

Taskforce for Responsible AI in the Law

Report on the 2024 Texas AI and Law Summit

February 26, 2024, Texas Law Center, Austin, Texas

Moderators:

John Browning, Chair TRAIL

Hon. Xavier Rodriguez*

Hon. Roy Ferguson *

Lisa Angelo*

Reginald Hirsch*

Peter Vogel*

Joshua Weaver*

Attendees:

Senior Justice Debra Lehrmann
SBOT President Cindy Tisdale
SBOT Executive Director Trey Apffel

Hedy Bower

Seth J. Chandler

Matt Cordon

Megan Goor-Peters*

Nina Hess Hsu

Heather Hughes*

Greg Ivy

Virginia Izaguirre

Lyndsay Jackson

Casey Kennedy

Prof. Randall Kelso

Sharon Kolbet

KaLyn Laney

Sarah Keathley

Dan Linna*

Megan LaVoie

Trish McAllister

Emily Miller

Joncilee Miller

James McQuiggan

Allison Neal

Zoe Niesel

Kent Ninomiya

Elizabeth Rogers*

Sharon Sandle*

Greg Sampson

Jacqueline Schafer

Jonathan Smaby

Betty Balli Torres

Jeffrey Tsunekawa

Mark Unger

Jessica Vittorio

Jonathan Vickery

Seana Willing

Daniel Wison*

* Indicates a member of the Taskforce for Responsible AI in the Law

Recommendations

The Artificial Intelligence (“AI”) Summit Attendees’ discussion resulted in the following recommendations:

- TRAIL should request a formal ethics opinion on the use of AI and generative AI by lawyers, including when it can be used and how to bill for its use. As a result of the discussion during the Summit, TRAIL Chair John Browning sent a request to the Professional Ethics Committee requesting an ethics opinion and has received a letter confirming that the PEC is working on preparing an ethics opinion in response to the request
- For attorneys using AI, Texas Rule of Civil Procedure 13 places the burden of proof on the filer to ensure they understand what they are doing, while Chapters 9 and 10 of the Texas Civil Practice & Remedies Code (“CPRC”) require reasonable diligence from the filer. The Supreme Court's Rules Committee should clarify the rules without being specific to AI and generative AI.
- The State Bar should educate lawyers and judges about the responsible use of AI and generative AI. This should include educational materials for judges, training on metadata, CLEs on prompting, data privacy, and responsible document sharing. Short-take CLE products and AI topics tailored to specific practice areas could also be effective. Education efforts could involve the Texas Access to Justice Commission (“ATJ”), the State Bar, pro bono groups, and other organizations, with resources provided on the State Bar website.
- A toolkit should be created, focusing on AI and cybersecurity more broadly, written in plain language, and maintained by the State Bar.

Executive Summary

The Taskforce for Responsible AI in the Law held an AI Summit in Austin at the Law Center on February 26, 2024. Members of the Taskforce moderated sessions on several issues identified by the Taskforce as important to lawyers in addressing the risks and opportunities presented by AI and generative AI. Topics included ethical use of AI, addressing AI through legal education, cybersecurity and privacy concerns, use of AI in the courtroom, and AI and access to justice. The Taskforce invited stakeholders from across the legal community to attend the discussion. The group of approximately 40 attendees included Supreme Court Senior Justice Lehrmann, Rules Attorney Nina Hsu, representatives from several Texas Law Schools, a representative from Texas Health Resources, and representatives from State Bar Committees including the CLE Committee, the Court Rules Committee, and the Law Practice Management Committee.

Ethical and Privacy Concerns

The AI Summit discussion focused on how the existing ethics rules apply to AI, and whether the existing rules are adequate in providing guidance to attorneys on how to use AI ethically. The group also considered whether additional ethics rules are necessary to provide attorneys with guidance and to protect clients.

The AI Summit attendees discussed AI broadly instead of focusing only on Generative AI. The AI Summit attendees noted that AI has become so pervasive in most technology applications that it is not feasible for attorneys to eliminate the use of AI, even if that were desirable. It would therefore

not be feasible for an attorney to effectively represent a client without in some way making use of AI.

The AI Summit attendees also noted that ethical and effective representation of a client might require not using AI in some situations and using it judiciously in other situations. The possibility exists that as AI, particularly generative AI, becomes more pervasive, failing to utilize this technology might be unethical in that the attorney is not adequately using the tools available.

2018 Ethics Opinion 680 requires lawyers to understand the technology they use, including cloud services. TRAIL's Interim Report proposed requesting a formal ethics opinion on the use of AI by lawyers, including when it can be used and how to bill for its use. The discussion at the Summit supported this recommendation.

An ethics committee should define due diligence for electronic services, as the level of risk varies among AI applications.

Transparency in AI is expected to improve, and lawyers need to review privacy notices and terms of service. Debate exists on whether increasing the technology CLE requirement is necessary, as market forces may address the issue and lawyers learn about AI risks quickly.

While the AI Summit discussion did not propose drafting additional ethics rules specifically addressing AI, the group did note that any new rules should be AI-agnostic, emphasizing the lawyer's responsibility for the contents of signed documents.

AI in the Courtroom

Discussion by the AI Summit attendees about the role of AI and generative AI tools in the courtroom focused on three areas: the use of AI by pro se litigants, the use of AI by attorneys, and the use of AI by court staff.

Pro se litigants will likely use any available AI tools, especially if they are free and accessible. Courts may want to warn pro se litigants about the risks of AI and legal research, potentially through clerks, standing orders, or pro se and self-help centers. Concerns exist about pro se litigants becoming overconfident in their case due to AI-generated content.

For attorneys using AI, Rule 13 places the burden of proof on the filer to ensure they understand what they are doing, while Chapters 9 and 10 of the CPRC require reasonable diligence from the filer. The Supreme Court's Rules Committee could clarify the rules without being specific to AI and generative AI. In addition to the risks inherent in using AI, there are potential benefits for attorneys. For instance, a free AI tool that checks citations for hallucinations could benefit good actors.

Nearly a quarter of judges use AI, and while responsible use in drafting opinions is permissible, requiring disclosure of AI use is not recommended. Standing orders educating about AI are encouraged, but those requiring disclosure are not.

Deep fakes and the authenticity of evidence are concerns, and Texas Rule of Evidence 901 should be reexamined in this context.

Recommendations include reviewing educational materials for judges, considering pretrial hearings for evidentiary challenges, and providing training on metadata. Education efforts could involve the ATJ, State Bar, Pro Bono Law Group, and other organizations, with resources provided on the State Bar website.

AI in Legal Education

Law schools should be encouraged to address the challenges and benefits of technology and AI in their curricula. AI education could be embedded in legal writing courses or offered through short CLE presentations. The State Bar can support law schools by clarifying what "professional competence" means concerning AI and offering nuts-and-bolts education for new lawyers.

Law students need to understand the terms of use of AI services, data privacy, and the complexity of de-identification.

CLEs on prompting, data privacy, and responsible document sharing could be helpful. Short-take CLE products and AI topics tailored to specific practice areas could also be effective.

Real-time, AI-driven spoken communication might transform how people learn about AI.

AI and Cybersecurity

AI is being used to create more effective phishing emails and malware, with threat actors patiently collecting information before attacking.

Continuous training is crucial for all staff members, not just attorneys. Cybersecurity issues need to be translated into plain language for better understanding. Solo and small firm attorneys need resources and toolkits, particularly regarding cyber insurance.

The State Bar could remind attorneys about the availability of cybersecurity insurance and resources. Cyber insurance requires affirmative steps to protect data and may not cover all potential problems.

Lawyers should understand where their data resides and take advantage of free resources for training and risk assessments.

A toolkit should be created, focusing on AI and cybersecurity more broadly, written in plain language, and maintained by the State Bar.

AI and Access to Justice

The AI Summit attendees discussed the potential benefits of AI and generative AI for increasing access to justice. However, many attendees also expressed concern that AI and generative AI is not an adequate substitute for qualified legal assistance. Concerns were raised about over-reliance on AI and generative AI as a method of providing low-cost legal services. Some members of the group

proposed considering safe harbors or coverage for attorneys doing pro bono work with AI, while some members opposed this proposal.

Other proposals included increasing support and funding for legal aid to serve as a testing ground for AI adoption and exploring the use of AI, including AI and generative AI videos, to create more educational and empathetic resources for pro se litigants.