

ETHICAL IMPLICATIONS OF THE USE OF ARTIFICIAL INTELLIGENCE IN LAWYERING

I. Artificial Intelligence Defined

- A. The legal definition of Artificial Intelligence (AI) is evolving. Current frameworks generally characterize AI as computer systems that perform tasks requiring human-like intelligence; however, a precise, universally accepted legal definition has yet to emerge, leading to regulatory challenges.
- B. The emerging definition of AI comes from current regulatory frameworks, such as the European Union Artificial Intelligence (EU AI) Act, formally adopted by the European Council on May 21, 2024, and the Biden Executive Order on AI, issued on October 30, 2023.
- C. The EU AI Act defines AI broadly, encompassing a range of techniques and applications. According to the Act, AI systems are defined as:
 - 1. Machine Learning: Including supervised, unsupervised, and reinforcement learning, using a wide variety of methods including deep learning.
 - 2. Logic and Knowledge-Based Approaches: Including expert systems, logic programming, and knowledge representation.
 - 3. Statistical Approaches: Including Bayesian estimation, search, and optimization methods.
- D. The EU AI Act emphasizes risk-based regulation, categorizing AI applications into four risk levels: unacceptable risk, high risk, limited risk, and minimal risk. This categorization guides the regulatory requirements and obligations for developers and deployers of AI systems.
- E. The Biden Executive Order on AI defines AI as: “A machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. AI systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action.”
- F. This definition underscores the role of AI in automating decision-making processes based on inputs from real and virtual environments. The Executive Order also introduces several specific terms related to AI, such as:
 - 1. AI Model—A component that uses computational statistical or machine-learning techniques to produce outputs.
 - 2. Generative AI—AI models that generate synthetic content, such as images, videos, audio, and text (see more below).
- G. Regarding other relevant statements of law and policy, the G7 Hiroshima AI Process, launched in May 2023, emphasizes a comprehensive policy framework for AI governance, recognizing the importance of trustworthy and responsible AI. It highlights the roles of various stakeholders, including governments, private sector, and civil society, in promoting safe and secure AI development and deployment.

II. The Advance of Generative AI

- A. For many years lawyers have used forms of AI in their law practice. For instance, commonly used online research programs use a form of AI in finding results to research queries. Specifically, AI works to extract information responsive to the user's query from a large set of existing data on which the program has been trained.
- B. The release of OpenAI's ChatGPT on November 30, 2022, exploded the use and popularity of *generative* AI. This technology goes beyond earlier forms of AI to generate products (such as textual responses or images) in response to a user's request based again on the large set of existing data on which the program has been trained. This generated content is designed to resemble human-created content. Below is a basic explanation of how it works.
 - 1. Basic Concept: Generative AI works by learning patterns from existing data and then using that knowledge to generate new, similar data. This process is like an artist who studies many paintings and then creates a new painting inspired by what they have learned.
 - a. Key Components
 - i. Training Data: Generative AI starts with a large dataset of examples. For instance, if the goal is to generate realistic images of cats, the AI would be trained on thousands of images of cats.
 - ii. Machine Learning Model: The heart of Generative AI is a machine learning model, typically a type of neural network. A neural network is a set of algorithms designed to recognize patterns, similar to how a human brain works.
 - iii. Learning Patterns: During training, the model analyzes the training data to learn important features and patterns. For example, it learns what makes a cat look like a cat – ears, whiskers, fur texture, etc.
 - b. Generating New Content: After training, the model can create new content that looks like the training data but is not a copy of any specific example. For instance, it can generate a new image of a cat that is unique but has all the characteristics of the cats from which it learned.
 - c. Another formulation of this process divides generative AI functionality into two phrases.
 - i. Training Phase
 - 1. Collect Data: Gather a large corpus of text (e.g., all the articles on Wikipedia).
 - 2. Process Data: Convert the text into a format the AI can understand, typically numerical values representing words or phrases.
 - 3. Train the Model: Use a neural network (like GPT, generative pre-trained transformer) to process this text data. The model learns the probability of words following each other.
 - ii. Generation Phase:
 - 1. Input a Prompt: Start with an initial text input, like "Once upon a time."
 - 2. Predict Next Word: The model predicts the next word based on the patterns it learned during training.
 - 3. Iterate: Use the new word as part of the input and predict the next word, and so on, generating a full sentence or paragraph.

III. Examples of Generative AI Programs/Software in Lawyering

Because the use of generative AI in lawyering is continually evolving, a detailed catalog of the AI tools lawyers are using is out-of-date soon after its compilation. With this caveat, lawyers are using these tools in the following areas:

- A. Legal document generation: Juro, Loio, ChatGPT, Claude
- B. Legal research assistance: Ross Intelligence, CoCounsel, LexisNexis, WestlawEdge (the last two classic research platforms are continually evolving with AI-powered tools)
- C. Contract review and analysis: Icertis, Lawgeex, Kira Systems, Luminance
- D. Litigation support and e-discovery: CoCounsel, Everlaw
- E. Legal predictive analytics: Lex Machina, Premonition, Litigation Analytics by Bloomberg Law
- F. Compliance and risk management: Ayfie, Seal Software
- G. Legal writing assistance: Writer, Grammarly

IV. Ethical Issues Related to the Use of AI

Although AI technology continues to change rapidly, this technology implicates the same ethical duties, such as competence, diligence, confidentiality, proper supervision, and independent professional judgment, that apply to lawyers' use of other forms of technology. Perhaps most notably, lawyers using generative AI must consider the same ethical implications as if they were overseeing another nonlawyer completing legal tasks.

A. Competence & Diligence

1. The ABA Model Rules and many state rules of professional conduct expressly provide that lawyers' general duties of competence extend to their use of technology like artificial intelligence. Lawyers who use AI must understand the "benefits and risks" associated with such technology. ABA Model Rule 1.1[8]; Virginia Rule 1.1[6]. Lawyers therefore cannot avoid considering using AI if it would benefit their practice. Moreover, if they use the technology, they cannot claim ignorance and must know how the technology works and how it can result in ethical problems. Ethics opinions acknowledge that lawyers and law firms often will need to rely on consultants generally in the use of technology but caution that in doing so the lawyers must still ensure ethical standards are satisfied. *See* ABA Formal Opinion 495 - Lawyers Working Remotely (December 16, 2020); ABA Formal Opinion 498 - Virtual Practice (March 10, 2021).
2. For AI, an important related ethical issue concerns what is known as the "black box" challenge. Specifically, when lawyers submit questions to AI-powered tools, the questions go into a "black box" and the AI tools provide an answer. The question then arises how much do competent lawyers using the technology need to know about what happens inside the "black box." As further discussed in this outline, such AI tools, for instance, may have biases that inhibit their ability to produce good answers.
3. Related to competence, lawyers' ethical duty diligence requires them to exercise "reasonable diligence" in representing a client. ABA Model Rule 1.3. Reasonable diligence, in turn, requires that lawyers do not so heavily rely on AI tools that

they fail to provide the proper human oversight to ensure adequate client representation.

4. Relevant Rules of Professional Conduct

ABA Model Rule 1.1: Competence

Client-Lawyer Relationship

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject (emphasis added).

Rule 1.3: Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Virginia Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology. . . . (emphasis added).

B. Confidentiality

1. The ABA Model Rules and many state rules of professional conduct expressly provide that lawyers' duty of confidentiality requires they undertake "reasonable efforts" to prevent the disclosure of confidential client information. This duty applies to lawyers' submission of confidential information to AI programs like ChatGPT, Claude, and Gemini for lawyering projects and to concerns over whether such information is improperly disclosed in training the AI or through data breaches or improper commingling of client data. (Note that these concerns also related to potential implications on the attorney-client privilege.)
2. In many ways, the confidentiality concerns regarding lawyers' use of these services relates to lawyers' use of cloud storage of client information, in which an outside vendor maintains the files.
3. Lawyers thus must take "reasonable" precautions to ensure confidentiality of client information in their use of AI programs. ABA and state rules outline in their comments, as noted below, several factors used in assessing the reasonableness of the lawyers' precautions. The comments to Virginia Rule of

- Professional Conduct 1.6, in particular, provide detailed information on steps lawyers should consider taking to protect confidential client information.
4. In a context analogous to AI programs, ABA Formal Opinion 498 provides detailed guidance on the considerations necessary to ensure the protection of a client's files and communications through a vendor who provides cloud storage. Specifically, ABA Formal Opinion 498 states: "If the access to such 'files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer.'" ABA Formal Op. 498 (quoting ABA Formal Op. 482).
 5. In outlining these reasonable steps, the opinion adds that the lawyer must take steps to ensure the vendor regularly backs up any client data stored with the vendor. The lawyer must also ensure other lawyers and nonlawyers the lawyer supervises, and any relevant vendors, understand the requirements necessary to protect confidential information. ABA Formal Op. 498.
 6. Relevant Rules of Professional Conduct

ABA Model Rule 1.6: Confidentiality of Information

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. *Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).* A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4]. (emphasis added)

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security

measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

North Carolina Rule 1.6: Confidentiality of Information

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Acting Competently to Preserve Confidentiality

[19] Paragraph (c) requires a lawyer to act competently to safeguard information acquired during the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information acquired during the professional relationship with a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. *Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).* A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information to comply with other law—such as state and federal laws that govern data privacy, or that impose notification requirements upon the loss of, or unauthorized access to, electronic information—is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4]. (emphasis added)

[20] When transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may

warrant special precautions. Factors to be considered in determining the reasonableness of the client's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Virginia Rule 1.6: Confidentiality of Information

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

[20] Paragraph (d) makes clear that a lawyer is not subject to discipline under this Rule if the lawyer has made reasonable efforts to protect electronic data, even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information. Perfect online security and data protection is not attainable. Even large businesses and government organizations with sophisticated data security systems have suffered data breaches. Nevertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms. Lawyers have an ethical obligation to implement reasonable information security practices to protect the confidentiality of client data. *What is "reasonable" will be determined in part by the size of the firm. See Rules 5.1(a)-(b) and 5.3(a)-(b). The sheer amount of personal, medical and financial information of clients kept by lawyers and law firms requires reasonable care in the communication and storage of such information. A lawyer or law firm complies with paragraph (d) if they have acted reasonably to safeguard client information by employing appropriate data protection measures for any devices used to communicate or store client confidential information.*

To comply with this Rule, a lawyer does not need to have all the required technology competencies. The lawyer can and more likely must turn to the expertise of staff or an outside technology professional. Because threats and technology both change, lawyers should periodically review both and enhance their security as needed; steps that are reasonable measures when adopted may become outdated as well.

[21] *Because of evolving technology, and associated evolving risks, law firms should keep abreast on an ongoing basis of reasonable methods for protecting client confidential information, addressing such practices as:*

- (a) Periodic staff security training and evaluation programs, including precautions and procedures regarding data security;*
- (b) Policies to address departing employee's future access to confidential firm data and return of electronically stored confidential data;*
- (c) Procedures addressing security measures for access of third parties to stored information;*

(d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;

(e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and

(f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity. (emphasis added)

C. Duty of Supervision

1. With the rise of AI, much legal commentary has already been devoted to how AI systems, particularly generative AI, can perform certain legal tasks that junior lawyers and paraprofessionals, like paralegals, have traditionally performed. Lawyers' ethical duty of supervision therefore applies to AI-powered tools.
2. Lawyers have duties in ABA Model Rules 5.1 and 5.3, and their state counterparts, to supervise lawyers and nonlawyers properly. The relevant rule in this context is Rule 5.3 regarding nonlawyer supervision and, in pertinent part, requires lawyers to "make reasonable efforts" to ensure that actions in which AI engages are "compatible with the professional obligations of the lawyer."

ABA Model Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

D. Unauthorized Practice of Law

1. Related to lawyers' duty to supervise nonlawyers properly is the duty that lawyers cannot ethically delegate certain tasks to a nonlawyer and cannot assist a nonlawyer in the unauthorized practice of law. See ABA Model Rule 5.5. At the same time, as noted above, lawyers' duty of competence and diligence encourages

lawyers not to “under-delegate” tasks to AI when such delegation would improve their provision of legal services.¹

2. “One way of framing this issue is automation versus augmentation,” states Dr. Tonya Custis, a Research Director at Thomson Reuters who leads a team of research scientists developing natural-language and search technologies for legal research. “There may be some tasks that we shouldn’t automate. For these tasks, AI can help attorneys do their jobs, but AI can’t do their jobs completely. So the question becomes: where do we draw that line?”²
3. Regarding the prohibition against lawyers’ assisting others in the unauthorized practice of law (UPL), the relevant rules provide:

ABA Model Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law (emphasis added)

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, *or assist another in doing so.*

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

Virginia Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law (emphasis added)

(c) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, *or assist another in doing so.*

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unauthorized persons. Paragraph (c) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3.

4. An interesting AI development related to UPL is “legal chatbots.” These are “AI-powered programs that interact with users who have legal issues by simulating a conversation or dialogue. These chatbots are now being used to . . . perform such tasks as fight parking tickets, advise victims of crimes, or draft privacy policies or non-disclosure agreements.”³ One such chatbot is DoNotPay. According to its website, “DoNotPay is an artificial intelligence chatbot that helps consumers fight corporations, beat bureaucracy, find hidden money, and protect their rights. The

¹ See David Lat, *The Ethical Implications of Artificial Intelligence*, at <https://abovethelaw.com/law2020/the-ethical-implications-of-artificial-intelligence/?rf=1> (last visited June 7, 2024).

² *Id.*

³ *Id.*

chatbot was created by British entrepreneur Joshua Browder in 2015 to help people appeal parking tickets. It has since expanded to help users with over 1,000 consumer issues and tasks.” <https://deepgram.com/ai-apps/donotpay> (last visited June 7, 2024).

5. When lawyers create or maintain these tools, the question arises whether the lawyers are assisting another, here AI-powered technology, in engaging in the unauthorized practice of law. Similarly, such technology is unlikely able to exercise the independent professional judgment and provide the nonlegal counseling needed in many legal situations. See ABA and Virginia Rules 2.1.

ABA Model Rule 2.1: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Virginia Rule 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

E. Communication

1. Another ethical issue concerns lawyers’ duty to keep their clients “reasonably informed” about their matters and to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” See ABA Model Rule 1.4.

ABA Model Rule 1.4: Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

2. From this duty, the question arises whether lawyers must consult with their clients when they use AI, particularly generative AI, to conduct the tasks needed to represent the client. Lawyers, of course, do not generally need to consult with their clients when they use technology to assist in the representation, as such assistance should reasonably be assumed. As potential uses for technology expand, however, and take on (as noted above) tasks traditional performed by

humans, such delegation to AI resembles outsourcing client work to nonlawyers. Such outsourcing may require client consent.

3. According to the New York State Bar Association Report on AI (cited below), “The California bar association recommends that lawyers inform their clients if generative AI tools will be used as part of their representation. The Florida bar association takes its recommendation a step further, suggesting that lawyers obtain informed consent before utilizing such tools.” (Report at page 35). See also 2007 North Carolina Ethics Op. 12 (adopted April 25, 2008) (allows such outsourcing “provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent”).
4. Moreover, if the lawyers’ use of AI materially impacts the lawyers’ fee, the general allocation of authority between clients and lawyers supports discussing these impacts with the client. See ABA Model Rule 1.2.

ABA Model Rule 1.2: Scope of Representation and Allocation of Authority Between Client & Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. *Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.* (emphasis added)

F. Fees and Billing

1. Lawyers have a general duty to ensure their fees are “not unreasonable.” See ABA Model Rule 1.5(a) (note that certain states ethics rules have slightly different standards regarding fees). With the ability of AI to enable lawyers to complete

certain legal tasks much more quickly, lawyers must ensure their fees remain ethically compliant. Lawyers who bill hourly therefore cannot charge for time they would have spent on a matter but no longer need to because of their use of AI. Of course, lawyers remain free to charge clients through other methods, such as flat fees, as long as the fee remains “not unreasonable” and does not misrepresent the time the lawyer spent on the matter.

2. In addition to their base fee, lawyers generally may not charge clients an overhead or administrative fee in which they roll in the firm’s general expenses for office-related costs, which could include costs associated with technology (like AI). Although decided well before the advent of AI technology in lawyering, a 1993 ABA Formal Ethics Opinion includes reasoning that clearly applies to billing for lawyers’ use of such technology. Specifically, the opinion reasoned that lawyers cannot charge clients general office overhead absent disclosure to the client in advance of the engagement. The opinion also prohibits surcharges on expense disbursements above the amount actually incurred in directly representing the client, absent disclosure to the client.
3. From this reasoning, lawyers who seek to pass along AI costs to their clients must not do so through a general administrative fee, unless they disclose this fee to the client prior to the engagement. Similarly, absent client consent, they cannot directly bill clients for AI services over the amount those services cost the lawyer for the specific work the lawyer dedicates to the client. See also 2022 North Carolina Formal Ethics Opinion 4 (adopted October 27, 2023) (addressing billing of expenses to clients).

V. Specific Risks of Generative AI: Hallucinations and Model Biases

- A. “Hallucinations” refer to instances where the AI model generates text that is incorrect, nonsensical, or fabricated. These hallucinations can manifest as factual inaccuracies, invented information, or illogical statements that seem plausible but are ultimately false.
- B. In his [2023 Year-End Report on the Federal Judiciary](#), Chief Justice John Roberts said “[A]ny use of AI requires caution and humility. One of AI’s prominent applications made headlines this year for a shortcoming known as ‘hallucination,’ which caused the lawyers using the application to submit briefs with citations to non-existent cases. (Always a bad idea.)”
- C. Examples of Hallucinations
 1. Fabricated Facts—The model might generate detailed but entirely invented historical events, scientific findings, or personal anecdotes that sound plausible but are false.
 2. Misattributions—GPT might attribute quotes, works, or ideas to the wrong authors or sources, creating a false narrative.
 3. Logical Inconsistencies—The model can produce text that contradicts itself within a single response, indicating a lack of coherent understanding.
- D. Hallucinations can occur for several reasons.
 1. Training Data Limitations—GPT models are trained on vast datasets collected from the internet, which contain a mixture of accurate and inaccurate information. During training, the model learns patterns and associations from this data, but it does not have an intrinsic understanding of truth or context. As a result, it can generate plausible-sounding but incorrect information based on patterns in the training data.
 2. Pattern Recognition Without Understanding—GPT models operate by recognizing and reproducing patterns in text. They do not have a true understanding of the content

- they generate. This lack of understanding can lead to situations where the model produces text that follows linguistic patterns but lacks factual accuracy.
3. **Lack of Real-World Knowledge**—While GPT models have access to a wide range of information, their knowledge is static and limited to what was available in the training data up to a certain cutoff date. They do not have the ability to access real-time information or verify facts dynamically. This limitation can result in outdated or incorrect responses.
 4. **Inference from Insufficient Context**—GPT models generate responses based on the immediate context provided in the input text. If the input is vague, ambiguous, or lacks sufficient context, the model may fill in gaps by generating plausible but incorrect information. This is particularly common when the model attempts to provide detailed answers with limited input.
 5. **Biases in Training Data**—The data used to train GPT models can contain biases, inaccuracies, and fictional content. These biases can influence the model's outputs, leading to the generation of hallucinated information that reflects the underlying biases or errors in the training data.
 6. **Probabilistic Nature of Generation**—GPT models generate text based on probabilities. They predict the next word in a sequence based on the likelihood derived from the training data. While this probabilistic approach enables the generation of coherent text, it also means that the model can sometimes produce incorrect or nonsensical outputs if the probabilistic cues lead in that direction.
- E. **Mitigating Hallucinations**—To mitigate the occurrence of hallucinations, several strategies can be employed. Some strategies can be employed by lawyers themselves whereas others depend on the AI models they select to use. Lawyers therefore can research to determine whether the models they use employ RAG, for instance.
1. **Post-Processing Verification**—Implementing mechanisms to verify the accuracy of the generated content post-generation can help catch and correct hallucinations. This might involve human oversight or automated fact-checking tools.
 2. **Improving Training Data**—Enhancing the quality and accuracy of the training data can reduce the likelihood of hallucinations. This includes curating datasets that are more reliable and less biased.
 3. **Contextual Prompts**—Providing clearer and more specific input prompts can help the model generate more accurate and contextually appropriate responses.
 4. **Feedback Loops**—Incorporating feedback from users and real-world use cases can help improve the model's performance over time, allowing it to learn from mistakes and reduce hallucinations.
 5. **Hybrid Models**—Combining GPT models with other systems that have access to real-time information or domain-specific knowledge can improve the overall reliability of the responses.
 6. **Retrieval-Augmented Generation (RAG)**—RAG “is an AI framework for improving the quality of LLM-generated responses by grounding the model on external sources of knowledge to supplement the LLM’s internal representation of information. Implementing RAG in an LLM-based question answering system has two main benefits. It ensures that the model has access to the most current, reliable facts, and that users have access to the model’s sources, ensuring that its claims can be checked for accuracy and ultimately trusted.” *What is retrieval-augmented generation?* <https://research.ibm.com/blog/retrieval-augmented-generation-RAG> (August 22, 2023) (last visited June 8, 2024).

VI. Examples/Case Summaries of Lawyers' Misuse of AI

- A. *Mata v. Avianca, Inc.*, 22-cv-1461 (PKC) (S.D.N.Y. June 22, 2023)—In this case, two lawyers were fined \$5,000 for submitting a brief that included fictitious legal research generated by ChatGPT. The judge in the case ruled that the lawyers acted in bad faith by relying on the AI-generated research without verifying its accuracy. *See* <https://www.mindingyourbusinesslitigation.com/2023/06/artificially-unintelligent-attorneys-sanctioned-for-misuse-of-chatgpt/>
- B. *Park v. Kim*, No. 22-2057 (2d. Cir. January 30, 2024)—The United States Court of Appeals for the Second Circuit referred a New York lawyer to its Grievance Panel for potential disciplinary action after using ChatGPT to research prior cases for a medical malpractice lawsuit and citing a non-existent state court decision. *See* <https://caselaw.findlaw.com/court/us-2nd-circuit/115760381.html>.
- C. Michael Cohen's Lawyer—On March 20, 2024, a federal judge in New York declined to sanction Michael Cohen and his lawyer David Schwartz for submitting fake case citations generated by Google's Gemini (formerly known as Bard). The judge called Schwartz's conduct "certainly negligent, perhaps even grossly negligent," but he found no evidence of bad faith to warrant sanctions. *See* <https://www.reuters.com/legal/michael-cohen-wont-face-sanctions-after-generating-fake-cases-with-ai-2024-03-20/>.
- D. *People v. Zachariah C. Crabill*. 23PDJ067. November 22, 2023—In May 2023, Crabill filed a motion that included fictitious case law generated by ChatGPT. He failed to verify the information before submission and initially blamed an intern for the error when questioned by the judge. The Colorado Supreme Court suspended Crabill for a year and a day, including a 90-day suspension and a two-year probation period. *See* <https://coloradosupremecourt.com/PDJ/Decisions/Crabill,%20Stipulation%20to%20Discipline,%2023PDJ067,%2011-22-23.pdf>.

VII. New York State Bar Association Report on Artificial Intelligence

- A. On April 6, 2024, the New York State Bar Association issued a 92-page report titled "Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence." *See* <https://nysba.org/app/uploads/2022/03/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf>.
- B. The Executive Summary provides:

"Artificial intelligence, particularly generative AI, has had a profound impact across multiple sectors of our society, revolutionizing how we approach creativity, problem-solving and automation. From art and entertainment to healthcare and education, AI is reshaping industries, creativity and society in multifaceted ways. While AI and generative AI offer immense potential for innovation and efficiency, the technology also presents challenges that require careful management, including ethical considerations, privacy concerns and labor impact. The ongoing evolution of generative AI promises to continue influencing the world in unprecedented ways.

"Considering the continued revolutionary impact of the technology, this Task Force undertook the challenge to assess its evolution, benefits and risks, and impact on the legal profession. Here, we summarize our four principal recommendations for adoption by NYSBA.

Task Force Recommendations

1. **Adopt Guidelines:** The Task Force recommends that NYSBA adopt the AI/Generative AI guidelines outlined in this report and commission a standing section or committee to oversee periodic updates to those guidelines.
2. **Focus on Education:** The Task Force recommends that NYSBA prioritize education in addition to legislation, focusing on educating judges, lawyers, law students and regulators to understand the technology so that they can apply existing law to regulate it.
3. **Identify Risks for New Regulation:** Legislatures and regulators should identify risks associated with the technology that are not addressed by existing laws, which will likely involve extensive hearings and studies involving experts in AI, and as needed, adopt regulations and legislation to address those risks.
4. **Examine the Function of the Law in AI Governance:** The rapid advancement of AI prompts us to examine the function of the law as a governance tool. Some of the key functions of the law in the AI context are: (i) expressing social values and reinforcing fundamental principles; (ii) protecting against risks to such values and principles; and (iii) stabilizing society and increasing legal certainty is included in the Appendix.”

APPENDIX

New York State Bar Association Warns That AI Must Not Compromise Attorney-Client Privilege

By David Alexander

April 8, 2024

<https://nysba.org/new-york-state-bar-association-warns-that-ai-must-not-compromise-attorney-client-privilege/>

The New York State Bar Association is advising lawyers to ensure that artificial Intelligence does not put attorney-client privilege at risk at a time of increasing security concerns about confidential information being disclosed by the technology.

The [report](#) from the association's Task Force on Artificial Intelligence, which was approved by its governing body, the House of Delegates, on Saturday, advises lawyers to disclose to clients when AI tools are employed in their cases. Under the Rules of Professional Conduct, attorneys also have an obligation to make sure that paralegals and other employees are handling AI properly, the report states.

The task force determined that New York's Rules of Professional Conduct provide helpful guidance governing attorneys' use of AI but said that more education was needed to make sure that attorneys and judges are handling the technology properly. The report also says that legislation may become necessary to govern its use.

"AI can enhance the delivery of legal services. It obviously has enormous potential because it can already draft documents, conduct research, predict outcomes, and help with case management. However, we have an obligation as attorneys to be aware of the potential consequences from its misuse that can endanger privacy and attorney-client privilege," said Richard Lewis, president of the New York State Bar Association. "I thank the task force for addressing this complex matter and providing direction on how we can incorporate it into our daily routines in a safe manner."

The report also recommends that the association form a standing committee to address evolving AI issues including ethical concerns that derive from the technology's tendency to hallucinate. The most serious hallucinations have resulted in citations and quotes from non-existent cases being included in briefs.

"Artificial Intelligence is the latest technological evolution that at one moment awes us and the next fills us with anxiety," said Vivian Wesson, chair of the task force and executive vice president and general counsel at The Board of Pensions of the Presbyterian Church. "We are aware of the enormous impact it will have on our profession but are also familiar with the many risks it poses regarding confidentiality. The technology is advancing at an alarming rate and so it is imperative that we address it at this time."

Other recommendations include:

- Legislators should determine whether AI regulations should be applied in a one-size-fits-all approach or through industry-specific regulation.

- Attorneys should consider whether the use of AI will help them represent their clients more effectively before employing it.
- In addition, the New York State court system's Appellate Division should consider rewriting the Rules of Professional Conduct to make it clear that attorneys should:
 - Have the latest information on technology (including AI and GenAI) that improves the quality of legal services.
 - Determine whether the use of AI enhances legal services on a case-by-case basis.
 - Be competent about how AI tools operate to better ensure that the research generated is legitimate.