essentially, literacy . . . . These large language models are now capable of reading text, interpreting it, classifying it, analyzing it, and doing all the sorts of other things that are so key to the practices of law"); Christopher Niesche, *Australia's Law Schools Consider Responses to ChatGPT,* LAW.COM (Feb. 6, 2023), https://www.law.com/international-edition/2023/02/06/australias-law-schools-consider-responses-to-chatgpt/ [https://perma.cc/QZG4-9FR4].

107.   *See* Marathe, *supra* note 9 (indicating that at Reed, Smith lawyers interested in technology are encouraged to experiment with A.I. "for simple tasks like email outlines"); *see also* Toutant, *supra* note 63 (discussing the use of A.I. to answer e-mail or write a blog post).

108.   *Cf.* Killele & Perez, *supra* note 60 ("It's out there and people are going to use it.").

109.   Roose, *supra* note 19; *see also* Satariano & Metz, *supra* note 10 ("Advancements in A.I. are beginning to deliver breakthroughs in breast cancer screening by detecting the signs that doctors miss. So far, the technology is showing an impressive ability to spot cancer at least as well as human radiologists, according to early results and radiologists, in what is one of the most tangible signs to date of how A.I. can improve public health.").

110.   Metz, *supra* note 62.

111.   *Id.*

"[M]achine learning researchers have struggled over the past couple of decades to capture the flexibility of human knowledge in computer models."[112] More importantly:

> The new chatbots do come with baggage. They often do not distinguish between fact and fiction. They can generate language that is biased against women and people of color. And experts worry that people will use them to spread lies at a speed they could not in the past.[113]

For example, in one case "biases had slipped into an AI tool that judges were using to determine the flight risk of a defendant requesting bail because the tool relied on ZIP codes from Black communities."[114] In another case:

> Amazon started a program to automate hiring by using an algorithm to review resumes. However, the program had to be discontinued after it was discovered that it discriminated against women in certain technical positions, such as software engineer, because the software analyzed the credentials of its existing employee base, which was predominantly male.[115]

In a third case: "researchers found a gender and skin-type bias with commercial facial analysis programs, with an error rate of 0.8 percent for light-skinned men, versus 34.7 for dark-skinned women."[116]

It can reasonably be argued that A.I. must be regulated when people's liberties are at stake.[117] But whether this will happen is open to question. There is no shortage of stories documenting harmful use of A.I.

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112.   Oliver Whang, *Can a Machine Know That We Know What it Knows?*, N.Y. TIMES (Mar. 27, 2023),   https://www.nytimes.com/2023/03/27/science/ai-machine-learning-chatbots.html [https://perma.cc/PH27-PLQE].

113.   Cade Metz & Karen Weise, *A Tech Race Begins as Microsoft Adds A.I. to Its Search Engine*, N.Y. TIMES (Feb. 7, 2023), https://www.nytimes.com/2023/02/07/technology/microsoft-ai-chatgpt-bing.html [https://perma.cc/CD4L-BKP6]; *see* Nico Grant & Karen Weise, *A.I. Frenzy Leads Tech Giants to Take Risks on Ethics Rules*, N.Y. TIMES (Apr. 7, 2023), https://www.nytimes.com/2023/04/07/technology/ai-chatbots-google-microsoft.html [https://perma.cc/Q647-XD7W] (claiming chatbots can "produce false information, hurt users who become emotionally attached to them and enable 'tech-facilitated violence' through mass harassment online").

114.   Reynolds, *supra* note 13.

115.   American Bar Association Resolution 604, *supra* note 1, at 6.

116.   *Id.*

117.   *See* Reynolds, *supra* note 13 (explaining the bias underlying AI technology).

"In the past decade, engineers, scholars, whistleblowers and journalists have repeatedly documented cases in which AI systems, composed of software and algorithms, have caused or contributed to serious harms to humans . . . . Social media feeds [for example] can steer toxic content toward vulnerable teenagers. AI-guided military drones can kill without any moral reasoning."[118]

Chatbots can also invade the privacy of persons whose information they collect, use, and recycle.[119] Fake documents and phishing e-mails can be made to appear flawless.[120] "Cyber propaganda" may be difficult or impossible to distinguish from legitimate news.[121]

"Conservatives have accused ChatGPT's creator, the San Francisco company OpenAI, of designing a tool that, they say, reflects the liberal values of its programmers."[122] In response, Sam Altman, OpenAI's chief executive responded that "ChatGPT was not meant 'to be pro or against any politics by default,' but that if users wanted partisan outputs, that option should be available."[123]

"To help companies comply with the upcoming New York City regulations, the boutique law firm BNH.AI, which focuses on AI and analytics issues, is launching its first publicly available—and free—tool that

118.   Mordechai Rorvig, *AI Is Getting Powerful. But Can Researchers Make It Principled?*, SCIENTIFIC AM. (Apr. 4, 2023), https://www.scientificamerican.com/article/ai-is-getting-powerful-but-can-researchers-make-it-principled [https://perma.cc/D6V9-DPQH].

119.   *See* Cassandre Coyer, *Could ChatGPT Soon Find Itself in Data Privacy Regulators' Crosshairs?*, LAW.COM (Feb. 1, 2023), https://www.law.com/legaltechnews/2023/02/01/could-chatgpt-soon-find-itself-in-data-privacy-regulators-crosshairs/ [https://perma.cc/P85M-LQEN] (discussing various privacy regulations); *see also* Etay Maor, *ChatGPT's Cybersecurity Implications: The Good, the Bad and the Ugly*, PROPERTY CASULTY 360 (Apr. 6, 2023), https://www.propertycasualty360.com/2023/04/06/chatgpts-cybersecurity-implications-the-good-the-bad-and-the-ugly/ [https://perma.cc/TQ8U-4T97] ("If ChatGPT's future versions start storing and collecting users' queries and the information they share, there could be a huge privacy and security risk. Malicious actors can steal and manipulate confidential or sensitive data for nefarious purposes.").

120.   *See* Maor, *supra* note 119 (noting deceptive e-mails can be distributed in multiple languages and appear to be from persons who are native speakers).

121.   *Id.*

122.   Stuart A. Thompson et al., *Conservatives Aim to Build a Chatbot of Their Own*, N.Y. TIMES (Mar. 25, 2023), https://www.nytimes.com/2023/03/22/business/media/ai-chatbots-right-wing-conservative.html [https://perma.cc/A5G4-V8AK].

123.   *Id.*

tests AI risks, called Microwave."[124] Users can test their A.I. application for bias or prejudice related to race, sex, ethnicity, or other demographic factors. However, it seems inevitable that there will need to be viable channels for judicial review to ensure that women, minorities, and other vulnerable segments of the population are not victimized by businesses searching for maximum profitability. As a front-page headline in the New York Times blared, "In A.I. Race, Microsoft and Google Choose Speed Over Caution."[125] The European Union has already proposed legislation to govern AI and at least one country (Italy) has temporarily banned a popular chatbot.[126] "[T]he biggest A.I. models are more vulnerable to cybersecurity attacks and present unusual privacy risks because they've probably had access to [more] private data . . . ."[127]

It is possible that the response of the market might act as a corrective force to limit the deficiencies resulting from intended or unplanned biases or prejudices in A.I. After Meta released a chatbot called Galactica that played "fast and loose with facts," an "avalanche of complaints" forced Meta to remove Galactica from the Internet "[a]fter just three days."[128] However, the speed with which the Internet widely disburses misinformation often far exceeds the deliberative, knowledge-based—but painfully slow—"marketplace of ideas."[129] The problems posed by misinformation are substantial because "[b]ias . . . could creep into large language models at any stage."[130]

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124. Cassandre Coyer, *Boutique Firm BNH.AI Launches AI Bias Calculator Ahead of New NYC Law*, LAW.COM (Mar. 28, 2023), https://www.law.com/legaltechnews/2023/03/28/boutique-firm-bnh-ai-launches-ai-bias-calculator-ahead-of-new-nyc-law/ [https://perma.cc/J8Z7-ZTP4].

125. *See* Grant & Weise, *supra* note 113 ("The surprising success of ChatGPT has led to a willingness at Microsoft and Google to take greater risks with their ethical guidelines set up over the years to ensure their technology does not cause societal problems . . . .").

126. *Id.*

127. *Id.*

128. Metz & Isaac, *supra* note 55.

129. *See* Robert L. Kerr, *From Holmes to Zuckerberg: Keeping Marketplace-of-Ideas Theory Viable in the Age of Algorithms*, 24 COMM. L. & POL'Y 477, 480 (2019) ("Over the course of that century, the Supreme Court has cited the marketplace of ideas as the rationale behind its First Amendment holdings more often than any other.").

130. Thompson et al., *supra* note 122 (discussing how the version of ChatGPA released in 2022 "trained on 496 billion 'tokens'—pieces of words, essentially—sourced from websites, blogposts, Wikipedia articles and more . . . . Humans select the sources, develop the training process and tweak its responses").

A.I. may make life easier for some lawyers, but more difficult for others. Lawyers have been excluded from entertainment venues because facial recognition software established that they worked for law firms that had sued the venue's parent company.[131] The same technology has been used by stores to evict repeat shoplifters.[132]

In February 2023, Allen & Overy, a global law firm with "more than 3,500 lawyers across 43 offices"[133] claimed to be "the first law firm to partner with Harvey A.I." and use "generative A.I." that's based on OpenAI's GPT models.[134] "The platform, dubbed Harvey, [was] developed in association with OpenAI, the company behind ChatGPT, and is designed specifically for the legal industry" for use in research and contract analysis.[135] Before Harvey's rollout, the platform was put through a trial run for roughly three months, during which the firm's lawyers "had asked Harvey about 40,000 queries for their day-to-day client work."[136] The firm indicated that no client data was used in the trial run, and that tailoring "the AI solution to clients . . . [would] require some sort of consent and pre-discussion with clients."[137]

General A.I. applications are often fined-tuned to enable them to perform specialized tasks. For example, a general language model can be trained "on the complexities of legal jargon so it can draft court filings."[138]

A judicial ethics opinion in New York has addressed the permissibility of a candidate for judicial office subscribing to a service that "uses artificial intelligence software to . . . 'provide[] information about the donors' . . .

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131.   *See* Kashmir Hill, *In Manhattan, a Technology Reporter Asks: Are You Scanning My Face*, N.Y. TIMES (Mar. 15, 2023), https://www.nytimes.com/2023/03/15/insider/facial-recognition-scan-nyc.html [https://perma.cc/FLX3-4S79] ("[T]housands of other lawyers from approximately 90 firms had also been banned from the company's four venues in [New York City].").

132.   *Id.*

133.   Linda A. Thompson, *Allen & Overy Rolls Out ChatGPT-Style Technology to Help Lawyers with Client Work*, LAW.COM (Feb. 15, 2023), https://www.law.com/international-edition/2023/02/15/allen-overy-to-implement-chatgpt-style-technology-to-help-lawyers-with-client-work/?slreturn=20230508135936 [https://perma.cc/DWG3-ZY3P].

134.   Allen & Overy, *A&O Announces Exclusive Launch Partnership with Harvey*, ALLEN & OVERY (Feb. 15, 2023), https://www.allenovery.com/en-gb/global/news-and-insights/news/ao-announces-exclusive-launch-partnership-with-harvey [https://perma.cc/GN3S-7Q75].

135.   Thompson, *supra* note 133.

136.   *Id.*

137.   *Id.*

138.   Thompson et al., *supra* note 122.

past donations."[139] The committee opined that such action was permissible if certain conditions were met.

"The amount of evidence a prosecutor has at his [or her] disposal has increased drastically with vast technological advances."[140] It is reasonable to expect that artificial intelligence will likewise transform how such evidence is evaluated, assembled, and presented to finders of fact. According to one writer:

> Gone are the days where a prosecutor could expect that a haphazardly organized bankers box filled with papers, photographs, and a dog-eared codebook would sufficiently serve as a reliable means of organizing a case file . . . . Such a case management system—or lack thereof—is wrought with opportunities for losing documents, failing to record which evidence has been disclosed, and makes it nearly impossible for a subsequent prosecutor to decipher anything about the case when they need to review the file.
> . . . .
> [However], [p]rosecutors must not become overly reliant on a computer system to ensure comportment with ethical and legal obligations.[141]

The search results produced by A.I.-aided applications may enjoy less protection under intellectual property law and have greater exposure to liability. "[O]nly content produced by humans is eligible for copyright protection, and works that are the product of AI [generally] are not."[142] In addition, a lawyer who hires an A.I. provider to generate content may be charged with infringement if the A.I. provider did not have the right to use the data in question.[143]

III. ARTIFICIAL INTELLIGENCE AND THE GOALS OF LEGAL MALPRACTICE

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139. NY Jud. Adv. Op. 21-30 (Mar. 11, 2021); *see* Autocomplete, WIKIPEDIA, https://en.wikipedia.org/wiki/Autocomplete [https://perma.cc/79P6-CYUV] ("Many autocomplete algorithms learn new words after the user has written them a few times, and can suggest alternatives based on the learned habits of the individual user.").

140. Joshua Luke Sandoval, *Ethical Considerations for Prosecutors: How Recent Advancements Have Changed the Face of Prosecution*, 10 ST. MARY'S J. LEGAL MAL. & ETHICS 60, 86 (2019).

141. *Id.* at 87.

142. Toutant, *supra* note 63. In an advisory issued on March 16, 2023, U.S. Copyright Office said that in some cases, "a work containing AI-generated material will also contain sufficient human authorship to support a copyright claim." *Id.* ("Although the copyright office has opened the door to giving protection to certain works produced by AI, 'that hasn't actually occurred yet.'").

143. *See id.* (recommending lawyers should "check into the indemnification clauses of the company providing the AI platform, and . . . use only AI products sold by U.S. companies").

LAW

The law of legal malpractice is animated by a variety of goals. At a high level of generalization, this body of law strives to protect clients (and sometimes nonclients) from unnecessary harm that may be caused by lawyers or those associated with them, while at the same time protecting lawyers from claims that are frivolous or otherwise lacking in merit.

However, on a closer inspection focused on the interests of legal malpractice plaintiffs, it is possible to articulate a more illuminating list of legal malpractice law objectives. Specifically, this body of law is intended to: (1) deter carelessness in the practice of law; (2) encourage undivided loyalty to clients; and (3) enable clients to exercise control in their representation. The following sections will discuss these objectives of legal malpractice law with specific reference to the increasing use of A.I. in connection with the representation of clients.

A. Deterring Carelessness in the Practice of Law

The workhorse cause of action in the law of legal malpractice is a garden-variety claim for negligence. This theory of liability is asserted in almost every legal malpractice action because it is typically flexible, understandable, and useful. Virtually everything a lawyer does in the practice of law can be done negligently. Jurors often readily understand the idea that people should be careful in what they do and held accountable if failure to exercise reasonable care causes harm. Moreover, negligence is often covered by legal malpractice insurance, and thus it may be possible to procure a settlement of a claim or collect a judgment based on negligence.[144]

What might a lawyer do wrong in a negligence case involving the use of artificial intelligence technology? The list is virtually endless. A lawyer might be negligent in hiring an unknowledgeable or inexperienced employee to design or operate an A.I. application, or in failing to carefully review the results produced by A.I., failing to protect that A.I. data from improper

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144. *See* JOHNSON & FORTNEY, *supra* note 41, at 29 ("[T]the nature of the claims asserted also affects whether the defendant's professional liability insurer will defend the claims and indemnify the defendant for losses. For example, legal malpractice policies generally do not cover intentional torts, but do cover ordinary negligence.").

access or misuse,[145] or failing to keep the client reasonably informed about the status of the work.[146]

In many cases, the issue of negligence is put to the jury in general terms, which simply asks whether the defendant lawyer failed to exercise that degree of care that would have been exercised by a reasonably prudent lawyer under the same or similar circumstances.[147] However, the expansive

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145. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(c) (AM. BAR ASS'N 2023) ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."). Comments 18 and 19 to Rule 1.6(c) state:

> [18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision . . . . A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules . . . .
> [19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions . . . .

MODEL RULES OF PROF'L CONDUCT R. 1.6 cmts. 18, 19.

146. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (AM. BAR ASS'N 2023). Rule 1.4 states:

> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> (3) keep the client reasonably informed about the status of the matter;
> (4) promptly comply with reasonable requests for information; and
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Id.

147. *See also Ronald E. Mallen*, § 37:153. *Jury instructions*, 4 LEGAL MALPRACTICE § 37:153 (2023 ed.) ("Normally, the jury should be instructed only on the theories involved in the action. Thus,

field of negligence has many subcategories, and the cases often speak of things such as: negligent hiring,[148] negligent supervision,[149] negligent outsourcing,[150] and negligent communication.[151] Thus, for example, a lawyer with managerial or supervisory authority can be held liable for negligent supervision of junior lawyers[152] or non-lawyer assistants.[153] This category might include personnel engaged, whether on a long-term or temporary basis, to carry out tasks related to A.I. equipment or work product.

1.   Promoting Competence

Virtually every state has a disciplinary rule that requires competence.[154] This rule nicely complements the prohibition against negligence. Someone

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if the attorney is charged with negligence, no instructions should be given on the attorney's fiduciary obligations.").

148.   *Cf.* Brice v. Wilson, No. 09-05-527 CV, 2006 WL 3239776, at *1 (Tex. App.—Beaumont Nov. 9, 2006, no pet.) (mem. op.) (alleging a claim for negligent hiring against a law firm).

149.   In *Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey*, the plaintiff argued that the defendant firm was liable for malpractice because the outside lawyer it employed to file a notice of claim with an estate had failed to do so. Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey, 863 N.Y.S.2d 100, 100 (App. Div. 2008). In ruling that the law firm was liable for negligent supervision of the outside lawyer, a New York appellate court held that no affidavit was necessary. *Id.* at 102. It was undisputed that the defendant law firm knew of the deadline for filing the notice of claim and took no steps whatsoever to ensure that the claim was filed. *Id.* Therefore, the plaintiff was entitled to summary judgment as a matter of law. *Id.*

150.   *See* Vincent R. Johnson & Stephen C. Loomis, *Malpractice Liability Related to Foreign Outsourcing of Legal Services*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 262, 298 (2012) ("If undisclosed outsourcing results in disappointed client expectations—such as an adverse judgment, a costly settlement, or a lost deal—the client may sue for malpractice, arguing in part that but for the nondisclosure the client would never have consented to the outsourcing. Full disclosure of material information minimizes the chances of this type of lack-of-informed consent claim.").

151.   *See* FORTNEY & JOHNSON, *supra* note 41, at 793 (discussing disclosure obligations including liability for negligent nondisclosure).

152.   *Cf.* MODEL RULES OF PROF'L CONDUCT R. 5.1(a)–(b) (AM. BAR ASS'N 2023) ("(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.").

153.   *Cf.* MODEL RULES OF PROF'L CONDUCT R. 5.3 (AM. BAR ASS'N 2023) ("With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.").

154.   *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness

who is negligent may not merely have made an unfortunate mistake, but viewed more broadly, may lack competence. It is therefore not surprising that the kind of careless actions that might generate a disciplinary complaint might also state a plausible claim for harm caused by negligence.

In the age of A.I. what does a lawyer have to do to demonstrate competence? Maybe a lawyer acting in a supervisory role must ensure that all "team members . . . have some basic data literacy."[155] Or perhaps a lawyer must "use a heightened standard for [determining] who, how, and when remote access to client confidential data will be allowed."[156] Or maybe, in a world of artificial intelligence, competent lawyers need to remember that humans need to perform three crucial roles: "They must train machines to perform certain tasks; explain the outcomes of those tasks, especially when the results are counterintuitive or controversial; and sustain the responsible use of machines (by, for example, preventing robots from harming humans."[157]

"These 'explainers' are particularly important in evidence-based industries, such as law and medicine."[158] Among other things, they need to explain the ethical constraints and exposure to legal malpractice liability that will inevitably shape the A.I.-driven work related to the representation of clients.

B. *Demonstrating Loyalty to Clients*

The law of fiduciary duty demands that an agent be loyal to the interests of the agent's principal. Since all lawyer–client relationships are fiduciary as a matter of law, loyalty to one's client is an obligation deeply embedded into

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and preparation reasonably necessary for the representation."); *but see* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01 (emphasis added) ("(b) In representing a client, a lawyer shall not: (1) neglect a legal matter entrusted to the lawyer; or (2) *frequently fail to carry out completely the obligations that the lawyer owes to a client* or clients. (c) As used in this Rule, "neglect" signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.").

    155. Martinho-Truswell, *supra* note 74, at 69.

    156. Rogers, *supra* note 8, at 864.

    157. H. James Wilson & Paul Daugherty, *Collaborative Intelligence: Humans and AI Are Joining Forces*, HARV. BUS. REV., July 1, 2018, at 112–14.

    158. *Id.*

the law of lawyering.[159] Indeed, in actions alleging breach of fiduciary duty, the standard of care is often expressed in highly demanding terms. For example, business transactions between a lawyer and a client may be treated as presumptively fraudulent on the part of the lawyer,[160] and disclosure of material information to a client must not be merely reasonable, but in some states, must sometimes satisfy the demanding standard of "absolute and perfect candor."[161]

Because a lawyer is a fiduciary, the lawyer can prefer neither his or her own interests, nor the interests of any third person, over the interests of the client. What this means is that a lawyer dealing with a new technology such as A.I., which has widely rippling consequences, must constantly be on guard to make sure the interests of the client come first. This can be difficult or impossible because the interests of a particular client may conflict with the interests of another current client, a former client, the lawyer or other lawyers or staff members in the law firm, or the interests of third persons.[162]

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159. *See generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (AM. L. INST. 2000) (discussing breach of fiduciary duty generally); FORTNEY & JOHNSON, *supra* note 41, at 793.

160. *See* Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964) (expanding on the attorney-client fiduciary relationship). The court stated:

> The relation between an attorney and his client is highly fiduciary in nature, and their dealings with each other are subject to the same scrutiny, intendments and imputations as a transaction between an ordinary trustee and his cestui que trust. 'The burden of establishing its perfect fairness, adequacy, and equity, is thrown upon the attorney . . . .'

Id.

161. *See* Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 742 (2003) ("The rubric of 'absolute and perfect candor' is rooted in the law of fiduciary duty. In this area of the jurisprudence, American courts frequently have been moved to invoke the most demanding rhetoric . . . ."); *see also* Lopez v. Muñoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 866–67 (Tex. 2000) (Gonzalez, J., concurring and dissenting) (quoting Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928)), stating:

> In Texas, we hold attorneys to the highest standards of ethical conduct in their dealings with their clients . . . . As Justice Cardozo observed, "[a fiduciary] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." Accordingly, a lawyer must conduct his or her business with inveterate honesty and loyalty, always keeping the client's best interest in mind.

Id. (internal citations omitted).

162. *See generally* MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2023) (discussing prohibitions against multiple forms of conflicts of interest); MODEL RULES OF PROF'L CONDUCT r. 1.8 (AM. BAR ASS'N 2023); MODEL RULES OF PROF'L CONDUCT r. 1.9 (AM. BAR ASS'N 2023).

In addition, a lawyer who usurps a business opportunity rightfully belonging to the client can be liable for breach of fiduciary duty[163]

1.   Exercising Independent Professional Judgment

Closely related to the idea of loyalty is the idea of independent professional judgment. The duty requiring a lawyer to exercise independent professional judgment on behalf of a client—and solely for the benefit of the client—plays out in many ways. It means, for example, that a lawyer cannot blindly defer to the work product of an A.I. application or provider, but must in fact exercise judgment about the soundness of the technology and the reliability of the end work product.

The principle holding that a lawyer must exercise independent professional judgment on behalf of his or her client is woven deeply into the law of lawyering.[164] The exercise of judgment is not a minor matter for

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163.   Receipt of an undisclosed commission, bonus, or gift from a third party for performing duties owed to the firm constitutes a breach of fiduciary duty. *Cf.* Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 512–13 (Tex. 1942) (failing to disclose the commission to be paid to one of Kinzbach's employees upon closure of the sales deal was a breach of duty). This is true even if there is no showing that the firm has been damaged.

164.   The principle was clearly expressed in the American Bar Association Code of Professional Responsibility (hereinafter "the ABA Code"), which between 1969 and 1983 served as the model for ethics rules adopted in virtually every American jurisdiction. *See* John S. Dzienkowski, *ABA Model Code of Professional Responsibility*, LEGAL ETHICS, LAW. DESKBK. PROF. RESP. 4–7 (2018–2019 ed.) ("[I]t was not until 1969 that the ABA adopted a completely revised set of rules, the Code of Professional Responsibility. . . . Less than a decade [later]. . . [t]he Kutak Commission drafted the 1983 ABA Model Rules of Professional Conduct, which the ABA House of Delegates approved in 1983. . . . By the end of 1999 over 80% of the states (and also the District of Columbia) had adopted the 1983 Model Rules.").
Canon 5 of the ABA Code provided that "A lawyer should exercise independent professional judgment on behalf of a client." MODEL CODE OF PROF'L RESP. Canon 5 (AM. BAR ASS'N 2023). As explained in Ethical Consideration 5-1 of the ABA Code:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Id. at EC 5-1. Ethical Consideration 5-21 further explained that: "The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment." *Id.* at EC 5-21. The ABA Code and its Canons are no longer in force, but the duty to exercise independent professional judgment is still recognized in numerous contexts. *See* John M. Burkoff, *§ 1:2. ABA Model Code of Professional Responsibility*, CRIMINAL DEFENSE ETHICS § 1:2 (2d ed, 2021 update) ("The ABA Code, which no longer applies in its entirety in any American jurisdiction, was made up of three distinct elements: nine Canons, and a varying number of

it goes to the essence of good lawyering. As Anthony Kronman, a former dean of Yale Law School explained: "[t]he lawyer-statesman is a paragon of judgment, and others look to him for leadership on account of his extraordinary deliberative power."[165]

2. Safeguarding Confidential Client Information

The duty of lawyers to protect the confidentiality of client information is well-established in the law of legal ethics.[166] The obligations imposed on lawyers are demanding. As explained by one writer:

> The prevalence of the use of technology in the legal profession, from storing electronic versions of client data to electronically filing court documents, has not come without its costs. Documents that are electronically stored and transmitted by law firms contain not only the norm—names, phone numbers, addresses, and social security numbers—but much more confidential and sensitive data. This information is extremely attractive to hackers because it offers the potential for access to valuable personal client information, such as "corporate clients' businesses, strategies, and proprietary interests." This confidential information becomes even more attractive when hackers realize how easy it is to gain access to the valuable information.[167]

Consequently, protecting client information is one of the most important duties that lawyers owe clients. As another writer observed:

> Technological developments, such as the ability to share information quickly online and use 'cloud computing' data retention to store and access vast amounts of information, have made confidential information more accessible

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Ethical Considerations . . . and Disciplinary Rules . . . within each of the Canons . . . . The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession.").

165.	*See* ANTHONY KRONMAN, THE LOST LAWYER 15, 53–62 (1995) (explaining "excellence of judgment").

166.	*See* Rogers, *supra* note 8, at 864 ("[T]here are overlapping duties regarding a lawyer's responsibility to safeguard personal data when using technology solutions. Specifically, the duty of confidentiality broadly requires the lawyer to not reveal a client's confidential information to anyone not authorized by the client.").

167.	Ashley "Nikki" Vega, *Securing Technological Privacy: Modernizing the Texas Disciplinary Rules of Professional Conduct to Protect Electronic Data*, 10 ST. MARY'S J. LEGAL MAL. & ETHICS 144, 146 (2019).

to intruders . . . [amplifying] the lawyer's need to protect lawyer-client communications.[168]

3. Avoiding Conflicts of Interest

Lawyers should minimize the harm caused by conflicts of interest by seeking sound advice about compliance with their ethics obligations. The revelation of confidential client information for such purposes is expressly[169] or impliedly permitted by the ethics rules in most jurisdictions. As the American Bar Association explained in an ethics opinion:

> A lawyer's effort to conform her conduct to applicable ethical standards is not an interest that will materially limit the lawyer's ability to represent the client. On the contrary, "it is inherent in that representation and a required part of the work of carrying out the representation. It is, in other words, not an interest that 'affects' the lawyer's exercise of independent professional judgment, but rather is an inherent part of that judgment." . . . Although the lawyer has an interest in avoiding conduct that will violate her own ethical duties, the consultation also serves the legitimate purpose of enabling the lawyer to advise a firm client about the legality and wisdom of the proposed course of action and about other available options. In situations such as this, where the lawyer is seeking prophylactic advice to assist in her representation of the client, there is no significant risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited by the lawyer's interest in avoiding ethical misconduct.[170]

C. Enabling Clients to Exercise Control in the Representation

The law governing lawyers has long recognized that clients have broad rights to exercise control over the legal representation. For example, clients normally can decide who to hire, when to fire, how far the scope of

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168. Baum, *supra* note 25, at 121.

169. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(c)(9), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9) ("(c) A lawyer may reveal confidential information: . . . (9) To secure legal advice about the lawyer's compliance with these Rules."); MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4) ("(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (4) to secure legal advice about the lawyer's compliance with these Rules.").

170. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 08-453 1 (2008) (discussing "In-House Consulting on Ethical Issues").

representation extends, and whether to plead guilty or settle, or take the witness stand, or assert a privilege against self-incrimination.[171] Subject to minor limitations (such as liability for unpaid attorney's fees when discharging a lawyer, or the necessity of obtaining court approval of a change in counsel during pending litigation), the rights mentioned above seem undisputed and secure.

1. Requiring Informed Consent

What is notable today is the broad recognition that clients have other rights to control their representation. In particular, the doctrine of informed consent animates many provisions in the *Model Rules of Professional Conduct*,[172] and the same principles now increasingly influence the litigation of legal malpractice cases.[173]

The informed consent doctrine holds that a lawyer has a duty to disclose to a client material information about the risks and alternatives associated with a course of action, and a lawyer who fails to make such required disclosures and obtain informed consent is negligent, regardless of whether the care was otherwise exercised in the representation. If such negligent nondisclosures cause damages, the lawyer can be held accountable for the client's losses.

It is reasonable to think that many unsophisticated clients will be overwhelmed by the complexities of artificial intelligence.[174] This may well impose a more stringent obligations on lawyers to clearly communicate information about the risk and alternatives associated with A.I. According to some commentators, "clients want lawyers who can help translate the

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171. *See also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (AM. BAR ASS'N 2023) ("[T]he lawyer shall abide by the client's decision[] . . . as to a plea to be entered, whether to waive a jury trial and whether the client will testify.").

172. *See* Johnson, *supra* note 33, at 377–84 (discussing informed consent in the law of lawyer discipline); *see also id.* at 379 ("The term 'informed consent' is used today in the Model Rules in ten blackletter rules (often coupled with a requirement that the informed consent be 'confirmed in writing') and eight official comments.").

173. *See id.* at 404 ("There are some cases that neither use the term 'informed consent' nor cite the Model Rules or state variations, that nevertheless recognize the principles on which the doctrine of informed consent is based.").

174. *Cf.* Roose, *supra* note 19 ("[O]ne early GPT-4 tester . . . told me that testing GPT-4 had caused the person to have an 'existential crisis,' because it revealed how powerful and creative the A.I. was compared with the tester's own puny brain.").

tech issues and associated data challenges into easy-to-understand and actionable guidance."[175]

IV. CONCLUDING THOUGHTS

Although the use of A.I. in client representation is only just beginning, it is important for lawyers and law firms to be proactive in minimizing the risks of A.I.-related legal malpractice claims and losses. Large firms with an ethics partner or ethics committee should make it part of their assignment to understand A.I. technology and the ethical issues related thereto. Guidance is beginning to emerge in professional literature about what types of policy statements should be adopted to promote the use of best practices in the context of A.I.[176] In various fields of business, standards are also beginning to emerge that can guide efforts to minimize the risk of tort liability. Similarly, "AI certification initiatives . . . have emerged as firms and lawyers seek to address liability and privacy concerns."[177]

Lawyers in smaller firms will address these risks at a different scale but can take comfort that conformance with the customary practices in a

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175.   Yount, *supra* note 14.

176.   *See, e.g.,* Huu Nguyen & Squire Patton Boggs LLP, *Artificial Intelligence and Tort Liability: The Evolving Landscape*, Practical Practice Note, stating:

A comprehensive AI policy can incorporate both technical and narrative elements, and support a company's showing that its operation of an AI product or system was safe, appropriate, and responsibly designed and deployed. This proactive step can help guard against later claims concerning the reasonableness of a company's AI-related conduct.

. . . .

An AI policy embodying . . . principles [relating to safety standards, ethical considerations, oversight and reporting, and third-party relationships] can not only guide the content of other internal policies and procedures but also aid the creation of external notices that address and explain the company's AI use. Companies may also publicize ethical standards, information security protocols, and tort incidence or crisis response plans, where appropriate. However, companies and their counsel should be aware that regulators and plaintiffs' attorneys may scrutinize policies, so a company should not include commitments in any policies or notices that it is unprepared to meet.

. . . .

In many cases, a company's use of AI will involve contracting with vendors to develop or implement an AI system. A best practice is for the company to manage AI vendor relationships as if the company itself were developing the AI. This means that a company selecting an AI vendor should consider whether the vendor has processes in place to comply with the company's AI principles and serve the company's core values concerning AI use.

Id.

177.   Reynolds, *supra* note 13.

profession normally raises an inference of reasonableness.[178] For those who keep pace with the state of the art, that may go a long way toward defeating a legal malpractice claim based on negligence.

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178. *See* RESTATEMENT (THIRD) OF TORTS § 13 cmt. c (AM. L INST. 2010) (discussing departure from custom).