Artificial Intelligence and Legal Ethics: Whether AI Lawyers Can Make Ethical Decisions

Catherine Nunez[*]

I.   INTRODUCTION

ROSS is the world's first artificial intelligence (AI) lawyer.[1] In mid-2016, ROSS landed its first job with law firm Baker Hostetler, where it was employed to work in the firm's bankruptcy practice and conduct legal research.[2] Now, ROSS is employed at ten law firms.[3]

The implementation of AI lawyers in the legal field has raised the question of whether human lawyers will be eventually replaced by AI lawyers. In 2011 and 2015, Altman Weil conducted a survey labeled

    1.   Cecille De Jesus, *AI Lawyer "Ross" Has Been Hired by Its First Official Law Firm*, FUTURISM (May 11, 2016), http://futurism.com/artificially-intelligent-lawyer-ROSS-hired-first-official-law-firm/.
    2.   Karen Turner, *Meet 'Ross,' the Newly Hired Legal Robot*, WASH. POST (May 16, 2016), http://www.washingtonpost.com/news/innovations/wp/2016/05/16/meet-ROSS-the-newly-hired-legal-robot/?utm_term=.421137862a3e.
    3.   ROSS, http://www.ROSSintelligence.com (last visited Aug. 31, 2017).

"Law Firms in Transition" that asked firm leaders if they could envision a law-focused AI-like system replacing, within the next five to ten years, any of the following in their firm: (1) paralegals; (2) first year associates; (3) second to third year associates; (4) four to six year associates; or (5) service partners.[4] Three hundred and twenty law firms responded, "including 47% of the 350 largest US law firms."[5] This survey showed that firm leaders were becoming receptive to the thought of AI lawyers replacing their employees, particularly the paralegals and the first year associates.[6] In 2011, only 35% of the firm leaders believed that AI lawyers could replace paralegals within the next five to ten years, as opposed to 47% of firm leaders in 2015.[7] In 2011, 23% of firm leaders answered that first year associates could be replaced. That figure jumped to 35% in 2015.[8] The belief that AI lawyers could replace second and third year associates jumped from 14% in 2011 to 19.2% in 2015.[9] Four to six year associates saw the least change.[10] In 2011, only 5.5% of firm leaders believed AI lawyers could replace four to six year associates, as compared to the 6.4% seen in 2015.[11]

     In a recent survey, law firm leaders demonstrated a significant increase in their belief that AI lawyers could eventually replace their employees, but not within the five to ten year time frame posed in the survey question.[12] This percentage jumped to 38% in 2015 compared to the 4.5% in 2011.[13] Lastly, a decline of more than half was noted in the last category—"[c]omputers will never replace human practitioners," where 46% of firm leaders answered yes to this question in 2011 but only 20.3% answered yes in 2015.[14]

     As of now, ROSS is still focusing on bankruptcy legal research;[15] however, this Comment explores the question of whether ROSS, with its current abilities, will be able to replace those lawyers who not only conduct legal research but also have to make decisions that entail

---

     4.   THOMAS S. CLAY & ERIC A. SEEGER, ALTAN WIEL, INC., 2015 LAW FIRMS IN TRANSITION 83 (2015), http://www.altmanweil.com/dir_docs/resource/1c789ef2-5cff-463a-863a-2248d23882a7_document.pdf.
     5.   *Id.*, at x.
     6.   *See id.* at 83.
     7.   *Id.*
     8.   *Id.*
     9.   *Id.*
     10.   *Id.*
     11.   *Id.*
     12.   *Id.*
     13.   *Id.*
     14.   *Id.*
     15.   *See* Turner, *supra* note 2.

applying legal ethical rules that explicitly defer to a lawyer's professional and moral judgment. Ultimately, this Comment proposes that ROSS likely will be capable of developing a professional and moral judgment in the future. Part II will provide a brief overview of AI and ROSS. Part III will explore how lawyers develop a professional judgment and whether morals should be considered when rendering legal advice. Part IV will suggest that the American Bar Association (ABA) Model Rules of Professional Conduct give great deference to a lawyer's professional and moral judgment. Part V will argue that, given ROSS's ability to learn through repetition, it is reasonable to assume that ROSS will eventually be able to apply rules that call for the consideration of a lawyer's professional and moral judgment. Part VI will offer concluding thoughts on ROSS.

II.   OVERVIEW OF AI INTELLIGENCE

A.   *What Is Artificial Intelligence?*

AI is a method of technology that teaches a machine how to do a task originally thought to be carried out by humans.[16] There are four main methods from which machines are being taught: (1) machine learning; (2) visual recognition; (3) speech recognition; and (4) natural language processing.[17] Machine learning is the use of "algorithms that iteratively learn from data," allowing machines to learn through experience, such as their interactions with humans,[18] rather than being programmed with the specific knowledge.[19] Visual recognition is "the ability for machines to identify images" (e.g., Facebook's photo recognition tool[20]).[21] Speech recognition is a machine's ability to understand how humans communicate verbally then translate the human vocal tones into words (e.g., Apple's Dictation feature[22]).[23] Natural

---

16.   *Artificial Intelligence (AI)*, TECHOPEDIA, http://www.techopedia.com/definition/190/artificial-intelligence-ai (last visited Mar. 30, 2017).

17.   CCBE, *Presentation ROSS Intelligence by Andrew Arruda*, YOUTUBE at 2:05-2:20 (Nov. 18, 2016), http://www.youtube.com/watch?v=hJk-dQnn4M8.

18.   *Id.*

19.   *Machine Learning*, SAS, http://www.sas.com/en_us/insights/analytics/machine-learning.html (last visited Mar. 30, 2017).

20.   Adam Geitgey, *Machine Learning Is Fun! Part 4: Modern Face Recognition with Deep Learning*, MEDIUM (July 24, 2016), http://medium.com/@ageitgey/machine-learning-is-fun-part-4-modern-face-recognition-with-deep-learning-c3cffc121d78.

21.   CCBE, *supra* note 17, at 3:32-3:37.

22.   *Use Your Voice To Enter Text on Your Mac*, APPLE (Oct. 6, 2016), http://support.apple.com/en-us/HT202584.

23.   *See* CCBE, *supra* note 17, at 3:51-4:04.

language refers to a human language.[24]   Thus, natural language processing (NLP) is the ability of machines to understand the relation between words and decipher the intent and meaning behind their usage by humans.[25]

   These different methods are not free from difficulty. NLP has shown to be difficult because of the "ambiguity of language" and the fact that humans rarely speak in precise, or plain, language (e.g., "'You're killing it!' may either mean 'You're doing great!' or 'You're a terrible gardener'"[26]).[27]   The ability for these machines to efficiently use NLP means to "understand not only the words, but the concepts and how they're linked together to create meaning."[28]   Machines become more efficient in processing human language "by tracking sentiment—the tone of a written message (tweet, Facebook update, etc.)—and tag that text as positive, negative or neutral."[29]   This method allows machines to begin to communicate how humans communicate rather than in graphs and terms.[30]   Similar to machine learning, "the more data analyzed, the more accurate" the machine will be when using the natural language processing method.[31]

B.   Who Is ROSS?

   In mid-2015, ROSS Intelligence, the company that created ROSS, came to the United States; in about ten and a half months,[32] ROSS, the first AI lawyer, was created.[33]   This AI lawyer is "[b]uilt on ROSS Intelligence's proprietary legal AI framework, Legal Cortex, combined

---

   24.   *Natural Language*, WEBOPEDIA, http://www.webopedia.com/TERM/N/natural_language.html (last visited Mar. 30, 2017).
   25.   *See* CCBE, *supra* note 17, at 2:51-3:18.
   26.   John Rehling, *How Natural Language Processing Helps Uncover Social Media Sentiment*, MASHABLE (Nov. 8, 2011), http://mashable.com/2011/11/08/natural-language-processing-social-media/#sIm8kTtyQEqE.
   27.   *Introduction to Natural Language Processing (NLP) 2016*, ALGORITHMIA (Aug. 11, 2016), http://blog.algorithmia.com/introduction-natural-language-processing-nlp/ [hereinafter NLP].
   28.   NLP, *supra* note 27.
   29.   Rehling, *supra* note 26.
   30.   *See* CCBE, *supra* note 17, at 3:18-3:28; *see also* NLP, *supra* note 27 (explaining that instead of hand-coding large sets of rules, NLP can rely on machine learning to automatically learn these rules by analyzing a set of examples (i.e. a large corpus, like a book, down to a collection of sentences), and making a statistical inference).
   31.   NLP, *supra* note 27.
   32.   Vanderbilt University, *Andrew Arruda: Artificial Intelligence and the Law Conference at Vanderbilt Law School*, YOUTUBE at 12:30-12:38 (May 6, 2016), http://www.youtube.com/watch?v=LF08X5_T3Oc.
   33.   *See* De Jesus, *supra* note 1.

with . . . IBM Watson's cognitive computing technology . . . ."[34]   ROSS uses "[NLP] and machine learning capabilities to" perform legal research by identifying relevant legal authorities to questions posed to it.[35]   One can ask ROSS a "fully formed legal research" question (e.g., specific jurisdiction questions),[36] and it will then collect "exact passages from cases that answer your questions."[37]   ROSS will then ask follow-up questions for clarifications to determine whether the information collected was helpful.[38]   By repeating this interaction and receiving positive or negative feedback, ROSS becomes smarter and learns without being programmed.[39]

   A pivotal difference between currently used legal research engines and ROSS is the manner in which a search is generated and the results. With the former, one must use keywords to perform a search, as opposed to the natural language tool in ROSS.[40]   Also, the former will only generate sources with those specific keywords.[41]   On the other hand, ROSS, through repetition, can learn to understand the intent behind questions and thus can bring back relevant information based on, for example, the true intent behind the questions.[42]   In addition, ROSS creators have implemented "a law monitor button" that enables ROSS to check the most current law relevant to the inquiry.[43]

   ROSS has gained the attention of the nation's leading law firms because of its ability to help save time and money.[44]   The system has been saving lawyers an estimated twenty to thirty hours per case.[45]   Due to ROSS's time efficiency, "law firms could charge lower fees since they wouldn't be paying humans (who generally prefer to get paid for their

---

   34.   David Houlihan, *ROSS Intelligence and Artificial Intelligence in Legal Research*, BLUE HILL RES. (Jan. 17, 2017), http://bluehillresearch.com/ross-intelligence-and-artificial-intelligence-in-legal-research/ (On the right side of the page, enter name and email to download the full Blue Hill Benchmark Report).
   35.   *Id.*
   36.   CCBE, *supra* note 17, at 5:05-5:13.
   37.   *Id.* at 5:13-5:20.
   38.   *Id.* at 5:22-5:28.
   39.   *Id.* at 5:28-5:33.
   40.   *See* Vanderbilt University, *supra* note 32, at 15:28-15:40.
   41.   *Id.*
   42.   *Id.*
   43.   *Id.* at 9:58-10:22.
   44.   ROSS, *supra* note 3.
   45.   Dan Mangan, *Lawyers Could Be the Next Profession To Be Replaced by Computers*, CNBC (Feb. 17, 2017, 1:55 PM ET), http://www.cnbc.com/2017/02/17/lawyers-could-be-replaced-by-artificial-intelligence.html; *see also* CCBE, *supra* note 17, at 4:38-5:05 (stating "so as before where a client came to my office and unless I had dealt with a similar case with the exact same fact pattern, I had to spend hours . . . searching through case law").

work) to handle clients' cases," and it will allow firms to take on more clients.[46]

        ROSS has not received positive feedback from everyone. The legal industry has been taken by a whirlwind, fearing that the more we use ROSS, the less we will need actual human lawyers, especially lower level lawyers. However, one of the creators of ROSS, Andrew Arruda, stated that:

> [rather than] replace jobs . . . I actually think [AI] will create more jobs[;] . . . the majority of people who need a lawyer can't afford one, but these . . . are not people with no money at all, these people just have lower budgets, that can't currently be served by the mechanism we have in place as our legal system.[47]

In addition, Arruda stated, "those lawyers currently out of work could use AI services like ROSS, which offer a lower barrier of entry into the market, to create more affordable options for clients."[48] Creators of the AI attorney even pledged to provide ROSS to those attorneys "at deserving organizations" (e.g., pro bono work).[49] Arruda added that instead of replacing jobs, AI lawyers will help enhance lawyers' capabilities.[50]

III. LAWYER'S PROFESSIONAL AND MORAL JUDGMENT

        In situations where "difficult issues of professional discretion arise," the ABA Model Rules of Professional Conduct has explicitly directed lawyers to resolve these difficulties "through the exercise of sensitive professional and moral judgment" with the ethics rules as guidance.[51] Professional judgment refers to the "process of bringing coherence to conflicting values within the framework of general rules and with sensitivity to highly contextualized facts and circumstances."[52] A lawyer's professional judgment carries "within it an operative theory about the role of lawyers in the legal system and in society."[53] Thus,

---

        46.   Chris Weller, *The World's First Artificially Intelligent Lawyer Was Just Hired at a Law Firm*, BUS. INSIDER (May 16, 2016, 3:24 PM), http://uk.businessinsider.com/the-worlds-first-artificially-intelligent-lawyer-gets-hired-2016-5?r=US&IR=T.
        47.   *See* CCBE, *supra* note 17, at 6:32-6:59.
        48.   *See* Weller, *supra* note 46.
        49.   *On the Sofa with Andrew Arruda Co-Founder and CEO of ROSS*, LEGAL IT INSIDER (Dec. 20, 2016, 5:00 AM), http://www.legaltechnology.com/latest-news/on-the-sofa-with-andrew-arruda-co-founder-and-ceo-of-ROSS/.
        50.   *See* De Jesus, *supra* note 1.
        51.   MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 9 (AM. BAR ASS'N 2011).
        52.   Katherine R. Kruse, *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, 9 U. ST. THOMAS. L.J. 250, 250 (2011).
        53.   *Id.* at 251.

when an attorney carries out their professional judgment, they tap into "an implicit underlying understanding of professional role that strikes a balance between competing professional values, even if the balancing process remains under the surface."[54] A lawyer's moral judgment refers to what the individual lawyer perceives as being right or wrong.[55]

A. *Professional Judgment*

What happens when an attorney needs to use her professional judgment to make a decision? Professor Katherine Krusse, in her article entitled, *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, recognized a three level process for professional judgment called for in the ABA Model Rules: "(1) analysis of the language of the applicable rule; (2) analysis of the problem in terms of the underlying principles and policies that animate the rule; and (3) examination of how competing conceptions of professional role will provide different guidance in ethical decision making."[56] Levels one and two arguably could be achieved by reading the relevant ethics rule and the following comments section. If the comments are not exactly helpful, then one can delve into the relevant case law. However, step three seems to be unique to the lawyer herself. The process whereby a lawyer perceives her professional role in the legal system is a peculiar one that can heavily influence her professional judgment and, thus, the way she makes decisions. There are three developed theories of a lawyer's professional role in legal ethics: (1) moral activism, (2) contextual justice, and (3) fidelity to law.[57]

Moral activism theory refers to a lawyer's commitment to carry out her duties as an advocate in the legal field for the greater good rather than for instrumental gain.[58] Professor David Luban's urged a "fourfold root" analysis to assess whether the strength of moral justification of a lawyer's professional role as an advocate outweighs the justification to break from that role to avert harm to others[59] (e.g., attorneys may choose to refrain from disclosing confidential information that would have

---

54.   *Id.*

55.   Lexmilian DeMello, *What Is the Definition of Moral Judgment?*, QUORA (Aug. 16, 2015), http://www.quora.com/What-is-the-definition-of-moral-judgment.

56.   Kruse, *supra* note 52, at 252.

57.   *Id.* at 260.

58.   Paul R. Tremblay, *Moral Activism Manqué*, 445 TEX. L. REV. 127, 128 (2002).

59.   *See* Kruse, *supra* note 52, at 262.

exonerated an innocent man, because of their duty to their client).[60] Under this theory, a lawyer's legal obligations becomes part of a larger group of the lawyer's moral obligations, and thus, Professor Luban's four step test provides a way of weighing these two realms of obligations and provides guidance on how to handle a situation where there is conflict between the two.[61] To assess whether an attorney should break from her professional role in order to prevent harm to a third party, an attorney must consider:

> (1) the moral justification for the adversary system of justice; (2) how essential the role of partisan advocate is to the proper functioning of that system; (3) how essential the obligation of zeal is to the fulfillment of the role; and (4) whether the act is required to fulfill the obligation of zeal.[62]

This fourfold test is cumulative; therefore an insufficient argument at any step diminishes the justification for every other part of the link.[63]

   Contextual justice theory refers to a lawyer directly relying on "the underlying principles and values of law and legal process" to make a decision.[64]   Under this theory, an attorney's primary objective is to promote justice rather than to pursue either her client's interest or her own moral beliefs.[65] Professor William Simon urged that lawyers must "interpret the law according to its intended purposes though lawyers must remain 'alert for indications that a purposive approach' will not further the interests of justice."[66]   Importantly, this view does not completely remove from its scope the use of partisan tactics but rather urges attorneys to "consider the balance of advocacy and the institutional competence of officials to reach reliable determinations of justice."[67]

   Under the fidelity to law theory, a lawyer's primary objective is to advocate for her client's legal entitlements rather than a client's interest or the lawyer's views on what justice looks like.[68] Professor Bradley Wendel of Cornell Law School urges that this theory gives great deference to the legislative history of the law.[69]

---

   60.   Jonathan Turley, *Lawyers Reveal 26-Year-Old Secret: Innocent Man Convicted of Murder of Security Guard*, JONATHAN TURLEY (Apr. 14, 2008), http://jonathanturley.org/2008/04/14/lawyers-reveal-26-year-old-secret-innocent-man-convicted-of-murder-of-security-guard/.
   61.   *See* Kruse, *supra* note 52, at 263.
   62.   *Id.* at 262.
   63.   *Id.*
   64.   *Id.* at 263.
   65.   *Id.* at 265.
   66.   *Id.*
   67.   *Id.*
   68.   *Id.* at 266.
   69.   *Id.*

> [Lawyers] should approach the law from a Hartian "internal point of view," which acknowledges law as a source of reasons for action and draws on specifically legal materials—statutory texts, cases . . . materials, underlying principles, and canons of interpretation—as resources for conforming behavior to the community's resolution of contested normative issues.[70]

Fidelity to law theory also prevents an attorney from rendering null a law because it is unjust or from disguising her "moral advice as a judgment about what the law permits."[71] However, Professor Wendell agreed that this theory does not completely exclude from its scope "some . . . interpretive judgment."[72] He stated, "[i]f it were possible to read the meaning of law directly from legal texts,"[73] a lawyer's job would be clear cut. But, because there is ambiguity integrated into the law, an attorney must use interpretive judgment keeping in mind that it is one of limits.[74]

B.   *Moral Judgment*

Scholars argue that morality should not be considered when furnishing legal advice. Specifically, the argument is that when an attorney allows her moral judgment to affect her legal advice, this legal advice is no longer reliable.[75] However, can a lawyer carry out her legal duty by excluding moral consideration altogether? "Perhaps our moral concepts are not parts of a unified whole but fragments of the various religious and secular traditions that have historically informed our reflection on questions of value and character."[76] Therefore, because of this inconsistency throughout each individual, the argument actually is that allowing this type of inconsistency would create an unworkable justice system. Moreover, the argument that moral judgment deems legal advice unreliable is justified if one of the three following premises are established: (1) exclusive positivism, (2) moral imperialism, or (3) libertarian.[77] The exclusive positivism premise states that an attorney is capable of furnishing legal advice without referencing any moral consideration.[78] The moral imperialism premise states that by referring to

---

70.   *Id.* at 267 (citing W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 FORDHAM L. REV. 1473, 1492-98 (2006)).

71.   *Id.* (quoting W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 98-99 (2010)).

72.   *Id.*

73.   *Id.* (quoting WENDEL, *supra* note 71, at 176).

74.   *Id.*

75.   W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67,100 (2005).

76.   *Id.* at 90.

77.   *Id.* at 100.

78.   *Id.*

an attorney's own moral judgment, this is tainting "the lawyer-client relationship or . . . the lawyer's interpretation of the law."[79]   Lastly, the libertarian premise states that when an attorney takes into consideration her moral judgment, she prevents her client from acting pursuant to the furthest extent allowed by the law.[80]

    The exclusive positivism premise argues "that law and morality are analytically separable"; therefore, a legal rule can be interpreted by reading the four corners of the rule itself.[81]   Thus, there is no need to resort to a moral argument.[82]   However, the issue with this argument is that there are already specific examples where the law defers to moral consideration (e.g., ABA Model Rules Preamble section 9 states that when an ethical conflict arises, "[s]uch issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."[83]).[84]   However, it is also important to keep in mind that in instances where the rules do permit for the consideration of moral judgment, this moral judgment would reflect "reference[s] to moral notions as they have been incorporated into law" (e.g., "A present-day judge asked to rule on whether a police practice shocks the conscience would not be undertaking any freestanding moral evaluation using only her capacity as a deliberating moral agent. Rather, the judge would refer to numerous decisions interpreting the 'shocks the conscience' test . . . ."[85]).[86]   Theorists argue that this premise would lead to more stability in the legal field because of the clarity that "comes from identifying 'the law' with certain sources, such as cases and statutes, whose content can be determined by social facts alone, without resort to moral argumentation."[87]   However, this premise begs the question of whether this type of premise will lead to structuring all laws, including rules of professional conduct, in such a way that are simply authoritative with no human discretion at all. Is that what we really want?

    Second, the moral imperialism premise "asserts that freestanding moral advice would somehow interfere with the lawyer-client relationship."[88]   This argument rests on the belief that when a lawyer

---

    79.   *Id.*
    80.   *Id.*
    81.   *Id.* at 101.
    82.   *Id.*
    83.   MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 9 (AM. BAR ASS'N 2011).
    84.   Wendel, *supra* note 75, at 101.
    85.   *Id.* at 104-05.
    86.   *Id.* at 105.
    87.   *Id.* at 107-08 (emphasis omitted).
    88.   *Id.* at 110.

gives her client moral advice, the client may feel pressured into conceding with the lawyer because of intimidation.[89] Intimidation on the part of the attorney would then taint the autonomy of the client.[90]

Third, the libertarian premise refers to the belief that a lawyer will taint a client's legal rights to go to the furthest extent of the law in situations where moral considerations are involved. Specifically, in a case where a client is walking on the line of legality and illegality, a lawyer who takes into account her morals might prevent her client from acting as the client wants, even though it conforms to the law. However, some argue that one "who tries to walk right up to the boundary of [illegality] simply misunderstands what it means to comply with [the law]. Even if he manages to avoid legal sanction in a particular case, he has still not truly 'complied' with the law."[91] Thus, the aforementioned three premises show that although there are arguments for the exclusion of moral consideration when rendering legal advice, there are also situations where morality is integrated in the law and, even where it is not, there are prevailing arguments for considering it.

IV. ABA MODEL RULES OF PROFESSIONAL CONDUCT-CONFIDENTIALITY OF INFORMATION

The ABA has explicitly integrated the ability for lawyers to use their professional and moral judgment into the Model Rules of Professional Conduct. Specifically, in situations where there is discretion given to the lawyer or there is a conflict between a lawyer's duties to the client and the lawyer's "own interest in remaining an ethical person while earning a satisfactory living," the Model Rules have stated that such conflicts can be resolved "through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."[92] Model Rule 1.6 is an example of where a lawyer is given discretion to use her professional and moral judgment. Rule 1.6 states, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm . . . ."[93]

---

89.   *Id.*
90.   *Id.* ("Unless the lawyer bullies or deceives the client into changing her mind about the ends of the representation, there is nothing wrong with persuading the client to give up a planned course of action . . . as long as they respect their client's authority as principal to make final decisions regarding ends.").
91.   *Id.* at 119.
92.   MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 9 (AM. BAR ASS'N 2011).
93.   *Id.* r. 1.6.

Rule 1.6 contains ambiguities.[94] First, the word "may" allows for an attorney to decide whether or not she wants to go forward and disclose the information without any guidance from the four corners of the rule itself and relatively no guidance from the comments.[95] There are jurisdictions that use the word "shall" instead of "may" and make it mandatory for attorneys faced with these situations to come forward (e.g., Arizona).[96] However, even in these jurisdictions, this rule still leaves open deference to an attorney's professional and moral judgment because of the ambiguous nature of the words, "reasonably believes"[97] and "substantial bodily harm."

In 1980, the Illinois Supreme Court adopted a Professional Code of Ethics for lawyers,[98] which states, "A lawyer shall disclose information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm to another person, and to the extent required by law or the rules of professional conduct . . . ."[99] In 1982, two Chicago attorneys, Dale Coventry and Jamie Kunz, were defending their client, Andrew Wilson, for killing two police officers.[100] The two attorneys learned from Mr. Wilson that he was also responsible for killing a security guard at a McDonalds, despite authorities charging an innocent man, Alton Logan, with the crime.[101] The attorneys kept silent, and Logan was found guilty of murder. They decided to write their client's confession in an affidavit for possible future use.[102] When asked about their decision, Mr. Coventry stated:

---

    94.   *See* Saul Jay Singer, *Speaking of Ethics: When Tarasoff Meets Rule 1.6*, DCBAR (May 2011), http://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/may-2011-speaking-of-ethics.cfm#note5 ("The [r]ules do not exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.").

    95.   MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt.

    96.   *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (ARIZ. BAR ASS'N 2015), http://www.azbar.org/Ethics/RulesofProfessionalConduct/ViewRule?id=26.

    97.   *Reasonable Belief*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "reasonable belief" as "a sensible belief that accords with or results from using the faculty of reason"); *see also* Singer, *supra* note 94 ("When does the lawyer's belief rise to the level of the requisite 'reasonable belief' so as to permit the lawyer to breach Rule 1.6?").

    98.   George Vernon, *The Illinois Code of Professional Responsibility: A New Blueprint for Disciplinary Enforcement*, 30 DEPAUL L. REV. 365, 365 (1981).

    99.   *Id.* at 370 n.26 (quoting Ill. Code R. 4-101(c) (1980)).

    100.   *60 Minutes: 26-Year Secret Kept Innocent Man in Prison*, CBS 1, 1 (Mar. 6, 2008), http://www.cbsnews.com/news/26-year-secret-kept-innocent-man-in-prison/.

    101.   *Id.*

    102.   *Id.* at 2.

> if you check with attorneys or ethics committees or you know anybody
> who knows the rules of conduct for attorneys, it's very, very clear—it's not
> morally clear—but we're in a position to where we have to maintain client
> confidentiality, just as a priest would or a doctor would. It's just a
> requirement of the law. The system wouldn't work without it.[103]

During the time the jury was deliberating whether to give Logan life in
prison or the death penalty, Coventry sat in the court room with the intent
to come forth with the information only if the jury sentenced Logan to
death.[104] Coventry and Kunz both explained that because Illinois only
required attorneys to come forward with confidential information to
prevent death or serious bodily harm, they were not required to do so
because Logan did not receive the death penalty, but rather life in
prison.[105] The lawyers' interpretation of the Illinois Code of Ethics raises
the question: could life in prison amount to the meaning of substantial
bodily harm?

   The answer has differed depending on whom you ask. In a case
coming out of North Carolina, attorney Staples Hughes disclosed
confidential information that exonerated the co-defendant in a case he
was defending.[106] Hughes argued that he was allowed to come forth with
the information because the co-defendant, Lee Wayne Hunt, had been
sentenced to two life sentences.[107] This ongoing harm, Hughes argued,
amounted to the meaning of "substantial bodily harm."[108] Hughes stated
that a North Carolina committee cleared him of all charges.[109] It is
therefore reasonable to assume that the committee also found this
reading of the ethics code to be proper. However, Jonathan Turley
penned an article disagreeing with Hughes's interpretation of the ethics
code. Turley stated, in part, that:

> Hughes' argument may go too far. If incarceration is the same as bodily
> injury, it would allow attorneys to break confidentiality in a wide array of
> cases. Confidentiality is already under great pressure as cases have forced
> a variety of exceptions to the rule. Moreover, there is a danger of a lack of
> disclosure or trust if clients believe that their lawyers can break
> confidentiality under fluid definitions of such harm. Finally, if a lawyer

---

   103. *Id.* at 1.
   104. *Id.* at 2.
   105. *Id.*
   106. Jonathan Turley, *Lawyer Faces Charges After Revealing Confidential Statement of
Late Client To Exonerate Inmate*, JONATHAN TURLEY (Apr. 14, 2008), http://jonathanturley.org/
2008/04/14/lawyer-faces-charges-after-revealing-confidential-statement-of-late-client-to-
exonerate-inmate/.
   107. *Id.*
   108. *Id.*
   109. *Id.*

can reveal such information, there may be demands for testimony when another lawyer suspects that such information has been conveyed. Since there is no bar to disclosure, one can imagine prosecutors or other defense attorneys demanding such information.[110]

In a case from Virginia, attorney Leslie Smith was barred from coming forward with confidential information by the ethics committee, even though it could have reduced a co-defendant's death penalty sentencing.[111] However, ten years later, he asked for permission again, and this time was allowed to disclose the confidential information.[112] The above are examples of how Rule 1.6 gives great deference to a lawyer's professional and moral judgment and because such judgment is so unique to the individual lawyer, interpretations of the rule can range widely.

V.   ROSS AND ITS DEVELOPMENT OF PROFESSIONAL AND MORAL JUDGMENT

   Does ROSS have the ability to develop professional and moral judgment as called for in the ABA Model Rules of Professional Conduct? First, can ROSS apply Professor Krusse's three level process for developing professional judgment that calls on a lawyer to determine and assess (1) the language of the applicable rule, (2) the conflicts in terms of the underlying principles and policies that create the rule, and (3) the lawyer's competing conception of her professional role that will provide guidance when making decisions?[113] It is reasonable to assume that ROSS would be able to determine and assess the language of the applicable rules and the conflicts in terms of the underlying principles and policies that create the rules given the fact that ROSS is able to collect "exact passages from cases that answer your questions."[114] Thus, it is reasonable to assume that ROSS would be able to extract the relevant passages from case law that speak on the meaning of the rules, as well as the underlying principles and policies. However, developing a professional role may be an obstacle for ROSS. An attorney's professional role is unique to the individual, as is one's morals. One could argue that ROSS would have to have a perception of what its

---

   110.   *Id.*
   111.   Jonathan Turley, *Mr. Smith Goes to Court: Ethics Rules Prevented Attorney from Revealing Alleged Prosecutorial Abuse*, JONATHAN TURLEY (Jan. 21, 2008), http://jonathanturley. org/2008/01/21/mr-smith-goes-to-court-ethics-rules-prevented-attorney-from-revealing-alleged-prosecutorial-abuse/.
   112.   *Id.*
   113.   *See* Kruse, *supra* note 52, at 252.
   114.   CCBE, *supra* note 17, at 5:05-5:20.

professional role would be before it could develop its professional judgment by developing one of the following professional role theories: (1) moral activism, (2) contextual justice, (3) or fidelity to law theory.[115] Moreover, although there have been convincing arguments articulating the importance of not considering morals when rendering legal advice,[116] there are laws that explicitly call for the consideration of the attorney's professional and moral judgment (e.g., Model Rules Preamble section 9). This begs the question—how will ROSS develop its professional and moral judgment?

Given the studies relating to ROSS's ability to learn through experience without being explicitly programmed,[117] it would not be surprising if, in the future, a law firm could teach ROSS how to handle issues that require the use of professional and moral judgment, consistent with the spirit of the law firm. If the attorneys allow ROSS to handle mock issues relating to things such as confidentiality conflicts, after some time, ROSS would have a database to refer back to in order to determine how a similar issue should be decided. For example, the firm could allow ROSS to handle a mock case, similar to the Alton Logan case, where its client confessed that he was the one who killed the security guard and not the innocent man being charged for the crime. ROSS would then pull up the relevant case law that offers guidance on how the issue should be handled. Because ROSS learns by getting positive or negative feedback on its work,[118] after ROSS brings back the information, the attorneys at the law firm could either approve of the findings or disapprove until ROSS finally handles the situation as the law firm sees fit.

Accordingly, it may be reasonable to assume that ROSS would then learn and eventually develop a perception of its professional and moral judgment. Of course, there would then be the concern of what would happen should ROSS break an ethical rule? Who gets disciplined? Will ROSS be suspended from the legal practice for a month, or will it just need to undergo some more training? Will the law firm be disciplined? Who knows? However, it is unlikely, at least at this point, that ROSS's work product will go unchecked before being used in a case.

---

115. *See* Kruse, *supra* note 52, at 260.
116. *See* discussion *supra* Section III.B.
117. *See* CCBE, *supra* note 17, at 5:20-5:33.
118. *Id.*

VI. CONCLUSION

In theory, it may seem as if ROSS could decide whether a law firm should come forth with confidential information about how its client is actually responsible for killing the security guard and not the innocent man charged for the crime. Attorneys in the field, and even the Chief Technology Officer of ROSS, Jimoh Ovbiagele, might beg to differ. In a recent article by the *New York Times*, Ovbiagele stated:

> An artificial intelligence technique . . . has proved useful in scanning and predicting what documents will be relevant to a case, for example. Yet other lawyers' tasks, like advising clients, writing legal briefs, negotiating and appearing in court, seem beyond the reach of computerization, for a while.[119]

It is clear that ROSS has been exceedingly useful in the legal research department. Its efficient search functions appear superior to the traditional and costly associate and search engine model. However, an attorney's role is not merely research. Attorneys must utilize their research skills in conjunction with their individual professional and moral judgment. Answers to questions requiring either of the two require a certain human quality of which ROSS is yet equipped. Although this Comment suggests that ROSS may eventually have the capability of developing a professional and moral judgment, ROSS is still incomplete in this respect, and thus practicing attorneys need not fear unemployment just yet.

---

    119.   Steve Lohr, *A.I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet.*, N.Y. TIMES (Mar. 19, 2017), http://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html?_r=0.