Ethics Considerations For Law Firms Implementing AI

By **Richard Finkelman and Yihua Astle** (November 23, 2020, 2:19 PM EST)

The world is a dizzying place. There is so much information available for consumption and there are so many artificial intelligence-powered technologies that are being used to curate and analyze data for various applications that the question of how to address AI and ethics and how to implement unbiased and ethical AI applications is increasingly difficult.

This article takes a look at the underlying principles driving AI and ethics in society and how those principles can be applied for law firms looking to appropriately deploy AI applications in their business.

Today many of the discussions around AI and ethics can be seen in debates over self-regulation versus legislated regulation.

For the companies that make and deploy systems that use AI technologies, the reasons for promoting self-regulation are centered on their expertise at building these technologies and their desire to protect intellectual property and other business assets that give them competitive advantage. Legislators see it differently — they are concerned about transparency, justice and fairness and the impact on privacy that have arisen from the deployment of AI applications.

Richard Finkelman

Yihua Astle

Increasingly many institutions, both public and private, have undertaken initiatives to guide the ethical development, deployment and governance of AI. Research performed last year found that there were 84 ethical guidelines published globally, Microsoft Corp.'s AI principles and the European Commission's "Ethics Guidelines for Trustworthy AI" being two prominent examples of this trend. Importantly 88% of these guidelines were released since 2017.

Most guidelines cover four core principles: transparency, justice and fairness, responsibility, and accountability and privacy. Transparency is the most popular principle and while it may seem obvious, it is in fact one of the more difficult areas to address.

Increasing the visibility into how applications interpret, communicate and decide is based on disclosing data usage, user interactions and automated decisions. The idea of a glass box that allows someone to see how AI has been developed and how it works once deployed is a good one, but the practicalities of getting there are still challenging.

Justice and fairness deals with the prevention, monitoring and mitigation of unwanted bias and discrimination. Criminal sentencing algorithms and the inaccuracies of facial recognition on minorities are two prominent examples of unwanted bias and discrimination.

Responsibility and accountability mean to clarify the attribution of responsibility and legal liability. Examples here include the responsibility of a self-driving car that has human driver interaction — who is at fault when the car has an accident?

Legal liability is being rethought in several contexts including where AI is now being considered a legal entity. The EU has been debating whether AI should be granted personhood, and in 2017, Deep Knowledge Ventures, a Hong Kong company, appointed the first AI director to its board.

Privacy is the last area of focus for AI and ethics. AI technologies often need a lot of data and ongoing sources of data to improve performance and output. Data protection, security and individual user rights are addressed in regulations like the Health Insurance Portability and Accountability Act, the EU General Data Protection Regulation and the California Consumer Privacy Act and will continue to require more laws and regulations as user interactions with AI systems continue to increase.

We can apply these core principles when we look at how professional service firms, and particularly law firms, are dealing with implementing AI applications in their businesses. For this article we are going to focus on three important areas — human resources and legal recruiting, conflicts, and advising clients on AI issues.

Human resources and legal recruiting are deploying and utilizing AI technologies at an accelerating pace. But the widespread use of applicant databases and the ability of technology to identify and recommend candidates for positions are an area of ethical concern for several reasons.

AI systems have the ability to identify and classify applicant information in ways that potentially violate fair and anti-discriminatory statutes. Today's systems can predict with high accuracy a person's race, gender, sexual orientation and political leanings.

AI technology accomplishes this through its own sort of profiling, by pulling in data about a candidate, their resume, their LinkedIn profile, and other social media accounts and activity. Zip codes are famously used for credit scoring and are a simple way to predict someone's race and ethnicity.

The ability to profile candidates likes this opens up issues with regard to privacy and discrimination and must be addressed thoughtfully through more transparency and a focus on justice and fairness in the use of AI technologies.

From a practical standpoint this means that law firms should understand the technology in the recruiting systems they use, both internally and with external recruiters and staffing firms. The glass box of transparency should include understanding the data sources being used to create recommended candidates, how those data sources interact and how they create a profile of a candidate. One of the biggest challenges here is trying to account for underlying bias in datasets of candidates.

For example, if a firm does most of its legal recruiting from a handful of law schools, is the candidate pool skewed too much toward one race? If so, then how should a firm diversify its candidate pool without violating privacy rights? Similarly, if an outside staffing firm is providing information technology resources to a firm, how can the firm be assured that they are being presented with a representative

sample of candidates that meet their diversity initiatives?

We believe the answers lie in understanding the technologies and in acknowledging the need for human guidance in the recruiting and selection process. Firms should look to educate their HR and legal recruiting functions on AI and ethics and look for ways to expand candidate pools to better match their results with their intent.

One way to do this is to take a statistical look at positions after they are filled. For example, it may not be discriminatory if a candidate pool for one type of job is comprised of 80% of a race if in the current marketplace, more than 80% of job holders are from the same race.

Conflict systems are another area of focus law firms should be thinking about. AI technology can be really great at finding infrequent but important data points. This should be a good thing for conflict systems since the nuances of related parties and quasi-conflicts should be easier to find. The technology should also help classifying conflicts by type, making it easier to discern a business conflict from an ethical conflict.

However, there is reason to be concerned about two trends that will impact conflict systems as AI is deployed more deeply into their workflows. One is the advent and acceleration of legal entity status of AI and the other is the use of conflict data for predicting business development opportunities.

The issues created by legal entity status are complicated. If, for example, AI is given personhood status in the EU, as has been debated, does that create a potential conflict for a multinational company in the U.S.? If autonomous vehicles become an AI version of a limited liability company, how do you decide if there is a representation conflict with a client like Uber Technologies Inc. or Lyft Inc.?

The second trend we see is the use of conflict data for business development and marketing. Are there ethical issues if a firm uses AI to predict new business opportunities from its conflict systems? Identifying future legal issues from conflicts is like sign stealing in baseball. There is nothing illegal about stealing signs in baseball. What is illegal is using technology to do it.

A flurry of new conflicts around medical device cases may be enough information for a firm to decide to expand its health care practice, but is it ethical if the marketing department uses that data to create marketing campaigns and webinars on the subject matter? Said another way, do clients have a right to privacy of their conflict data?

We think the principle of responsibility and accountability are core to addressing these two issues — who owns the data, how the information is used and what oversight exists will be key for firms to properly evaluate and deploy AI technology into their conflict processes. Once again, education will play a key role in mitigating risk here and as we will see shortly, the idea of an AI ombudsman position inside a firm may become one of the best ways to handle many of the issues raised in this article.

For reasons that will seem obvious, AI and ethics can have the biggest impact on a firm as it does its core business, providing legal advice and counsel to clients. How firms adopt AI counseling and their proficiency with understanding the issues it creates for their clients could be the difference in winning or losing future client work, or worse, it could be the difference in potential malpractice claims for clients who are poorly served by their lawyers.

We highlight two examples that illustrate our point.

In litigation settings experts who testify to damages often use statistics and econometrics to calculate their damage assessments. Increasingly these calculations use AI and machine learning to test and validate various damage models.

What happens if the underlying AI tools being used are flawed? What happens if the data being used is biased and not truly representative of a class of people who are claiming damages? And what happens when the data scientists who support the experts pick the wrong algorithms to use in their modeling?

We see a future where dueling data scientists are called as testifiers to refute or support the technologies used and to give fact testimony to potential bias in their work. Firms will need to do more due diligence in their vetting and retaining of experts where AI technologies are supporting expert reports and testimony.

The second and more important issue we see is the need for attorneys to become knowledgeable of their client's use of AI in running their businesses and in products or services they sell. The upside of learning about your client's AI should be a competitive advantage in the near term and a bedrock of client service in the future. The downside of not learning is the loss of competitive advantage and potential malpractice claims if the advice and counsel does not consider important AI and ethical issues a client has.

There is an old saying in law firms that the best way to kill any idea is to appoint a committee to study it. In this setting, we think just the opposite.

One of the best ways for a law firm to contemplate and address AI applications and ethics is to create an AI committee. Some group of people will need to be charged with the tasks of analyzing, recommending and adjudicating AI issues.

We think the idea of an AI ombudsman within a firm is a good one; dealing with AI and ethics is not just a set of technology issues and should not be handled just by IT professionals. A more thoughtful approach is required, and certainly a place for people to bring concerns for discussion and resolution would be a great start.

As we noted in the beginning of this article, these are dizzying times for AI and ethics. There are so many areas where the technologies are meaningfully enhancing all of our lives — from recommendation engines when we shop or browse Netflix to medical treatment advances for reading and diagnosing test results and scans. On the other hand, we have seen and will continue to see that real issues around transparency, justice and fairness, accountability and responsibility, and privacy must be addressed as our society continues forward with the use of AI in our lives.

Richard Finkelman is a managing director and Yihua Astle is a director at Berkeley Research Group LLC.