

# **AI: Double Edged Sword**

by

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## **ABSTRACT**

**For good and for ill, AI triggers action. Efficiency and liability need not be in equal measures. For law, and thus also for AI, jurisdiction matters. Can do is not the same as may do; and may do is not the same as should do. Abbreviated version the detail of and the unambiguous consumer protection bias embedded in regulations governing AI array on the continuum as EU > CA > UK > USA. Exercise caution and seek to avoid hubris.**

**Legally,  
when you say "agent" do you know what you have said?**

**Do ---NOT--- say "I used my AI agent".**

**Legally, the only word worse than "agent" is "partner".**

**Never say "partner".**

**As a matter of law,  
an action by an agent is the action of that agent's principal.**

**As a matter of law,  
every partner is both principal to and agent of  
the other partners.**

**Say "I used an AI tool."**

**Jurisdiction of download**

**springs from Nebraska USA Senator J.J. Exon.**

**[https://www.law.cornell.edu/topn/communications\\_decency\\_act\\_of\\_1996](https://www.law.cornell.edu/topn/communications_decency_act_of_1996)**

**Holding the all time speed record for**

**federal legislation to be declared unconstitutional**

**when including a legislative findings of fact is that 1996 which sought to ban indecency from the internet; but also included the**

**infamous grant of immunity in (as codified) section 230 to internet service providers as well as the less celebrated but**

**equally important jurisdiction of download (as codified 47 USC 230 (e)(3) [a.k.a., *Zippo* test**

**[https://en.wikipedia.org/wiki/Personal\\_jurisdiction\\_in\\_Internet\\_cases\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Personal_jurisdiction_in_Internet_cases_in_the_United_States) ].**

**Jurisdiction matters  
for every aspect of the professional practice  
of being an expert witness in the subject area of forensic  
economics.**

**The "jurisdiction of download" (e.g., law of where the user's  
mouse is) is critical; but is not dispositive.**

**Have you learned the broad rules for choice of law?**

**[https://en.wikipedia.org/wiki/Choice\\_of\\_law](https://en.wikipedia.org/wiki/Choice_of_law)**

**May you (thus can you) always choose where you want to be?**

## **CHOICE OF LAW**

**Routinely,  
more than geographical jurisdiction has nexus with a transaction.**

**Some jurisdictions prohibit choice of another judications.**

**Some jurisdictions exert extraterritorial application of its law.**

***Often*, when multiple jurisdictions have sufficient nexus with the transaction; *but far from always*, the parties may specify which jurisdiction's laws will control their transaction.**

## **NEXUS**

**domicile; location of parties; location of subject matter;  
civil v. criminal; contract v. tort v. property v. probate**

**manifest intent to be bound by jurisdiction**

## **CHOICE OF VENUE**

**Courthouse versus law applied by the court.**

**If**

**the parties may choose the jurisdiction,**

**then**

**the parties are largely free to pick which courthouse of multiple court houses containing a court with jurisdiction will hear the parties' suit.**

**Choice of Law plus Choice of Venue might require court #A to apply to the law of jurisdiction #B instead of #A.**

## **NEW WINE IN OLD BOTTLES**

**The Law can not anticipate; it is reactive.**

**The Law reacts to changes in The People's reasonable expectations.  
Which bottle is picked does much to determine the outcome.**

**What is the focus of The Law:**

**is it on *the action taken*; or  
is it on *the tool used*?**

**Your liability is greater when the focus is on the action taken.**

**Your AI agent (read: you) takes an action**

**Sometimes the result is the fault of the tool, not the user of the tool.**

**AI IS CHANGING: RAPIDLY;  
NECESSARILY THE LAW LAGS BEHIND.**

**The tasks routinely assigned to AI  
are increasing both in terms of  
frequency of use and in magnitude of the task.**

**The reactions of The Law to the use of AI  
are increasing both in terms of  
frequency of reaction and in magnitude of the reaction.**

**Increasingly,  
yesterday's AI could not do something that today's AI can;  
accordingly  
what was lawful yesterday  
increasingly today triggers civil and/or criminal liability.**

## **THREE BRANCHES ARE NOT REACTING IN UNISON.**

**Legislative has *broadest discretion* and tends to react slowly.**

**Legislature has power to fundamentally change The Law.  
But consensus is required for action.**

**Executive has narrowest discretion, but *can react quickly*.**

**Executive limited to changing itself  
(e.g., prioritizes within appropriated budget);  
but executive can not The Law.**

**Judiciary, *given a case*, can change The Law (e.g., pick different bottle),  
and can change faster  
than either of the political branches are willing to do so.  
But, legislature can overrule the judiciary.**

## **LEGISLATION REFLECTS FIVE RECURRING THEMES**

**TRANSPARENCY:** notice; adverse disclosure

**PRE-USE VETTING:** bias audits; risk analysis; cybersecurity

**TRAINING & MONITORING OF AI:**

AI basics; in-use monitoring; auditing; testing of modifications

**POLICIES & DOCUMENTATION:** AI assessment; risk; certification

**INDIVIDUAL RIGHTS:** opt out; access; appeal; human review

How many of those fifteen items do you do with your AI?

EU and California broadest and most consumer protection

## **However**

**Texas legislative finding of fact that AI reports the "truth"**

(relative to existing biases) **and** the "truth" shall not be changed

to seek a different future; **and**

**zero liability due to AI's action or inaction**

so as to foster development of AI.

## "EFFICIENCY"

**You manage what you measure.**

**Avoid the false efficiency of subunit optimization.**

e.g., A defective final draft

due to a speedy but uncorrected first draft by AI.

**AI is fast, but AI hallucinates.**

**Depending upon which AI is being used and how it is being used**

**AI's demonstrable error rate is no less than 6% to well over 20%.**

**Just like HAL in "2001",**

**AI has a fundamental programming bias that prompts its hallucinations.**

**AI is programmed in answer.**

**AI is programmed to **NOT** not answer.**

**When an answer is not readily available, AI hallucinates.**

## **AI IS A GUESSING MACHINE**

AI's answers are

the **most likely next item** in a wide web of calculated probabilities.

What is a confounding variable?

What is "big data"?

LLMs (large language model)

are said to have been trained on the entire internet.

all of the internet is not the same as all knowledge

pre-1994

paywalls

updating

Routinely, new entries *that are captured*  
(*and all are not*)

merely arginally adjusts the probabilities  
that AI algorithm uses.

**Transformative new knowledge underappreciated.**

**WHEN ASKING AI, NARROWER IS BETTER.**

**Asking AI without confining AI invites more hallucinations.**

**The art of prompt engineering is the art of narrowing.**

**Narrow your prompts**

**by field (e.g., law versus economics)**

**NOTE: Law uses a Reasonable Person.  
Economics uses a Rational Person.  
Rational Persons are not Reasonable.**

**by citable source**

**NOTE: this reduces, but does not eliminate,  
hallucinated citations**

**by vocabulary**

**specify a field specific dictionary (e.g., *Black's Law*)**

**USE AI AS A FUNNEL.**

**The scope of AI is vastly broader than the scope of human.**

**Get AI to look at the whole and identify high probability parts.**

**Then have the human focus on the AI targeted parts.**

**After the human has "completed" analysis,  
then ask the AI to evaluate that completed project for missing parts.**

## **IF AI IS SO BAD, THEN WHY USE AI?**

As Mr. Natural sez: **"Get the right tool for the job."**

**Using a hammer when you need a pair of scissors is bad.**

**AI is at its best when:**

**sorting massive document troves by objective criteria**

**e.g., Of 100,000 emails which contain both**

**the word "liability" and a specific manager as the sender?**

**automating repetitive tasks**

**first draft coding projects**

**identifying judicial tendencies across many cases**

**identifying gaps in completed legal research**

**identifying weaknesses in an expert's report**

**early tasks (e.g., brainstorming; first drafts)**

**UNFORTUNATELY,  
AI ALSO IS AT ITS BEST**

**hallucinating**

**creating citations that in no way exist**

***We fed AI all of our novels and we are surprised AI lies?***

**producing more quantity without regard to quality**

**without authorization by user and without notice to user**

**revealing confidential information**

**e.g., AI defaults to chronically feeding the LLM**

**stealing intellectual property**

**Of those four, only the first three**

**can you tightly limit by improving your prompt engineering**

**BEST PRACTICES TO MITIGATE RISKS OF USING AI**

**DO NOT USE FREE AI; buy the most expensive.**

**CHANGE THE DEFAULT SETTINGS:**

**turn off training; turn up privacy**

**in *every* app: both browser and AI and .....**

**clear your cache on exit both from the AI and the browser**

**DO NOT RE-OPEN PRIOR CHATS.**

**LEARN PROMPT ENGINEERING.**

**practice, practice, practice your prompt engineering skills**

**HAVE AN AI POINT PERSON.**

**to keep up on developments and to train you *frequently***

**FORMALIZE YOUR CRITERIA FOR FIRING YOUR CLIENT**

**due to your client's use of AI**

**and/or**

**due to your client's client's use of AI**

**REQUIRE YOUR CLIENTS TO WARRANT TO YOU THE FACTS**

**provided to you are true and free of AI hallucinations.**

# ATTORNEYS HAVE DUTIES TO COURT AND TO CLIENTS

See, American Bar Association's *Rules of Professional Conduct*

R.P.C. 2.1. independent professional judgement

R.P.C. 3.3. **candor to the tribunal**; transparency  
(explainability; data provenance; training)

R.P.C. 4(a)2. reasonable consult the client about means of service

R.P.C. 1.1 **competency**: legal knowledge, skill, thoroughness, preparation

R.P.C. 1.15 safekeeping property with complete records

R.P.C. 1.6 **confidential information**

R.P.C. 5.3 responsibilities: nonlawyer assistance (**unauthorized practice of law**)

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