

The Sky(net) Is Falling!: Ethical Issues Surrounding The Use of Legal Bots As Lawyer Substitutes

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“Sue anyone by pressing the button.”

Plain, rounded text sits below a minimalist iconographic drawing of a finger hovering over a round, purple button with a tasteful “\$” decorating the surface. The screenshot available on DoNotPay’s App Store page¹ seems to promise that getting easy, free money by using the American legal system is as simple as the clean lines and effortless graphics used in the app’s design.

DoNotPay promotes itself as “the home of the world’s first robot lawyer.”² Joshua Browder, son of the co-founder and CEO of investment firm Hermitage Capital Management Bill Browder, invented DoNotPay as an answer to the dozens of parking tickets that he was racking up at age 18.³ While the app started with the goal of helping users protest traffic tickets, Browder has since expanded to offer more complex legal services, such as data breaches and unfair banking fees.⁴ And according to the 21-year-old entrepreneur, he plans to expand DoNotPay’s services to cover landlord-tenant disputes, marriages, divorce, and bankruptcies.⁵ Browder himself is not a lawyer, and at no point do the users of the app ever actually speak with an attorney—everything is entirely artificial intelligence. While Browder claims that the app was developed with the help of “volunteer and part-time attorneys,” no information is given about these attorneys and no certification is offered.⁶

Still, despite the app’s oversimplified take on the law, the app is attempting to solve a real problem. The American legal system is undeniably inaccessible to non-lawyers and those without money. According to Clio’s 2017 Legal Trends Report, the industry average hourly rate for an immigration lawyer is \$340.⁷ In our current political climate, there is a clear need for lawyers doing pro bono work or offering services to those who couldn’t otherwise afford it. Browder has stated his goal of specifically protecting housing rights for HIV-positive tenants and refugees avoiding deportation. These are services for which there is dire need, and, if DoNotPay is successful, that could be doing a

¹ APPLE APP STORE, <https://itunes.apple.com/app/id1427999657#?platform=iphone> (last visited, March 21, 2019).

² *Id.*

³ Caroline Haskins, *New Apps Lets You ‘Sue Anyone By Pressing a Button,’* MOTHERBOARD (Oct. 10, 2018, 5:59 AM), https://motherboard.vice.com/en_us/article/bj43y8/donotpay-app-lets-you-sue-anyone-by-pressing-a-button.

⁴ *Id.*

⁵ John Mannes, *DoNotPay launches 1,000 new bots to help you with your legal problems,* TECHCRUNCH (Jul. 12, 2017), <https://techcrunch.com/2017/07/12/donotpay-launches-1000-new-bots-to-help-you-with-your-legal-problems/>.

⁶ Ephrat Livni, *The world’s first ‘robot lawyer’ isn’t a damn lawyer,* QUARTZ (July 14, 2017), <https://qz.com/1028627/motion-to-dismiss-claims-the-worlds-first-robot-lawyer-is-a-damn-lawyer-by-a-damn-lawyer/>.

⁷ Oliver Duchesne, *Priori Insights: The Hourly Cost of Hiring a Lawyer,* PRIORI (June 27, 2018), <https://www.priorilegal.com/blog/priori-insights-part-2>.

community and global good. Having homelessness rates rise is not only morally outrageous; it's a public health issue. And having political refugees who are unable to speak rudimentary English deported back to an unsafe country because of one hearing in a foreign legal system is one of America's current greatest failings. DoNotPay, and maybe other "robot lawyer" apps like it, could be a part of the solution to America's overburdened and inaccessible legal system—and, as a result— help save the people who most dearly need access to justice.

However, when a lawyer practices law, they are subject to their jurisdiction's professional conduct rules, which are often modeled after the ABA Model Rules of Professional Conduct. Thus, what the Model Rules dictate about a particular topic often influences the real world rules that lawyers must follow. Laypeople are rarely aware of these rules nor do they necessarily understand the purpose of such rules, but nonetheless they shape the way that attorneys interact with clients and handle cases. In the case of a *robot* lawyer, whether or not the Model Rules give any guidance to such a topic is unclear. Every state in the U.S. has some statute barring non-attorneys from giving legal advice.⁸ Subject to limited exceptions, these statutes prohibit the unauthorized practice of law. The crux of whether or not a legal bot is engaging in the unauthorized practice of law relies on what is considered "legal advice" in each jurisdiction. Regardless, what constitutes "legal advice" under a jurisdiction's rules has always been created with the aim of protecting non-lawyers (and often clients) from the misconduct of attorneys⁹

For example, who do the users of DoNotPay sue if the app's AI hands them the wrong form, and their statute of limitations runs out? How does the court deal with frivolous suits brought by users who don't understand the law and "pressed the button" in the hopes of getting easy money? Since DoNotPay is not licensed to practice law, is the information that users submit to the app discoverable and not subject to attorney-client privilege if the users eventually contact a licensed attorney and decide to sue? If the legal bot fails in some way, would users be able to appeal based on incompetence of counsel?

These are *also* real problems that affect people's lives and burden the judicial system. Users of DoNotPay may find that it does more harm than good when the app doesn't actually do what it has promised to do. Legal bots might seem enticing to users who feel that they have a claim but are hesitant to contact an attorney because of financial reasons. In the world of the law, however, "testing the waters" with legal bots can change the course of the suit, or bar the user from bringing a claim at all. The state rules of professional conduct are in place for the protection of non-lawyers and to promote fairness and justice, and allowing legal bots to supersede these rules results in the very harm that the rules sought to protect against. To protect the rights of non-lawyers and to avoid harm to the judicial system, the Model Rules of Professional Conduct should directly address legal bots and identify them as the unauthorized practice of law. The Model Rules are influential on both state legislators and different jurisdictions' ethical rules, and directly addressing legal bots in the Model Rules can offer guidance to both law makers and lawyers¹⁰ in order to craft individualized, local solutions to the legal bot problem. Lawyers

⁸ The American Bar Association, *State Definitions of the Practice of Law*, THE AMERICAN BAR ASSOCIATION (Jan. 14, 2016, 10:24 PM), https://web.archive.org/web/20160114222449/https://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf.

⁹ It should be noted, however, that the Model Rules also protect at least in part the financial interests of lawyers. *See, e.g.*, Model Rule 1.5(a), which sets out guidelines for determining if a fee is "reasonable."

¹⁰ Jurisdictions are split on the topic of legal bots. Professional responsibility rules only apply to lawyers, while unauthorized practice of law statutes apply to non-lawyers. This paper hopes to change the Model Rules to have the greatest influence overall, in the case that legal bots are someday seen as

hold themselves to a certain code of professional conduct for the very purpose of protecting non-lawyers and maintaining the integrity of the profession. Allowing legal bots to bypass these rules and practice law defeats the very protections that enforceable ethics codes for attorneys are designed to provide. While the law is currently generally inaccessible to the non-wealthy, legal bots are not the answer to that problem.

I. The Current State and Capabilities of Artificial Intelligence and Machine Learning

As more and more DoNotPay-style apps break into the market, and tech insiders see the potential to disrupt the half-trillion dollar legal industry, lawyers become more aware of cautionary tales of how robots will soon take their jobs. However, the current state of technology is nowhere near capable of doing the job of an attorney.¹¹ To do the job of an attorney, machines would need to be capable of actual thought¹² and strategy, which is far beyond the current scope of our understanding of what computers are able to do.

To properly understand what technology is currently capable of, it is important to distinguish between the different types of legal artificial intelligence (“AI”) that exists. AI can be thought of as an umbrella—and under it falls Machine Learning (“ML”). All ML is AI, while not all AI is encompassed within ML.¹³ John McCarthy, one of the founders of AI, defined AI as “the science and engineering of making intelligent machines, especially intelligent computer programs. It is related to the similar task of using computers to understand human intelligence, but AI does not have to confine itself to methods that are biologically observable.” While AI may mimic human intelligence, it does not need to and often doesn’t. In his own words, McCarthy stated, “On the one hand, we can learn something about how to make machines solve problems by observing other people or just by observing our own methods. On the other hand, most work in AI involves studying the problems the world presents to intelligence rather than studying people or animals. AI researchers are free to use methods that are not observed in people or that involve much more computing than people can do.”¹⁴ In comparison, ML is a type of AI that improves upon itself by “learning” from data given to it and modifies itself according to trends that it learns from that data.¹⁵

lawyers in some jurisdictions (in which case professional responsibility rules would apply) or in the case that they are not seen as the practice of law, in which case state legislators may use the Model Rules to craft unauthorized practice of law statutes.

¹¹ Neil Sahota, COGNITIVE WORLD, *Will A.I. Put Lawyers Out of Business?*, FORBES (February 9, 2019 10:43 PM), <https://www.forbes.com/sites/cognitiveworld/2019/02/09/will-a-i-put-lawyers-out-of-business/#4598854d31f0>.

¹² See, e.g., the Allen Institute for AI found that its Multi-Modal Machine Comprehension program(MC3) when given contexts of text, images, and diagrams, could not answer questions taken from middle school science curricula. Research Paper, Allen Institute for Artificial Intelligence, University of Washington, Aniruddha Kembhavi, et al., *Are You Smarter Than A Sixth Grader? Textbook Question Answering for MultiModal Machine Comprehension*, http://ai2-website.s3.amazonaws.com/publications/CVPR17_TQA.pdf.

¹³ SKYMIND.AI, ARTIFICIAL INTELLIGENCE (AI) VS. MACHINE LEARNING VS. DEEP LEARNING <https://skymind.ai/wiki/ai-vs-machine-learning-vs-deep-learning> (last visited March 21, 2019).

¹⁴ John McCarthy, *Artificial Intelligence Basic Questions*, STANFORD UNIVERSITY (Nov. 12, 2007), <http://www-formal.stanford.edu/jmc/whatisai/node1.html>.

¹⁵ SKYMIND.AI, ARTIFICIAL INTELLIGENCE (AI) VS. MACHINE LEARNING VS. DEEP LEARNING <https://skymind.ai/wiki/ai-vs-machine-learning-vs-deep-learning> (last visited March 21, 2019).

a. What Programs Currently Exist

While the state of AI and ML are ever changing in the tech industry, the two main forms of legal AI/ML that developers have inserted into the market are supplemental legal programs and legal bots. Supplemental programs are those that a law firm or solo practitioner would use in the course of practice *to aid and assist* the attorney in providing legal counsel, rather than allowing the bot to act as an *alternative* to an attorney. For example, IBM’s “ROSS” describes itself as “an advanced legal research tool that harnesses the power of artificial intelligence to make the research process more efficient.”¹⁶ Already being used by several big law firms globally, ROSS is always in the role of an assistant, and lawyers are responsible for looking over anything that ROSS submits. ROSS, and other supplemental legal programs, are the tools that an attorney can use. While, in the future, supplemental legal programs might be considered necessary for attorneys to keep up to date with competent legal representation, under Model Rule 1.1, as an example, as of right now they are merely tools that a lawyer may use.¹⁷

In contrast, legal bots are another matter entirely, which neither the Model Rules, nor their binding state-adopted counterparts, have yet addressed.¹⁸ Legal bots use ML to replace lawyers. Apps like DoNotPay and LegalZoom effectively advertise themselves as lawyer alternatives, despite any claims they make to the contrary, because they provide legal services to their clients without the use of an attorney.¹⁹ Whether or not these legal bots are offering legal advice, and thus engaging in the unauthorized practice of law, is yet to be ascertained. But these applications effectively market themselves as a replacement for an attorney, and their lack of competence is not governed through the professional responsibility rules of lawyers.

Further, machine learning at this point in time is not capable of providing the legal assistance necessary to keep up with case law, understand when a statute has been amended, nor understand what terms are legal terms of art, much less apply any of this to a client’s case. ML may provide us tools to keep up with advancing case law, but not necessarily the nuance or subtlety of understanding to distinguish cases that appear to be factually or legally similar or understand the propagation of hard logical changes to underlying fact patterns. ML is bad at layering logic, and often leads to conclusions based on obscure connections that a human would find irrelevant.²⁰ While ML is good at making general connections to concepts and ideas, it fails when it comes to any sort of abstract logic required by an attorney in framing her case. For example, if the system is not set up well, it may even make the connection between a client’s name and their likelihood of winning a case based on pre-existing published cases which give favorable rulings to parties with the same name.

¹⁶ ROSS INTELLIGENCE, <https://rossintelligence.com/> (last visited May 10, 2019).

¹⁷ MODEL RULES OF PROF’L CONDUCT R. 1.1 (2016)

¹⁸ It should be noted that some jurisdictions’ courts have addressed the issue of legal bots, in addition to some jurisdictions passing legislation in response [*see, e.g.*, Tex. Gov’t. Code Ann. § 81.101(a) (1998)]. However, no jurisdiction at this time has implemented professional responsibility codes of conduct directly address legal bots as the unauthorized practice of law.

¹⁹ APPLE APP STORE, <https://itunes.apple.com/app/id1427999657#?platform=iphone> (last visited, March 21, 2019); LEGAL ZOOM, <https://www.legalzoom.com/> (last visited March 21, 2019).

²⁰ *See, e.g.*, Research Paper, Robin Jia, Perry Lang, Adversarial Examples for Evaluating Reading Comprehension Systems (Jul. 23, 2017), <https://arxiv.org/pdf/1707.07328.pdf>. (“In this adversarial setting, the accuracy of sixteen published models drops from an average of 75% F1 score to 36%; when the adversary is allowed to add ungrammatical sequences of words, average accuracy on four models decreases further to 7%.”)

For example, LegalZoom offers a variety of services that are sufficiently complex and would warrant an attorney. LegalZoom’s site breaks this down into six overarching categories: Business, Wills & Trusts & Family, Intellectual Property, Workplace Benefits, Contracts & Agreements, and Legal Advice.²¹ LegalZoom offers everything from registering a trademark to drafting a demand letter, while using its own algorithm to determine which form is appropriate for the user and fill out the form based on the information that the user has given. Further, LegalZoom will also file any forms created for the user, rather than requiring the user to do so herself. However, unlike DoNotPay, LegalZoom actually does offer attorney services, and actually requires that an attorney evaluate the client’s case before offering the client any legal advice, like when using LegalZoom’s Bankruptcy services.²² Much like DoNotPay, LegalZoom acts as a sort of “attorney lite,” filling the space between no attorney and having a full-service attorney; the service has actual attorneys that are available for some users, but for the most part, it allows users to purely interact with bots that dish out forms. Similarly, LegalZoom also acts to address the longstanding issue of the inaccessibility of legal services. On its “about” page, LegalZoom opines, “LegalZoom definitely works to fill the gap between the need for an attorney and access to an attorney, and it is really powerful.”²³

Legal bots hope to fill the void of the lack of services—no attorney required. This becomes especially problematic, however, as slow moving courts and luddite lawyers are hesitant to question legal bots because of a lack of understanding of the technology, as well as a general overestimation of the technological capabilities that these programs provide.²⁴ Rather, lawyers should afford the same caution in understanding the nuances of artificial intelligence’s process and predictions as they would to understanding the law itself.

II. The Current State of the Law and Is it Legal Advice? Model Rules 5.5, 5.7

Understanding the limitations of these bots is important, particularly as it relates to evaluating whether the services they offer constitute providing legal advice and thus, the unauthorized practice of law. Most jurisdictions have not yet made any decisions on whether the services that legal bots offer should be considered legal advice under professional responsibility rules. However, different jurisdictions’ approaches to what constitutes legal advice, along with what currently exists in the Model Rules of Professional Conduct 6.5 (which allows non-profit and court annexed limited legal service programs without the expectation of continuing representation²⁵), may offer a predictor for the future of legal bots, if any.

What constitutes the “unauthorized practice of law” is often circular and conclusory. For example, Black’s Law Dictionary defines the unauthorized practice of law as “The practice of law by a person, typically a nonlawyer, who has not been licensed or admitted to practice law in a given jurisdiction.”²⁶ This can include giving legal advice without a license, or even for a lawyer to assist

²¹ LEGAL ZOOM, <https://www.legalzoom.com/> (last visited March 21, 2019).

²² LEGAL ZOOM BANKRUPTCY OVERVIEW, <https://www.legalzoom.com/personal/financial/bankruptcy-overview.html> (last visited March 21, 2019).

²³ LEGAL ZOOM WHY US, <https://www.legalzoom.com/why-us/> (last visited March 21, 2019).

²⁴ Jane Croft, *Artificial Intelligence Disrupting The Business Of Law*, FIN. TIMES (Oct. 5, 2016), <https://www.ft.com/content/5d96dd72-83eb-11e6-8897-2359a58ac7a5> [<https://perma.cc/5XD6-RPRX>] (“Its traditional aversion to risk has meant the legal profession has not been in the vanguard of new technology.”).

²⁵ MODEL RULES OF PROF'L CONDUCT R. 6.5 (2016)

²⁶ Garner, Bryan A. ed. *Black’s Law Dictionary* (7th ed.). St. Paul MN: West. Pp. 1191-1192.

another in the unauthorized practice of law.²⁷ What constitutes legal advice and the practice of law varies by jurisdiction, and thus, requires an understanding of modern jurisdictions' approaches.²⁸

a. Different Jurisdictions' Approaches

Although many jurisdictions have not yet addressed legal bots within their respective professional rules of conduct, some jurisdictions have precedent that impacts how future cases are likely to evaluate whether the services of legal bots constitute the unauthorized practice of law, or their rules have existing sections that could have an impact on legal bot businesses. The legal profession as a whole may be hesitant to comment on legal bots, but persuasive authority in both directions that may impact future evaluations of legal bots does exist.

i. The Second Circuit / North Carolina

While it is troubling that many circuits have not yet addressed the issue of AI and the law, what is even more troubling is case precedent from the Second Circuit in its decision of *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, 620 F. App'x 37 (2d Cir. 2015). In this decision the Second Circuit held that "tasks that could otherwise be performed entirely by a machine" were not the "practice of law."²⁹ When looking at apps like DoNotPay, which advertises itself as a digital lawyer replacement, this becomes an exceedingly troubling holding.

At the time of his case, David Lola was a lawyer who was licensed to practice in the state of California, and in April of 2012 began working at Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden") doing document review work and essentially acting as a paralegal. Lola had moved to North Carolina before starting his work in document review, but was not yet admitted to the North Carolina bar. However, North Carolina permits attorneys who are licensed in another state to provide legal services under "limited circumstances." Lola worked forty-five to fifty-five hours per week and was paid an hourly rate of \$25/hour, even when working overtime... Thus leading to the reason for Lola's suit: he wanted overtime pay.

Attempting to get out of paying its employee overtime, Skadden argued that Lola was doing the work of an attorney. The Department of Labor regulations for the Fair Labor Standards Act ("FLSA") exempts those who practice law from claims to overtime wages.³⁰ Lola rebutted this claim on the basis that his tasks were minimal: Skadden provided documents to review, but not before those documents had been pre-marked by the firm's software system, Relativity. Relativity used predictive coding and technology assisted review to pre-mark documents before Lola even saw them. And thus, Lola argued, what he was doing could not possibly constitute legal advice.

The Second Circuit agreed with him. The court turned to North Carolina state law in making its decision, focusing specifically on the North Carolina code of conduct that it considered to be unclear:

[P]erforming any legal service for any other person, firm or corporation, with or without compensation, specifically including ... the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or

²⁷ MODEL RULES OF PROF'L CONDUCT R. 5.5 (2016), Comment 1

²⁸ MODEL RULES OF PROF'L CONDUCT R. 5.5 (2016), Comment 2

²⁹ *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, 620 F. App'x 37, 45 (2d Cir. 2015).

³⁰ Fair Labor Standards Act § 29 U.S.C. § 201-219 (2016).

assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation...³¹

Finding the statute to be vague and unhelpful as to the meaning of legal advice, the court instead relied on a North Carolina ethics opinion, which considered legal support services to include “reviewing documents.” Taking this ethics opinion into consideration, the court determined that the threshold for defining the practice of law was low. “Even undisputedly legal services like the drafting of motion briefs and the negotiating of documents require the performance of tasks—checking cases to make sure quotations are accurately reproduced, conforming citations to the stylistic dictates of the Bluebook, ensuring that documents are free of grammatical and typographical errors—that require little to no legal judgment.”³² Moreover, the court acknowledged that document review tasks are the “bread and butter of much legal practice and essential to the competent representation of clients.”³³ In essence, mere contract review was not considered legal advice.

So, while the tasks that the document review software was fulfilling were often done by lawyers for the purpose of fulfilling their lawyerly duties, because such tasks could be completed by AI, they do not constitute legal advice for the state of North Carolina. The Second Circuit’s decision is limited to North Carolina, but it still can be used as persuasive authority, especially for states that are unsure how to handle such new and intimidating concepts. The Second Circuit became the first federal appellate court to make a distinction between the role of humans and the role of machines within the practice of law.³⁴ In particular, the issue of what constitutes “legal work” was not even brought up by either party in briefings at the appellate level nor by the district court—Judge Lohier raised the question for the first time during questioning. “[W]hat Mr. Lola actually was actually [sic] doing, which was to be given a set of search terms and to see if documents had the search terms—a computer can do that, and in effect confirms what the computer has determined. *How in the world is that the practice of law, under any jurisdiction?*”³⁵ Moreover, Judge Lohier makes the distinction between Lola essentially checking the machine’s work, and Lola actually performing the task himself: “why would you need a human being to conduct oversight of the machine if it is that perfunctory of a function?”³⁶

By making this distinction between functions that a machine can do on its own, and tasks that a machine can do that require attorney oversight, Judge Lohier had perhaps unknowingly targeted the issue of legal bots like DoNotPay specifically as opposed to just the use of primitive AI like the Relativity program that Skadden used. The Relativity program was essentially a word finder program that was taught to automatically redact certain words, without understanding the reason for doing so. While legal bots might not have the capability to understand reasoning for why they are doing what they are doing, they are certainly capable of acting in the role that an attorney provides. For example, a self-driving car has the capability to understand not to hit anything or anyone, but whether it has any understanding of physics is irrelevant to its task. A legal bot filling out forms might understand what type of form a client needs to file without at all understanding the rationale behind it that an attorney

³¹ *Lola* at 10, N.C. Gen. Stat. section 84-2.1

³² *Lola* at 13.

³³ *Lola* at 13.

³⁴ Michael Simon, etl al., *Lola v. Skadden and the Automation of the Legal Profession*, 20 Yale J. L. & Tech. 234, 243 (2018).

³⁵ Oral argument at 40:20, *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, 620 F. App’x 37 (2d Cir. 2015) (No.14-3845-cv) [oral argument transcript found through Michael Simon, etl al., *Lola v. Skadden and the Automation of the Legal Profession*, 20 Yale J. L. & Tech. 234, 243 (2018)].

³⁶ *Id.* 34:00.

would use. This could be considered a “perfunctory function,” but it is still very much completing a task that an attorney would use strategy to complete, such as choosing whether to file in state court or federal, or choosing which claims to include in the pleading. So while the Court held that Lola was not doing attorney’s work for the purposes of the FLSA, the Second Circuit’s opinion has also created a side effect in its ruling: in the Second Circuit, because work that a machine can do is not the practice of law, and as such, legal bots cannot be engaged in the *unauthorized* practice of law.

ii. Texas

A federal district court in Texas has also established case precedent in that jurisdiction in relation to legal bots and the jurisdiction’s ethical rules. In *Unauthorized Practice of Law v. Parsons Tech, Inc.*, the Northern District Court of Texas found that Parson’s Technology (also known as Quicken Family Law [“Parson’s”]) constituted the unauthorized practice of law by allowing clients to use legal templates.

In *Parsons Tech*, Parsons, a software company, offered a product (Quicken Family Lawyer, “QFL”) that included legal forms as well as instructions on how to fill out these forms. The unauthorized practice of law committee of Texas brought suit alleging that Defendant’s sale of the program violated Texas’ unauthorized practice of law statute.³⁷ Plaintiffs sought to enjoin Parsons from being able to sell the program because the sale of the program constituted the alleged unauthorized practice of law. In granting the Plaintiffs’ movement for summary judgment, the court found that the program violated the Texas statute because the preparation of legal instruments of all kinds involves the practice of law. Further, despite Defendant’s argument otherwise, their First Amendment rights were not violated because the burden placed on the Defendant was necessary to serve the state’s legitimate and content-neutral interest. This is because regulating the practice of law is necessary to protect Texas citizens from misleading legal practice.

Further, after the case was appealed, the Texas legislature passed a statute clarifying that the practice of law does not include design, creation, publication, distribution, display or sale of computer software or various other products.³⁸ This is only so long as the products clearly and conspicuously state that they are not a substitute for the legal advice of counsel.³⁹

In *Parsons*, QFL was a program that would provide over 100 different legal forms for the user, including employment agreements, real estate forms, premarital agreements, and wills and trusts forms. The program also offered instructions on how to complete these forms. QFL claimed to be “valid in 49 states,” “developed and reviewed by expert attorneys,” and “updated to reflect recent legal formats.”⁴⁰ QFL worked by asking the user questions, including “helpful hints” on how to answer the questions, and then would provide the user with the appropriate form that they needed for the type of work that the client had selected.⁴¹ While no disclaimer appears on the packaging, a first time user logging into QFL will see the following text:

³⁷ Tex. Gov’t Code § 81.101.

³⁸ Tex. Gov’t. Code Ann. § 81.101(a) (1998).

³⁹ *Id.*

⁴⁰ *Unauthorized Practice of Law v. Parsons Tech Inc.*, 179 F.3d 956 at 4-5 (5th Cir. 1999) (per curiam), Pl Ex 1 page 8.

⁴¹ *Id.*

This program provides forms and information about the law. We cannot and do not provide specific information for your exact situation.

For example, we can provide a form for a lease, along with information on state law and issues frequently addressed in leases. But we cannot decide that our program's lease is appropriate for you.

Because we cannot decide which forms are best for your individual situation, you must use your own judgment and, to the extent that you believe appropriate, the assistance of a lawyer.⁴²

Even if a user inputs to QFL that she would like to select her own legal form, QFL will still mark the forms that it believes are most relevant to the user.⁴³

The court in *Parsons* relied on a Texas Supreme Court ruling, which held that the mere advising or informing a client whether or not to file a form requires legal skill, and thus would constitute the practice of law.⁴⁴ The Court made the distinction between the lack of disclaimer on the box and the disclaimer appearing merely once at the beginning of the product's use.⁴⁵ The court concluded that the software presented itself as a reliable legal source for customers, and even if it disclaimed otherwise, the impression was such as to lead users to believe that it was a lawyer substitute.⁴⁶ This potential misleading of customers is sufficient to constitute the unauthorized practice of law.⁴⁷ "While no single one of QFL's acts, in and of itself, may constitute the practice of law, taken as a whole *Parsons*, through QFL, has gone beyond publishing a sample form book with instructions, and has ventured into the unauthorized practice of law."⁴⁸

The court in *Parsons* seems to suggest that merely disclaiming that a legal bot is not a substitute for a lawyer does not bar the software from giving legal advice. Rather, the standard is more reliant on the perception that people using the software *could have* in relation to the program's presentation as a reliable legal source. Both the Texas Supreme Court and the court in *Parsons* also emphasize that it is not merely one act alone that would constitute the unauthorized practice of law, but the program taken as a whole constitutes unauthorized practice. Under the Texas code, apps like DoNotPay would likely be considered the unauthorized practice of law, if only because it refers to itself specifically as a robolawyer, implying that it is an alternative to a lawyer and capable of everything that a lawyer could do.

iii. The Ninth Circuit

In a different context, but reaching a similar result to that in Texas, the Ninth Circuit has previously held that software that offers automated bankruptcy assistance constitutes the unauthorized practice of law. *Frankfort Dig. Servs. v. Kistler (In re Reynoso)*, 477 F.3d 1117 (9th Cir. 2007). The software in question (Ziinet Bankruptcy Engine ["Ziinet"]) claimed to merely provide clerical services

⁴² *Parsons Tech, Inc.* at 5-6.

⁴³ *Id.*

⁴⁴ *Unauthorized Practice of Law Committee v. Cortez*, 692 S.W.2d 47, 50 (Tex. 1985).

⁴⁵ *Parsons Tech, Inc.* at 5-6.

⁴⁶ *Parsons Tech, Inc.* at 18-19.

⁴⁷ *Parsons Tech, Inc.* at 18-19.

⁴⁸ *Id.*

in the same way that a bankruptcy petition preparer would. Bankruptcy petition preparers are not required to be attorneys, and so, by definition, cannot be doing legal work. However, Ziinet went beyond the scope of mere clerical work, and instead teetered into the realm of legal advice. Ziinet determined in which schedule to place information provided to the debtor, selected exemptions for the debtor and supplied relevant legal citations. Providing personal guidance in this way, the court concluded, constituted a violation of California’s definition of the unauthorized practice of law. “California courts have long accepted that, in a general sense, ‘the practice of law . . . includes legal advice and counsel and the preparation of legal instruments and contracts.’”⁴⁹

Further, the court noted that the standard for what constitutes legal advice is not merely based on any individual instances of legal practice, but rather on the program as a whole.⁵⁰ “[The] system touted its offering of legal advice and projected an aura of expertise concerning bankruptcy petitions; and, in that context, it offered personalized—albeit automated—counsel. We find that because this was the conduct of a non-attorney, it constituted the unauthorized practice of law.”⁵¹ Rather than simply hold that all legal bots constitute the unauthorized practice of law, the court held that, in this specific instance, the system projected “an aura of expertise” and offered personalized counsel, which constituted legal advice. This implies that in some way, legal bots might not practice law if they do not offer a similar “aura of expertise” nor personalized services. Because DoNotPay and LegalZoom provide services that provide a form based on what the program believes to be correct for each individual client and fills it out based on that designation, at this time, the court’s description appears to encompass these programs.

b. Model Rule 6.5

While the Model Rules have not officially addressed whether legal bots constitute legal advice, the Rules do allow some instances of lawyers offering legal services without needing to abide by other ethical rules within the Model Rules, especially in regards to limited services.⁵² Model Rule 6.5 allows lawyers to participate in nonprofit and court-annexed legal systems for the purpose of limited legal representation of one-off clients, such as helping clients fill out forms, much in the same way that legal bot programs might do. Model Rule 6.5 allows a lawyer generally to bypass rules governing conflicts of interest when helping in such a limited capacity (Model Rules 1.7, 1.9(a), and 1.10).

Legal bot developers may argue that their programs are attempting to rectify the same issue that these nonprofit and court-annexed programs are. The argument here would be that it is good public policy to encourage lawyers (and potentially legal bots) to provide legal advice for those who need it, since we want those who cannot afford a lawyer to still have access to the legal system. However, Model Rule 6.5 does not give free reign to attorneys who provide those services. Comment 1 to Model Rule 6.5 seems to emphasize that the primary protection offered to attorneys who provide these services is that there is no expectation that a lawyer’s representation of the client will continue beyond that session, *even though an attorney-client relationship has been established*.⁵³ This is because such programs are

⁴⁹ *Reynoso v. United States*, 477 F.3d 1117, 1125 (9th Cir. 2007), citing *Baron v. Los Angeles*, 2 Cal. 3d 535, 86 Cal. Rptr. 673, 469 P.2d 353, 357 (Cal. 1970).

⁵⁰ *Id.* at 1125.

⁵¹ *Id.* at 1126.

⁵² It should be noted once more that the Model Rules are a guideline and are unenforceable on their own, however, many states base their own professional responsibility rules off of the Model Rules, which are binding within that jurisdiction.

⁵³ MODEL RULES OF PROF'L CONDUCT R. 6.5 (2016), Comment 1.

normally set up such that it would be incredibly difficult for an attorney to screen for conflicts of interest.⁵⁴

Further, Comment 2 to the rule requires that an attorney still secure the client's consent to the limited scope of such representation, and, as well, that the attorney advise the client to seek further assistance of counsel if short-term representation is unreasonable under the circumstances.⁵⁵ Legal bots developers could argue that they secure consent by use of the software, and often such programs have some sort of legal disclaimer such that the forms offered are not legal advice and are not a substitute for an attorney. However, typically in most jurisdictions, merely claiming that something does not constitute legal advice is insufficient, and the attorney's actions as a whole should be taken into consideration. This is necessary to prevent lawyers from misleading laypeople, and the very purpose of establishing attorney-client relationships, even if they are short term as is the case in Model Rule 6.5. Likely, Model Rule 6.5 would not carve out an exception for legal bots under the same rule that allows attorneys to engage in legal form services. Rather, it should be noted that the Model Rules consider the filling out of legal forms to still constitute legal advice and engage an attorney-client relationship, even if that relationship has a limited and temporary scope.

There is no current consensus on whether or not legal bots constitute legal advice across jurisdictions, and legal bots are not directly addressed in the Model Rules. The current state of the law in relation to legal bots ranges from jurisdictions deeming computer programs to not be legal advice at all,⁵⁶ to programs like LegalZoom engaging in the unauthorized practice of law.⁵⁷ By changing the Model Rules to directly address these currently existing legal bot programs as the unauthorized practice of law, state legislators can look to the Model Rules when drafting unauthorized practice of law statutes for non-lawyers. Similarly, considering there is no consensus on the legality of legal bots, if other jurisdictions eventually deem legal bots to be a lawyer equivalent, those jurisdictions' ethical committees can look to the Model Rules to adopt their own enforceable rules on what legal bots must be capable of (or the inverse). The Model Rules offer a guideline to the ethical practice of law, and changing these rules to directly address legal bots can offer some guidelines for that practice in the muddled and legally gray topic of legal bots.

III. Issues That May Arise With the Use of Legal Bots

Rather than determining whether legal bots act in ways consistent with the practice of law in other jurisdictions, one method for determining whether the Model Rules should be amended to specifically address legal bots is whether legal bots cause issues that the Model Rules seek to prevent. As mentioned in the *Parsons* case, the primary reason for barring non-attorneys from giving legal advice is the potential to mislead laypeople who have mistakenly relied on that advice to their own detriment.⁵⁸ This article hopes to both predict and explore the ways that laypeople may rely on legal bots to their detriment for the purpose of encouraging the Model Rules of Professional Conduct to specifically address legal bots as giving legal advice (and thus the unauthorized practice of law) to prevent these issues before they arise.

⁵⁴ *Id.*

⁵⁵ MODEL RULES OF PROF'L CONDUCT R. 6.5 (2016), Comment 2.

⁵⁶ *Lola v. Skadden, Arps, Slate, Meagher & Flom LLP*, 620 F. App'x 37, 45 (2d Cir. 2015).

⁵⁷ *Unauthorized Practice of Law Committee v. Cortez*, 692 S.W.2d 47, 50 (Tex. 1985).

⁵⁸ *Unauthorized Practice of Law v. Parsons Tech Inc.*, 179 F.3d 956 at 18-19 (5th Cir. 1999) (per curiam).

a. Competence and Diligence: Model Rule 1.1 and 1.3

Model Rule 1.1 requires that an attorney provide competent legal representation to a client:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.⁵⁹

Similarly, Model Rule 1.3 requires that a lawyer act diligently with respect to her client, “A lawyer shall act with reasonable diligence and promptness in representing a client.”⁶⁰

Essential for representing a client, these rules are difficult for computers to follow. Comment 1 to Rule 1.1 details a list of factors required for an attorney to be deemed competent, including considering the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In addition, expertise is usually measured against the proficiency of a general practitioner, but can be elevated to a higher standard depending on the case.⁶¹ Furthermore, Comment 1 to Rule 1.3 specifies that a lawyer must also act with “commitment and dedication to the interests of the client” and with “zeal in advocacy upon the client’s behalf.” And while a lawyer has discretion in professional judgment for strategy, she still must employ some amount of actual strategy.⁶²

Legal bots at this stage are nowhere close to the competence level required to be a competent attorney, and do not have the capacity to “think” to the extent employed by attorneys when using a legal strategy in a case. Geoff Hinton of Google Brain and the University of Toronto has described the way that neural networks “strategize” as being largely unknown:

“People can’t explain how they work, most of the things they do. When you hire somebody, the decision is based on all sorts of things you can quantify, and then all sorts of gut feelings. People have no idea how they do that. If you ask them to explain their decision, you are forcing them to make up a story.

Neural nets have a similar problem. When you train a neural net, it will learn a billion numbers that represent the knowledge it has extracted from the training data. If you put in an image, out comes the right decision, say, whether this was a pedestrian or not. But if you ask ‘Why did it think that?’ well if there were any simple rules for deciding whether an image contains a pedestrian or not, it would have been a solved problem ages ago.”⁶³

So not even the developers of many legal bots apps have much insight into why the bot might choose specific forms for specific users, or choose to submit a complaint in federal court as opposed to state court, or even out-of-court strategies, like the choice to write a demand letter before taking further

⁵⁹ MODEL RULES OF PROF’L CONDUCT R. 1.1 (2016).

⁶⁰ MODEL RULES OF PROF’L CONDUCT R. 1.3 (2016).

⁶¹ MODEL RULES OF PROF’L CONDUCT R. 1.1 (2016), Comment 1.

⁶² MODEL RULES OF PROF’L CONDUCT R. 1.3 (2016), Comment 1.

⁶³ Tom Simonite, *Google’s AI Guru Wants Computers to Think More Like Brains*, WIRED (Dec. 12, 2018, 12:14 PM), <https://www.wired.com/story/googles-ai-guru-computers-think-more-like-brains/>.

legal action. While it's true that much of a lawyer's decision making is often based on factors that cannot be "quantified," the professional responsibility rules in the lawyer's jurisdiction keep her accountable to at the very least explain her reasoning for her strategic decisions, should her jurisdiction's ethics board open an investigation. Without understanding why bots choose to employ the strategy that they do, it is impossible to tell whether a legal bot would rise to the sufficient diligence and competence required of an attorney.

Furthermore, while a lawyer may take a client if she *becomes* competent in the necessary areas of law in order to represent her client,⁶⁴ a legal bot might not have the ability to do so. While neural networks can theoretically be trained in only a matter of hours or days, some of their underlying understanding (often of word representations) may be learned from somewhere else and imported. That imported work may be based upon a domain not even near the legal domain, even theoretically from old newspapers or random webpages.⁶⁵ Neural networks might not ever be updated, depending on the developer; they may or may not retrain models as a part of a standard operation, but it is not required. It would depend on the speed at which new information is fed into the system. If the company had to hire experts to annotate the data and didn't want to do that again, they may never even update the underlying dataset, for example. Further, there are rarely regression tests for logic, so an update may trigger an entirely different behavior to a previously "checked" model.⁶⁶

Essentially, apps like DoNotPay could be using the same dataset repeatedly, without allowing the legal bot to have access to updated data that would allow it to give the user different, "updated" results. If the developer believed that the "rules" of the law do not change (or even, if the developer is unable to keep up with the regularity of updates required by ongoing case law), coded those rules once, and had not updated them since, the legal bot would not have access to any sort of updated version of the law, and could not make itself "competent" when representing its client. The legal bot would have no way of knowing when to seek new information, nor how to change its data. Considering how often the law changes with each case precedent, it is highly unlikely that an app like DoNotPay would be able to consistently update as required to stay competent under Rule 1.1. If that was the case, the app would have to have a new version essentially every day, which it is unlikely to do if it remains available through a market like the App Store. It would be like a lawyer doing research once, and then henceforth only using that research for new clients for similar cases without checking if new cases have come out since then, or if Congress or state assemblies have passed any laws. Such a lawyer would undoubtedly be disciplined for lack of competence and diligence, and so legal bots cannot meet the standard necessary for a general practitioner required under the Model Rules.

Moreover, rather than just being disciplined, there is a client on the other end of that lawyer's conduct who is likely harmed by the lawyer's lack of competence. A lawyer who does not properly research has the potential to harm her client's case. In this instance, the client could have her remedy through suing her lawyer for malpractice. However, in the case of a robot lawyer, any potential remedy

⁶⁴ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2016), Comment 2.

⁶⁵ See, e.g., Research Paper, Jieyu Zhao, et al., Gender Bias in Contextualized Word Embeddings (Apr. 5, 2019), <https://arxiv.org/pdf/1904.03310.pdf>. [ELMo is a widely used, pre-trained language model component, trained on news data from across the web, which was proven to show a gender bias.]

⁶⁶ See, e.g., Google's automated photo labeling system, which in 2015 would often tag black people as gorillas. Nearly two years later, Google's awkward work around was to eliminate the word "gorilla" from its lexicon entirely. Tom Simonite, *When It Comes to Gorillas, Google Photos Remains Blind*, WIRED (Jan. 11, 2018 7:00 AM), <https://www.wired.com/story/when-it-comes-to-gorillas-google-photos-remains-blind/>.

is not clear. Typically, legal malpractice claims involve a lawyer.⁶⁷ Instead, jurisdictions that do not view legal bots as the practice of law, such as the Second Circuit in *Lola v. Skadden*, may find that the client has no recourse because there is no lawyerly work being done. As it currently stands, at least as might be inferred in the Second Circuit, there is a crack that clients can fall through, where legal bot entities are not “practicing law,” and so there isn’t any remedy should the legal bot lack competence and commit legal malpractice.

b. Maintaining Attorney-Client Privilege: Model Rule 1.6

One other critical issue with legal bots relates to whether confidentiality can be maintained when information is shared through a legal bot. This confidentiality concern could arise in three instances. First, is information that is shared with a legal bot subject to any form of confidentiality protection, and if not, is it discoverable? Second, does a legal bot break its requirement of confidentiality if it shares a client’s information as data with the developer. And third, when a developer collects or sells user data, has it violated the attorney-client privilege?

Model Rule 1.6 requires an attorney to keep confidential conversations with a client in confidence.⁶⁸ One key element of the basis for this privilege is confidentiality—a conversation that an attorney has with her client in a public setting surrounded by others is unlikely to be privileged information, even if that other person is a parent or guardian.⁶⁹ Similarly, when an app shares its information with the developer, it is now inviting a third party into the conversation that the robot “attorney” is having with its client. Much like when a client shares information with another third party, that information could be subpoenaed in another case. Say, for example, that Plaintiff decides to start her case by consulting DoNotPay. She inputs information about what happened to her into the app, and the app outputs a form that it believe she qualifies for. Plaintiff doesn’t feel the app is helping her, and believing she has a good case, decides to take her case to a real attorney. Attorney takes Plaintiff’s case and gets to the discovery stage. Once there, Defendant subpoenas DoNotPay for the records of what Plaintiff put into the app, and the data that was subpoenaed cost Plaintiff her case. DoNotPay would be unlikely to claim attorney-client privilege to avoid the subpoena, because DoNotPay as a company is not an attorney, and Plaintiff has not spoken with an attorney, but instead a chat bot. Similarly, it is unlikely that Plaintiff would be able to claim confidentiality because Plaintiff likely knew that what she put into the app was not in confidence, since applications generally must share data with the developers in order to keep the app running—it is unrealistic to expect that a person will have total privacy when talking to a chat bot. Most non-lawyers are unlikely to know the specifics of attorney-client confidentiality, even if they’re aware that such a privilege exists. By allowing users to speak with chat bots without giving any disclaimer that such communications would ordinarily be protected but are not because of the nature of the program, DoNotPay and apps like it are essentially creating a problem wherein users have false expectations of what protections are offered to them, or don’t understand the potential consequences of

⁶⁷ See, e.g., Judicial Council of Civil Jury Instructions (2011) No. 601, Damages for Negligent Handling of Legal Matter: “To recover damages ... [name of plaintiff] must prove that [he/she/it] would have obtained a better result if [name of defendant] had acted as a **reasonably careful attorney**...” [emphasis added].

⁶⁸ MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2016).

⁶⁹ *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4, 97 S. Ct. 837, 843 (1977): “[A]ttorney-client communications in the presence of a third party not the agent of either are generally not protected by the privilege.”

using the program. This lack of protection from the attorney-client privilege has the potential to make future clients lose their cases, without any warning as to the significance of using the program.

Further, by the very nature of ML and deep learning, algorithms learn from the data that is put into them; learning to replicate that data is how ML is able to update its own knowledge. It is very possible that DoNotPay and other apps like it train the underlying language model of the application on the data inputted from users, which are the other “cases” that it takes from other client-users. That knowledge would then be shared across the other cases to which the ML model has access. A machine does not have the capability to decide between what data must remain confidential and what broad lessons it is allowed to “learn” compared to what needs to be maintained by attorney-client privilege. While a human lawyer would know that she can apply one strategy that she learned from one case without giving away a client’s information, a legal bot would not have this capability. Even the forms that a legal bot would share with one user could be from information that it has taken from handling another user’s case.

Legal bot developers may find salvation in Comment 4 to Rule 1.6, which allows a lawyer to reveal protected information through the use of a hypothetical, “so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.”⁷⁰ While it is true that random users of DoNotPay are unlikely to have enough information on one another to ascertain the identity of other users, another issue arises: what about the sale of client data?

Free apps like DoNotPay often remain free by making money off of its users in some way, often through the sale of advertisements or through selling user data. This highlights the core issue with a legal robot as opposed to a human lawyer: human lawyers are regulated by the state bars to which they are admitted, *there is no regulation for AI*. There would be no way to know if a legal bot was selling user data and thus breaking the attorney-client confidentiality obligation, which it would presumably have to its user-client if the legal bot advertised itself as being the equivalent of an attorney. This is the very issue that the courts in *Parsons* and *Frankfurt* sought to protect against, the idea that legal software could mislead laypeople, in this case by assuming that their information is confidential and privileged.

c. Conflicts of Interest: Model Rule 1.7, 1.9

If apps like DoNotPay become more prevalent as alternatives to seeking the advice of a lawyer, this poses a new hypothetical issue: what if two opposing parties to the same action both attempt to use DoNotPay? Does DoNotPay have an obligation to update its software to block certain users from using its services, and does it even have the ability to do so?

As previously discussed, legal bots have the capability to use one client’s data to learn and adapt. If a legal bot were providing services to two users for the same action, the bot would naturally learn from one party and use that information to gain an advantage for the other party. This is inherently contrary to the purpose behind Model Rule 1.7(a)(1) and Model Rule 1.9(a). Comment 1 to Rule 1.7 states that, “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client or a third person or from the lawyer’s own interests.”⁷¹ While the primary purpose behind the rule is the independent judgment of the attorney without outside influence, ironically the legal bot would have the opposite issue. A legal bot does not have the same outside influence that a lawyer would,

⁷⁰ MODEL RULES OF PROF’L CONDUCT R. 1.6 (2016), Comment 4.

⁷¹ MODEL RULES OF PROF’L CONDUCT R. 1.7 (2016), Comment 1.

because it gains its knowledge through data of its own system, or datasets to which it has access. The neural network is essentially a hivemind, and so a legal bot likely does not have the capability to “block” itself from using what it knows about one of its users (e.g., Plaintiff) to aid another user (e.g., Defendant).

While it may seem like an unlikely possibility that both parties in a suit would be users of DoNotPay, consider that DoNotPay hopes to expand its capabilities to prenuptial agreements and other marital contracts. Laypeople often do not understand that, because they inherently have competing interests when signing a prenuptial agreement, they should seek independent counsel. Ordinarily, a lawyer who was called upon by an engaged couple would need to explain to the two that she cannot represent both of their interests without an agreement of waiver from both of them, because of the inherent conflict of interest in representing two people with opposing interests in the formation of a contract. DoNotPay is unlikely to do so—and if it did, who or what would DoNotPay refer the other spouse to? If the referral were to a real lawyer, that would inherently disadvantage the party using the legal bot, or even more unlikely, another competing legal bot program? Rather, what is more likely is that the couple who are unlikely to understand the purpose behind Model Rule 1.7, would use the application together to write their pre-marital agreement. Unlike a lawyer who can discuss with her clients the potential drawbacks of having both parties represented by the same attorney, it’s unlikely that a legal bot would be able to properly convey this information to the extent required in order to waive a conflict of interest. Rather, because the bot only works with the information that the user puts in, the users, and consequently the legal bot, may never realize that there was a conflict to begin with.

This is problematic from a public policy standpoint. Almost invariably, using biased data leads to a biased result. Unfortunately, there exists a nationwide trend of women coming away with significantly less than their male partners in divorce proceedings, which would determine the majority of the data that any legal bot program would use, even without any conscious decision by the developer.⁷²

For example, in a paper titled “Debiasing representations by removing unwanted variation due to protected attributes” by Amanda Bower, et al. researchers found that ML programs are able to determine a person’s race, gender, and other protected class status purely by the data input into it.⁷³ And this isn’t uncommon: Amazon’s computer program to hire job applicants was shown to have an inherent bias against hiring female candidates.⁷⁴ Since the program was using data about the applicants hired by the industry, it learned to mirror the bias against women.⁷⁵

Since the program will by necessity use data from past cases, often where women earn less than their male partners and take away less from the marriage than their male partners, it is a fair assumption

⁷² Research Paper, Jieyu Zhao, et al., *Men Also Like Shopping: Reducing Gender Bias Amplification using Corpus-level Constraints* (Jul. 29, 2017), <https://arxiv.org/pdf/1707.09457.pdf>. (“For example, the activity cooking is over 33% more likely to involve females than males in a training set, and a trained model further amplifies the disparity to 68% at test time.”)

⁷³ Research Paper, Proceedings of the 35th International Conference on Machine Learning, Amanda Bower, et al., *Debiasing representations by removing unwanted variation due to protected attributes*, http://www.fatml.org/media/documents/debiasing_representations.pdf.

⁷⁴ Jeffrey Dastin, *Amazon scraps secret AI recruiting tool that showed bias against women*, REUTERS (Oct. 9, 2018, 8:12 PM), <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G>.

⁷⁵ Although it should be noted that these programs are also susceptible to creating biases against non-protected classes of people.

that the legal bot will take this data and mirror that bias towards the female client, which is dangerous in a prenuptial agreement, and which would legally bind the couple's interests in their mutual and separate property. This is even more troubling because of the potential the legal bot has to mislead the client. Machines are often seen as more "logical" than humans. Consequently, the undisclosed bias that the legal bot's algorithm might harbor would be insidious and detrimental to fairness to the users and the "independent judgment" of the robot lawyer.

d. The Roles of an Attorney: Model Rule 2.1

Probably the most overdone trope in science fiction becomes a reality when it comes to legal bots: can a robot understand human feelings? Unfortunately for legal bot developers, the answer suggests that legal bots cannot truly fill the shoes of an actual, human attorney. The Model Rules dictate that a lawyer fills several roles in her line of work, some of which require the lawyer to be more than just an advocate, but also a counselor and advisor. Model Rule 2.1 indicates that, "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."⁷⁶ Rather than merely providing the "best legal outcome," lawyers have a professional responsibility to consider what solution would be best for their client. This would include endeavoring to sustain the client's morale,⁷⁷ as well as keeping in mind practical considerations, such as the cost to the client both financially and emotionally.⁷⁸ Furthermore, "[w]here consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation."⁷⁹ Suffice it to say, a lawyer has an ethical obligation to be cognizant of the emotional state of her client, so as to aid her best both as an advocate and as an advisor.

Legal bots are not yet at a place that such emotional detection is even possible.⁸⁰ Any lawyer who has done a single client interview can attest that those in need of legal aid are often in an emotionally vulnerable state; if a person is seeking legal aid, it is likely that something has gone wrong. Clients can be unwilling to discuss certain facts due to emotional vulnerability or other fears in regards to both the judgment of the lawyer and the consequences at law. Rather than simply take notes of what the client says, the advisor considers the situation from a practical point of view to address the client's true needs and concerns, beyond merely what the client believes that she needs. For example, an attorney may take the client's word at face value that she wants her day in court, or the attorney can consider practical concerns, such as the client's budget and mental toll due to an ongoing lawsuit, and advise the client in regards to alternative dispute resolution options.

⁷⁶ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2016).

⁷⁷ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2016), Comment 1.

⁷⁸ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2016), Comment 2.

⁷⁹ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2016), Comment 4.

⁸⁰ Research Paper, IEEE Transactions on Cybernetics, Maurizio M. Ficocelli, et al., Promoting Interactions Between Humans and Robots Using Robotic Emotional Behavior (Nov. 10, 2015), <https://www.sparrho.com/p/how-can-robots-feel-like-humans/166667/i/7408b1/>. It should be noted that while there is a substantial amount of research into ML programs which can sense human emotion, at this time the nuance required for something like a lawyer, who often sees clients dealing with a mixture of subtle and volatile emotions, is not yet possible.

Currently, legal bots do not even properly recall facts, much less the emotions of a client who is not giving her attorney the full story.⁸¹ At the hopeful end of the spectrum, Stanford’s Sentiment Analysis projects that its bot can determine that, although the words “funny” and “witty” are positive overall, the sentence “This movie was actually neither that funny nor super witty” is overall negative.⁸² Robin Jia and Percy Lang indicate in their paper, “Adversarial Examples for Evaluating Reading Comprehension Systems” that computer systems may encounter more challenging pitfalls than these examples suggest. Jia and Lang use a method of testing whether systems could answer questions about short writings that contain inserted, automatically generated sentences—without changing the right answer or misleading humans.⁸³ The paper concluded that machines have a particularly tough time when incorrect grammar is added to sentences, or even distinguishing basic facts when sentence structure was moved around.⁸⁴

Considering machines have a difficult time even comprehending facts about what a user is saying, much less the sentiment behind these words, legal bots are unlikely to be able to fulfill this aspect of the Model Rules. While most users likely don’t use a legal bot as a counselor or advisor in the same way that one might an attorney, this becomes potentially problematic when considering the type of client who uses legal bots, namely those who cannot afford an attorney. Clients who are unable to afford an attorney likely need an advisor to watch out for their practical and emotional needs. Because lawyer substitute legal bots fill out forms or a letter template⁸⁵ based on what the user inputs, they are unlikely to inform a client about her options in relation to settlements or alternative dispute resolution options, much less make recommendations to speak with a professional in another field. Merely filling out designated forms and helping with filing may be considered the practice of law, but it is not the practice of law in its entirety. Lawyers are required to advocate for, counsel, and advise clients—roles that legal bots may never completely satisfy.

e. Frivolous Claims: Model Rule 3.1

Similarly, it is not the client’s obligation to understand the law, but the attorney’s. A client is not responsible for knowing whether her claim is frivolous, but it is the attorney’s job to not proceed with frivolous claims under Model Rule 3.1. What constitutes a frivolous claim is one that ignores the limits established by both law and procedure.⁸⁶ A lawyer is engaging in a frivolous action if she cannot make a good faith argument on the action’s merits or make a good faith argument for the extension,

⁸¹ See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.2 (2016), Comment 10. “A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent.”

⁸² Research Paper, Conference on Empirical Methods in Natural Language Processing (EMNLP 2013), Richard Socher, et al., Recursive Deep Models for Semantic Compositionality Over a Sentiment Treebank, <https://nlp.stanford.edu/sentiment/>.

⁸³ Research Paper, Stanford University Computer Science Department, Robin Jia and Percy Lang, Adversarial Examples for Evaluating Reading Comprehension Systems, <https://arxiv.org/pdf/1707.07328.pdf>.

⁸⁴ See also Research Paper, Proceedings of the Workshop on Machine Reading for Question Answering, Marc Antoin-Rondeau and Timothy J. Hazen, Systematic Error Analysis of the Stanford Question Answering Dataset (July 19, 2018), <http://www.aclweb.org/anthology/W18-2602>.

⁸⁵ Joanna Goodman, *Legal technology: the rise of the chabots*, LAW SOCIETY GAZETTE (March 20, 2017), <https://www.lawgazette.co.uk/features/legal-technology-the-rise-of-the-chatbots/5060310.article>.

⁸⁶ MODEL RULES OF PROF’L CONDUCT R. 3.1 (2016), Comment 1.

modification, or reversal of the law.⁸⁷ The filing of an action, which later turns out to not be meritorious, is not frivolous merely because the lawyer has not properly substantiated facts from her client.⁸⁸ However, user-guided legal bot models like DoNotPay and LegalZoom allow the user to choose what actions she wants to take, rather than having certain actions limited by a real attorney who would refuse to file an action when the dictates of a MR 3.1 rule or equivalent are not met. For example, in real life, an attorney would not file an action that she knew had no merit under the law and would explain to the potential client that she does not have a case. In the world of legal bots, where the user decides what actions are to be taken and the legal bot program simply suggests forms to users, there is nothing stopping the client from filing frivolous lawsuits, motions, or even sending demand letters for completely frivolous, meritless, or nonsensical claims.⁸⁹ While this issue may seem trivial in comparison to more serious issues, like clients who will lose their rights to sue or will sign unfair agreements, the impact of frivolous lawsuits is significant.⁹⁰

Model Rule 3.1 stems from a respect for the legal system, and an unwillingness to allow lawyers to misuse procedure.⁹¹ This can have a real world impact on all parties involved. The defendant must address the lawsuit without any gain to herself, and defending a lawsuit—especially lawsuits that are drawn out for several years—can be hugely costly. An attorney filing a frivolous claim, and in some instances the plaintiff as well, can be sanctioned for such actions, which also can be crippling to the client’s resources to move forward with her case. Even certain statutory remedies exist for defendants in frivolous actions, where the court grants reasonable fees for costs that would not have been incurred but for the party’s actions.⁹²

In this case, if such sanctions were applicable, the users of DoNotPay would essentially be punished for not understanding the law. It is not the user’s responsibility to understand what actions are frivolous, as the very purpose of obtaining a license to practice involves understanding the complexities of the legal system sufficiently to avoid such actions. Rather, DoNotPay allows users access to the courts without the proper guidance that an attorney would bring under Model Rule 3.1.

Furthermore, due to the nature of the app, it is unclear where the user’s recourse would be, if the judge treated the user as if she were represented by counsel and ordered sanctions. Could the user sue DoNotPay, presumably for some sort of malpractice for allowing the user to proceed regardless of the legal consequences? Or does DoNotPay not have any obligations to a user beyond any tips or warnings that it gives as to what form should be used? Due to the lack of any definitive rules in most jurisdictions regarding legal bots, any recourse that a user-client would have when using DoNotPay or similar legal bot apps, or what obligations such apps have to its users are unforeseeable. Such a lack of acknowledgement leads to a dangerous gray area wherein apps like DoNotPay may not have any duties or obligations to its clients, and the outcome of anything that goes wrong is solely the problem of the user-client, without the availability of any recourse whatsoever. Regardless, the issue ultimately affects both users of the app, as well as non-users who must now deal with an overcrowded court docket on

⁸⁷ MODEL RULES OF PROF’L CONDUCT R. 3.1 (2016), Comment 2.

⁸⁸ MODEL RULES OF PROF’L CONDUCT R. 3.1 (2016), Comment 2.

⁸⁹ For example, DoNotPay’s App Store page states “Sue anyone by pressing the button,” indicating that the power to sue lies in its users.

⁹⁰ *Procup v. Strickland*, 792 F.2d 1069, 1070 (11th Cir. 1986). “Every lawsuit filed, no matter how frivolous or repetitious, requires the investment of court time, whether the complaint is reviewed initially by a law clerk, a staff attorney, a magistrate, or the judge.”

⁹¹ MODEL RULES OF PROF’L CONDUCT R. 3.1 (2016), Comment 1.

⁹² See e.g., The Public Health and Welfare § 42 U.S.C. §1988.

unnecessary or frivolous actions, and defendants who now must pay for legal representation to defend themselves where they wouldn't have had to otherwise.

f. Interests of the Developer: Model Rule 5.4

Finally, if DoNotPay is truly a robot lawyer as the app claims, a question arises in relation to fee sharing with the developer of the application. Model Rule 5.4 disallows an attorney from engaging in professional practice with a non-attorney such that her professional independent judgment is compromised, such as in the case of sharing fees with a non-attorney or forming a corporation or partnership with a non-lawyer for practicing law.⁹³ Browder is himself not an attorney, but DoNotPay refers to itself as a robot attorney. If this is truly the case, DoNotPay, as a corporate entity, is in direct violation of the Model Rules of Professional Conduct, as Browder is not an attorney but has founded a corporation with the goal of practicing law, and has potentially “shared fees” with DoNotPay, depending on how the application is funded and whether or not the jurisdiction in which the application is being used would consider robot lawyers to be lawyers.

DoNotPay as a robot lawyer could not possibly have independent professional judgment subject to Model Rule 5.4, because a non-lawyer is directly responsible for DoNotPay's updated content, availability to users, and allocation of funds within the application. To deploy a real machine learning model in the real world, updating its dataset is quite costly. Further, oftentimes a bot will be deployed, and developers at the company will not update the dataset for some time, if at all.⁹⁴ By its own nature, a legal bot will have to be updated often—however, who decides to update the dataset and when is something that the company will internally process. This is essentially allowing non-lawyers to decide what level of representation their users will receive, which places an inappropriate influence on how DoNotPay will represent its clients.

Furthermore, if the app ever does monetize through users paying for services, i.e., exchanging money for legal advice, the app will naturally be fee-sharing with the non-lawyer developers. Even if the app stays free and chooses instead to sell user data or provide advertisements, that inherently creates a rift in the independent professional judgment of DoNotPay the robot lawyer. Even if only to a minor degree, it is likely, under a model that provides money in exchange for clicking through on an advertisement, developers will alter the type of content that is available through the app to correspond to more click-throughs for advertisements, or ask the users to provide certain types of data to sell. This is allowing a non-lawyer to influence a robot lawyer actually giving legal advice to clients for the purpose of monetary gain. Considering apps like DoNotPay cannot run without a developer, it is difficult to see how legal bots could ever adhere to the Model Rules regarding the independent professional judgment of the attorney when non-lawyer developers are the ones who produce legal bots as a product.

IV. Call to Action

⁹³ MODEL RULES OF PROF'L CONDUCT R. 5.4 (2016).

⁹⁴ Research Paper, Eindhoven University of Technology, The Netherlands, An overview of concept drift applications, Indr'e Zliobait'e, et al., https://www.win.tue.nl/~mpechen/publications/pubs/CD_applications15.pdf. “However, concept drift research field is still in an early stage. The research problems, although motivated by a belief that handling concept drift is highly important for practical data mining applications, have been formulated and addressed often in artificial and somewhat isolated settings.”

While legal bots are unlikely to be able to replicate actual human lawyers any time in the near future, legal bots are still advantageous in a number of ways. As it stands, the current legal system in the U.S. is flawed. While lawyers like to think of the judicial branch as being one of the more even playing fields for the “little guy” to stand up to big corporations or to have access to justice, as is often the case in life, the more wealthy a person is, the more favorably the legal system acts in her favor. Legal bots are attempting to turn the tables and give people the access to justice that they deserve, even if these solutions are created by developers with a lack of understanding of the law or legal ethics.

A. The Future of Legal Bots

Despite all of this, legal bots do have a place in our legal system, and not just supplemental legal bot programs supervised by an attorney, but true standalone “robot lawyers” a la DoNotPay. The problem with legal bots is that they often attempt to stretch too far into the work that lawyers do, often engaging in what is arguably the unauthorized practice of law. Rather, legal bots should stick to basic, everyday tasks such as disputing parking tickets—which was DoNotPay’s roots.

While this may seem like the unauthorized practice of law, really, these programs are doing no more than giving people a guide for what information to look for in order to achieve their legal goal. Forms to contest parking tickets can be searched just by looking at the local traffic court’s webpage. This is hardly a job that requires a lawyer’s expertise. Furthermore, many jurisdictions already allow non-lawyers to assist people by directing them to the correct legal form. For example, the Maine Volunteer Lawyers Project allows non-lawyers to provide legal information and conduct intake interviews.⁹⁵ Similarly, The Hawai’i State Judiciary allows non-lawyer volunteers to explain to self representing litigants the process of the civil case system and the court’s protocol.⁹⁶ However, the difference between this and the type of work that apps like Legal Zoom and DoNotPay are attempting to do is that the state-mandated programs attempt to educate those with primarily small civil claims who, generally, are attempting to represent themselves. These programs stress that they are purely to provide information in order to make the legal system more accessible, not in any way to represent the people that they are helping. Rather, apps like DoNotPay should switch its focus from becoming a “robot lawyer” which represents clients, and instead to use AI as a way to help educate people in the same way that these volunteer programs do. The legal system is weighed down by gatekeeping measures which keep the system inaccessible to those looking for help for everyday legal problems—by offering information rather than proclaiming expertise, legal bots can give people a place to start with how to solve their everyday legal problems.

Even though these functions are minor, they are able to help those without the monetary capital for an attorney do the type of work that no lawyer would take on. Most lawyers would be hard-pressed to take a case that involved contesting a \$100 parking ticket⁹⁷ (that is, unless roped into helping a cousin by a concerned aunt or uncle). However, this is still the type of work that needs to be done, and legal bots can fill this niche. While apps like DoNotPay may have bigger dreams, helping with things like contesting parking tickets can have an overall large, positive impact on society. After all, when one is living paycheck to paycheck, an unexpected parking ticket for \$100 can literally be the difference

⁹⁵ MAINE VOLUNTEER LAWYERS PROJECT, <http://www.vlp.org/our-mission> (last visited March 21, 2019).

⁹⁶ HAWAI’I STATE JUDICIARY, https://www.courts.state.hi.us/outreach/volunteer_opportunities (last visited March 21, 2019).

⁹⁷ Mike Moffitt, *The 10 worst blocks in San Francisco for parking tickets*, SFGATE (Oct. 23, 2017, 1:38 PM), <https://www.sfgate.com/local/article/San-Francisco-parking-worst-blocks-for-tickets-12294603.php>. A report on SFGate shows that the average parking ticket in San Francisco costs \$97.40.

between food on the table or going hungry.⁹⁸ Furthermore, while this may seem like small potatoes in comparison to helping tenants avoid eviction, it is essentially offering a solution before the problem exists. Saving a user one hundred dollars can help avoid the eviction problem entirely if the user is able to then pay rent on time. In addition, this is the type of work that allows for upward mobility in its users. One hundred dollars is change to an attorney looking for her fees, but for the average low socio economic status American, one hundred dollars can lead to a larger savings, or can prevent a car being towed, allowing the user to keep having access to transit to get to work. This work may seem small in comparison to the work that an attorney does, but it is a necessity which is primarily being overlooked.

B. The Push For Access to Justice Must Come From The Legal Community

However, legal bots alone cannot pick up the slack for those in need of representation. The underlying problem that legal bots are attempting to solve is that legal representation is necessary for all people, regardless of socio-economic status, and as of right now, some people are being afforded more legal protections than others. This is a separate problem from the ethical issues that arise from legal bots, but AI can still give us the opportunity to solve it.

In many ways, it is unsurprising that so many AI researchers and developers are entranced by the law. The tests and rules that our legal system uses in given scenarios are very algorithmic, and something that a bot would be good at reasoning through. However, the problem arises when developers attempt to create apps that essentially practice law without an attorney—in not realizing how intricate the system that they are trying to “overturn” actually is, many developers underestimate what is actually required of an attorney, and the limitations that their bots have in that regard.

Rather, attorneys should not be worried about “robot lawyers” taking their jobs, but instead focus on embracing AI as a way to make their practice more efficient, and thus take on more clients and help more people. As previously noted, programs like IBM’s ROSS, a program built on the technology from IBM’s Watson, are already readily used by Big Law firms across the globe for the purpose of making research more efficient.⁹⁹ As our world becomes more complicated and filled with more problems—problems, which require a lawyer to handle—it only makes sense to use the technology at our disposal to help with as many of those problems as we can.

As this ever-improving technology becomes more and more commonplace and more importantly, common *practice*, it is the responsibility of lawyers, as a profession, to hold themselves to the standard required by their communities. This means that as legal bots become more prevalent actors within the legal system, lawyers must become technologically savvy enough to engage with low income people, whether to use as supplemental programs in aiding these people as clients, or by explaining the technology, aiding in a way like the Maine Volunteer Lawyers Project or the Hawai’i State Judiciary allows.

⁹⁸ Board of Governors of the Federal Reserve System, Report on the Economic Well-Being of U.S. Households in 2017 (May 2018), <https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf>. “Four in 10 adults, if faced with an unexpected expense of \$400, would either not be able to cover it or would cover it by selling something or borrowing money.”

⁹⁹ Vanderbilt University, Andrew Arruda: *Artificial Intelligence and the Law Conference at Vanderbilt Law School*, YOUTUBE (May 6, 2016) https://www.youtube.com/watch?v=LF08X5_T3Oc.

Artificial intelligence has the ability to close poverty gaps in one of the most meaningful ways possible, by securing the legal rights of low income people.¹⁰⁰ It's clear that developers do not have a complex enough understanding of the legal system to be able to properly create a true "robot lawyer," and so the responsibility should fall on attorneys to become efficient in using this technology such that attorneys are able to use it for their clients and explain the technology to those in settings like court mandated limited legal work, for clients who will go onto use this technology on their own.¹⁰¹

While AI has the potential to close that poverty gap, it also has the potential to increase it. In upholding this responsibility, lawyers cannot shy away from advancing technology. "[E]ffective and responsible use of AI by lawyers will require clients to comprehend AI to some extent, and they will only be able to understand AI if they have access to, and understand, the associated technology."¹⁰² While historically supplemental legal programs have been used at Big Law firms,¹⁰³ as the technology becomes more and more prevalent, it is important that small firm attorneys do not shy away from it, even at the higher cost of training hours and attorney time. Otherwise, those who can afford Big Law firm representation will have the benefit of that technology, while those who hired technology-resistant firms will suffer.¹⁰⁴

At the end of the day, legal bot programs can only help a given community so much, and it is the professional responsibility of the lawyers within the community to take a stand to help those in need. Despite the hopeful visions of the future from people like Joshua Browder, apps like DoNotPay will never be a substitute for a real, flesh and blood attorney. Still, there are those in need who require the assistance of counsel every day without the means for an attorney. AI-based legal programs should be used to supplement an attorney's work, rather than replace an attorney entirely, such that she is able to tackle the needs of her clients in a more efficient manner while still being able to offer her services for those in need to improve her community overall.

In conclusion, the Model Rules of Professional Conduct should update its rules to specifically address the issue of legal bots as the unauthorized practice of law. Due to the many ethical concerns that may arise given the nature of legal bots, they pose too much of a risk to the legal rights of laypeople to be allowable as a substitute for an attorney. In that regard, however, it is the responsibility of attorneys to offer their services to those who cannot afford legal representation otherwise. The inaccessibility in the law is so unjust that even outside AI developers are trying to solve this problem, however, with a lack of understanding of what the legal system entails. Instead, it is the responsibility of lawyers to rise to the challenge of understanding how AI can be used to help clients, and thus provide legitimate, ethical legal help for those in need.

¹⁰⁰ Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Useful Artificial Intelligence in the Practice of Law*, HASTINGS LAW JOURNAL VOL 70:173, 185.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Vanderbilt University, Andrew Arruda: *Artificial Intelligence and the Law Conference at Vanderbilt Law School*, YOUTUBE (May 6, 2016) https://www.youtube.com/watch?v=LF08X5_T3Oc.

¹⁰⁴ Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Useful Artificial Intelligence in the Practice of Law*, HASTINGS LAW JOURNAL VOL 70:173, 188.