

**ARE ASIMOV’S THREE LAWS ENOUGH?
POLICING AI LAWYERS THROUGH THE RULES OF
PROFESSIONAL RESPONSIBILITY**

Eric McCoy & Taylor Treece

INTRODUCTION

An unsuspecting person watches TV placidly on their couch when suddenly their door crashes down to reveal a hulking metal form. The form advances, crimson light from its LED eyes reflecting off the metallic bulk of its body as it backs the unfortunate soul against a window. The fragile assemblage of flesh and blood darts to the fire escape only to see legions of similar automatons filling the street their metallic voices chanting, “Down with Humans!”

The prospect of a robot rebellion has long been a science fiction trope, capitalizing on popular concerns that intelligent robots—should they come to exist—will ultimately overthrow and seek to destroy humans. For as long as artificial intelligence has been imagined and researched, philosophers and scientists alike have concerned themselves with how to responsibly develop the technology so as not to unintentionally spell doom for humanity. Science fiction writer Issac Asimov famously proposed three simple laws¹ to prevent robot rebellion, which are commonly referenced today in discussions about robot ethics and regulating artificial intelligence (AI) activity. At their core, these and other proposed ethical codes for governing AI activities and behaviors center on a universal desire: to avoid harming humans.

THE BIGGER THREAT: “AI LAWYERS” & ACCOUNTING FOR ERRORS

Robot rebellion is a frightening prospect, but AI’s expansion to professional services—particularly, for the purposes of this paper, legal services—poses a more likely and equally daunting prospect: harm to humans through simple, even innocent, AI errors. Improper legal service can greatly affect a client’s life by exposing them to hefty civil penalties or obligating them to unnecessary criminal sentences.² Likewise, while Asimov’s laws may be arguably well

¹ ISSAC ASIMOV, I, *ROBOT 51* (1990) (listing the three laws of robotics: “(1) a robot may not injure a human being or, through inaction, allow a human being to come to harm; (2) A robot must obey orders given it by human beings except where such orders would conflict with the First Law; (3) A robot must protect its own existence so long as such protection does not conflict with the First or Second Law”).

² See, e.g., Sheila M. Berry, “*Bad Lawyering*” *How Defense Attorneys Help Convict the Innocent*, 30 N. KY. L. REV. 487 (2003); Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs’ Briefs, Its*

adapted to the purpose of preventing robot *rebellion*, they would be nevertheless insufficient to ensure professionally responsible legal AI tools. In a landscape of complex professional ethics, generalized statements about “avoiding harm” or “obeying human directives” will be of little help to keep AI in line with cultural expectations about the quality of legal services they should receive.³

Engineers have developed AI systems to augment or supplant lawyers’ services,⁴ giving rise to the question of how to allocate responsibility for AI error. Direct application of the tort doctrines of malpractice, vicarious liability, and products liability are potential options, but would entail practical difficulties that put their viability into question. Lawyers’ rules of professional responsibility, on the other hand, address industry specific risks—the various ethical quandaries unique to the practice of law. While designed to specifically address a lawyer’s professional duties, the rules already extend to other individuals under the lawyer’s supervision; these rules of professional responsibility may address the threat of AI errors by requiring lawyers to supervise adequately the output of their AI tools. Similarly, as AI technology advances, AI tools may be capable of taking on more responsibilities analogous to what today’s lawyers handle, which could also trigger the same or similar restraints and duties that bind human lawyers. As this paper will continue to argue, applying the legal rules of professional responsibility is, at present, the most efficient method of governing AI-enabled legal services.

PRACTICAL DIFFICULTIES APPLYING TORT DOCTRINES TO ALLOCATE RISKS

Generally speaking, tort doctrines are a common way to distribute risk of harm under the law, providing compensation to injured parties and incentivizing or deterring behavior through the imposition of liability.⁵ Tort law encompasses a number of causes of action, available for plaintiffs to vindicate their rights and seek relief. In the context of legal AI tools, certain tort theories of liability

Impact on the Law, and the Market Failure it Reflects, 63 EMORY L.J. 59 (2013); Emily M. West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases*, INNOCENCE PROJECT (2010); Ellen Yaroshefsky & Laura Schaefer, *Defense Lawyering and Wrongful Convictions*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD (Allison D. Redlich, et al., eds. 2014).

³ Cf. ASIMOV, *supra* note 1.

⁴ See e.g., Katherine Medianik, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1497, 1498-1501 (2018) (describing “ROSS,” a legal AI that performs legal research, writes memos, formats citations, and learns from experience).

⁵ See *Tort*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/tort> (last visited May 15, 2019).

have been suggested to remedy when harms are caused, including malpractice (a form of professional negligence), vicarious liability (a theory of liability derived from employer/employee relationships), and products liability (a strict liability theory for manufacturing, design, warning, or other product defects). However, as this section will explain, each of these theories of tort liability have their drawbacks when applied to govern legal-AI tools.

1. *Legal Malpractice*

Malpractice liability occurs when an attorney fails to serve their client with the degree of skill generally accepted as the standard required of an ordinary bar member, and either harms or would foreseeably harm the client.⁶ Usually, the standard of skill required for malpractice actions is that of a general practitioner, a relatively low bar.⁷ Additionally, legal malpractice claims are notoriously difficult to prove;⁸ for example, one element a client must show is that, but for their attorney's negligence, their claim would have been successful.

That said, if lawyers were to use AI tools, the standard of care required of legal professionals may increase due to the sophisticated representation that AI tools allow.⁹ For example, if general practitioners were assumed to use an AI that identified potential legal issues with contracts in the event of a breach, this might decrease a court's willingness to overlook missteps with basic or even advanced contract doctrine because, due to the assistance of the AI, the court would impute the general practitioner with a higher standard of knowledge and care. In essence, to the extent that AI reduces errors and improves the quality of legal advice, legal standards of care may rise in response to a heightened expectation of what a reasonable lawyer—with the benefit of AI tools—should do. As a practical consequence, a heightened standard of care might incentivize lawyers not to use legal AI tools in order to gain the benefit of a lower standard for malpractice actions; this, in turn, would be disadvantageous to potential clients, who stand to benefit from any improvements AI tools could make to the legal services rendered. The combined effect of a tort theory that is difficult to establish—and thus relatively unlikely to be successful—with the

⁶ *Legal Malpractice*, BOUVIER LAW DICTIONARY (2018).

⁷ *Id.*

⁸ Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1674 (1994) (noting that according to an ABA study up to 67% of cases settle due to difficulty of prosecution).

⁹ Jessica S. Allain, *From Jeopardy! To Jaundice: The Medical Liability Implications of Dr. Watson and Other Artificial Intelligence Systems*, 73 LA. L. REV. 1049, 1061-64 (2013) (describing the effects of AI on medical malpractice liability).

threat of perverse incentives to avoid AI innovations ultimately renders legal malpractice a poor fit to govern harms caused by legal AI tools.

2. *Vicarious Liability*

A second option is vicarious liability, which holds employers liable for the actions of their employees.¹⁰ In theory, this doctrine would treat legal AI tools as if they were an attorney's employee, and would then borrow from liability rules governing when employers are held responsible for the actions of their employees. However, there are several issues even with this initial premise of treating AI as an employee. Legal scholars have already begun to explore the ontological questions of AI personhood and the problematic consequences of "employing" a legal person—including the question of AI rights, especially the right to be paid for services rendered.¹¹ Vicarious liability and related doctrines from agency law are not as easily transferred to AI as they may seem.

The doctrine's application to lawyers using AI tools would also allow lawyers to rather easily and virtually completely abdicate responsibility for AI by employing providers of AI legal tools as independent contractors. Generally, employers are not liable for the acts of independent contractors.¹² Agency law may impute vicarious liability where an independent contractor appears to provide services on behalf of an entity—in other words, when they are an employee in all but name.¹³ However, law firms may easily avoid such liability by adhering to doctrinally-based patterns, such as contractually specifying that the AI provider maintains certain degrees of control over their work or by having the independent contractors provide a slice of services directly to their clients. While vicarious liability may have some application to legal AI tools, it is once again a poor fit for governing the responsible and ethical use of these tools in legal services.

3. *Products Liability*

A third option, products liability law, generally holds manufacturers and retailers liable for making and selling unreasonably dangerous products.¹⁴ Products liability theories typically arise from a manufacturing, design, warning, or other

¹⁰ See 74 Am. Jur. 2d *Torts* § 60.

¹¹

¹² RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 57(d) (2012); RESTATEMENT (SECOND) OF TORTS § 409 (1965).

¹³ See Allain, *supra* note 9 (noting that a hospital's representation to the public that physicians worked for the hospital made the institution vicariously liable for the independent contractor's action).

¹⁴ RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (1995).

defect in the quality of the product.¹⁵ Even outside the realm of legal services tools, it is questionable whether and to what extent products liability law will apply to AI tools. Because the AI in question might be either purely software or embedded within connected or other tangible devices, it is uncertain whether the law will recognize AI as a “product” in the first place.¹⁶ Even if so, many of the harms likely to be caused by AI tools do not neatly fall within existing categories of products liability; the question becomes whether core features that drive the usefulness and desirability of AI can be considered “defective” at all. Even in the event these are treated as defects, manufacturers must warn consumers of dangers posed by their product’s use, and will not be held liable when they adequately warn consumers of these dangers;¹⁷ it is therefore likely that legal AI tools will contain a litany of warnings for the lawyers who will use them in an efforts to reduce their liability risk.

Then there is the problem of who may be held responsible for products liability doctrine, and by whom. Products liability law opens up manufacturers and retailers, as part of the “chain of commerce,” to potential liability.¹⁸ However, a client harmed by faulty AI legal tools may not pursue the lawyers who use them under a products liability theory because these lawyers are providing services, not selling or manufacturing the AI devices themselves.¹⁹ The lawyer’s clients also likely cannot bring products liability claims against the manufacturers because they did not actually purchase or use the product.²⁰ In this case, courts may choose to apply the “learned intermediary” doctrine—prevalent in cases where doctors use medical devices to provide services—to lawyers using AI services.²¹ This doctrine requires the person in the best position to weigh the risks of the device’s use to warn the end-

¹⁵ *Id.* § 2.

¹⁶ *See id.* § 4.

¹⁷ *See id.* § 2(h), (k), (l).

¹⁸ RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 5.

¹⁹ *Cf.* Allain, *supra* note 9, at 1067-68 (noting that physician provision of services using medical devices does not subject them to products liability actions).

²⁰ CHARLES J. NAGY, JR., AMERICAN LAW OF PRODUCTS LIABILITY § 1:1 (2019) (noting that products liability “refers to legal responsibility for injury resulting from the use of a product”).

²¹ *See, e.g.*, Diane S. Kane, Annotation, *Construction and Application of Learned-Intermediary Doctrine*, 57 A.L.R. 5th 1 (1998); Barry A. Lindahl, *Elements of Strict Liability – “Defective” Product – Defective Warning – To Whom Warning Given – Prescription Drugs: “Learned Intermediary” Doctrine*, 3 MOD. TORT L.: LIABILITY & LITIG. § 27:59 (2d ed., June 2018 Update); David G. Owen & Mary J. Davis, *Persons to be Warned – Physicians, Patients, and the Learned Intermediary Doctrine*, in OWEN & DAVIS ON PROD. LIAB. § 9:25 (4th ed., May 2019 Update).

consumer of the device’s dangers.²² Lawyers are arguably in the best position to weigh the risk of using AI legal tools because of their education; therefore, the manufacturers have a duty to the lawyers engaging their products, the lawyers have a duty to their clients, but the manufacturers will not have a duty to the clients directly. If courts choose to apply this doctrine to lawyers using AI legal tools, the victim’s only option will be to pursue the lawyer in a malpractice action—already addressed as a less-than-ideal.²³

Another drawback of products liability theories—and, indeed, many tort liability theories—is that the scope of damages that can be sought is limited. Economic losses, for instance, that recipients of AI legal services would incur are typically precluded as the basis for a products liability action.²⁴ In the realm of professional services, economic losses are likely to make up the bulk, if not the entirety, of the damages sustained by faulty or erroneous AI legal tools. Lawyers would also be left without much recourse against the manufacturer of AI tools, as their (likely) economic loss would preclude them from a products liability action. Their only recourse may be to the terms of the contract between them and their legal services AI, which may nonetheless leave the lawyer’s clients without much opportunity for meaningful recourse.

EXTENDING EXISTING LEGAL PROFESSIONAL RESPONSIBILITY RULES

Taking into account the likely commercial environment in which AI legal services will operate, holding lawyers responsible for competently choosing and “supervising” AI is the most practical option. The Model Rules of Professional Conduct²⁵ could accomplish this by extending attorneys’ duty of competent representation to encompass responsible use of AI tools and extending attorneys’ responsibility to supervise non-lawyer assistants to AI tools.

Extending attorneys’ duty of competent representation would help ensure that they use these tools responsibly. The model rules require lawyers to give competent representation and note that lawyers should keep apprised of developments in technology to remain competent.²⁶ At least one author argues that the rules could set objective best practices for AI use and require lawyers to adhere to them to remain competent.²⁷ Similarly, extending attorneys’

²² Allain, *supra* note 9, at 1069.

²³ *Id.* at 1070.

²⁴ RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 6.

²⁵ MODEL RULES OF PROF’L CONDUCT (Am. Bar Ass’n).

²⁶ *Id.* at r. 1.1.

²⁷ Medianik, *supra* note 4, at 1516.

responsibilities to supervise non-lawyer assistants²⁸ to AI would ensure that attorneys could not completely abdicate responsibility for the work of so-called “AI lawyers” without obliging them to essentially re-do the computer’s legal work.²⁹ With slight modification, this rule provision could expressly include AI tools and require attorneys to supervise the quality of the final work product.

The combined effect of these rules stops short of requiring lawyers to have special technical knowledge of AI tools, but rather asks attorneys to evaluate the outputs of their own and their assistants’ work: the end-result legal advice, which is still within the lawyer’s expertise. Both protections are client-oriented, protecting their interest in quality legal services, while also incentivizing responsible innovation. As such, each of these suggestions aligns with the objectives of the model rules of professional conduct and addresses the unique threats, and benefits, AI legal tools are likely to implicate.

Extending lawyers’ rules of professional responsibility also avoids the practical difficulties of policing errors through malpractice, vicarious liability, and products liability for three reasons. First, it would not discourage the use of AI to avoid a potentially heightened malpractice liability standard. Extending the duty of competence to encapsulate proficient use of AI systems, and setting objective criteria for what constitutes proficient use, would allow practitioners to take advantage of these systems without the chilling effect that a nebulous standard would create. On the other hand, it still provides recourse for clients in the form of professional reporting, review, and sanctions—which further incentivizes responsible AI use for the benefit of clients.

Second, it would make lawyers responsible for the errors of independent contractors by subjecting them to professional sanctions for failing to supervise their output. This is consistent with existing norms, whereby attorneys must supervise the non-lawyers they hire to assist in providing legal services to ensure this work product conforms to the standards of a competent lawyer. It can also avoid the question of whether to treat AI as a legal “person” by expressly expanding the legal and ethical duty to supervise to these AI legal tools.

Finally, it would allow the market to police manufacturers of AI legal tools. Allowing the professional rules to set objective standards for competent AI-aided representation would allow lawyers to select tools based on which manufacturer meets these

²⁸ MODEL RULES OF PROF’L CONDUCT r. 5.3.

²⁹ See Medianik, *supra* note 4, at 1520-1524.

objective standards. The market could then regulate out the devices that would subject practitioners to malpractice liability or sanctions. This would, again, serve the ultimate goal of ensuring an adequate quality of legal services.

CONCLUSION

The possibility of robot rebellion is frightening; however, the possibility of sub-par legal services provided through AI lawyers is a more imminent threat, with the potential to do much damage. Mitigating this damage by making existing ethical and professional responsibility rules applicable to these new legal tools avoids the difficulties of policing it through tort doctrine, and therefore is the preferable solution. As technology continues to develop and permeate the industry, the legal profession should be proactive in protecting the clients' best interests by encouraging the responsible implementation of AI legal tools and promoting the means best suited to tackle this new challenge in the delivery of legal services.