AI, Ethics, Legal Malpractice – How to Avoid the Malevolent Consequences of the Witches Brew

What is artificial intelligence? What is generative AI? How is machine learning different from artificial intelligence? They are all areas of ethical concern. The use of artificial intelligence in the legal profession raises several ethical considerations for lawyers. While AI can provide valuable support to legal practitioners, it is essential for lawyers to remain mindful of their professional obligations and ethical duties. Some of the key ethical considerations include: confidentiality, competence and diligence, supervision, communication, avoiding the unauthorized practice of law, billing, bias and fairness, and responsibility and accountability.

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Seminar Title: AI, Ethics, Legal Malpractice - How to Avoid the Malevolent Consequences of the Witches Brew

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What is artificial intelligence?

What is generative AI?

How is machine learning different from artificial intelligence?

Areas for eithical concern

The use of artificial intelligence in the legal profession raises several ethical considerations for lawyers. While AI can provide valuable support to legal practitioners, it is essential for lawyers to remain mindful of their professional obligations and ethical duties. Some of the key ethical considerations include:

1. Confidentiality
2. Competence and Diligence

3. Supervision

4. Communication

5. Diligence

6. Avoiding Unauthorized Practice of Law (UPL)

7. Billing

8. Bias and fairness

9. Responsibility and accountability

New ABA Rules on AI and Ethics Shows the Technology Is 'New Wine in Old Bottles'

Not addressed in the American Bar Association's opinion on generative AI is whether the technology is considered to be engaging in the practice of law.

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5 minute read

Legal Ethics and Attorney Discipline

By The Law Journal Editorial Board | August 16, 2024 at 11:00 AM

On July 29, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 512 on generative artificial intelligence tools. The opinion follows on such opinions and guidance from several state bar associations, as well as similar efforts by non-U.S. bars and regulatory bodies around the world. While the ABA had previously added a commentary to its black-letter model rule on competence that competence includes keeping abreast of "the benefits and risks associated with relevant technology," generative AI has raised questions as to the continued viability of current rules to address this particular technology. Formal Opinion 512 indicates that the old bottles are sufficient to handle the new wine, but admits that this is not the last word and updated ethical guidance will issue.

Focused on GAI, the opinion addresses six core principles: competence, confidentiality, communication, meritorious claims and candor to tribunal, supervision and fees. A theme of reasonableness underlies the opinion;

competence, for example, does not require GAI expertness, but a "reasonable understanding" of the technology's capabilities and limitations, which cannot remain "static." How much "independent verification or review" will depend on the circumstances of the task. When the ABA first discussed adding a technological component to the competence rule, concern was raised as to the cost to the smaller firms or solo practitioners. The opinion appropriately does not attempt a one-size-fits-all admonition, but emphasizes the balancing of factors.

Other applications are self-evident, but warrant emphasis. The input of information into the GAI tool requires consideration of confidentiality issues and, where required, informed consent of the client obtained. This also leads to the need for satisfaction of the requirements of informed consent; to the extent the lawyer is using GAI in the representation, such may (or if asked, must) be disclosed to the client. While not addressed specifically in this section of the opinion, lawyers may consider addressing the use of GAI in the engagement letter, in the same way other outside services or vendors may be used. This leads to consideration of fees, which the opinion also addresses, and how the lawyer's time in using the GAI is billed, as well as the extent to which GAI is "overhead" and otherwise covered by previous opinions.

What is not commonly understood, perhaps, is that GAI "hallucinates," and generates content. That is its job. The unfortunate poster child—*Mata v. Avianca,* from the U.S. District Court for the Southern District of New York, where lawyers submitted GAI briefs that contained fictitious cases and quotes—vividly demonstrated the other discussed principles of supervision, meritorious claims and candor toward the tribunal. Various legal research products are using GAI, but their databases contain real cases. Just as in

"2001: A Space Odyssey," one cannot blame the computer if it is given contradictory parameters. GAI not properly supervised or reviewed cannot be blamed for doing its job, i.e., generating content (hallucinating) from sources available to it. The opinion correctly references the lawyer's obligation to ensure that these traditional principles of supervision and review are employed.

Not addressed in the opinion is whether GAI is engaged in the practice of law. The Japanese Ministry of Justice has issued a ruling that it is not, but that those employing it may be held liable for any actionable errors. The opinion also does not address what restraints, if any, may or should apply in terms of judicial use of GAI, and whether codes of conduct for judicial employees, as in New Jersey, should be amended. Other national bars have highlighted ethical rules relating to independence of lawyers in terms of exercise of judgment, avoidance of bias (which would implicate ABA Model Rule 8.4, which is mentioned in the opinion regarding dishonesty but not the harassment or discrimination component of the rule). While the particular guidances are not exactly alike, the core principles form a common denominator.

At the ABA annual meeting, representatives of more than 20 "foreign" bars participated in a roundtable on GAI. In a world of cross-border practice, there was a desire for harmonization. The place for that, at least from a U.S. perspective, is ABA Model Rule 8.5 (New Jersey RPC 8.5) addressing choice of law in application of ethics rules. We commend the work done on Formal Opinion 512, which is essential reading, but also suggest consideration be given to harmonization efforts where appropriate in commentary to Rule 8.5.

We also note that New Jersey's rule on competence, RPC 1.1, does not address technological competence, and that in its May 2015 report, the New Jersey Supreme Court's Special Committee on Attorney Ethics and Admissions declined to recommend any amendment to RPC 1.1, or to add an official comment to the rule to address technological competence.

We editorialized in May 2017 that rule or no rule, lawyers need to keep abreast of technology and its relevance to legal practice. While the RPCs generally do not have comments, the "Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers," issued Jan. 24, again failed to identify competence as an applicable ethical rule, focusing instead on accuracy and truthfulness (RPCs 3.1, 4.1 and 8.4), honesty, candor and communication (RPCs 3.3, 1.2 and 1.4), confidentiality (RPC 1.6), prevention of misconduct (RPC 8.4) and oversight (RPC 5.1, 5.2 and 5.3).

We urge the Supreme Court to revisit this and add technological competence to the competency requirement, even if only by inclusion in its guidelines.

Formal Opinion 512   **July 29, 2024**

Generative Artificial Intelligence Tools

To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.

I.   Introduction

Many lawyers use artificial intelligence (AI) based technologies in their practices to improve the efficiency and quality of legal services to clients.[1] A well-known use is electronic discovery in litigation, in which lawyers use technology-assisted review to categorize vast quantities of documents as responsive or non-responsive and to segregate privileged documents. Another common use is contract analytics, which lawyers use to conduct due diligence in connection with mergers and acquisitions and large corporate transactions. In the realm of analytics, AI also can help lawyers predict how judges might rule on a legal question based on data about the judge's rulings; discover the summary judgment grant rate for every federal district judge; or evaluate how parties and lawyers may behave in current litigation based on their past conduct in similar litigation. And for basic legal research, AI may enhance lawyers' search results.

This opinion discusses a subset of AI technology that has more recently drawn the attention of the legal profession and the world at large – generative AI (GAI), which can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions.[2] GAI tools that produce new text are prediction tools that generate a statistically probable output when prompted. To accomplish this, these tools analyze large amounts of digital text culled from the internet or proprietary data sources. Some GAI tools are described as "self-learning," meaning they will learn from themselves as they cull more data. GAI tools may assist lawyers in tasks such as legal research, contract review, due diligence, document review, regulatory compliance, and drafting letters, contracts, briefs, and other legal documents.

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[1] There is no single definition of artificial intelligence. At its essence, AI involves computer technology, software, and systems that perform tasks traditionally requiring human intelligence. The ability of a computer or computer-controlled robot to perform tasks commonly associated with intelligent beings is one definition. The term is frequently applied to the project of developing systems that appear to employ or replicate intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience. BRITTANICA, https://www.britannica.com/technology/artificial-intelligence (last visited July 12, 2024).
[2] George Lawton, *What is Generative AI? Everything You Need to Know*, TECHTARGET (July 12, 2024), https://www.techtarget.com/searchenterpriseai/definition/generative-AI.

GAI tools—whether general purpose or designed specifically for the practice of law—raise important questions under the ABA Model Rules of Professional Conduct.[3] What level of competency should lawyers acquire regarding a GAI tool? How can lawyers satisfy their duty of confidentiality when using a GAI tool that requires input of information relating to a representation? When must lawyers disclose their use of a GAI tool to clients? What level of review of a GAI tool's process or output is necessary? What constitutes a reasonable fee or expense when lawyers use a GAI tool to provide legal services to clients?

At the same time, as with many new technologies, GAI tools are a moving target—indeed, a *rapidly* moving target—in the sense that their precise features and utility to law practice are quickly changing and will continue to change in ways that may be difficult or impossible to anticipate. This Opinion identifies some ethical issues involving the use of GAI tools and offers general guidance for lawyers attempting to navigate this emerging landscape.[4] It is anticipated that this Committee and state and local bar association ethics committees will likely offer updated guidance on professional conduct issues relevant to specific GAI tools as they develop.

II.   Discussion

A.   Competence

Model Rule 1.1 obligates lawyers to provide competent representation to clients.[5] This duty requires lawyers to exercise the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as well as to understand "the benefits and risks associated" with the technologies used to deliver legal services to clients.[6] Lawyers may ordinarily achieve the requisite level of competency by engaging in self-study, associating with another competent lawyer, or consulting with an individual who has sufficient expertise in the relevant field.[7]

To competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations

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[3] Many of the professional responsibility concerns that arise with GAI tools are similar to the issues that exist with other AI tools and should be considered by lawyers using such technology.

[4] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023. The Opinion addresses several imminent ethics issues associated with the use of GAI, but additional issues may surface, including those found in Model Rule 7.1 ("Communications Concerning a Lawyer's Services"), Model Rule 1.7 ("Conflict of Interest: Current Clients"), and Model Rule 1.9 ("Duties to Former Clients"). *See, e.g.*, Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, at 7 (2024) (discussing the use of GAI chatbots under Florida Rule 4-7.13, which prohibits misleading content and unduly manipulative or intrusive advertisements); Pa. State Bar Ass'n Comm. on Legal Ethics & Prof'l Resp. & Philadelphia Bar Ass'n Prof'l Guidance Comm. Joint Formal Op. 2024-200 [hereinafter Pa. & Philadelphia Joint Formal Opinion 2024-200], at 10 (2024) ("Because the large language models used in generative AI continue to develop, some without safeguards similar to those already in use in law offices, such as ethical walls, they may run afoul of Rules 1.7 and 1.9 by using the information developed from one representation to inform another."). Accordingly, lawyers should consider all rules before using GAI tools.

[5] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2023) [hereinafter MODEL RULES].

[6] MODEL RULES R. 1.1 & cmt. [8]. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 2–3 (2017) [hereinafter ABA Formal Op. 477R] (discussing the ABA's "technology amendments" made to the Model Rules in 2012).

[7] MODEL RULES R. 1.1 cmts. [1], [2] & [4]; Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *2–3 (2015).

of the specific GAI technology that the lawyer might use. This means that lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations.[8] This is not a static undertaking. Given the fast-paced evolution of GAI tools, technological competence presupposes that lawyers remain vigilant about the tools' benefits and risks.[9] Although there is no single right way to keep up with GAI developments, lawyers should consider reading about GAI tools targeted at the legal profession, attending relevant continuing legal education programs, and, as noted above, consulting others who are proficient in GAI technology.[10]

With the ability to quickly create new, seemingly human-crafted content in response to user prompts, GAI tools offer lawyers the potential to increase the efficiency and quality of their legal services to clients. Lawyers must recognize inherent risks, however.[11] One example is the risk of producing inaccurate output, which can occur in several ways. The large language models underlying GAI tools use complex algorithms to create fluent text, yet GAI tools are only as good as their data and related infrastructure. If the quality, breadth, and sources of the underlying data on which a GAI tool is trained are limited or outdated or reflect biased content, the tool might produce unreliable, incomplete, or discriminatory results. In addition, the GAI tools lack the ability to understand the meaning of the text they generate or evaluate its context.[12] Thus, they may combine otherwise accurate information in unexpected ways to yield false or inaccurate results.[13] Some GAI tools are also prone to "hallucinations," providing ostensibly plausible responses that have no basis in fact or reality.[14]

Because GAI tools are subject to mistakes, lawyers' uncritical reliance on content created by a GAI tool can result in inaccurate legal advice to clients or misleading representations to courts and third parties. Therefore, a lawyer's reliance on, or submission of, a GAI tool's output—without

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[8] Pa. Bar Ass'n, Comm. on Legal Ethics & Prof'l Resp. Op. 2020-300, 2020 WL 2544268, at *2–3 (2020). *See also* Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2023-208, 2023 WL 4035467, at *2 (2023) adopting a "reasonable efforts standard" and "fact-specific approach" to a lawyer's duty of technology competence, citing ABA Formal Opinion 477R, at 4).

[9] *See* New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749 (2017) (emphasizing that "[l]awyers must be responsive to technological developments as they become integrated into the practice of law"); Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *1 (2015) (discussing the level of competence required for lawyers to handle e-discovery issues in litigation).

[10] MODEL RULES R. 1.1 cmt. [8]; *see* Melinda J. Bentley, *The Ethical Implications of Technology in Your Law Practice: Understanding the Rules of Professional Conduct Can Prevent Potential Problems*, 76 J. MO. BAR 1 (2020) (identifying ways for lawyers to acquire technology competence skills).

[11] As further detailed in this opinion, lawyers' use of GAI raises confidentiality concerns under Model Rule 1.6 due to the risk of disclosure of, or unauthorized access to, client information. GAI also poses complex issues relating to ownership and potential infringement of intellectual property rights and even potential data security threats.

[12] *See,* W. Bradley Wendel, *The Promise and Limitations of AI in the Practice of Law,* 72 OKLA. L. REV. 21, 26 (2019) (discussing the limitations of AI based on an essential function of lawyers, making normative judgments that are impossible for AI).

[13] *See, e.g.*, Karen Weise & Cade Metz, *When A.I. Chatbots Hallucinate*, N.Y. TIMES (May 1, 2023).

[14] Ivan Moreno, *AI Practices Law 'At the Speed of Machines.' Is it Worth It?*, LAW360 (June 7, 2023); *See* Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning, & Daniel E. Ho, *Hallucination Free? Assessing the Reliability of Leading AI Legal Research Tools*, STANFORD UNIVERSITY (June 26, 2024), *available at* https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf (study finding leading legal research companies' GAI systems "hallucinate between 17% and 33% of the time").

an appropriate degree of independent verification or review of its output—could violate the duty to provide competent representation as required by Model Rule 1.1.[15] While GAI tools may be able to significantly assist lawyers in serving clients, they cannot replace the judgment and experience necessary for lawyers to competently advise clients about their legal matters or to craft the legal documents or arguments required to carry out representations.

The appropriate amount of independent verification or review required to satisfy Rule 1.1 will necessarily depend on the GAI tool and the specific task that it performs as part of the lawyer's representation of a client. For example, if a lawyer relies on a GAI tool to review and summarize numerous, lengthy contracts, the lawyer would not necessarily have to manually review the entire set of documents to verify the results if the lawyer had previously tested the accuracy of the tool on a smaller subset of documents by manually reviewing those documents, comparing then to the summaries produced by the tool, and finding the summaries accurate. Moreover, a lawyer's use of a GAI tool designed specifically for the practice of law or to perform a discrete legal task, such as generating ideas, may require less independent verification or review, particularly where a lawyer's prior experience with the GAI tool provides a reasonable basis for relying on its results.

While GAI may be used as a springboard or foundation for legal work—for example, by generating an analysis on which a lawyer bases legal advice, or by generating a draft from which a lawyer produces a legal document—lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that call for the exercise of professional judgment. For example, lawyers may not leave it to GAI tools alone to offer legal advice to clients, negotiate clients' claims, or perform other functions that require a lawyer's personal judgment or participation.[16] Competent representation presupposes that lawyers will exercise the requisite level of skill and judgment regarding all legal work. In short, regardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.

Emerging technologies may provide an output that is of distinctively higher quality than current GAI tools produce, or may enable lawyers to perform work markedly faster and more economically, eventually becoming ubiquitous in legal practice and establishing conventional expectations regarding lawyers' duty of competence.[17] Over time, other new technologies have become integrated into conventional legal practice in this manner.[18] For example, "a lawyer would have difficulty providing competent legal services in today's environment without knowing how

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[15] *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451, at 1 (2008) [hereinafter ABA Formal Op. 08-451] (concluding that "[a] lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1").

[16] *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.

[17] *See, e.g.*, Sharon Bradley, *Rule 1.1 Duty of Competency and Internet Research: Benefits and Risks Associated with Relevant Technology* at 7 (2019), *available at* https://ssrn.com/abstract=3485055 ("View Model Rule 1.1 as elastic. It is expanding as legal technology solutions expand. The ever-changing shape of this rule makes clear that a lawyer cannot simply learn technology today and never again update their skills or knowledge.").

[18] *See, e.g.*, Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975) (stating that a lawyer is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by *standard research techniques*") (emphasis added); Hagopian v. Justice Admin. Comm'n, 18 So. 3d 625, 642 (Fla. Dist. Ct. App. 2009) (observing that lawyers have "become expected to use computer-assisted legal research to ensure that their research is complete and up-to-date, but the costs of this service can be significant").

to use email or create an electronic document."[19] Similar claims might be made about other tools such as computerized legal research or internet searches.[20] As GAI tools continue to develop and become more widely available, it is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients.[21] But even in the absence of an expectation for lawyers to use GAI tools as a matter of course,[22] lawyers should become aware of the GAI tools relevant to their work so that they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means.[23] As previously noted regarding the possibility of outsourcing certain work, "[t]here is no unique blueprint for the provision of competent legal services. Different lawyers may perform the same tasks through different means, all with the necessary 'legal knowledge, skill, thoroughness and preparation.'"[24] Ultimately, any informed decision about whether to employ a GAI tool must consider the client's interests and objectives.[25]

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[19] ABA Formal Op. 477R, *supra* note 6, at 3 (quoting ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012)).

[20] *See, e.g.*, Bradley, *supra* note 17, at 3 ("Today no competent lawyer would rely solely upon a typewriter to draft a contract, brief, or memo. Typewriters are no longer part of 'methods and procedures' used by competent lawyers."); Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 608 (2000) ("The lawyer in the twenty-first century who does not effectively use the Internet for legal research may fall short of the minimal standards of professional competence and be potentially liable for malpractice"); Ellie Margolis, *Surfin' Safari— Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 110 (2007) ("While a lawyer's research methods reveal a great deal about the competence of the research, the method of research is ultimately a secondary inquiry, only engaged in when the results of that research process is judged inadequate. A lawyer who provides the court with adequate controlling authority is not going to be judged incompetent whether she found that authority in print, electronically, or by any other means."); Michael Thomas Murphy, *The Search for Clarity in an Attorney's Duty to Google*, 18 LEGAL COMM. & RHETORIC: JALWD 133, 133 (2021) ("This Duty to Google contemplates that certain readily available information on the public Internet about a legal matter is so easily accessible that it must be discovered, collected, and examined by an attorney, or else that attorney is acting unethically, committing malpractice, or both"); Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 91 (2000) ("Unless it can be shown that the use of electronic sources in legal research has become a standard technique, then lawyers who fail to use electronic sources will not be deemed unethical or negligent in his or her failure to use such tools.").

[21] *See* MODEL RULES R. 1.1 cmt. [5] (stating that "[c]ompetent handling of a particular matter includes . . . [the] use of methods and procedures meeting the standards of competent practitioners"); New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749, 2017 WL 11659554, at *3 (2017) (explaining that the duty of competence covers not only substantive knowledge in different areas of the law, but also the manner in which lawyers provide legal services to clients).

[22] The establishment of such an expectation would likely require an increased acceptance of GAI tools across the legal profession, a track record of reliable results from those platforms, the widespread availability of these technologies to lawyers from a cost or financial standpoint, and robust client demand for GAI tools as an efficiency or cost-cutting measure.

[23] Model Rule 1.5's prohibition on unreasonable fees, as well as market forces, may influence lawyers to use new technology in favor of slower or less efficient methods.

[24] ABA Formal Op. 08-451, *supra* note 15, at 2. *See also id.* ("Rule 1.1 does not require that tasks be accomplished in any special way. The rule requires only that the lawyer who is responsible to the client satisfies her obligation to render legal services competently.").

[25] MODEL RULES R. 1.2(a).

B.   Confidentiality

A lawyer using GAI must be cognizant of the duty under Model Rule 1.6 to keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent, disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by an exception.[26] Model Rules 1.9(c) and 1.18(b) require lawyers to extend similar protections to former and prospective clients' information. Lawyers also must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."[27]

Generally, the nature and extent of the risk that information relating to a representation may be revealed depends on the facts. In considering whether information relating to any representation is adequately protected, lawyers must assess the likelihood of disclosure and unauthorized access, the sensitivity of the information,[28] the difficulty of implementing safeguards, and the extent to which safeguards negatively impact the lawyer's ability to represent the client.[29]

Before lawyers input information relating to the representation of a client into a GAI tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm. Lawyers must also evaluate the risk that the information will be disclosed to or accessed by others *inside* the firm who will not adequately protect the information from improper disclosure or use[30] because, for example, they are unaware of the source of the information and that it originated with a client of the firm. Because GAI tools now available differ in their ability to ensure that information relating to the representation is protected from impermissible disclosure and access, this risk analysis will be fact-driven and depend on the client, the matter, the task, and the GAI tool used to perform it.[31]

Self-learning GAI tools into which lawyers input information relating to the representation, by their very nature, raise the risk that information relating to one client's representation may be disclosed improperly,[32] even if the tool is used exclusively by lawyers at the same firm.[33] This can occur when information relating to one client's representation is input into the tool, then later revealed in response to prompts by lawyers working on other matters, who then share that output with other clients, file it with the court, or otherwise disclose it. In other words, the self-learning

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[26] MODEL RULES R. 1.6; MODEL RULES R. 1.6 cmt. [3].

[27] MODEL RULES R. 1.6(c).

[28] ABA Formal Op. 477R, *supra* note 6, at 1 (A lawyer "may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when … the nature of the information requires a higher degree of security.").

[29] MODEL RULES R. 1.6, cmt. [18].

[30] *See* MODEL RULES R. 1.8(b), which prohibits use of information relating to the representation of a client to the disadvantage of the client.

[31] *See* ABA Formal Op. 477R, *supra* note 6, at 4 (rejecting specific security measures to protect information relating to a client's representation and advising lawyers to adopt a fact-specific approach to data security).

[32] *See generally* State Bar of Cal. Standing Comm. on Prof'l Resp. & Conduct, PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW (2024), *available at* https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf; Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.

[33] *See* Pa. & Philadelphia Joint Formal Opinion 2024-200, *supra* note 4, at 10 (noting risk that information relating to one representation may be used to inform work on another representation).

GAI tool may disclose information relating to the representation to persons outside the firm who are using the same GAI tool. Similarly, it may disclose information relating to the representation to persons in the firm (1) who either are prohibited from access to said information because of an ethical wall or (2) who could inadvertently use the information from one client to help another client, not understanding that the lawyer is revealing client confidences. Accordingly, because many of today's self-learning GAI tools are designed so that their output could lead directly or indirectly to the disclosure of information relating to the representation of a client, a client's informed consent is required prior to inputting information relating to the representation into such a GAI tool.[34]

When consent is required, it must be informed. For the consent to be informed, the client must have the lawyer's best judgment about why the GAI tool is being used, the extent of and specific information about the risk, including particulars about the kinds of client information that will be disclosed, the ways in which others might use the information against the client's interests, and a clear explanation of the GAI tool's benefits to the representation. Part of informed consent requires the lawyer to explain the extent of the risk that later users or beneficiaries of the GAI tool will have access to information relating to the representation. To obtain informed consent when using a GAI tool, merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient.[35]

Because of the uncertainty surrounding GAI tools' ability to protect such information and the uncertainty about what happens to information both at input and output, it will be difficult to evaluate the risk that information relating to the representation will either be disclosed to or accessed by others inside the firm to whom it should not be disclosed as well as others outside the firm.[36] As a baseline, all lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms and policies of any GAI tool they use to learn who has access to the information that the lawyer inputs into the tool or consult with a colleague or external expert who has read and analyzed those terms and policies.[37] Lawyers may need to consult with IT professionals or cyber security experts to fully understand these terms and policies as well as the manner in which GAI tools utilize information.

Today, there are uses of self-learning GAI tools in connection with a legal representation when client informed consent is not required because the lawyer will not be inputting information relating to the representation. As an example, if a lawyer is using the tool for idea generation in a manner that does not require inputting information relating to the representation, client informed consent would not be necessary.

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[34] This conclusion is based on the risks and capabilities of GAI tools as of the publication of this opinion. As the technology develops, the risks may change in ways that would alter our conclusion. *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4, at 2; W. Va. Lawyer Disciplinary Bd. Op. 24-01 (2024), *available at* http://www.wvodc.org/pdf/AILEO24-01.pdf.

[35] *See* W. Va. Lawyer Disciplinary Bd. Op. 24-01, *supra* note 34.

[36] Magesh et al. *supra* note 14, at 23 (describing some of the GAI tools available to lawyers as "difficult for lawyers to assess when it is safe to trust them. Official documentation does not clearly illustrate what they can do for lawyers and in which areas lawyers should exercise caution.")

[37] Stephanie Pacheco, *Three Considerations for Attorneys Using Generative AI,* Bloomberg Law Analysis (June 16, 2023, 4:00 pm), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-considerations-for-attorneys-using-generative-ai?context=search&index=7.

C. Communication

Where Model Rule 1.6 does not require disclosure and informed consent, the lawyer must separately consider whether other Model Rules, particularly Model Rule 1.4, require disclosing the use of a GAI tool in the representation.

Model Rule 1.4, which addresses lawyers' duty to communicate with their clients, builds on lawyers' legal obligations as fiduciaries, which include "the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."[38] Of particular relevance, Model Rule 1.4(a)(2) states that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Additionally, Model Rule 1.4(b) obligates lawyers to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Comment [5] to Rule 1.4 explains, "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Considering these underlying principles, questions arise regarding whether and when lawyers might be required to disclose their use of GAI tools to clients pursuant to Rule 1.4.

The facts of each case will determine whether Model Rule 1.4 requires lawyers to disclose their GAI practices to clients or obtain their informed consent to use a particular GAI tool. Depending on the circumstances, client disclosure may be unnecessary.

Of course, lawyers must disclose their GAI practices if asked by a client how they conducted their work, or whether GAI technologies were employed in doing so, or if the client expressly requires disclosure under the terms of the engagement agreement or the client's outside counsel guidelines.[39] There are also situations where Model Rule 1.4 requires lawyers to discuss their use of GAI tools unprompted by the client.[40] For example, as discussed in the previous section, clients would need to be informed in advance, and to give informed consent, if the lawyer proposes to input information relating to the representation into the GAI tool.[41] Lawyers must also consult clients when the use of a GAI tool is relevant to the basis or reasonableness of a lawyer's fee.[42]

Client consultation about the use of a GAI tool is also necessary when its output will influence a significant decision in the representation,[43] such as when a lawyer relies on GAI

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[38] Baker v. Humphrey, 101 U.S. 494, 500 (1879).

[39] *See, e.g.*, MODEL RULES R. 1.4(a)(4) ("A lawyer shall . . . promptly comply with reasonable requests for information[.]").

[40] *See* MODEL RULES R. 1.4(a)(1) (requiring lawyers to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent" is required by the rules of professional conduct).

[41] See section B for a discussion of confidentiality issues under Rule 1.6.

[42] See section F for a discussion of fee issues under Rule 1.5.

[43] Guidance may be found in ethics opinions requiring lawyers to disclose their use of temporary lawyers whose involvement is significant or otherwise material to the representation. *See, e.g.*, Va. State Bar Legal Ethics Op. 1850, 2010 WL 5545407, at *5 (2010) (acknowledging that "[t]here is little purpose to informing a client every time a lawyer outsources legal support services that are truly tangential, clerical, or administrative in nature, or even when basic legal research or writing is outsourced without any client confidences being revealed"); Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2004-165, 2004 WL 3079030, at *2–3 (2004) (opining that a

technology to evaluate potential litigation outcomes or jury selection. A client would reasonably want to know whether, in providing advice or making important decisions about how to carry out the representation, the lawyer is exercising independent judgment or, in the alternative, is deferring to the output of a GAI tool. Or there may be situations where a client retains a lawyer based on the lawyer's particular skill and judgment, when the use of a GAI tool, without the client's knowledge, would violate the terms of the engagement agreement or the client's reasonable expectations regarding how the lawyer intends to accomplish the objectives of the representation.

It is not possible to catalogue every situation in which lawyers must inform clients about their use of GAI. Again, lawyers should consider whether the specific circumstances warrant client consultation about the use of a GAI tool, including the client's needs and expectations, the scope of the representation, and the sensitivity of the information involved. Potentially relevant considerations include the GAI tool's importance to a particular task, the significance of that task to the overall representation, how the GAI tool will process the client's information, and the extent to which knowledge of the lawyer's use of the GAI tool would affect the client's evaluation of or confidence in the lawyer's work.

Even when Rule 1.6 does not require informed consent and Rule 1.4 does not require a disclosure regarding the use of GAI, lawyers may tell clients how they employ GAI tools to assist in the delivery of legal services. Explaining this may serve the interest of effective client communication. The engagement agreement is a logical place to make such disclosures and to identify any client instructions on the use of GAI in the representation.[44]

D.   Meritorious Claims and Contentions and Candor Toward the Tribunal

Lawyers using GAI in litigation have ethical responsibilities to the courts as well as to clients. Model Rules 3.1, 3.3, and 8.4(c) may be implicated by certain uses. Rule 3.1 states, in part, that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert and issue therein, unless there is a basis in law or fact for doing so that is not frivolous." Rule 3.3 makes it clear that lawyers cannot knowingly make any false statement of law or fact to a tribunal or fail to correct a material false statement of law or fact previously made to a tribunal.[45] Rule 8.4(c) provides that a

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lawyer must disclose the use of a temporary lawyer to a client where the temporary lawyer's use constitutes a "significant development" in the matter and listing relevant considerations); N.Y. State Bar Ass'n, Comm on Prof'l Ethics 715, at 7 (1999) (opining that "whether a law firm needs to disclose to the client and obtain client consent for the participation of a Contract lawyer depends upon whether client confidences will be disclosed to the lawyer, the degree of involvement of the lawyer in the matter, and the significance of the work done by the lawyer"); D.C. Bar Op. 284, at 4 (1988) (recommending client disclosure "whenever the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations"); Fla. State Bar Ass'n, Comm. on Prof'l Ethics Op. 88-12, 1988 WL 281590, at *2 (1988) (stating that disclosure of a temporary lawyer depends "on whether the client would likely consider the information material");.

[44] For a discussion of what client notice and informed consent under Rule 1.6 may require, see section B.

[45] MODEL RULES R. 3.3(a) reads: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if

lawyer shall not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." Even an unintentional misstatement to a court can involve a misrepresentation under Rule 8.4(c). Therefore, output from a GAI tool must be carefully reviewed to ensure that the assertions made to the court are not false.

Issues that have arisen to date with lawyers' use of GAI outputs include citations to nonexistent opinions, inaccurate analysis of authority, and use of misleading arguments.[46]

Some courts have responded by requiring lawyers to disclose their use of GAI.[47] As a matter of competence, as previously discussed, lawyers should review for accuracy all GAI outputs. In judicial proceedings, duties to the tribunal likewise require lawyers, before submitting materials to a court, to review these outputs, including analysis and citations to authority, and to correct errors, including misstatements of law and fact, a failure to include controlling legal authority, and misleading arguments.

E. Supervisory Responsibilities

Model Rules 5.1 and 5.3 address the ethical duties of lawyers charged with managerial and supervisory responsibilities and set forth those lawyers' responsibilities with regard to the firm, subordinate lawyers, and nonlawyers. Managerial lawyers must create effective measures to ensure that all lawyers in the firm conform to the rules of professional conduct,[48] and supervisory lawyers must supervise subordinate lawyers and nonlawyer assistants to ensure that subordinate lawyers and nonlawyer assistants conform to the rules.[49] These responsibilities have implications for the use of GAI tools by lawyers and nonlawyers.

Managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools.[50] Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained,[51] including in the ethical and practical use of the GAI tools relevant to their work as well as on risks associated with relevant GAI use.[52] Training could include the basics of GAI technology, the capabilities and limitations of the tools, ethical issues in use of GAI and best practices for secure data handling, privacy, and confidentiality.

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necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

[46] *See* DC Bar Op. 388 (2024).

[47] Lawyers should consult with the applicable court's local rules to ensure that they comply with those rules with respect to AI use. As noted in footnote 4, no one opinion could address every ethics issue presented when a lawyer uses GAI. For example, depending on the facts, issues relating to Model Rule 3.4(c) could be presented.

[48] *See* MODEL RULES R. 1.0(c) for the definition of firm.

[49] ABA Formal Op. 08-451, *supra* note 15.

[50] MODEL RULES R. 5.1.

[51] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

[52] *See generally*, MODEL RULES R. 1.1, cmt. [8]. One training suggestion is that all materials produced by GAI tools be marked as such when stored in any client or firm file so future users understand potential fallibility of the work.

Lawyers have additional supervisory obligations insofar as they rely on others outside the law firm to employ GAI tools in connection with the legal representation. Model Rule 5.3(b) imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's conduct conforms with the professional obligations of the lawyer. Earlier opinions recognize that when outsourcing legal and nonlegal services to third-party providers, lawyers must ensure, for example, that the third party will do the work capably and protect the confidentiality of information relating to the representation.[53] These opinions note the importance of: reference checks and vendor credentials; understanding vendor's security policies and protocols; familiarity with vendor's hiring practices; using confidentiality agreements; understanding the vendor's conflicts check system to screen for adversity among firm clients; and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement. These concepts also apply to GAI providers and tools.

Earlier opinions regarding technological innovations and other innovations in legal practice are instructive when considering a lawyer's use of a GAI tool that requires the disclosure and storage of information relating to the representation.[54] In particular, opinions developed to address cloud computing and outsourcing of legal and nonlegal services suggest that lawyers should:

- ensure that the [GAI tool] is configured to preserve the confidentiality and security of information, that the obligation is enforceable, and that the lawyer will be notified in the event of a breach or service of process regarding production of client information;[55]
- investigate the [GAI tool's] reliability, security measures, and policies, including limitations on the [the tool's] liability;[56]
- determine whether the [GAI tool] retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information;[57] and
- understand the risk that [GAI tool servers] are subject to their own failures and may be an attractive target of cyber-attacks.[58]

F.   Fees

Model Rule 1.5, which governs lawyers' fees and expenses, applies to representations in which a lawyer charges the client for the use of GAI. Rule 1.5(a) requires a lawyer's fees and expenses to be reasonable and includes a non-exclusive list of criteria for evaluating whether a fee

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[53] ABA Formal Op. 08-451, *supra* note 15; ABA Formal. Op. 477R, *supra* note 6.

[54] *See* ABA Formal Op. 08-451, *supra* note 15.

[55] Fla. Bar Advisory Op. 12-3 (2013).

[56] *Id.* citing Iowa State Bar Ass'n Comm. on Ethics & Practice Guidelines Op. 11-01 (2011) [hereinafter Iowa Ethics Opinion 11-01].

[57] Fla. Bar Advisory Op. 24-1, *supra* note 4; Fla. Bar Advisory Op. 12-3, *supra* note 55; Iowa Ethics Opinion 11-01, *supra* note 56.

[58] Fla. Bar Advisory Op. 12-3, *supra* note 55; *See generally* Melissa Heikkila, *Three Ways AI Chatbots are a Security Disaster*, MIT TECHNOLOGY REVIEW (Apr. 3, 2023), www.technologyreview.com/2023/04/03/1070893/three-ways-ai-chatbots-are-a-security-disaster/.

or expense is reasonable.[59] Rule 1.5(b) requires a lawyer to communicate to a client the basis on which the lawyer will charge for fees and expenses unless the client is a regularly represented client and the terms are not changing. The required information must be communicated before or within a reasonable time of commencing the representation, preferably in writing. Therefore, before charging the client for the use of the GAI tools or services, the lawyer must explain the basis for the charge, preferably in writing.

GAI tools may provide lawyers with a faster and more efficient way to render legal services to their clients, but lawyers who bill clients an hourly rate for time spent on a matter must bill for their actual time. ABA Formal Ethics Opinion 93-379 explained, "the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she has actually expended on the client's behalf."[60] If a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the GAI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness. As further explained in Opinion 93-379, "If a lawyer has agreed to charge the client on [an hourly] basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter,"[61] because "[t]he client should only be charged a reasonable fee for the legal services performed."[62] The "goal should be solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client."[63]

The factors set forth in Rule 1.5(a) also apply when evaluating the reasonableness of charges for GAI tools when the lawyer and client agree on a flat or contingent fee.[64] For example, if using a GAI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the GAI tool as when not using it. "A fee charged for which little or no work was performed is an unreasonable fee."[65]

The principles set forth in ABA Formal Opinion 93-379 also apply when a lawyer charges GAI work as an expense. Rule 1.5(a) requires that disbursements, out-of-pocket expenses, or additional charges be reasonable. Formal Opinion 93-379 explained that a lawyer may charge the

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[59] The listed considerations are (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

[60] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379, at 6 (1993) [hereinafter ABA Formal Op. 93-379].

[61] *Id.*

[62] *Id.* at 5.

[63] *Id.*

[64] *See, e.g.*, *Williams Cos. v. Energy Transfer LP*, 2022 Del. Ch. LEXIS 207, 2022 WL 3650176 (Del. Ch. Aug. 25, 2022) (applying same principles to contingency fee).

[65] Att'y Grievance Comm'n v. Monfried, 794 A.2d 92, 103 (Md. 2002) (finding that a lawyer violated Rule 1.5 by charging a flat fee of $1,000 for which the lawyer did little or no work).

client for disbursements incurred in providing legal services to the client. For example, a lawyer typically may bill to the client the actual cost incurred in paying a court reporter to transcribe a deposition or the actual cost to travel to an out-of-town hearing.[66] Absent contrary disclosure to the client, the lawyer should not add a surcharge to the actual cost of such expenses and should pass along to the client any discounts the lawyer receives from a third-party provider.[67] At the same time, lawyers may not bill clients for general office overhead expenses including the routine costs of "maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities, and the like."[68] Formal Opinion 93-379 noted, "[i]n the absence of disclosure to a client in advance of the engagement to the contrary," such overhead should be "subsumed within" the lawyer's charges for professional services.[69]

In applying the principles set out in ABA Formal Ethics Opinion 93-379 to a lawyer's use of a GAI tool, lawyers should analyze the characteristics and uses of each GAI tool, because the types, uses, and cost of GAI tools and services vary significantly. To the extent a particular tool or service functions similarly to equipping and maintaining a legal practice, a lawyer should consider its cost to be overhead and not charge the client for its cost absent a contrary disclosure to the client in advance. For example, when a lawyer uses a GAI tool embedded in or added to the lawyer's word processing software to check grammar in documents the lawyer drafts, the cost of the tool should be considered to be overhead. In contrast, when a lawyer uses a third-party provider's GAI service to review thousands of voluminous contracts for a particular client and the provider charges the lawyer for using the tool on a per-use basis, it would ordinarily be reasonable for the lawyer to bill the client as an expense for the actual out-of-pocket expense incurred for using that tool.

As acknowledged in ABA Formal Opinion 93-379, perhaps the most difficult issue is determining how to charge clients for providing in-house services that are not required to be included in general office overhead and for which the lawyer seeks reimbursement. The opinion concluded that lawyers may pass on reasonable charges for "photocopying, computer research, . . . and similar items" rather than absorbing these expenses as part of the lawyers' overhead as many lawyers would do.[70] For example, a lawyer may agree with the client in advance on the specific rate for photocopying, such as $0.15 per page. Absent an advance agreement, the lawyer "is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of the photocopy machine operator)."[71]

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[66] ABA Formal Op. 93-379 at 7.

[67] *Id.* at 8.

[68] *Id.* at 7.

[69] *Id.*

[70] *Id.* at 8.

[71] *Id.* Opinion 93-379 also explained, "It is not appropriate for the Committee, in addressing ethical standards, to opine on the various accounting issues as to how one calculates direct cost and what may or may not be included in allocated overhead. These are questions which properly should be reserved for our colleagues in the accounting profession. Rather, it is the responsibility of the Committee to explain the principles it draws from the mandate of Model Rule 1.5's injunction that fees be reasonable. Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services." *Id.*

These same principles apply when a lawyer uses a proprietary, in-house GAI tool in rendering legal services to a client. A firm may have made a substantial investment in developing a GAI tool that is relatively unique and that enables the firm to perform certain work more quickly or effectively. The firm may agree in advance with the client about the specific rates to be charged for using a GAI tool, just as it would agree in advance on its legal fees. But not all in-house GAI tools are likely to be so special or costly to develop, and the firm may opt not to seek the client's agreement on expenses for using the technology. Absent an agreement, the firm may charge the client no more than the direct cost associated with the tool (if any) plus a reasonable allocation of expenses directly associated with providing the GAI tool, while providing appropriate disclosures to the client consistent with Formal Opinion 93-379. The lawyer must ensure that the amount charged is not duplicative of other charges to this or other clients.

Finally, on the issue of reasonable fees, in addition to the time lawyers spend using various GAI tools and services, lawyers also will expend time to gain knowledge about those tools and services. Rule 1.1 recognizes that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] explains that "[t]o maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engaging in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[72] Lawyers must remember that they may not charge clients for time necessitated by their own inexperience.[73] Therefore, a lawyer may not charge a client to learn about how to use a GAI tool or service that the lawyer will regularly use for clients because lawyers must maintain competence in the tools they use, including but not limited to GAI technology. However, if a client explicitly requests that a specific GAI tool be used in furtherance of the matter and the lawyer is not knowledgeable in using that tool, it may be appropriate for the lawyer to bill the client to gain the knowledge to use the tool effectively. Before billing the client, the lawyer and the client should agree upon any new billing practices or billing terms relating to the GAI tool and, preferably, memorialize the new agreement.

III.   Conclusion

Lawyers using GAI tools have a duty of competence, including maintaining relevant technological competence, which requires an understanding of the evolving nature of GAI. In

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[72] MODEL RULES R. 1.1, cmt. [8] (emphasis added); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021).

[73] Heavener v. Meyers, 158 F. Supp. 2d 1278 (E.D. Okla. 2001) (five hundred hours for straightforward Fourth Amendment excessive-force claim and nineteen hours for research on Eleventh Amendment defense indicated excessive billing due to counsel's inexperience); *In re* Poseidon Pools of Am., Inc., 180 B.R. 718 (Bankr. E.D.N.Y. 1995) (denying compensation for various document revisions; "we note that given the numerous times throughout the Final Application that Applicant requests fees for revising various documents, Applicant fails to negate the obvious possibility that such a plethora of revisions was necessitated by a level of competency less than that reflected by the Applicant's billing rates"); Att'y Grievance Comm'n v. Manger, 913 A.2d 1 (Md. 2006) ("While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client."); *In re* Hellerud, 714 N.W.2d 38 (N.D. 2006) (reduction in hours, fee refund of $5,651.24, and reprimand for lawyer unfamiliar with North Dakota probate work who charged too many hours at too high a rate for simple administration of cash estate; "it is counterintuitive to charge a higher hourly rate for knowing less about North Dakota law").

using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services, and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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PRACTICAL GUIDANCE FOR THE USE OF
GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW

EXECUTIVE SUMMARY

Generative AI is a tool that has wide-ranging application for the practice of law and administrative functions of the legal practice for all licensees, regardless of firm size, and all practice areas. Like any technology, generative AI must be used in a manner that conforms to a lawyer's professional responsibility obligations, including those set forth in the Rules of Professional Conduct and the State Bar Act. A lawyer should understand the risks and benefits of the technology used in connection with providing legal services. How these obligations apply will depend on a host of factors, including the client, the matter, the practice area, the firm size, and the tools themselves, ranging from free and readily available to custom-built, proprietary formats.

Generative AI use presents unique challenges; it uses large volumes of data, there are many competing AI models and products, and, even for those who create generative AI products, there is a lack of clarity as to how it works. In addition, generative AI poses the risk of encouraging greater reliance and trust on its outputs because of its purpose to generate responses and its ability to do so in a manner that projects confidence and effectively emulates human responses. A lawyer should consider these and other risks before using generative AI in providing legal services.

The following Practical Guidance is based on current professional responsibility obligations for lawyers and demonstrates how to behave consistently with such obligations. While this guidance is intended to address issues and concerns with the use of generative AI and products that use generative AI as a component of a larger product, it may apply to other technologies, including more established applications of AI. This Practical Guidance should be read as guiding principles rather than as "best practices."

PRACTICAL GUIDANCE

Applicable Authorities	Practical Guidance
Duty of Confidentiality Bus. & Prof. Code, § 6068, subd. (e) Rule 1.6 Rule 1.8.2	Generative AI products are able to utilize the information that is input, including prompts and uploaded documents or resources, to train the AI, and might also share the query with third parties or use it for other purposes. Even if the product does not utilize or share inputted information, it may lack reasonable or adequate security. A lawyer must not input any confidential information of the client into any generative AI solution that lacks adequate confidentiality and security protections. A lawyer must anonymize client information and avoid entering details that can be used to identify the client. A lawyer or law firm should consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols. A lawyer should review the Terms of Use or other information to determine how the product utilizes inputs. A lawyer who intends to use confidential information in a generative AI product should ensure that the provider does not share inputted information with third parties or utilize the information for its own use in any manner, including to train or improve its product.
Duties of Competence and Diligence Rule 1.1 Rule 1.3	It is possible that generative AI outputs could include information that is false, inaccurate, or biased. A lawyer must ensure competent use of the technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law. Before using generative AI, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable terms of use and other policies governing the use and exploitation of client data by the product. Overreliance on AI tools is inconsistent with the active practice of law and application of trained judgment by the lawyer. AI-generated outputs can be used as a starting point but must be carefully scrutinized. They should be critically analyzed for

Applicable Authorities	Practical Guidance
	accuracy and bias, supplemented, and improved, if necessary. A lawyer must critically review, validate, and correct both the input and the output of generative AI to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand, including as part of advocacy for the client. The duty of competence requires more than the mere detection and elimination of false AI-generated results.
	A lawyer's professional judgment cannot be delegated to generative AI and remains the lawyer's responsibility at all times. A lawyer should take steps to avoid over-reliance on generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing. For example, a lawyer may supplement any AI-generated research with human-performed research and supplement any AI-generated argument with critical, human-performed analysis and review of authorities.
Duty to Comply with the Law Bus. & Prof. Code, § 6068(a) Rule 8.4 Rule 1.2.1	A lawyer must comply with the law and cannot counsel a client to engage, or assist a client in conduct that the lawyer knows is a violation of any law, rule, or ruling of a tribunal when using generative AI tools. There are many relevant and applicable legal issues surrounding generative AI, including but not limited to compliance with AI-specific laws, privacy laws, cross-border data transfer laws, intellectual property laws, and cybersecurity concerns. A lawyer should analyze the relevant laws and regulations applicable to the attorney or the client.
Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers Rule 5.1 Rule 5.2 Rule 5.3	Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of generative AI and make reasonable efforts to ensure that the firm adopts measures that give reasonable assurance that the firm's lawyers and non lawyers' conduct complies with their professional obligations when using generative AI. This includes providing training on the ethical and practical aspects, and pitfalls, of any generative AI use. A subordinate lawyer must not use generative AI at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer's professional responsibility and obligations.

Applicable Authorities	Practical Guidance
Communication Regarding Generative AI Use Rule 1.4 Rule 1.2	A lawyer should evaluate their communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with generative AI use, scope of the representation, and sophistication of the client. The lawyer should consider disclosure to their client that they intend to use generative AI in the representation, including how the technology will be used, and the benefits and risks of such use. A lawyer should review any applicable client instructions or guidelines that may restrict or limit the use of generative AI.
Charging for Work Produced by Generative AI and Generative AI Costs Rule 1.5 Bus. & Prof. Code, §§ 6147–6148	A lawyer may use generative AI to more efficiently create work product and may charge for actual time spent (e.g., crafting or refining generative AI inputs and prompts, or reviewing and editing generative AI outputs). A lawyer must not charge hourly fees for the time saved by using generative AI. Costs associated with generative AI may be charged to the clients in compliance with applicable law. A fee agreement should explain the basis for all fees and costs, including those associated with the use of generative AI.
Candor to the Tribunal; and Meritorious Claims and Contentions Rule 3.1 Rule 3.3	A lawyer must review all generative AI outputs, including, but not limited to, analysis and citations to authority for accuracy before submission to the court, and correct any errors or misleading statements made to the court. A lawyer should also check for any rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of generative AI.
Prohibition on Discrimination, Harassment, and Retaliation Rule 8.4.1	Some generative AI is trained on biased information, and a lawyer should be aware of possible biases and the risks they may create when using generative AI (e.g., to screen potential clients or employees). Lawyers should engage in continuous learning about AI biases and their implications in legal practice, and firms should establish policies and mechanisms to identify, report, and address potential AI biases.

Applicable Authorities	Practical Guidance
Professional Responsibilities Owed to Other Jurisdictions Rule 8.5	A lawyer should analyze the relevant laws and regulations of each jurisdiction in which a lawyer is licensed to ensure compliance with such rules.

Task Force on Artificial Intelligence (AI) and the Law:

Report, Requests, Recommendations, and Findings

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NJSBA Task Force on Artificial Intelligence and the Law: Official Report, Recommendations, and Findings

Executive Summary:

This report includes the collaborative efforts and conclusions of the New Jersey State Bar Association's 27-member Task Force on Artificial Intelligence and the Law. As such, it addresses fundamental considerations and provides practical, actionable guidance for attorneys and legal professionals to use AI while maximizing its benefits safely and ethically. Critical areas explored include understanding AI's benefits, recognizing potential risks, selecting appropriate AI tools, ensuring data protection and effectively training staff.

This report is designed to serve as a practical resource. The conclusions and recommendations herein emphasize the importance of prioritizing AI education, establishing baseline procedures and guidelines, and collaborating with data privacy, cybersecurity, and AI professionals as needed. Given the complexity of the topic and the resources necessary for attorneys to safely use AI, interim measures such as adopting temporary guidelines are recommended until a comprehensive AI policy can be developed and implemented. These priorities and recommendations are essential to ensure the responsible integration of AI in legal practice and adherence to ethical and legal standards.

Finally, this report highlights several important social justice concerns related to the use of AI, including the importance of transparency in AI software algorithms, bias mitigation, and equitable access to AI tools. The Task Force concluded that legal AI tools should be reviewed for fairness and accessibility, particularly tools designed for individuals from marginalized or vulnerable communities. Understanding the risks and benefits of AI as related to social justice is crucial to maintaining a just and inclusive legal system that benefits all members of society.

Introduction and Background

The NJSBA Task Force on AI and the Law is comprised of 27 attorneys and industry experts. It was established in late 2023 with the objectives of examining the impact of AI on the legal profession and providing practical guidance to attorneys and legal professionals. The Task Force, co-chaired by Steven Eisenstein, Rebecca Rakoski and Dr. Robert Spangler, aimed to provide attorneys and legal professionals with the tools, education, guidance and resources needed to safely and ethically navigate and benefit from the growing use of AI in the legal field.

The Task Force was organized into four workgroups, each dedicated to addressing specific facets of AI's interaction with the legal domain. These workgroups (Artificial Intelligence and Social Justice Concerns, Artificial Intelligence Products and Services, Education and CLE Programming, Ethics and Regulatory Issues) were asked to deliver findings and/or recommendations tailored to the needs of New Jersey's legal community.

Each workgroup operated independently, conducting thorough research, analysis and deliberation. Workgroup findings were reported back to the entire Task Force in group meetings. This report represents the culmination of these efforts.

Focus of the Report

A central tenet of this Task Force was to avoid duplicating the existing efforts of other state and regional AI task forces and committees. Instead, it sought to build on the insights and expertise of these groups by contributing practical information and recommendations tailored to the specific needs of New Jersey's legal community.

Similarly, in crafting this report, the Task Force acknowledged the dynamic nature of the field and the continuous evolution of AI technologies. As such, the recommendations presented here are designed to remain relevant and to be adapted in line with future developments. This report is intended to serve as the initial installment in a series of statements, guidance documents, videos and educational resources that will be updated as needed and focused on the intersection of AI and the law.

Summary of Requests, Findings, and Recommendations

The following primary requests, findings and recommendations underscore the importance of education, ethical considerations and responsible implementation of AI tools in the legal profession.

Requests for the NJSBA Board of Trustees:

1. The NJSBA should continue to provide diverse educational opportunities for attorneys on AI selection and use, as well as the impact of AI on the practice of law.

2. The NJSBA should establish a permanent group dedicated to AI, the evolving technological landscape and its application to the legal profession.

Recommendation for further discussion:

1. It is recommended to propose that the New Jersey MCLE Board require attorneys to earn one CLE credit every two years in technology-related legal subjects. Specifically, given the ethics and social justice issues inherent in using AI in the practice of law, the Task Force recommends that one of the five required ethics credits for CLE compliance be technology related.

Findings:

1. Legal professionals must understand that education, knowledge and guidance are necessary to operate AI tools safely and ethically in a legal setting.

2. When assessing AI tools and services, it is crucial to categorize them according to their intended users and recipients. Tools designed for the public, as opposed to legal professionals, should not be used for tasks considered "the practice of law."

3. When evaluating AI tools and services, it is essential to identify and document how data, especially client data, is transmitted, used and stored by the AI to ensure its confidentiality. This information should guide the assessment of whether a particular AI tool is suitable for its intended use.

4. All law firms should adopt an organizational AI policy with a risk assessment framework (sample template provided in Appendix 2).

5. The Rules Governing the Courts of New Jersey, the New Jersey Rules of Evidence and the Rules of Professional Conduct are sufficiently flexible to address considerations relating to AI.

Additional Findings and Recommendations:

This report acknowledges the ever-evolving nature of AI and offers initial guidance, rather than definitive policies. Subsequent tools and recommendations will be provided as the technology progresses, with a continued emphasis on practicality. The following additional findings and recommendations support this mission:

Additional recommendations for further discussion:

1. The Task Force recommends the creation of a monthly or bi-monthly AI email newsletter distributed by the NJSBA. This newsletter would feature curated articles, case studies, instructional videos and updates on AI-related topics relevant to the legal profession. Additionally, it could include highlights from recent court decisions involving AI, interviews with experts in the field and announcements about upcoming AI-related events and conferences.
2. The Task Force proposes the establishment of an AI hub on the NJSBA website. This hub would provide access to various resources, including educational videos, toolkits, best practice guides and FAQs.
3. The Task Force recommends the publication of a comprehensive compendium of AI-related legislation, rules and other legal materials. Compiled by Hon. Ronald J. Hedges (Ret.) and published by the NJSBA, this compendium would serve as a valuable resource for legal professionals seeking to navigate the complex legal landscape surrounding AI. Updated regularly, the compendium would be available as both an e-book and a PDF on the NJSBA website, providing legal professionals with easy access to the latest information on AI-related legal frameworks. A draft of this compendium has been submitted to the Task Force for review and consideration.

Additional findings:

1. The practice of law is poised for substantial transformation due to AI. While the full extent of this transformation remains to be seen, attorneys must keep abreast of and adapt to evolving technological landscapes and embrace opportunities for innovation and specialization in emerging AI-related legal domains.
2. The bench, bar and public must be able to easily determine when AI or generative AI is used in a legal matter. It is equally important to understand how to use AI correctly in light of applicable laws and rules. The Task Force will continue to monitor this and will provide subsequent recommendations.
3. When developing or implementing AI systems, collaboration with data privacy experts, cybersecurity professionals and/or AI professionals is highly recommended to ensure responsible integration and adherence to ethical and legal standards.
4. As technology evolves, and with cloud computing and AI becoming increasingly integral to legal practice, lawyers may lose additional control over data privacy and security. Consequently, some of the responsibility for protecting sensitive information may need to shift from law firms to their technology providers, potentially enhancing data protection as these providers are often better equipped to manage sophisticated privacy and cybersecurity challenges.
5. Although considerable advances have occurred that improve access to technology for all demographic and socio-economic groups, ongoing focus is required to ensure that all

individuals have access to the technology and tools – including AI – that will allow them to understand and pursue available legal rights and remedies.

6. Guidelines and rules for the use of AI by both pro se litigants and attorneys should prioritize and ensure general awareness and appreciation of the limitations and risks of the use of AI and promote equitable access to AI tools and technologies.

7. Partnerships and collaborative networks should be established with a broad spectrum of legal entities, advocacy groups, social justice organizations and policymakers to promote fair, unbiased and ethical deployment of AI as a resource to be available and applied in appropriate civil and criminal matters. Such collective endeavors would enhance AI development and application in legal matters with a particular sensitivity toward justice, equality and ethical considerations.

8. A structured and reliable framework for ongoing dialogue, review and scrutiny of AI use by courts, legal service organizations and the bar must be established and maintained to ensure appropriate access and implementation of AI for all demographics – in particular underserved, marginalized and at-risk communities. This entails tracking the evolution of AI and actively assessing the direct and ancillary effects on various demographic groups. Continuous monitoring and evaluation will enable the legal profession to proactively address potential disparities and strategies to mitigate any adverse impacts.

Understanding Artificial Intelligence: The Basics

Attorneys must comprehensively understand the risks, benefits and core principles of AI.

AI refers to technology that enables machines to mimic human intelligence (National Institute of Standards and Technology, 2024). AI plays a crucial role in enhancing user experiences and streamlining tasks in various applications, such as:

1. Video conferencing tools that use AI algorithms for background noise cancellation (Li & Liu, 2012) and automatic transcription.
2. Virtual assistants from companies like Apple, Google, Amazon, and Microsoft that use AI to understand and respond to spoken or written user commands.
3. AI-powered tools like Suggested Replies in Outlook and Outlook Mobile that use machine learning to suggest responses based on the context of the email.* (Kannan et al., 2016).

   While not the case for all AI tools, Suggested Replies in Outlook and Outlook Mobile can help users save time and effort while maintaining privacy.

It is critical to acknowledge that not all AI is created equal. Generative AI, for instance, goes beyond basic data processing and interaction by generating new content – including text, images, videos and more – from a potentially vast array of sources (Lv, 2023). Generative AI tools increase efficiency in the practice of law, but may also pose significant risks, including our ability to distinguish between real and fabricated data and data privacy and ethical issues. Accordingly, verifying accuracy and understanding sources provided by AI is critical. Furthermore, attorneys must familiarize themselves with the concept of "hallucinations" in AI. Hallucinations arise when AI systems produce outputs that appear plausible but lack factual basis, often presenting the content with an air of authority, complicating their detection. (MIT Sloan Teaching & Learning Technologies, 2024). These inaccuracies can have significant practical and ethical implications, especially in legal contexts where accuracy and reliability are paramount. Therefore, attorneys must exercise caution when relying on AI-generated content and diligently verify its validity to ensure sound decision-making and uphold the integrity of the legal process.

Ethics and Regulatory Issues Work Group: Impact on the Practice of Law

Work Group Members:
Hon. Ronald J. Hedges (Ret.)*, Seth Abrams, Christopher J. Asakiewicz, Trina L. Glass, Robert B. Hille*, Michael Paglione
*Note: * Indicates Co-Chair*

The Ethics and Regulatory Issues Work Group of the Task Force studied AI and its potential implications for the law and the legal system. After a series of meetings and comprehensive research, the following conclusions were drawn:

- The current state of the law, including the Rules Governing the Courts of New Jersey, the NJRE and the RPCs, are sufficiently flexible to address considerations relating to AI.
- As with any technology, AI use in legal matters should be scrutinized for compliance with relevant laws and regulations.
- The increasing use of AI and generative AI technologies by attorneys and legal professionals could significantly disrupt the industry's traditional hourly billing model. Significant use of these technologies may conflict with current billing practices in light of ABA Model Rule 1.5(a)(1) (American Bar Association, 2024).

Focus of Our Examination

The work group's examination began with a thorough exploration of the nature of AI, investigating its potential as a legal tool and considering both its responsible use and potential misuse by legal professionals and the public. The work group next assessed how such use or abuse could affect the legal profession, legal practice and the integrity of the law. Additionally, the work group examined the potential impact on the administration of justice and evaluated whether existing legal frameworks required revision to effectively address emerging and future concerns presented by AI.

The examination focused on the following key areas:

1. **Preservation of Legal Obligations:** A significant consideration centered on the responsible use of AI tools while upholding confidentiality obligations, privilege protections and intellectual property rights, as maintaining these legal safeguards ensures the integrity of legal proceedings and protects the rights of all parties involved.

2. **Identification of AI Usage**: Another critical consideration involved the potential need to clearly identify instances where AI, particularly generative AI, is employed. This extends to understanding the nature of AI-generated output – including how it was produced – and metadata analysis, which is integral to the court's gatekeeping function and ensures transparency in the legal process.

3. **Ensuring Integrity and Reliability**: There was a clear consensus on the importance of ensuring the integrity and reliability of AI-generated products. This encompasses accountability measures to prevent misuse, detection of fabricated evidence (such as deep fakes) and adherence to established evidentiary standards outlined in the New Jersey

Rules of Evidence (NJRE), particularly concerning the definition of original evidence (see NJRE 1002 and 1003).

Examples of Law Examined by the Working Group

The examination included a review of the relevant RPCs and an analysis of *Baxt v. Liloia, 155 N.J. 190 (NJ 1998)*. The following RPCs can establish a standard in legal malpractice cases.

1. 1.0(a), (c), (f), (i), (j), (k), (o), (p)
2. 1.4
3. 1.6 and comment (Note proficiency requirement in (f))
4. 1.16(d)
5. 3.1 (fake authorities from AI)
6. 3.3 (see 3.1)
7. 3.4 (see 3.1)
8. 4.1 (see 3.1)
9. 4.4(b) and Stengart v. Loving Care Agency, Inc., 201 N.J. 300 (NJ 2010)
10. 5.1, 5.2 and 5.3

Of particular significance are the following RPCs to consider when dealing with any technology: RPC 1.0(p) (defining metadata), RPC 1.6 (pertaining to client confidentiality duties and the obligation to stay abreast of technological advancements, in conjunction with RPC 1.0(i), (j), and (k) defining reasonableness), RPC 4.4(b) (addressing confidentiality duties to third parties) and RPC 5.3 (establishing liability for vendor breaches). These RPCs encompass various technological obligations and considerations.

Additionally, depending on the circumstances, NJRE 101(a)(3), 101(b)(3), 801(e), 901, 1001, 1004 and 1006 may also be implicated, along with NJ Court Rules 4:10, 4:25-7 and -8, and 3:13.

The Emergence of AI and its Practical Impact on the Practice of Law

This Task Force has observed a significant increase in the past 12 months in the availability of AI and GAI tools designed for both consumers and the legal profession. Before using these tools, it is imperative that legal practitioners:

> 1. Thoroughly scrutinize the claims made by AI providers regarding the capabilities and security of their tools.

> 2. Remain cognizant of the critical areas where AI is likely to have the most significant initial impact on legal practice.

> 3. Differentiate between AI tools designed for the public and those designed for the practice of law.

The Task Force has also identified several key areas where we believe AI may to emerge and substantially influence the practice of law in the near future:

> **1. Document drafting:** Generative AI-powered tools may streamline the document drafting process by automating repetitive tasks like contract generation and legal document preparation, giving lawyers more time to focus on complex strategy, research and client relationships.

> **2. Research:** AI may facilitate faster and more comprehensive legal research by analyzing vast amounts of case law, statutes and other legal documents. Moreover, AI-driven data analytics tools may uncover insights and trends that would elude manual review, potentially enhancing the quality and depth of legal analysis.

> **3. Correspondence:** AI-powered communication tools, such as email drafting for non-legal matters and/or automation platforms, may enable attorneys to manage client communications more efficiently. These tools are designed to provide timely responses, schedule appointments and draft and summarize routine correspondence, freeing up valuable time for higher-value tasks.

> **4. General case preparation:** AI and Generative AI technologies may eventually offer valuable support in case preparation, from predictive analytics for case outcomes to organizing and summarizing voluminous evidence. By automating tasks like evidence management and deposition analysis, attorneys can focus on developing persuasive legal strategies and advocating for their clients more effectively.

> **5. Misuse of AI to fabricate evidence and data:** The potential misuse of AI to fabricate documents, data and other materials raises significant concerns, particularly regarding the authenticity of evidence. This issue extends to conspiracy theorists and others, highlighting the importance of adhering to evidence rules such as Rules 803, 14, 15, and 18. Lawyers must play a crucial role to safeguard against the proliferation of counterfeit evidence and falsified documents. Lawyers should also consider disclaimers and representations to protect against the inadvertent violation of the Rules of Professional Conduct.

6. AI as a discovery tool: AI may streamline legal discovery by significantly enhancing efficiency. It may enable the rapid analysis of extensive datasets encompassing various forms of data such as documents, video, audio, photos and more. Through advanced algorithms and machine learning, AI may streamline the review of diverse data types, potentially saving substantial time and resources for legal teams. Ultimately, the use of AI-driven discovery may facilitate thorough and effective preparation for litigation or regulatory compliance.

7. AI trial preparation tools:

AI trial preparation tools, including those for jury selection, promise to transform legal strategies. Using advanced algorithms and machine learning, these tools will analyze data to aid in developing comprehensive trial strategies. By efficiently assessing potential jurors' backgrounds and biases, AI may optimize jury selection for favorable outcomes, enhancing legal representation and decision-making during litigation. However, it is essential to consider the impact of any bias in AI tools when creating and using them.

8. AI integration with case management software:

Integrating case management software with AI and generative AI capabilities might turn these programs into virtual assistants, potentially streamlining tasks like document generation and workflow optimization. Simplifying document management and enhancing workflow efficiency could help legal practitioners navigate their caseloads more effectively. Additionally, AI and generative AI features empower users to extract valuable insights from extensive datasets, facilitating informed decision-making and expediting case resolution. This innovative synergy might ensure superior client service delivery, heightened productivity and reduced errors in legal operations.

9. AI integration with practice management software: Much like previous examples, integrating AI with practice management software could streamline scheduling, billing and routine administrative tasks while providing actionable insights. Empowering legal professionals with data-driven analysis would also likely enhance decision-making and client service delivery.

10. AI trial presentation tools: While futuristic, the use of AI at trial may assist in presenting evidence to judges and juries in an informative and effective manner. It could significantly enhance the courtroom presentation of evidence, resulting in greater jury involvement and understanding of the issues presented.

Substituted Judgment

Significant concern arises when attorneys rely on AI to replace their professional judgment. For instance, while AI can be employed to efficiently analyze extensive surveillance footage and extract key moments, attorneys maintain an ethical duty to personally review the footage. The legal community must grapple with the critical question of distinguishing between processes that enhance human performance and those that supplant it.

Similarly, another crucial issue is determining whether the ethical rules apply solely to the final product submitted to the court or extend to the numerous intermediate steps leading to that final product.

Rise of New Areas of Practice

The widespread availability of AI and AGI is a transformative event that will potentially reshape the legal landscape, much like the internet revolutionized communication and commerce. As AI becomes increasingly sophisticated and ubiquitous, new legal practice areas will emerge to address critical issues such as bias, transparency, accountability and fairness in AI decision-making. Lawyers specializing in these fields will be instrumental in guiding the responsible deployment of AI technologies and ensuring compliance with evolving legal and regulatory frameworks.

Furthermore, as AI increasingly permeates various aspects of society, legal frameworks must adapt to address emerging challenges and opportunities. This may entail the enactment of new legislation, the revision of existing regulations and the establishment of ethical guidelines for AI usage across industries.

While the full extent of AI's impact remains to be seen, attorneys must keep abreast of and adapt to evolving technological landscapes and embrace opportunities for innovation and specialization in emerging AI-related legal domains.

Artificial Intelligence in Legal Products and Services: Practical Guidance and Key Insights

Work Group Members:
John Allen, Kelly Castor, Philip W. Lamparello*, Scott R. Malyk, Stephanie J. Wilson*
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This section aims to offer practical, actionable guidance for legal professionals seeking to integrate or who have integrated AI tools and services into their practices. It combines extensive research, including interviews with stakeholders across the AI and legal industries, with lived experience and AI expertise to provide a nuanced understanding of AI's role and its challenges.

AI tools, particularly those facing the public like ChatGPT, Bing, Gemini and Claude, are scrutinized for their suitability in legal matters. Accordingly, the Task Force recommends against their use for specific legal tasks due to potential ethical, privacy and security implications. Instead, it categorizes GAI tools and recommends a set of easy-to-follow questions to assist legal professionals in making informed decisions about employing AI in their practice. This guidance will be updated as technology advances.

Finally, this section emphasizes the need for a foundational framework to guide practitioners in evaluating AI technologies and ensure the upholding of ethical standards and privacy concerns.

State of Artificial Intelligence in the Legal Profession

The rapid advancement of AI technology has fostered the development of many new tools in the legal industry, from upgrades and integration into existing software to novel innovations. Legal professionals are inundated with marketing materials touting the benefits of these AI solutions, including claims of significant time and cost savings. However, the need for established safety and data privacy standards, coupled with the absence of objective evaluation criteria, makes it difficult for practitioners to assess the effectiveness of these tools.

Concerns about security, privacy and regulatory compliance further complicate the adoption of AI in legal practice. Furthermore, the rise of generative AI introduces additional intricacies. This technology can produce novel content, such as textual compositions, imagery or sound, by identifying and applying patterns extracted from extensive data compilations encompassing a considerable segment of the internet, necessitating a continuous process of adaptation and assessment of any established guidelines.

Despite these challenges, this report provides a foundational framework through the use of easy-to-follow questions to help guide legal professionals in understanding, evaluating and determining whether to employ a given AI technology in a legal setting. This framework will continue to evolve as the technology and applications mature.

Our Research

The findings presented in this section of the report result from extensive research, including interviews with AI technology providers, legal industry experts, AI specialists and legal practitioners. The insights from these interviews provide a nuanced understanding of the current landscape and the challenges legal professionals face in adopting AI. By combining input from

various companies and industry experts, the report aims to offer actionable recommendations and strategic insights for navigating the evolving terrain of AI in the legal profession.

Over 50 companies were evaluated, including vendors specializing in eDiscovery, law firm management, cybersecurity and data privacy, legal research, legal writing and contract drafting.

Integration of Artificial Intelligence in Law Firms and Legal Practice

When evaluating GAI tools, it's crucial to classify them into specific categories based on their intended users. Distinguishing between tools that are specifically designed for the public and those designed for the practice of law will help to avoid potentially significant issues with respect to data privacy, ethics and other concerns.

A. AI Tools Intended for the Public:

Guidance:

Lawyers should only use AI tools designed for the practice of law, as opposed to those designed for the public when using client data, generating documents or conducting research (when using any AI, have a plan to prevent sharing or storing sensitive information). However, public tools can be useful to spark creativity and as an aid when structuring ideas for an email, letter or more, provided no client information is shared with them and any information they produce is comprehensively reviewed for accuracy. Examples of public AI tools generally unsuitable for sensitive or private information include, but are not limited to, ChatGPT, Gemini and Claude.

Key Considerations:

As with all essential tools, education, knowledge and guidance are needed to operate AI tools intended for the public safely.

AI tools intended for the public gather data from the internet and various other sources (Vial et al., 2021), often without citation. Unlike focused and vetted professional AI tools, which are designed for specific use cases in the legal profession and rely on carefully curated, highly accurate and factually proven sources and data, AI tools intended for the public generate content and provide potential insights on a wide range of topics drawn from all available sources, typically with minimal or no data protection or confidentiality. Their use for any matter that could be considered "the practice of law" should be restricted, and any other use requires careful consideration due to potential privacy, security and ethical concerns.

While there are risks associated with their use, the complete prohibition of legal practice AI tools or AI tools intended for the public in a legal practice may not be advisable. For example, public-facing AI may offer inspiration for simple, non-legal tasks. Additionally, the ongoing integration of AI into everyday tools underscores the inevitability of its presence in legal workflows. A blanket prohibition might inadvertently encourage unsanctioned or inappropriate use of AI tools intended for the public on personal devices.

B. Tools Tailored for Legal Professionals:

Guidance:

An expanding array of industry-specific AI tools tailored to the unique requirements of legal professionals is emerging. Many well-established legal software providers have either introduced or anticipate introducing and integrating AI or GAI features into their software. While these tools may offer enhanced privacy controls compared to AI tools intended for the public, evaluating their safety and capabilities remains challenging due to the absence of standardized regulations governing their development and implementation, but is essential to ensure compliance with the Rules of Professional Conduct.

Key Considerations:

As legal AI becomes more prevalent, law firms and attorneys must evaluate its privacy, security and ethical implications. The absence of standardized regulations governing AI and GAI, coupled with the American Bar Association's amendment in 2012 to its Model Rules of Professional Conduct Rule 1.1 to include technological competence (Simons, 2018), underscores the need for a proactive approach to understanding and evaluating these tools' potential risks and benefits.

When considering the adoption of legal-specific AI tools, it's essential to scrutinize the vendor's handling of data, security measures and compliance with relevant legal and ethical standards. Additionally, understanding the tool's intended use, risks, limitations and potential biases is vital to ensuring its appropriate use and upholding the integrity of the work produced using the AI tools.

To assist legal professionals in this endeavor, this Task Force has compiled a practical **AI in Legal Products and Services Selection Criteria**. These criteria include questions and standards that can be used to evaluate whether a given AI tool is suitable for use.

AI in Legal Products and Services Selection Criteria

How to Use This Selection Criteria

This selection criteria provides a framework for evaluating AI products and services tailored for the legal profession. It offers questions, considerations and evaluation criteria to assist legal professionals in making informed decisions when assessing AI tools.

Note: This selection criteria is not for use with public-facing AI tools like ChatGPT, Gemini, Copilot, Claude or similar platforms.

Software Reputation and Footprint: Moral and Ethical Alignment

When assessing legal AI tools, consider the provider's reputation, longevity and ownership. A company's track record reflects its reliability, stability and commitment to ethics.

Before committing to a new AI product or service, it may also be beneficial to thoroughly review the provider's ownership structure and identify potential conflicts of interest (particularly when evaluating newer companies). Understanding the ownership and leadership of the software provider can help to ensure that the AI tools you choose are compatible with the values and priorities of your legal practice.

These questions may be useful when evaluating the suitability of new AI tools and services.

>Q. Does the company have a proven track record of providing reliable, secure and compliant solutions specifically tailored to the legal sector?

>Q. Are there any case studies, testimonials or references from other legal professionals who have successfully used the tool? Reaching out to colleagues or requesting references from the provider can yield valuable insights.

>Q. If the company is relatively unknown, who are its owners, and are there any potential ethical concerns related to the ownership structure? Researching the company's website, press releases and financial disclosures can help uncover this information.

Key Considerations in Selecting an AI Vendor

a. **Type of technology:** Understanding whether general AI or GAI has been used is critical in evaluating and avoiding potential risks.
b. **Problem the AI is solving for:** Consider whether an AI product you are evaluating is designed to simplify an existing task. If not, it may complicate your practice and add an extra layer instead of improving efficiency. Before adopting an AI solution, evaluate if it aligns with your needs and can integrate into your current processes to provide benefits rather than challenges.
c. **Data sources:** Gaining an understanding of the quality and source of the data used by AI systems is crucial for evaluating their potential reliability and performance. Equally important is understanding whether user prompts and/or

user-supplied data will be included in the AI system's training data, as this can lead to unintentional and unexpected confidentiality and ethics issues.

    d. **Privacy standards:** Evaluating vendors' data collection and ownership standards, privacy protocols and cybersecurity safeguards is essential for ensuring client confidentiality and regulatory compliance.

    e. **Cybersecurity measures:** It is important to assess the cybersecurity measures implemented by the vendor to maintain data integrity and avoid or minimize the risks posed by cyber threats.

    f. **Bias recognition:** Recognizing and mitigating bias within AI algorithms contributes to upholding fairness and equity in legal processes.

    g. **Integration, training and support:** Examining a vendor's provisions for integration, training and ongoing support can streamline implementation and enhance the user experience.

    h. **Data localization:** Consideration of the jurisdictional location of data and AI engines ensures compliance with regulatory frameworks and data sovereignty principles.

    i. **Updates and monitoring:** Examining the frequency of product updates, adherence to bias auditing, issue monitoring, technical and ethical standards, responsiveness to problems, update criteria and user notification methods offers insight into a company's dedication to your safety and success. Infrequent updates without an established cadence may be cause for concern.

    j. **Differences among software options:** Are there pricing plans offering differing levels of data access? If so, do the less expensive versions of the software rely on outdated data or datasets that need to be updated more frequently?

Danger Areas and Pitfalls

Data privacy laws and regulations, much like AI, are continuously evolving. Several states, including New Jersey, have passed comprehensive data privacy legislation. However, the implementation of these laws is progressing at varying rates across different states. These privacy laws and regulations require an organization to understand and disclose to data subjects (individuals whose personal data is collected, processed, stored or otherwise used by organizations) the nature of the data collected, the legal basis for the collection and the rights a data subject has regarding their data.

AI systems are trained on data, so their use may be impacted by data privacy laws and regulations, particularly for organizations with international operations. International regulations, such as the European Union's General Data Protection Regulation (GDPR) (Voss & Houser, 2019) and the proposed EU AI Act, must be understood to ensure compliance and avoid potential financial and legal consequences.

Transparency and Accuracy in GAI Usage

When using GAI, it is important to ask if its use is transparent to users when generating the data they engage with. Transparency helps legal professionals identify potential ethical risks and understand the content's nature, allowing them to make informed decisions about its reliability and relevance to their needs.

Furthermore, it is beneficial to ascertain if there is a straightforward process for users to provide feedback on errors or inconsistencies in AI-generated content. Understanding the vendor's prioritization of user feedback, their review and reporting processes, and who is responsible for monitoring and acting upon feedback offers insights into the company's integrity.

Artificial Intelligence Education for the Legal Profession

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Addressing the knowledge gap among attorneys regarding AI is critical. This section outlines a plan for educating the New Jersey legal community, including the NJSBA's AI Task Force's collaborative efforts with the New Jersey Supreme Court Committee on Artificial Intelligence to develop a dynamic curriculum and monitor advancements in AI.

A robust array of programs proposed for integration into the NJSBA's educational schedule for 2024 can be found at NJSBA.com. The programs will help ensure legal professionals are equipped to navigate the evolving AI landscape effectively.

Recommendations:

1. **Development and Implementation of an Adaptable AI Curriculum**:

The NJSBA should continue the development and implementation of a comprehensive AI curriculum that addresses foundational concepts and emerging trends in AI technology. This curriculum should be adaptable, allowing for updates and revisions as new developments arise. Collaboration with experts from academia, industry and the legal profession should be sought to ensure the curriculum remains current and relevant.

2. **Proposal for a Monthly or Bi-Monthly AI Email Newsletter**:

The Task Force recommends the creation of a monthly or bi-monthly AI email newsletter distributed by the NJSBA. This newsletter would feature curated articles, case studies, instructional videos and updates on AI-related topics relevant to the legal profession.

Additionally, it could include highlights from recent court decisions involving AI, interviews with experts in the field and announcements about upcoming AI-related events and conferences.

3. **Creation of an AI Hub on NJSBA.com**:

The Task Force proposes the establishment of an AI hub on the NJSBA website. This hub would provide access to various resources, including educational videos, toolkits, best practice guides and FAQs.

4. **Publication of a Compendium of AI Legislation, Rules, and More**:

The Task Force recommends the publication of a comprehensive compendium of AI-related legislation, rules and other legal materials. Compiled by Judge Hedges and published by the NJSBA, this compendium would serve as a valuable resource for legal professionals seeking to navigate the complex legal landscape surrounding AI. Updated regularly, the compendium would be available as both an e-book and PDF on the NJSBA website, providing legal professionals with easy access to the latest information on AI-related legal frameworks. A draft of this compendium has been submitted to the Task Force for review and consideration.

5. Proposed MCLE Requirement Revision: The Task Force recommends requesting that the New Jersey MCLE Board consider amending the MCLE requirements to require attorneys to earn one CLE credit in technology-related subjects every two years. Given the ethical and social justice implications of technology in the legal system (such as safeguarding client data and understanding the potential risks associated with AI and GAI), we propose changing the current ethics and diversity requirement to "Ethics, Diversity, and Technology" and making the new one-hour credit requirement part of that mandate.

Next Steps

The Task Force is committed to taking proactive measures to ensure ongoing education and adaptation to the evolving landscape of AI in the legal profession. Continuous monitoring of AI developments will be conducted, with regular updates provided to Task Force members and the broader legal community using the AI newsletter and AI hub on NJSBA.com. This will involve staying abreast of emerging technologies, regulatory changes and notable AI case law. Additionally, the Task Force will remain flexible, adjusting schedules and topics to address emerging trends and challenges.

The Task Force also recognizes the importance of interdisciplinary collaboration in navigating the complex intersection of AI and the law. To this end, efforts will be made to engage with allied professionals such as CPAs, cybersecurity experts, data privacy professionals and law enforcement. This collaboration will facilitate knowledge sharing, best practice development and the identification of potential areas for joint action.

By staying vigilant, fostering collaboration and engaging with stakeholders across various sectors, the Task Force aims to ensure that the legal community is well-equipped to navigate the opportunities and challenges presented by AI in the years to come.

Artificial Intelligence and Social Justice Concerns

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*Note: * Indicates Co-Chair*

Integrating AI into the legal system offers benefits but requires vigilance. The vast data processing and potential for inaccurate correlations demand:

> 1. Rigorous monitoring and evaluation to prevent misuse and unintended consequences.

> 2. Transparency regarding the data powering AI systems, especially those with legal implications.

> 3. Clear insight into the replicability of AI-generated results to maintain accountability and foster trust among legal professionals and the public.

Public Use of AI and Unauthorized Practice of Law (UPL)

In an era where AI is increasingly integrated into daily life, the public – especially those unable to afford professional legal services and used to using AI for other purposes – might turn to publicly available AI tools for legal guidance. This trend could inadvertently expose individuals to legal risks without the safeguards provided by legal professionals. Additionally, AI's ability to produce seemingly authoritative and precise responses may lead laypersons to misconstrue its capabilities and outputs as infallible, fostering a false sense of legal security.

While this scenario remains speculative, it's crucial to recognize it as a potential future outcome requiring proactive consideration. To address this, we must collaborate with those regulating the practice of law to enhance public awareness of the limitations and risks associated with relying on AI for legal advice. Similarly, it may be necessary to implement stricter guidelines and regulatory frameworks for AI-generated legal content while ensuring the accessibility of affordable legal services. Above all, as these technologies evolve, continuous monitoring, discussion and collaboration are essential.

Addressing Risks, Including At-Risk Populations

AI's rapid data processing capability offers efficiency and innovation opportunities but also harbors significant risks related to bias and discrimination (Chen et al., 2024). For instance, the case of Amazon discontinuing its AI recruitment tool due to gender bias underscores the necessity for ongoing AI system monitoring to ensure adherence to ethical guidelines and avoidance of perpetuating existing inequalities. Specifically, the bias stemmed from the tool being trained on a dataset predominantly comprising men's resumes, leading it to favor male candidates (Andrews & Bucher, 2022). This example emphasizes the dangers of unchecked AI in decision-making processes.

The legal industry should examine the lessons learned from the challenges faced by other sectors when developing and implementing AI to avoid repeating similar mistakes and to proactively address potential issues, including:

1. **Racial bias:** AI can exhibit bias or discriminatory behavior if it's trained on biased data or designed with biased algorithms. This can happen due to: use of historical training

data; biased labels or annotations in the data; algorithmic biases, feedback loops that perpetuate bias, lack of diversity in development teams and lack of transparency in algorithmic development (Blount, 2024).

2. **Economic inequality through automated decisions:** In financial sectors, AI-driven decisions such as loan approvals and credit scoring can perpetuate economic disparities, potentially sidelining those from disadvantaged backgrounds (Addy et al., 2024). A similar bias in legal decision-making AI could negatively impact vulnerable populations.

3. **Health care disparities:** AI in health care risks worsening existing disparities (Hastings, 2024) and raises concerns regarding how similar disparities could, without proper intervention, occur within the legal system.

4. **Privacy and surveillance:** The use of surveillance technologies, including facial recognition, may pose significant risks various communities (Swaminathan & Danks, 2024), emphasizing the need for responsible AI that respects privacy rights and provides accountability.

5. **Predictive policing:** Predictive policing relies on historical crime data and may amplify prejudice by disproportionately targeting minority communities and exacerbating systemic biases.

   This approach can create a feedback loop where increased police presence in certain neighborhoods leads to more arrests and higher reported crime rates, reinforcing the perception that these areas are more prone to crime. This, in turn, leads to further over-policing and surveillance. Algorithms may disproportionately target minority communities due to the data they are trained on, often overlooking the underlying social and economic factors that contribute to criminal behavior.

   Addressing the racial biases inherent in predictive policing requires careful consideration of the data used, increased transparency and accountability in algorithmic decision-making and a broader effort to address systemic inequalities within the criminal justice system.

6. **Forensic science:** Forensic science increasingly relies on software, including AI, for data analysis, probability calculations, model training and quality assurance. This reliance on "black box" software can be problematic, as it blurs the line between human judgment and machine judgment. Attorneys must be mindful of potential challenges to the admissibility of evidence and the credentials of experts who rely on AI in their analyses.

These examples emphasize the necessity for a nuanced approach to mitigate the risks associated with AI, particularly in the context of social justice concerns. They underscore the importance of integrating fairness and bias mitigation techniques into the development of legal AI products. Engaging a diverse range of professionals in designing, implementing and reviewing AI systems is crucial to ensuring equitable and responsible outcomes for society. Furthermore, it is imperative to draw lessons from past integrations of AI and related technologies to avoid repeating mistakes and to foster positive societal impacts.

AI and Access to Justice

While much has been said about the potential pitfalls associated with AI, it also has the potential to help many people. For example, AI may improve access to justice by making legal services more efficient and available. However, this potential is contingent upon equitable access to AI tools and technologies, which requires reliable access to the internet, a rudimentary understanding of technology and the ability to navigate AI-driven systems.

Unequal access to high-speed internet, especially in rural and underserved urban areas, hinders the fair adoption of AI. Providing universal high-speed internet access enables vulnerable communities to benefit from AI-powered legal aid and support services. However, it is crucial to address the social inequalities that contribute to this digital divide, such as disparities in technological capital and resources (Comi et al., 2024). Bridging this gap is essential for ensuring that the benefits of AI in the legal system are accessible to all, regardless of their socioeconomic background or geographic location.

Moreover, there may come a time when providing legal aid and support for vulnerable communities in New Jersey leverages AI in a manner that addresses systemic inequities rather than exacerbating them. Upholding ethical guidelines and ensuring fairness in AI applications are imperative steps toward achieving access to justice for all residents of New Jersey. Policymakers, legal professionals and technology experts in New Jersey must collaborate and develop strategies that prioritize equitable access to AI tools and technologies, address digital disparities and uphold ethical standards to ensure that AI contributes positively to the pursuit of justice in the state.

Next Steps and Recommendations

To effectively navigate the complexities presented by the integration of AI within a legal practice and to capitalize on its potential to foster social justice, the following strategic initiatives are recommended:

1. Although considerable advances have occurred that improve access to technology for all demographic and socio-economic groups, ongoing focus is required to ensure that all individuals have access to the technology and tools – including AI – that will allow them to understand and pursue available legal rights and remedies.

2. Guidelines and rules for the use of AI by both pro se litigants and attorneys should prioritize and ensure general awareness and appreciation of the limitations and risks of the use of AI and promote equitable access to AI tools and technologies.

3. Partnerships and collaborative networks should be established with a broad spectrum of legal entities, advocacy groups, social justice organizations and policymakers to promote fair, unbiased and ethical deployment of AI as a resource to be available and applied in appropriate civil and criminal matters. Such collective endeavors would enhance AI development and application in legal matters with a particular sensitivity toward justice, equality and ethical considerations.

4. A structured and reliable framework for ongoing dialogue, review and scrutiny of AI use by courts, legal service organizations and the bar must be established and maintained to

ensure appropriate access and implementation of AI for all demographics – in particular underserved, marginalized and at-risk communities. This entails tracking the evolution of AI and actively assessing the direct and ancillary effects on various demographic groups. Continuous monitoring and evaluation will enable the legal profession to proactively address potential disparities and strategies to mitigate any adverse impacts.

With time, consideration and open dialogue, the legal profession can help steer the course of AI integration to maximize its benefits while mitigating its risks. This proactive and inclusive approach ensures that the advancement of AI technologies in our industry aligns with the overarching principles of equity, justice and ethical responsibility, reinforcing the commitment to upholding the dignity and rights of all people.

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Appendix 1:

Essential Factors for Selecting AI Products and Formulating an AI Policy in Legal Firms: A Starting Point

This guidance provides initial discussion items law firms and/or legal professionals can use to navigate integrating AI tools into their practices.

From understanding the risks and advantages of AI to selecting appropriate tools, ensuring data protection and training staff, each aspect is designed to help legal professionals address vital factors that must be considered. When undertaking substantial AI projects, it is advisable to consult with data privacy and AI experts throughout the integration process. Simultaneously, it is of utmost importance to maintain detailed records of any interactions involving AI, GAI and client data.

Disclaimer
This guidance is designed to initiate conversations and serve as a starting point for law firms considering the integration of AI into their practices. It is not intended to replace a comprehensive AI policy. By addressing the key questions and considerations outlined in this guidance, law firms can take proactive steps toward using AI in alignment with ethical and legal considerations.

Key Considerations

1. **Understanding AI risks**: Alongside its advantages, AI presents potential risks such as data privacy concerns and ethical dilemmas. Conducting a thorough risk assessment is crucial for identifying and mitigating these risks.

Here are some key questions to consider, and if possible, ask the AI software provider when starting a risk assessment for AI:

> 1. What are the potential risks associated with the AI system, such as data privacy breaches, bias or unintended consequences?
>
> 2. How is the AI system trained, and what data sources are used? Are there any potential biases or limitations in the training data?
>
> 3. If the system is specifically designed to work with sensitive data of any kind, what measures are in place to ensure the security and privacy of the data used by the AI system?
>
> 4. How are the AI system's decisions or outputs validated and monitored for accuracy and fairness?
>
> 5. What are the potential legal and ethical implications of the AI system's actions or decisions?
>
> 6. What is the plan for addressing and mitigating any identified risks or unintended consequences?
>
> 7. How will transparency and replicability be monitored and maintained?

8. What is the process for involving stakeholders, such as AI experts, legal professionals and ethical advisers in the risk assessment and management process?

These questions can help organizations identify, evaluate and mitigate some of the potential risks when implementing AI systems.

2. **Leverage AI's advantages and choose the right tools:** Before investing in an AI tool, thoroughly investigate its capabilities to determine whether it can deliver the desired benefits, such as increased efficiency and cost savings, in a responsible and secure manner. With the exponential growth of AI tools tailored to the legal sector, it is essential to select tools aligned with your firm's needs and use cases.

Establishing key performance indicators (KPIs) can help gauge the effectiveness of AI tools in improving legal services. Given the wide range of choices available, retaining a trusted technology adviser can significantly assist in navigating the increasingly complex landscape of AI product options, especially for those in traditionally non-technical professions.

3. **Ensure data protection**: To address data protection and privacy concerns, establish clear policies for data usage with AI tools. Keep up to date with changing data protection laws and verify that both you and your AI software or service providers adhere to industry-standard best practices for data privacy and security.

The National Institute of Standards and Technology (NIST) provides a valuable resource, the NIST Privacy Framework, for organizations looking to establish robust data privacy standards. This comprehensive tool offers a structured approach to identifying, evaluating, and addressing privacy risks, along with recommendations for implementing effective controls and protective measures. By adopting the guidelines outlined in the NIST Privacy Framework, organizations can align their data privacy practices with industry standards and best practices ("Getting Started | NIST," 2021).

More information about NIST's Privacy Framework is available at https://www.nist.gov/privacy-framework/getting-started-0

4. **Train your staff**: Regular training sessions should cover technical aspects and ethical considerations of using AI tools. Law firm staff should be well-versed in data protection guidelines.

5. **Manage integrating AI with existing systems**: It is essential to collaborate with data privacy and AI professionals as necessary during the integration process of AI tools with existing systems. Additionally, it is crucial to document any interactions between AI, GAI and client data, specifying the tools used and the data involved.

6. **Stay current with technology**: Law firms must stay updated on advancements in technology in two ways – first, through maintaining subscriptions to relevant publications or by attending industry conferences, and second, through software updates that fix bugs, privacy and security issues and more.

7. **Attribute AI content when necessary**: Law firms should establish and follow clear guidelines on attributing content generated or inspired by AI. Providing staff with a framework for acknowledgment can streamline this process.

8. **Monitor AI for bias and errors**: Law firms must adopt and adhere to regular fact-checking and bias review procedures to ensure the accuracy and integrity of AI-generated content. It is vital for law firms to report any identified bias or errors to the AI software or service provider(s) immediately.

9. **Consider the impact of AI:** Evaluate how AI may affect the financial aspects of law practice, and if necessary, consider adapting billing models to align with client expectations regarding AI's ability to streamline tasks that were previously time-consuming. *Note: Ensure that any changes to billing models are clearly communicated to clients prior to engagement.*

10. **Know your legal obligations**: Using the guidance provided in this report, as well as educational materials and information published by the NJSBA, the Administrative Office of the Courts (AOC), and other trusted legal sources, ensure that you thoroughly understand the legal and ethical obligations you must consider or adhere to when incorporating AI or GAI into your legal practice.

Appendix 2:

Sample Artificial Intelligence and Generative Artificial Intelligence Use Policy

1. Purpose

This policy establishes guidelines for the ethical, responsible, and efficient use of Artificial Intelligence (AI) and Generative Artificial Intelligence (GAI) technologies within the law firm. It aims to ensure compliance with legal and ethical standards, safeguard client confidentiality and uphold the highest level of professional conduct while harnessing the benefits of AI and GAI tools.

2. Scope

This policy applies to all individuals who currently use or plan to use AI and GAI tools to support the practice of law, including employees, partners, associates, contractors, vendors, finance and accounting professionals, billing companies and law firm staff members.

Note: To comply with RPC 1.1, attorneys must reasonably understand the technology they use, including its risks and proper usage. They must also diligently protect confidentiality and privilege. When considering AI tools and services, attorneys should only use credible vendors that provide adequate safeguards to fulfill their professional responsibilities under the RPCs.

3. Definitions

3.1. Artificial Intelligence (AI): Computer systems simulate human intelligence processes, including learning, reasoning, and self-correction ("Artificial Intelligence | NIST," 2024).

3.2. Generative Artificial Intelligence (GAI): A subset of AI focused on creating new content, such as text, images, or audio, based on patterns learned from training data ("Artificial Intelligence | NIST," 2024).

4. Approval and Oversight

4.1. Any use of AI or GAI tools must receive approval from the firm's designated AI Oversight Committee before implementation.

4.2. The AI Oversight Committee is responsible for evaluating each AI or GAI tool's potential benefits, risks, and ethical implications and determining its suitability for firm-wide use.

4.3. The AI Oversight Committee conducts regular audits and assessments of AI and GAI tools to ensure ongoing compliance with this policy and relevant laws and regulations.

4.4 List the Firm's AI Oversight Committee members here:

5. Ethical and Legal Compliance

5.1. All usage of AI and GAI tools must adhere to applicable laws, regulations and professional ethical standards, including the Rules of Professional Conduct (RPCs) governing client confidentiality, data protection and intellectual property.

5.2. AI and GAI tools shall not be used to engage in or promote discriminatory, biased or unethical practices.

 5.3. The firm shall maintain transparency with clients when using AI and GAI tools on their matters and obtain informed consent when necessary.

5.4. Only GAI or AI tools designed explicitly for legal matters and with sufficient client data protection should be used for specific legal issues. No public-purposed AI tools should be used for specific legal matters, and no client or other sensitive or regulated data should be shared with public-purposed AI tools.

6. Data Protection and Confidentiality

6.1. Any data used for training or operating AI and GAI tools must be appropriately secured and protected by the firm's data protection policies and relevant laws and regulations.

6.2. Strict access controls require only authorized personnel to use AI and GAI tools and access associated data. While ensuring this does not happen in today's remote work environment is complex, a strict compliance model and proper use of standard security technology like VPNs will provide incentives for correct usage and consequences for policy violation.

6.3. Necessary technical and organizational measures are implemented to prevent unauthorized disclosure or exposure of confidential client information through AI and GAI tools.

7. Human Oversight and Review

7.1. All outputs generated by or with the assistance of AI and GAI tools must undergo review and validation by qualified human professionals before use in any legal matter (every review is cataloged for audit purposes).

7.2. AI and GAI tools augment and support human expertise, but do not replace it. Human professionals must make all final decisions and judgments.

7.3. Clear protocols are established for escalating issues or concerns related to AI and GAI tool outputs to the appropriate supervisory authority.

8. Training and Education

8.1. All personnel using AI and GAI tools must receive comprehensive training on their proper use, limitations and potential risks before using them for any firm matter or activity.

8.2. Ongoing education and resources are provided to ensure personnel stay informed about AI and GAI technologies' developments and best practices in the legal profession.

9. Intellectual Property and Ownership:

9.1. The firm respects third parties' intellectual property rights in developing, training and using AI and GAI tools.

9.2. AI or GAI models, algorithms or outputs developed using the firm's resources or data are considered the firm's intellectual property unless otherwise agreed upon.

10. Monitoring and Review

10.1. The AI Oversight Committee continuously monitors AI and GAI tools' use and performance to identify potential issues, biases or errors.

10.2. The AI Oversight Committee regularly reviews and updates this policy to ensure continued relevance and effectiveness amid evolving technologies, legal standards and ethical norms.

10.3. Audits of work products created with GAI or AI are regularly performed to ensure accuracy, and the human review record is checked as part of this process.

11. Enforcement and Reporting

11.1. Violations of this policy may result in disciplinary action, including termination of employment or position in the firm, regardless of what the level of that position may be.

11.2. All personnel must report suspected policy violations or concerns regarding the usage of AI and GAI tools to the AI Oversight Committee or firm management.

12. Acceptance

As AI becomes more common, it will become increasingly important to understand its place in an expanded system of practice. It is important to note that this technology may change significantly and often. As such, it is the shared responsibility of all employees to maintain an understanding of the latest developments, risks and best use cases AI can provide.

By implementing an AI and GAI use policy, the law firm underscores its commitment to the ethical, responsible and compliant use of these technologies while using their potential to enhance the quality and efficiency of legal services provided to clients.

Appendix 3:

Questions for Vendors When Selecting AI Products and Services

What training is available to understand the technology better and avoid dangerous areas/pitfalls?

Key considerations: Inquire about comprehensive training and support that covers technical issues, ethical considerations and best practices for applying AI in a legal context.

Are there any case studies, testimonials or references from other legal professionals who have successfully used the tool?

Key considerations: Reach out to colleagues or request references from the provider to gain valuable insights into the tool's effectiveness and user experiences.

How do you monitor accuracy and detect potential issues?

Key considerations: Understand the vendor's quality control measures, such as audits, testing and monitoring for errors or biases. Inquire about their process for addressing and resolving identified issues.

Who is this software intended for: solo practitioners, small law firms, mid-size firms, large firms?

Key considerations: Ensure the vendor's offering aligns with your legal practice's size and needs and can scale according to your growth plans.

What are your recommended best practices for using this tool and adhering to the Rules of Professional Conduct (RPCs)?

Key considerations: Seek guidance on using the AI tool in compliance with RPCs, including maintaining client confidentiality, ensuring proper supervision and avoiding conflicts of interest.

How do we place appropriate data privacy and security disclosures in our retainer agreements and other documents to ensure clients understand and can be satisfied by the safeguards and protocols put in place when using your product?

Key considerations: When discussing data privacy and security with an AI vendor, ensure they address the following:

> *1. Data ownership, access, protection measures and compliance with laws and regulations*
>
> *2. Data breach notification, remediation, retention and deletion policies*
>
> *3. Subcontractor management and employee training practices*
>
> *4. Termination procedures and data handling post-termination*

Addressing these points helps protect your data and meet your organization's privacy and security requirements.

Does the company have a proven track record of providing reliable, secure and compliant solutions specifically tailored to the legal sector?

Key considerations: Request any information the company will provide to assess its commitment to providing reliable and compliant solutions for the legal industry.

Are there any other client disclosures required of attorneys beyond the retainer?

Key considerations: Determine if additional disclosures or notifications are needed when using the AI tool, such as informing clients about AI usage, obtaining consent or explaining limitations and risks.

If the company is relatively unknown, it may be helpful to know who the owners are and if there are any potential ethical concerns related to the ownership structure.

Key considerations: Research the company's website, press releases and financial disclosures to uncover information about the owners and identify any potential ethical concerns.

Appendix 4

Key Terms to Know

Understanding key terms in AI is essential for attorneys navigating the complex landscape of technology in the legal sphere. While the following terms represent critical concepts, it is important to note that this list is not exhaustive. Nonetheless, familiarity with these terms will empower legal professionals to engage with AI-related issues and make informed decisions effectively.

The key terms below have been referenced from NIST's Glossary, which can be found here: https://airc.nist.gov/AI_RMF_Knowledge_Base/Glossary

1. Artificial intelligence (AI): Intelligent systems that mimic the human mind, such as solving complex problems, reasoning and problem-solving, often used in legal research, document analysis, and predictive analytics.

2. Machine learning: A subset of AI that enables systems to learn from data and improve performance over time without being explicitly programmed, used for tasks like case prediction and contract analysis in legal practice.

3. Deep learning: Advanced machine learning technique using neural networks with multiple layers to learn patterns and representations from data, applied in tasks like natural language processing (NLP) for contract review and sentiment analysis.

4. Natural language processing (NLP): AI technology enables computers to understand, interpret and generate human language, which is critical for tasks like automated document summarization and legal document classification.

5. Bias: Systematic errors or inaccuracies introduced by AI algorithms or data that result in unfair outcomes, requiring legal professionals to assess and mitigate bias in AI systems used for decision-making.

6. Transparency: The degree to which AI systems' decisions, data usage and operations are understandable and explainable, which is crucial for ensuring accountability and regulatory compliance in legal contexts.

7. Replicability: The ability to reproduce AI experiments or results to validate findings and ensure reliability is essential for establishing AI applications' credibility in legal research and analysis.

8. Large language model (LLM): AI-powered software designed to manage and organize legal documents, streamline workflows and improve legal document review and production efficiency.

9. Algorithm: A step-by-step procedure or rules for solving a problem or accomplishing a task. AI often uses it to process data and make decisions, and its legal applications include predictive modeling and risk assessment.

10. Bias auditing: The process of systematically evaluating and identifying biases in AI systems, including data collection, model development and decision outputs, to ensure fairness and equity in legal applications and decision-making processes.

NOTICE TO THE BAR

LEGAL PRACTICE: PRELIMINARY GUIDELINES ON THE USE OF ARTIFICIAL INTELLIGENCE BY NEW JERSEY LAWYERS

Artificial intelligence (AI) includes a variety of rapidly evolving technologies with significant capabilities as well as significant risks. In furtherance of its responsibility to uphold the highest level of professionalism among lawyers, the New Jersey Supreme Court seeks to balance the benefits of innovation while safeguarding against the potential harms of misuse. To that end, the Court here provides preliminary guidelines on the use of AI to support lawyers who practice in New Jersey and the clients who depend on those lawyers.

Supreme Court Committee on AI and the Courts

The Supreme Court Committee on Artificial Intelligence and the Courts, which includes private and public lawyers, as well as judges, Judiciary leaders, technologists, and experts in academia and media, recommended these initial guidelines to support lawyers in continuing to comply with the existing Rules of Professional Conduct (RPCs) and the Rules of Court.

The attached preliminary guidelines are intended to inform and assist lawyers in navigating their ethical responsibilities in light of the current and anticipated effects of AI -- in particular generative AI -- on legal practice.
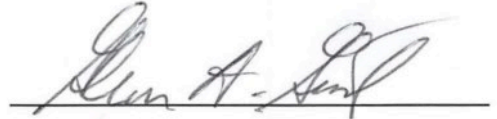
Questions and Suggestions

Lawyers with specific questions about their own prospective conduct related to the use of AI should continue to seek direction from the Attorney Ethics Hotline at (609) 815-2924 or in writing to Court-Use-of-AI.mbx@njcourts.gov. As always, the identity of lawyers who pose such specific questions will remain confidential. However, the issues raised by such inquiries may inform the development of future, more detailed guidance regarding the ethical use of AI in the practice of law.

While these interim guidelines are effective immediately, the Supreme Court also invites comments and questions on the use of AI in legal practice, including suggestions of potential use cases for lawyers and the courts.

Questions regarding this notice should be directed to the Office of the Administrative Director of the Courts at (609) 376-3000. Written inquiries and any comments on the preliminary guidelines should be submitted via email to Comments.Mailbox@njcourts.gov.

Stuart Rabner
Chief Justice

Glenn A. Grant, J.A.D.
Acting Administrative Director

Dated: January 24, 2024

PRELIMINARY GUIDELINES ON NEW JERSEY LAWYERS' USE OF ARTIFICIAL INTELLIGENCE

Artificial intelligence (AI) refers to a machine-based system that can make predictions, recommendations, or decisions. AI systems use machine and human-based inputs to perceive environments, abstract such perceptions into models through automated analysis, and use model inference to formulate options. While various forms of AI have been widely used for years, the advent of generative artificial intelligence (Gen AI) -- a subset of AI in which machine-based systems create text or images based on predictive models derived from training with large datasets -- has elevated interest in and use of AI in legal and other professions. These preliminary guidelines refer generally to AI with the understanding that certain provisions relate primarily to generative AI. The ongoing integration of AI into other technologies suggests that its use soon will be unavoidable, including for lawyers. While AI potentially has many benefits, it also presents ethical concerns. For instance, AI can "hallucinate" and generate convincing, but false, information. These circumstances necessitate interim guidance on the ethical use of AI, with the understanding that more detailed guidelines can be developed as we learn more about its capacities, limits, and risks.

Artificial Intelligence Does Not Change Lawyers' Duties

Lawyers in some jurisdictions improperly relied on Gen AI to generate content, which in some cases resulted in the submission to courts of briefs containing references to fake case law (which those lawyers did not check before or after submission). At the other end of the spectrum, reputable resources including LexisNexis and Westlaw promise to improve the quality of legal practice through the integration of AI to provide faster, more reliable legal research and writing assistance. Larger law firms are continuing to develop in-house AI systems while vendors are marketing AI-facilitated contract review and administrative support to smaller firms and solo practitioners. In this complex and evolving landscape, lawyers must decide whether and to what extent AI can be used so as to maintain compliance with ethical standards without falling behind their colleagues.

The core ethical responsibilities of lawyers, as outlined in the Rules of Professional Conduct (RPCs) are unchanged by the integration of AI in legal practice, as was true with the introduction of computers and the internet. AI

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tools must be employed with the same commitment to diligence, confidentiality, honesty, and client advocacy as traditional methods of legal practice. While AI does not change the fundamental duties of legal professionals, lawyers must be aware of new applications and potential challenges in the discharge of such responsibilities. As with any disruptive technology, a lack of careful engagement with AI could lead to ethical violations, underscoring the need for lawyers to adapt their practices mindfully and ethically in this evolving landscape. This notice highlights particular RPCs that may be implicated by the use of AI, with the understanding that such references are not intended to be exhaustive.

Accuracy and Truthfulness

A lawyer has a duty to be accurate and truthful. RPC 3.1 provides that a lawyer may not "assert or controvert an issue . . . unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous . . . ." RPC 4.1(a)(1) prohibits a lawyer from making a false statement of material fact or law. And RPC 8.4(c) states that it is misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Because AI can generate false information, a lawyer has an ethical duty to check and verify all information generated by AI to ensure that it is accurate. Failure to do so may result in violations of the RPCs.

Honesty, Candor, and Communication

RPC 3.3 requires a lawyer to uphold candor to the tribunal, including by not knowingly making "a false statement of material fact or law . . . ." or offering "evidence that the lawyer knows to be false . . . ." RPC 3.3(a)(1); RPC 3.3(a)(4). A lawyer who uses AI in the preparation of legal pleadings, arguments, or evidence remains responsible to ensure the validity of those submissions. While the RPCs do not require a lawyer to disclose the use of AI, such use does not provide an excuse for the submission of false, fake, or misleading content. The RPCs prohibit a lawyer from using AI to manipulate or create evidence and prohibit a lawyer from allowing a client to use AI to manipulate or create evidence. See, e.g., RPC 1.2(d); RPC 1.4(d); RPC 3.4(b).

RPC 1.2 provides that a lawyer must "abide by a client's decisions concerning the scope and objectives of representation . . . and as required by

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RPC 1.4 shall consult with the client about the means to pursue them." RPC 1.4(b), in turn, provides that a lawyer must promptly comply with a client's reasonable requests for information, and RPC 1.4(c) provides that a lawyer must provide sufficient explanation for a client to make informed decisions regarding the representation. Those RPCs do not impose an affirmative obligation on lawyers to tell clients every time that they use AI. However, if a client asks if the lawyer is using AI, or if the client cannot make an informed decision about the representation without knowing that the lawyer is using AI, then the lawyer has an obligation to inform the client of the lawyer's use of AI. As to client interactions, a lawyer can use AI to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions . . . ." consistent with RPC 1.4, but the lawyer must continue to oversee such communications to ensure accuracy.

Confidentiality

RPC 1.6 provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . ." To uphold this core duty, a lawyer must not only avoid intentional disclosure of confidential information but must also "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information related to the representation of a client." RPC 1.6(f). Today, the market is replete with an array of AI tools, including some specifically designed for lawyers, as well as others in development for use by law firms. A lawyer is responsible to ensure the security of an AI system before entering any non-public client information.

Prevention of Misconduct, Including Discrimination

A lawyer must not engage in misconduct, including "conduct involving dishonesty, fraud, deceit or misrepresentation;" "conduct that is prejudicial to the administration of justice;" and "conduct involving discrimination . . . ." RPC 8.4(c); 8.4(d); 8.4(g). Those duties are addressed in part by the ongoing requirements to ensure accuracy (and avoid falsification) of communications with clients and the court.

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Oversight

Law firms and lawyers are responsible for overseeing other lawyers and nonlawyer staff, as well as law students and interns, as they may be held responsible for ethical violations by those individuals. See, e.g., RPC 5.1 (Responsibilities of Partners, Supervisory Lawyers, and Law Firms); RPC 5.2 (Responsibilities of a Subordinate Lawyer); RPC 5.3 (Responsibilities Regarding Nonlawyer Assistance). This requirement extends to ensuring the ethical use of AI by other lawyers and nonlawyer staff.

Conclusion

These preliminary guidelines are intended to assist lawyers in complying with the existing RPCs, which remain unchanged by the availability and use of AI. The references to specific RPCs are intended for illustration and not as an exhaustive list. For instance, the use of AI likely will affect lawyer billing practices and advertising. See, e.g., RPC 1.5 (Fees); RPC 7.2 (Advertising). Those and other specific applications can be addressed in future guidelines if and as needed.

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